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Lewis v Howick College Board of Trustees [2010] NZEmpC 4; [2010] ERNZ 1 (19 January 2010)

Last Updated: 2 December 2011

IN THE EMPLOYMENT COURT

AUCKLAND [\[2010\] NZEMPC 4](#)ARC 82/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN RAYMOND CLENDON LEWIS
Plaintiff

AND HOWICK COLLEGE BOARD OF TRUSTEES
Defendant

Hearing: 28, 29, 30 September and 1 October 2009

(Heard at Auckland)

Appearances: Brian Henry and Grace Church, Counsel for Plaintiff
Richard Harrison, Counsel for Defendant

Judgment: 19 January 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of case

[1] The issues on this challenge by hearing de novo to the determination of the Employment Relations Authority are:

- whether Raymond Lewis's summary dismissal by his employer, Howick College Board of Trustees, was justified;
- if so, whether Mr Lewis should now be reinstated in his former position or in one no less advantageous to him;
- whether Mr Lewis should be reimbursed for the whole or any part of his salary lost as a result of his dismissal;
- whether compensation should be paid to Mr Lewis for humiliation, loss of dignity and injury to feelings as a result of his dismissal and, if so, how much; and
- costs.

[2] Mr Lewis was unrepresented in the Employment Relations Authority. It dismissed all his claims. Mr Lewis is now professionally represented and his case has changed and for the better from his point of view. That is in the sense that the basis of his claim and his evidence in support of it now relate to the circumstances that led to his dismissal and not to a number of other peripheral concerns that Mr Lewis had (and no doubt continues to have) about Howick College generally. What was ultimately the well structured, orderly and issues-focused hearing in this Court was very different to the investigation meeting in the Employment Relations Authority from some of the accounts of that event that I was told in evidence. I do not mean by that to be critical of the Authority's conduct of

its investigation process. Rather, I think it is fair to say that the conduct of his own case by a then unwell Mr Lewis intent upon having a very broad range of complaints (some of them clearly beyond the Authority's jurisdiction) determined by it, contrasts starkly with the nature and content of the hearing in this Court.

The Authority's determination

[3] For several reasons it is unnecessary to deal with this more than cursorily. As already noted, the nature of the case on this challenge by hearing de novo is so different from that presented to the Authority that comparisons would be largely meaningless. No doubt because of the manner in which his case was presented by him, the Authority focussed on Mr Lewis's conduct rather than the Board's as is required under [s 103A](#) of the [Employment Relations Act 2000](#) ("the Act"). There was, arguably, a distracting emphasis on issues of personality in the Authority including the conflicts between Mr Lewis and Mr Harrison, counsel for the Board, and on the investigation of his issues by the Authority Member. Suffice it to say that the Authority concluded that Mr Lewis was dismissed justifiably.

Professional consequences of dismissal

[4] Before dealing with the detail of the parties' particular circumstances, I will make some general remarks about the employment of professional persons for whom occupational licensing requirements provide a need for special care by employers.

[5] As in the cases of other professional employees whose very livelihoods are affected by a dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case, a summary dismissal for serious misconduct, affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professionally registered to practise. Dismissals of teachers (and a range of lesser sanctions in employment) trigger automatically a vocational or professional registration investigation. As with many other professions there is little, if any, opportunity for employment in New Zealand without registration. An employer dismissing a teacher is bound by law to advise the Teacher Registration Council. As in this case, it can be expected that there will be a level of inquiry into the teacher's fitness to be registered in light of the circumstances of the dismissal and other relevant considerations. So the effect of the dismissal of a teacher is especially significant. Put simply, allegations of misconduct or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods.

[6] Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. So, too, independent courts and tribunals considering the justification for dismissals of teachers must be conscious of that consequence and the corresponding need to examine such cases with great care. It is an onerous responsibility that the legislation has placed on boards of trustees as employers who are very much part-time, nominally remunerated, and, for many board members, without appropriate expertise either in the teaching profession or employment relations. It is important, in these circumstances, that boards of trustees as employers take and follow correct professional advice and that they are advised independently and dispassionately on education matters by the school's professional leader, its principal, who must be ex officio a member of the Board.

General background

[7] Until his dismissal in 2008, Mr Lewis had been a teacher at Howick College for a period of some 20 years. He took a year's leave of absence in 2003 in an attempt to recover from the effects of a family bereavement and what he categorised as the stress associated with his position which had, by then, become head of the school's economics department.

[8] Mr Lewis returned to work at Howick College but, initially, on a part-time basis and not as the head of economics. Inter-personal problems with other staff, and particularly those in a supervisory role in the Business and Management Department, began to emerge in 2004. Mr Lewis made a formal complaint about a senior teacher in the department but the school's facilitated investigation of this complaint found that Mr Lewis was largely responsible for the unsatisfactory professional relationship with his colleague. Although Mr Lewis then attempted to obtain employment elsewhere, the teacher about whom he had complained moved to another school and Mr Lewis had no similar conflict with his replacement as the head of economics throughout 2005 and 2006.

[9] In 2007 the head of economics left Howick College at a time when the overall school roll was falling and the number of students studying economics was also shrinking. Mr Lewis considered that he was then expected to take on an unfairly onerous burden of additional work including management within the department. Things began to deteriorate at work again for Mr Lewis in 2007 culminating in his suspension in March, and then summary dismissal in April 2008.

[10] These deteriorating relationships manifested themselves in mutual complaints by and against both Mr Lewis's head of department, Desiree Reyneke, and Mr Lewis himself. Mr Lewis also took exception to the Board's refusal to reconsider its decision to meet some of the disbursements paid by him in connection with a school trip to the United Kingdom. As evidence has only recently confirmed, this deterioration in personal and professional

relationships with Mr Lewis coincided with deterioration in his psychological and psychiatric health for which he was receiving professional medical attention but which he did not disclose to his employer or others with whom he was working.

[11] As a result of the school's refusal to reimburse Mr Lewis for some of his expenses of taking a small party of students to the United Kingdom, with the assistance and support of his union he notified the Board of a personal grievance. Although unknown to Mr Lewis at the time, his head of department and her husband had complained formally to the school's Principal, William (Bill) Dimery, about Mr Lewis's conduct towards Mrs Reyneke.

[12] I do not propose to set out in detail the conflicts between Mr Lewis and Mrs Reyneke which led to her complaint to the Board about him. Neither will I elaborate on Mr Lewis's own dissatisfactions with the school including its refusal to reimburse him for travel expenses. The case is not about the merits of these complaints. Rather, it is about how they were dealt with by the Board as employer leading to Mr Lewis's dismissal, and the justification for this. The following account of events therefore begins with the Board's involvement with Mr Lewis.

[13] The Board of Trustees met on Tuesday 26 February 2008 "in committee" (that is in private session). It received a report from the Principal, Mr Dimery, about Mr Lewis's expenses' reimbursement personal grievance. Mr Dimery also reported to the Board that Mrs Reyneke and her husband had lodged a formal complaint against Mr Lewis. The minutes reveal that "G Simmons and B Dimery met with R Harrison (the Board's solicitor) and D Reyneke and her husband on Monday of this week". The board resolved to send a "legal letter" to Mr Lewis on 27 February over the hand of its Chairperson, Georgina Simmons "outlining the next step" and that Mr Lewis would be asked to respond to the Reyneke complaint and the Board's letter. The minutes reveal that the Board set up a subcommittee of four including Mrs Simmons and Mr Dimery, to "look at the response from RLewis, then meet with R Lewis and D Reyneke and determine the next step."

[14] The "legal letter" dated 29 February 2008 was delivered by hand by Mrs Simmons to Mr Lewis although not until Monday 3 March. The letter, authored by the Board's solicitor but signed by Mrs Simmons:

- recorded the tabling of Mrs Reyneke's complaints with the Board and attached "A copy of the email ... together with a summary of complaints compiled by Desiree Reyneke";
- advised Mr Lewis of the establishment of the subcommittee and its delegation "to investigate this complaint and make decisions arising from the inquiry process";
- advised Mr Lewis of his right to consult the Post Primary Teachers Association Inc ("PPTA") or another representative and of his right to representation at all stages of the process because the complaint "on its face may amount to a breach of discipline";
- advised that the subcommittee's first task would be "to make initial inquiries to determine whether disciplinary procedures should be initiated, as referred to in clause 3.4.1 of the Secondary Teachers' Collective Employment Agreement";
- advised that where the facts were clear and acknowledged, there would be the possibility of resolution by informal discussion;
- invited Mr Lewis to present a written response to the complaint by Friday 7 March, and provided the opportunity to meet with the subcommittee to present initial responses or to make alternative arrangements;
- required that confidentiality in the process be maintained;
- invited Mr Lewis to indicate if there were staff who might assist the subcommittee with its inquiry and who would be interviewed by the subcommittee if it was so advised;
- advised that if, "as a result of the initial inquiries there is a difference on the facts, then we will undertake a full and fair inquiry process including interviewing relevant staff on a confidential basis"; and
- advised that Mr Lewis would "be kept fully advised of all information that the sub committee receives through this process as [well] as the complainant, Ms Reyneke".

[15] Mr Lewis responded promptly by e-mail to the members of the Board's subcommittee "who are currently in New Zealand and could be available for an early meeting on this matter." Mr Lewis advised that he had not had a sufficient opportunity to consider the complaints before the deadline of 7 March imposed by it for reply, and provided only what he described as his "initial response" saying that he would advise the Board in more detail in the following week. Mr Lewis's initial response was to assert that Mr and Mrs Reyneke's claims were "vexatious" and did not contain matters of substance. Mr Lewis asserted that Mrs Reyneke's complaints themselves amounted to "workplace bullying" and were grounds for a personal grievance by him.

[16] Mr Lewis also complained about the delivery by Mrs Simmons of the letter of 29 February to him whilst on duty in the course of a school day and advised that he had referred that and other matters in the letter to the Ministry of Education. These other matters were said to have included Mrs Reyneke's failure to comply with the New Zealand Qualifications Authority ("NZQA") moderation requirements between 2004 and 2007. Mr Lewis said that Mrs Reyneke's complaint was very similar to one that she had made in response to his complaints about her in 2004 and asserted that in both cases "the principal and the Board treated the fact that I have complained as the basis of a complaint against me." Mr Lewis complained, presciently, that the Board had "failed to comply with Howick College Board Complaints Policy." Mr Lewis's response asserted, also presciently as it turns out, that

“Because the matter concerns the Board Chair, Howick College Complaints Policy requires that the complaint be made to the principal, Mr Dimery.” After a number of other allegations Mr Lewis concluded:

I would also appreciate the opportunity to discuss the issue of my workload this year with you. I emailed Mr Dimery about this prior to his departure but have not received a reply.

[17] All subsequent correspondence on the part of the Board was then undertaken by its solicitor, Mr Harrison, on his office letterhead. Mr Harrison wrote to Mr Lewis by a letter sent on 10 March 2008 about the Reyneke complaint and its investigation. Mr Harrison’s letter included: “It is accepted from your initial response that the facts are not acknowledged and nor is it realistic to pursue an informal resolution at this time.” Mr Harrison advised that in these circumstances the Board subcommittee would “now initiate formal disciplinary procedures in accordance with clause 3.4.3 of the Teachers’ Collective.” Mr Lewis was invited to meet with the subcommittee in person or through a representative on Wednesday 12 March at 4 pm at the college.

[18] Mr Lewis responded that the timeframe was not suitable and that he was going to take legal advice about the matter. The board postponed the subcommittee’s meeting until 19 March.

[19] On Friday 14 March Mrs Simmons walked past Mr Lewis’s classroom where he was teaching. Mr Lewis left his class and walked behind Mrs Simmons for an unknown distance and period until she turned around, realised that she was being followed, and then deviated from her intended course to an area where there were other staff. Nothing was said between Mr Lewis and Mrs Simmons and Mr Lewis returned to his classroom. Mrs Simmons felt intimidated by this event and made this known to the Board’s solicitor and the other members of the subcommittee.

[20] This caused the Board’s solicitor, Mr Harrison, to write to Mr Lewis by letter dated 17 March 2008 which was delivered to him the same day during school time by hand. The letter referred to the incident just described and also to an enigmatic allegation that:

Two members of the senior management team expressed their concerns on Friday regarding your conduct. This concern is of a more general nature, both fed back that they have had some students and staff speak about your allegedly erratic behaviour.

[21] Mr Harrison’s letter advised Mr Lewis that the Board was giving consideration to either his suspension or a transfer of duties as provided for in the collective agreement “if the welfare and interest of any student or employee at the school may require such interim intervention.” The board invited a response before considering those matters and, in view of the allegations, advised Mr Lewis of a meeting at the school at 4 pm that day at which he might attend or for which he might provide written responses. The letter advised him: “Until you are advised of the decision you are directed not to attend school tomorrow.”

[22] Mr Lewis did attend the meeting on 17 March and minutes were kept. Other persons in attendance were the Chairperson of the Board (Mrs Simmons), Mr Johnson (a member of the subcommittee considering the complaints against Mr Lewis), a deputy principal recorded as “B Evans” as well as a minute taker. Mr Lewis said that he had not had time to read and digest the letter and declined to answer the matters in it, saying that he had contacted the Employment Relations Authority and was commencing proceedings there. Mrs Simmons advised Mr Lewis that the subcommittee would consider whether to suspend him or place him on alternative duties. Mr Lewis inquired whether the Principal, Mr Dimery, (who was then out of the country) was a member of the subcommittee investigating the Reyneke complaint but Mrs Simmons responded that although he was a member of the Board, she would get back to Mr Lewis about Mr Dimery’s membership of the subcommittee. The board agreed to advise Mr Lewis by telephone of its decision and after he had departed the subcommittee continued to meet, being joined by its other member by telephone. It then resolved:

That for the safety of the school, students and staff, R Lewis will be suspended on full pay until such time as the complaint by D Reyneke against him is resolved.

[23] On 17 March Mr Lewis had also advised the Board’s solicitor that he had not then had time to consult his support person who was overseas. He complained that the Board had not told him in its letter to him of 13 March 2008 (which agreed to postpone the 12 March meeting by one week), who had decided to hold a meeting or the reasons for it. He requested a postponement of that meeting so that Mr Harrison could obtain advice.

[24] The board’s solicitor responded by letter of 18 March 2008 which enclosed the minutes of the meeting of the subcommittee on 17 March after which Mr Lewis had been suspended. The board agreed to postpone further its investigative meeting to 26 March 2008. Its solicitor expressed its concern that its inquiry was being delayed repeatedly to provide Mr Lewis with time to instruct a lawyer and urged him to do so. The board’s solicitor’s letter confirmed that Mr Dimery would not be part of the subcommittee but would assist its process.

[25] On 18 March 2008 Mr Lewis’s general medical practitioner prepared a brief letter about his condition following a consultation on that day. The letter was subsequently sent on to the Board although, the evidence establishes, to support a complaint by Mr Lewis of “work place stress” rather than to explain his behaviour as the Board had suggested he might. The letter stated materially:

In my opinion he [Mr Lewis] is suffering from extreme work place stress and anxiety. [His] blood pressure as a consequence is high, whereas he usually has very low readings.

Should Raymond give you permission then feel free to contact me for confirmation.

[26] By letter dated 25 March 2008 to Mr Lewis, the Board's solicitor noted that he had not heard back from him and inquired whether he had been in touch with a support person or representative and whether he intended coming to the meeting (re)scheduled for 27 March 2008. Mr Harrison asked for Mr Lewis's response as soon as possible and advised that if there was no response the subcommittee would proceed with its meeting based on the information with which it had been provided to that date, "primarily Ms Reyneke's complaint and attached documents together with your initial response."

[27] Mr Lewis's reply was by e-mail on the same day and said simply: "Today, I commenced a claim in the Employment Relations Authority."

[28] Mr Harrison wrote again to Mr Lewis on 26 March 2008. Mr Lewis was advised, correctly, that his proceedings in the Authority did not alone stop the subcommittee's inquiry into the Reyneke complaint. It confirmed both the scheduled meeting for the following day and Mr Lewis's suspension and the reasons for it. It added that the subcommittee wished to hear from him on those matters and, further, on his advice that correspondence about his suspension had been forwarded to the Prime Minister and the Minister of Education while Mr Lewis had allegedly advised staff and others in the school community of a significant law suit against board members.

[29] For the first but not final time, the defendant referred to possible explanations for what was becoming by then Mr Lewis's increasingly bizarre and erratic behaviour. It did so in writing as follows:

I set these additional concerns out as there may be a medical condition or personal circumstances that could help explain some of these behaviours. It is noted that you forwarded a medical certificate from Dr Greenfield dated 18 March 2008 relating to high blood pressure which, in Dr Greenfield's opinion, he considers to be the result of extreme workplace stress and anxiety. If this is something that you wish the sub committee to be aware of, then further information will be required to assist the sub committee understand this response which will be held in confidence. The point is, the sub committee cannot be expected to try and understand your position without a greater degree of co-operation and information from you. However, neither can the process go on indefinitely awaiting a response from you, which is why the meeting is to proceed tomorrow whether or not you choose to attend. If it is not suitable to your support person or representative, then either of them will need to contact me directly in order to discuss an alternative date.

[30] It appeared Mr Lewis did not reply and he did not attend the subcommittee's meeting as invited which was held on 27 March 2008. On 31 March 2008, Mr Harrison wrote again to Mr Lewis. The letter confirmed that the subcommittee considered:

... the information that they have obtained to date including your initial response as well as a medical report received from Ms Reyneke ... and a copy [of which] is attached to this letter. ... Sub committee members were satisfied based on the information received by them that Ms Reyneke's complaint of workplace bullying and harassment is valid and is of a serious nature and amounts to a serious breach of discipline.

[31] Mr Lewis was advised that the subcommittee's findings would be reported to the Board at its meeting on 1 April 2008 and that while the subcommittee had been delegated to make a decision, this would nevertheless be an opportunity for the full board to review that decision and decide whether to adopt its findings. Mr Lewis was also advised that the Board would review his suspension at that meeting. He was again advised of an opportunity to make further written submissions by 4 pm on Tuesday 1 April 2008. He was directed particularly to any submissions about the subcommittee's findings on Mrs Reyneke's complaint

... and information and/or reasons that may cause the Board not to adopt these findings or to modify them; and ... Responses in respect of the decisions to suspend you on full pay, again any information or reasons that may support your wish to lift the suspension and so cause the Board to review or modify the suspension decision.

[32] Mr Lewis wrote a detailed letter to the Board dated 1 April 2008 and attempted to ensure its receipt by it before the 4 pm deadline that day. For reasons that are unclear but seem to have amounted to a misunderstanding, the submissions were not received in time and therefore were not considered by the Board that evening. Its minutes, dealing with Mr Lewis, noted:

A letter 'Notification of the Outcome of the Sub-Committee' from R Harrison was read to the Board by G Simmons.

A letter 'Desiree Reyneke Complaint – Investigation' from R Harrison was tabled.

[33] The board adopted the subcommittee's findings "upholding the complaint of Desiree Reyneke and confirms the behaviours complained of are of a serious nature and amount to bullying and/or harassment in the work place." The board also resolved to confirm "... that the Sub Committee continues with the employment issue arising out of the Desiree Reyneke complaint and subsequent concerns during the course of the inquiry with respect to Mr

Lewis's conduct and specifically the Sub Committee is delegated on the Board's behalf as provided under clause 3.4.3 of the Secondary Teachers' Collective Agreement." Finally, the board resolved to ratify "... the Sub Committee's decision to suspend Mr Lewis on full pay pursuant to clause 3.4.3(c) of the Secondary Teachers' Collective and further resolves that the suspension remain in place until the completion of the disciplinary procedures that have been initiated against Mr Lewis."

[34] Perhaps the most detailed exposition of the defendant's grounds for Mr Lewis's subsequent dismissal is contained in the letter from the Board's solicitor to him of 10 April 2008. This recorded the events and outcomes of the meeting on the previous day of the subcommittee investigating the complaints against him by Mrs Reyneke. The letter:

- confirmed that Mr Lewis's earlier responses had been considered;
- confirmed the subcommittee's considerations of letters dated 5 and 6 April 2008 from Mr Lewis;
- advised that a letter from Mrs Reyneke's husband dated 7 April 2008 in response to Mr Lewis's earlier letters was considered – a copy of that letter was enclosed;
- advised that the subcommittee resolved to uphold its earlier finding of the validity of Mrs Reyneke's complaints and, in particular, that she had been subjected to "workplace bullying and harassment which has impacted on her health.";
- addressed what it described as "the question of penalty" by reference to clauses 3.4.3(d) and (e) of the Secondary Teachers' Collective Agreement;
- recorded the subcommittee's resolution to recommend to the Board that Mr Lewis's employment be terminated;
- attached a copy of the subcommittee's minute to this effect;
- set out some of the factors which the subcommittee considered relevant in order to assist Mr Lewis's understanding of its recommendation;
- in view of Mr Lewis's long service, invited him to advise the Board whether there might perhaps be "external and/or medical reasons that may help them understand this situation.";
- invited Mr Lewis to consider whether there might be "an alternative way forward, one example being medical retirement" available under the collective agreement;
- indicated to Mr Lewis that the Board would be prepared to review its recommendation to enable access to financial benefits of an arrangement such as medical retirement if this was applicable;
- invited Mr Lewis to respond so that this response might be considered by the Board at its next meeting on 15 April 2008;
- encouraged Mr Lewis to take advice or involve a support person or representative in the process; and
- reiterated that the subcommittee's recommendation to terminate Mr Lewis's employment was not a final decision and that other options suggested by him would be considered.

[35] Mr Lewis's response to the solicitor's letter of 10 April 2008 was by e-mail dated 11 April. He advised that he would be overseas on 15 April and did not intend making further submissions to the Board. He referred to his disadvantage grievance proceedings in the Employment Relations Authority and to his intention to amend these to include a claim for "wrongful dismissal". Mr Lewis advised that his assertion that the Board was in breach of the [Health and Safety in Employment Act 1992](#) had been referred to inspectors of the Department of Labour and noted that penalties included imprisonment and substantial fines. Mr Lewis's response included an assertion that the Board appeared not to be able to pay compensation to another teacher with a personal grievance and asserted that it had both refused to return his property to him and photocopied his notes. It also included a reference to his personal grievance in 2004 in respect of Mrs Reyneke's conduct towards him. Further, his response noted that the Ministry of Education's investigators' report into what he described as his 'whistle blowing' allegations was due on 11 April. Mr Lewis referred to his complaints about seven other staff members and attached these to his e-mail. He asked that his seven complaints be discussed by the Board at a forthcoming meeting, asserting that it had so undertaken to the Employment Relations Authority.

[36] At its meeting on 15 April the Board dismissed Mr Lewis summarily. The documents that illustrate the defendant's grounds for dismissal are the Board's minuted resolution to this effect and the letter written to Mr Lewis by its solicitor advising him of his dismissal. The minutes of a special meeting of the Board held on 15 April 2008 disclose a resolution "that D Reyneke's complaint was of a serious nature". Carried unanimously was a resolution "that the full Board accepted the recommendation of the sub-committee that R Lewis's employment at Howick College be terminated immediately and that it has been dealt with as a matter of serious misconduct (discussion followed)." The subsequent letter advising Mr Lewis of his dismissal merely recorded the Board's acceptance of the subcommittee's recommendation that his employment be terminated summarily.

The issues

[37] As pleaded by the plaintiff in his amended statement of claim, these are five.

[38] First, Mr Lewis says that the Employment Relations Authority determined erroneously as matters of fact and

law that he was dismissed justifiably. This is, however, a challenge by hearing de novo so that the Court must make its own determination of the merits of the case rather than reviewing, as a purely appellate court, the correctness of the Authority's decision. As already noted, Mr Lewis's case is a very different one in this Court.

[39] Second, the plaintiff says that the Authority did not ever seize the issues between the parties. Again, that is a complaint that is subsumed by the de novo nature of the challenge. In addition, a combination of explicit pleadings and the adversarial nature of litigation ensures that the real issues can be examined.

[40] Third, Mr Lewis submits that the Board did not follow correct school policy in dismissing him and, in particular, in "bypassing the Principal". The plaintiff says that despite the college's policy requiring issues of teacher conduct or competence to be dealt with by the Principal, the defendant failed or refused to do so and dealt with the complaints against the plaintiff by itself in the first instance. The plaintiff says that no attempt was made by Mr Dimery to resolve the Reyneke complaint against him as required by the school's complaints policy and that the Board provided the only consideration of the complaints as a first and final resort rather than, as required by the policy, as a last resort.

[41] Penultimately, the plaintiff alleges actual bias by the Board in that its Chairperson (Mrs Simmons) was also one of the complainants against Mr Lewis whose complaints resulted in his suspension and subsequent dismissal. The plaintiff says that the Chairperson acted wrongfully in not recusing herself from the deliberations of the Board when the decision was made by it to terminate his employment for serious misconduct. This was said to be despite the Chairperson's conflict of interest, being one of the complainants against Mr Lewis and part of the decision making board and, more particularly, in her role heading the special subcommittee that made recommendations to the full board.

[42] Finally, the plaintiff says that the Board's subcommittee, established to deal with the complaints against him, did not follow a fair procedure and, therefore, did not determine Mr Lewis's response to the complaints on its merits.

Legal tests for justification of dismissal and consequences

[43] These are set out in s 103A of the the Act as follows:

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[44] This requires the Court to consider both whether Mr Lewis's summary dismissal was what a fair and reasonable employer would have done in all the relevant circumstances at the time and, second, that the manner in which the decision to dismiss summarily was how a fair and reasonable employer would have gone about it in all the circumstances at the time. The plaintiff's case focuses on the second test but is also that if a fair process had been engaged in, summary dismissal could not reasonably have been the outcome.

[45] Section 103A requires an employer to justify a dismissal by establishing both limbs of the section, what might be called the 'what' and 'how' of the dismissal. Failure to establish either or both of the tests means that a dismissal will not be justified. As to the requirement for a fair and reasonable process (the 'how' test), the Court does not look minutely and pedantically to see whether the employer has acted fairly and reasonably to a standard of perfection. Rather, the assessment is one of overall fairness and reasonableness in all the circumstances of the parties and of the case. Some minor or inconsequential flaw or even flaws that are part of a process that is nevertheless fair and reasonable overall, will not cause a dismissal that is otherwise justifiable in substance to be declared unjustifiable. However, a process that is fundamentally, pervasively, and manifestly unfair must and will clearly have that result under s 103A. In such circumstances, it is likely that the unfairness and unreasonableness of the employer's process will, in turn, have led to it not making a fair and reasonable decision to dismiss on the merits of the allegations against the employee. None of this is novel or remarkable. It is well known and well established employment law.

[46] An employer in the circumstances of the Board of Trustees in this case is expected to abide by statutory requirements, and collective or other employment agreement provisions to which it is bound, and to comply with its own unilaterally promulgated procedures that affect its employment relations and, as it has held out to its employees, will govern the conduct of its relations with them. That means, in turn, that if there are breaches by it of one or more of these rules governing the employer and such breach, or breaches together, cause the employer's process to have been unfair and unreasonable, s 103A requires the Court to find dismissal to have been unjustified.

[47] That is, of course, not the end of the matter because the Court has a broad discretion in remedies to reflect the nature and extent of the employer's wrongful conduct. Examples of this include the requirement to reflect in remedies the employee's culpable contributory conduct (s 124), the requirement to consider the practicability of reinstatement in employment as the primary remedy for unjustified dismissal, and the ability to reflect a mixed result in an award of costs.

Collective agreement provisions

[48] Although Mr Lewis was not, at relevant times, a member of the PPTA, being the relevant union of secondary school teachers, it is common ground that the union's collective agreement was applicable to and binding on him and the Board. Relevant provisions of that collective agreement include the following (with pertinent passages italicised for the purposes of this judgment):

3.4 Teacher Conduct and Discipline

...

3.4.1 Where a breach of discipline appears to have occurred, the employer shall determine whether disciplinary procedures should be initiated. Where the employer considers it appropriate it shall make initial enquiries to establish whether the disciplinary procedures should be initiated. In some cases, where the facts are clear and acknowledged, resolution may be achieved informally by discussion between the parties without the need for initiating the disciplinary procedures. Questions of conduct or discipline should be handled in a manner which as far as possible protects the mana and dignity of the teacher concerned. Teachers may seek whanau, family, professional and/or Association support in relation to such matters.

3.4.2 The teacher shall be informed of any allegation of breach of discipline and of her/his right to consult the Association and of the right to be represented by it at any stage.

3.4.3 Where an employer decides to initiate formal disciplinary procedures against a teacher, the following principles are to be observed:

(a) The employer or its agent shall advise the teacher in writing of the reason for the disciplinary procedures being initiated, invite the teacher to respond in writing, and advise the teacher of her/his right to request Association assistance and/or representation at any stage.

(b) Before any substantive disciplinary action is taken, an investigation must be undertaken by the employer. The teacher shall be invited to attend any such investigation and to make a statement concerning the matter either personally or through a representative.

(c) Notwithstanding 3.4.3(b) above if the employer is satisfied that the welfare and interests of any student attending the school or of any employee at the school so requires the employer may at any time before the matter has finally been disposed of either:

(i) Suspend the teacher

(Note: suspension would normally be on pay except in exceptional circumstances); or

(ii) Transfer the teacher to other duties.

(d) Where a breach of discipline is held to have occurred, the employer shall not impose any penalty on the teacher without first:

(i) Giving the teacher the opportunity to make representations to it; and

(ii) Taking into account any period of suspension already imposed.

(e) In the case of a finding of serious misconduct the employer may dismiss the teacher without notice.

3.4.4 Where a teacher has been suspended, and subsequently a breach of discipline is held not to have been proved, the teacher shall, unless the teacher has already resigned, be entitled forthwith to resume teaching duties.

3.4.5 The following area examples of matters that may warrant disciplinary action. This is not an exhaustive list nor is it intended that every such matter listed here must always be treated as a disciplinary matter. Each case must be assessed on its individual merits.

(a) Disobedience of lawful orders or instructions.

(b) Negligence, carelessness or indolence in carrying out her/his duties as a teacher.

(c) Gross inefficiency as a teacher.

(d) Misuse or failure to take proper care of school property or equipment in her/his custody or charge.

(e) Absence from duty without valid excuse.

(f) Conduct in her/his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service.

Relevant statutory provisions

[49] Also relevant are the statutory good faith obligations in s 4 of the Act including the obligations on both parties neither to mislead or deceive the other, nor to engage in conduct that is likely to mislead or deceive. The parties are also required to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, to be responsive and communicative: s 4(1A)(b).

[50] The board was obliged to provide Mr Lewis with access to information relevant to the continuation of his employment and an opportunity to comment on it before a decision that was or was likely to have an adverse effect on the continuation of his employment: s 4(1A)(c).

Relevant school policies

[51] Clause 3.1 of the collective agreement incorporates s 77A of the [State Sector Act 1988](#) which is as follows (with pertinent references italicised for the purposes of this judgment):

77A General principles

(1) *Every employer in the Education service must—*

(a) *operate a personnel policy that complies with the principle of being a good employer; and*

(b) *make that policy (including the equal employment opportunities programme) available to its employees; and*

(c) *ensure its compliance with that policy (including its equal employment opportunities programme) and report in its annual report (if any) on the extent of its compliance.*

(2) For the purposes of this section a **good employer** is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—

(a) Good and safe working conditions; and

(b) An equal employment opportunities programme; and

(c) The impartial selection of suitably qualified persons for appointment; and

(d) Recognition of—

(i) The aims and aspirations of the Maori people; and

(ii) The employment requirements of the Maori people; and

(iii) The need for greater involvement of the Maori people in the Education service; and

(e) Opportunities for the enhancement of the abilities of individual employees; and

(f) Recognition of the aims and aspirations and employment requirements, and the cultural differences, of ethnic or minority groups; and

(g) Recognition of the employment requirements of women; and

(h) Recognition of the employment requirements of persons with disabilities.

(3) In addition to the requirements specified in subsections (1) and (2) of this section, *each employer shall ensure that all employees maintain proper standards of integrity, conduct, and concern for—*

(a) The public interest; and

(b) *The wellbeing of students attending the institution.*

[52] Clause 3.1.1 of the collective agreement also requires the defendant to operate a personnel policy that complies with the provisions of being a good employer. The “Complaints Policy” promulgated by the Board of Trustees in November 1998 deals with complaints by and about a variety of sources concerning the school. Complainants may include staff members. The policy requires that such complaints are dealt with quickly, fairly, with due seriousness and with a consistent approach. Among the policy’s purposes are:

- To ensure that the concern is directed to the appropriate person in the first instance.

- To resolve complaints co-operatively and at an early stage where possible.
- To ensure that concerns are not blown out of proportion.
- To ensure complaints are properly investigated and decisions made only on the basis of sound evidence and proper evaluation.

[53] The policy and its procedures are to be “applied irrespective of the source of the complaint, that is complaints from students, staff or parents.” Representation of any party to the complaints procedure is allowed for. Guideline 2a) provides that “Failing satisfactory resolution the complaint should be elevated to a higher level of management.”

[54] The next step is under guideline 3 and provides that where a complaint cannot be resolved informally at the lower levels, a formal complaint should be lodged in writing with the Principal. The policy requires a register of formal complaints to be maintained. Guideline 5 provides that “While initial investigation may be delegated, any complaint which involves issues of teacher conduct or competence must be dealt with by the Principal.” The next step is:

The person dealing with the complaint should meet with the complainant and discuss salient points of the complaint. Discussions should centre on identifying the problem and planning possible remedies.

[55] Step 7 of the guidelines requires the person complained about to be informed “when appropriate” and that the person dealing with the complaint is to investigate the matter in an appropriate manner “which may include questioning the other party and any witnesses present to the matter complained of, etc.”

[56] Step 8 of the guidelines provides that “Where a complaint is found to have substance the person dealing with it should arbitrate or negotiate a settlement.” If that is not possible, step 9 provides that the complaint be referred to the Principal, “and if the Principal is unable to find a solution, to the Board of Trustees through the BOT Complaints procedure.” The procedures flow chart confirms this step by step approach which is applicable to complaints by staff members about the conduct or competence of other staff members.

[57] If, having been dealt with under the school’s Complaints Policy, a complaint remains unsettled, the “Board of Trustees Complaints Policy” also promulgated by the Board in November 1998 deals with the matter. This:

- allows a staff member complained against to have a representative during the process;
- requires “thorough documentation” to be kept of the process;
- requires the assignment of a complaint to a subcommittee of the Board which will review all written material relating to a complaint, call for further written reports as appropriate, and either conduct further investigations itself or engage an external investigator if appropriate;
- requires the subcommittee to compile a report about the complaint and make a recommendation on it for the Board;
- where a complaint is found to have substance, or a prima facie case exists for an employee to answer, requires the subcommittee’s report and recommendation to be discussed with, and to the extent determined by the Board, adopted by it; and
- if a recommendation is that disciplinary action be taken against a staff member, requires the appropriate disciplinary procedures to immediately be invoked (see policies on staff discipline or competence).

[58] The complaints procedure flow chart shows that if, after discussion and adoption by the full board of the subcommittee’s recommendations, there is a possibility of disciplinary action, then relevant disciplinary or competency procedures are to be adopted and insurers advised. This refers in turn to the employment agreement procedures.

Synthesis of Complaint Procedures

[59] In summary, the process for dealing with issues that arose in this case is governed in ascending order by, first, the Board’s own policies; second, by the applicable collective agreement; and, to the extent that these may be deficient, by the statutory minimum requirements of good faith in fair process in the Act.

[60] A complaint such as Mr and Mrs Reynekes’ was to be dealt with first under the school’s generic complaints policy. Given that it was of a serious nature and by a head of a department against a senior teacher, I conclude that it was appropriate that the complaint would be dealt with by the Principal or one of his deputies in the first instance. The policy required that the investigator would assemble “sound evidence” and would subject this to “properly investigated” and evaluated complaints. Relevant considerations were to include that the complaint was to be dealt with “co-operatively” and, where possible, at an early stage. Concerns were “not [to be] blown out of proportion”. Failing informal resolution, it was incumbent on the Principal to both involve Mr Lewis and to “question [presumably any witnesses about] the matter complained of”. If the complaint was found by the Principal to have had substance, he was obliged to have attempted to arbitrate or negotiate a settlement of it. Only if these courses proved unavailing, the complaint was to be referred to the Board under its separate complaints

policy.

[61] A Board inquiry into the complaint required that “thorough documentation” was to be kept of the investigation. This policy allowed for an investigation either by a subcommittee of the Board or, as would have been prudent in this case, by an external investigator. Finally, if the Board’s investigation found that the complaint warranted “disciplinary action”, the school’s staff disciplinary policies and/or relevant procedures under the employment agreement were applicable.

[62] Although the Board in this case appears to have regarded these procedures and adherence to them as cumbersome, unnecessary, and discretionary, it cannot bypass or ignore its own complaint procedures that it has determined unilaterally and held out to the school community, including staff, as the orderly, fair, and productive way of dealing with complaints in the school.

[63] Policies and procedures are more than a requirement to be prepared, updated and held for quality assurance and certification purposes or simply allowing boxes to be ticked. They are living documents in the integrity of which affected persons are entitled to place their reliance. They cannot be read down or ignored when perceived to be inconvenient or inappropriate in a particular case. They are a form of social contract between parties including a Board of Trustees, school pupils and their families, the community and, no less importantly, a school’s employees. In cases such as this, they are enforceable in the sense that compliance with them may determine whether a dismissal is justifiable. To use the language of s 103A of the the Act, a fair and reasonable employer will comply with its own relevant policies.

A Belated Medical Explanation for Plaintiff’s Conduct

[64] Although not revealed, at least comprehensively until the investigation by the Employment Relations Authority into Mr Lewis’s claim of unjustified dismissal and, more completely in evidence, at this hearing, the plaintiff has been treated by psychiatrist Dr Roger Elliott since late 2001. Even before then, Mr Lewis had the assistance of another psychotherapist for his symptoms of depression which, in 2001, Dr Elliott assessed as being classical of major depressive disorder and included a pervasive low sense of self esteem and confidence. Dr Elliott’s assessment is that Mr Lewis had and has obsessional personality traits associated with his depression and that these can be compounded by his depressive disorder in times of stress. Dr Elliott concluded that Mr Lewis also suffers from dysthymia, a condition resulting in a persistent low mood and negative outlook on life.

[65] Mr Lewis was treated with anti-depressant medication from 2001 until late 2006 when, with a new prescription, Dr Elliott describes him as having “a further lift in mood and improved outlook in life.” This was associated with Mr Lewis having undertaken a long period of psychotherapy. Dr Elliott then assessed Mr Lewis as having gained greater confidence in himself.

[66] Dr Elliott assessed a change for the worse in Mr Lewis’s condition from September 2007 after his return from a school trip to England. He described Mr Lewis as having been agitated and beginning to show heightened stress together with signs of adjustment disorder with an intensification of anxiety, agitation, low frustration tolerance, and an intense desire to repair the wrongs he perceived at the time. In the first six months of 2008 Dr Elliott assessed Mr Lewis as showing signs of becoming progressively more stressed, and a heightening of his obsessional traits which compounded and exaggerated his stress and caused him to become increasingly passionate and focused on those perceived wrongs. Dr Elliott’s assessment was that this continued and worsened during the balance of 2008 although the prescription of a tranquiliser had a calming effect as was intended to settle Mr Lewis down. The plaintiff’s stress levels increased again in March 2009 and he exhibited behaviours such as increasing anger when his views were challenged and an increasing inability to appreciate the opinions of others. Further new prescriptive medication from late April 2009 improved Mr Lewis’s clinical condition.

[67] Dr Elliott attributes Mr Lewis’s increasing stress from April 2007 to an increased workload and a lack of guidelines from the defendant in relation to the school trip to England. From October 2007 these causal factors were assessed by Dr Elliott to have expanded to include a lack of support from the school during and after the trip to England associated with the death of a student on a concurrent but separate school trip.

[68] Dr Elliott concluded that because of Mr Lewis’s obsessional traits, he had a heightened focus on issues that were important to him which escalated as he focused on the detail of what he was trying to prove and he became less able to see others’ points of view. Dr Elliott said that a person with such obsessional traits needs authority figures to display high levels of professionalism and structure but that Mr Lewis was concerned that the Board increasingly failed to follow its disciplinary protocols and fair procedures. This Dr Elliott attributed to Mr Lewis’s increased stress, the undermining of his faith in the ability of the process to provide him with a fair and balanced result, leaving him unable to cope in a logical and effective manner with what was occurring in the disciplinary process. Dr Elliott opined that if Mr Lewis perceived that the Board did not hear his concerns and address these, this would have increased his stress and, as a result, compounded his obsessional traits, creating a vicious cycle effect.

[69] It is difficult to imagine that with these symptoms, no one in the college’s management could have failed to notice Mr Lewis’s increasingly erratic and even bizarre behaviour and would not have realised or even suspected the origin of this in a psychiatric or psychological disorder. However, obligations on people in employment relationships in those circumstances are not one-sided. Mr Lewis, himself, bore an obligation in employment law

to bring his state of health to his employer's attention to the extent that it was affecting adversely his work performance as it clearly was. That is often easier said than done, especially in cases of psychiatric illness and a resistance in the sufferer to disclose this for fear of adverse consequences. The stigmas of mental illness and of its disclosure can still be feared by its sufferers.

[70] In this case and in the weeks, if not months, leading up to Mr Lewis's dismissal, the Board strongly suspected the cause of Mr Lewis's symptoms. It offered him, appropriately and sensitively, several opportunities to disclose them. These were rebuffed by the plaintiff aggressively and absolutely. So, of course with the benefit of hindsight, it is now possible to analyse Mr Lewis's aggressive and intolerant conduct towards some colleagues and his employer's representatives as the manifestation of his psychiatric incapacity that would have been both treatable and manageable. That, unfortunately, did not occur and Mr Lewis must bear a significant degree of responsibility for that failure or refusal to acknowledge the effects on others at work and to take steps to ameliorate that dysfunctionality.

[71] Dr Elliott's current assessment of Mr Lewis's condition was that he is now settled, his moods are normal, and he handles the stress of his present predicament better than previously. His assessment is that Mr Lewis is now able to accept others' opinions and better able to understand the different motivations in others. Dr Elliott put this more stable condition down to an effective medication regime and to the objective assistance of legal representation in this proceeding.

[72] None of Dr Elliott's diagnoses or prognoses was challenged by the Board.

Decision - Substantive fairness and reasonableness

[73] This is the first element of the statutory test for justification of dismissal under [s 103A](#) of the [Employment Relations Act 2000](#). If Mr Lewis's conduct had been as Mr Reyneke complained, a fair and reasonable school Board of Trustees would have been justified in dismissing Mr Lewis albeit on notice, rather than summarily, as it did. The evidence establishes, however, that in material respects, Mrs Reyneke's complaint to the Board of "bullying and harassment" by Mr Lewis was not objectively sustainable. Had it been investigated and determined as the Board failed to do, I am satisfied that the Board would not have reached the conclusion that this was culpable or deliberate serious misconduct by Mr Lewis towards his supervisor Mrs Reyneke. Rather, it was a legitimate professional disagreement that was held in common with other staff members and, as such, would not reasonably have resulted in Mr Lewis's summary dismissal. Although elements of Mr Lewis's behaviour towards colleagues and his employer were unprofessional and even reprehensible, as manifestations of his deteriorating mental and psychological health, following a proper professional investigation of them, they would have been dealt with as such. A reasonable employer in the circumstances would have referred to the Principal the substance of Mrs Reyneke's and Mr Lewis's criticisms, to deal with collegially and in the manner that professional educational issues are resolved. The inappropriate manner in which a number of Mr Lewis's communications with colleagues took place would also have been a matter for counselling and other professional assistance to a longstanding but unwell member of the school's staff.

[74] As it has been said before in other cases, it is difficult if not impossible to separate neatly procedural and substantive justification for dismissals although [s 103A](#) requires that these be assessed separately. As happens, not infrequently, the employer's failure or refusal to follow a fair and reasonable process leading to a decision to dismiss is not only a personal grievance in itself, but leads to a substantively unfair or unreasonable dismissal. That is what has occurred in this case as the following analysis of the Board's compliance with the second limb of [s 103A](#) reveals.

Decision - Procedural fairness and reasonableness

[75] This is not a case where a single or even several procedural infelicities are discernible leading up to summary dismissal. The employer's errors began at the outset of the process, were pervasive, multi-dimensional and, together, meant that the procedure was so unfair and unreasonable that it does not meet the [s 103A](#) test. It is not to scrutinise minutely and pedantically the employer's actions to so conclude. The procedural flaws were such as to place the correctness of its assessment of Mr Lewis's serious misconduct in significant doubt in several respects.

[76] It cannot be said that if the Board had adopted and applied a fair and reasonable process, it would still have come to the same decisions about Mr Lewis's conduct as it did in a flawed way. One example of this analysis is the significant complaint of Mrs Reyneke that she was "overruled" by Mr Lewis which she categorised as bullying and harassment. Had the Board investigated this allegation that Mr Lewis denied, albeit barely, it would have interviewed their colleague Brenda Kop. As analysis emerged at the hearing, so too would the Board have had to conclude, fairly and reasonably, that Mrs Kop did not support Mrs Reyneke's allegation as the complainant had alleged. Indeed, the Board ought to have concluded that Mr Lewis, in concert with other staff members, acted appropriately in taking his complaints about the National Certificates of Education Achievement ("NCEA") course content, assessment, and moderation to a more senior level of educational management in the school's hierarchy. Mr Lewis and his colleagues were justified in doing so, not only in the result in the sense that their position was vindicated but this was an appropriate way of acting upon professional educational concerns. That Mrs Reyneke may not have liked the outcome (the challenge by Mr Lewis and other staff to a clearly debatable educational

issue), was neither Mr Lewis “overruling” Mrs Reyneke nor, importantly in terms of her complaint, what she described and the Board accepted, harassment and bullying of her by him.

[77] More broadly, had the school conducted a fair inquiry including interviewing Mrs Kop, it is likely that it would have reached at least less serious conclusions about Mr Lewis’s conduct towards Mrs Reyneke in staff meetings. That is because Mrs Kop, who was present on those occasions, would not have corroborated at least the more serious of Mrs Reyneke’s allegations of unprofessional conduct by Mr Lewis. She would probably have confirmed his account of these meetings. The school’s policies required it to consider the accounts of persons such as Mrs Kop and other staff whose input could have assisted in resolving the allegations that Mr Lewis had contested. It did not do so. It was not sufficient that Mr Lewis may not have identified particular staff such as Mrs Kop. The obligation rested with the Principal and the Board to do so themselves in the event of a dispute which clearly existed.

[78] That is not to discount the threat that Mrs Reyneke may have felt genuinely that Mr Lewis posed to her authority and, thereby, to her health and wellbeing. But the Board was obliged to conduct an independent, objective, and fair investigation of what were very serious complaints of professional misconduct against another member of staff and I am satisfied it did not do so.

Compliance with Complaints Policy

[79] The school was required first to deal with Mrs Reyneke’s complaint against Mr Lewis under its generic complaints policy. This meant that the complaint should have been investigated and dealt with by the Principal but that did not occur. Had a complaint been about the Principal, this would have permitted, indeed probably required, such a leap-frogging directly to the separate board’s complaints procedure. That was not the position here. The Principal could not justifiably have abrogated all responsibility under the complaints policy to deal with what was properly at that stage a matter of professional educational dispute between staff members. There was no provision for the Principal to override the complaints policy as he did and nothing established in evidence makes doing so reasonable in all the circumstances. A fair and reasonable employer in these circumstances would not have done as it (and the Principal) did.

Representation/Assistance

[80] It is very regrettable that only recently and at the urgings of professional medical advisers and this Court, Mr Lewis has taken and followed professional, detached and objective advice about his predicament. Although he was not a member of a union and therefore ineligible for its assistance except at the very early stages of his troubles at the college, the Board advised him, as it was obliged to and, on numerous occasions of his entitlement to assistance and representation. I must assume (and there is evidence) that it was Mr Lewis’s own choice not to do so. That is also reinforced by some evidence of his responses to the Board referring to his knowledge of and experience in employment relations and employment law. Mr Lewis over-estimated his abilities and lacked a detached and objective view of his predicament, although he is not alone in this in the Court’s experience of similar cases.

[81] The defendant cannot be held responsible for the unfortunate consequences to the plaintiff of his election not to take and act on professional advice.

[82] In addition to the effect of this election on the tactical conduct of his dispute with the Board, there is another unfortunate consequence of Mr Lewis’s “do it yourself” approach to these issues. He failed or elected not to disclose his medical condition and its close connection to the complaints made against him and its explanations for some of the ways in which he chose to deal with those complaints in the Board’s investigation. Although it is frequently difficult for people in the circumstances that Mr Lewis faced from about 2007, to acknowledge to others their mental health disabilities, the Board cannot be blamed for acting in a way that it might not have had it known of these. Indeed there were, not surprisingly, assessments by various representatives of the Board that Mr Lewis’s increasingly uncharacteristic and bizarre behaviours may have been explicable by the conditions now disclosed by Dr Elliott. The Board invited, subtly as was appropriate in all the circumstances, Mr Lewis to resolve the difficulties by medical resignation. Not only did the plaintiff reject out of hand those suggestions designed for his benefit but took umbrage at their making. He accused the Board and its advisers of allegations of insanity so that this opportunity for resolution was not only shut down but probably contributed to increased antagonism from Mr Lewis towards the Board.

[83] Again it is very regrettable that it does not appear that Mr Lewis took professional objective advice about those proposals at the time that might have obviated the consequent summary dismissal and its potential implications for his teacher registration.

[84] The Board makes the correct point that it advised Mr Lewis in writing of his entitlement to be represented or assisted at all relevant stages of its processes that led to his dismissal and that it was apparently his choice that he was not represented at significant times in that process. In many cases the Court would not expect a fair and reasonable employer in all the circumstances to do more than this. But that is not an immutable rule. As the Court has concluded, albeit rarely in other cases, the circumstances may be such that it is incumbent on a fair and reasonable employer acting fairly and reasonably in a process that has potential to lead to dismissal and disqualification from professional practice altogether, to do more than merely point out this entitlement, even repeatedly.

[85] This is one of those cases where the circumstances call for more than formulaic advice in writing of entitlement to representation. Those circumstances include the following.

[86] At important times Mr Lewis was not a member of the union and professional organisation of secondary school teachers, the PPTA. He had become disillusioned with, and resigned from, the PPTA after it declined to take his claim for reimbursement of overseas school travel expenses further than had been achieved by the PPTA delegate at the school.

[87] Next, the Board's investigative process had the potential to result not only in Mr Lewis's dismissal from employment at the college but, because of mandatory reporting requirements, he also faced the real risk of loss of his teacher registration and thus his professional career as a teacher at any school.

[88] Next, the time limits for taking steps to respond to the Board's allegations that were set unilaterally by the Board were minimal. At times before his suspension, Mr Lewis was expected to address very serious allegations that had been formulated and considered by the Board over a relatively long period, but for Mr Lewis, over only a few evenings after a full day's teaching and therefore at times when it would be inherently more unlikely that effective representation could be obtained. It may indeed have been better for the Board to have relieved Mr Lewis temporarily of his teaching duties and given him more and uninterrupted time to address his situation. It could hardly have been criticised for so doing. The Board was aware of the absence of professional assistance for Mr Lewis.

[89] Penultimately, and significantly, the Board knew that Mr Lewis was suffering from ill-health. Although it was not aware of the full extent of Mr Lewis's mental disabilities including his depression and dysthymia, he had made known to the Board by the provision of a medical certificate that he was under "stress". It must have been obvious to the Board that what it regarded as, and what was indeed, his 'erratic behaviour' at the school was uncharacteristic in a long-term and apparently successful teacher.

[90] The Principal, the school's professional leader, and the Board had and took the benefit of professional legal advice at all stages of the process. Indeed, it is clear that even before its solicitor took over conduct of the process personally, he was very closely involved in advising the Board on strategies and the author of early correspondence. This was a substantial power imbalance between the parties that, as a fair and reasonable employer, the Board ought to have attempted to remedy in part by doing more than simply advising Mr Lewis neutrally of his entitlement to representation. Not only were there colleagues within the school not involved in the complaints against Mr Lewis but experience in other cases (and evidence in this case) has shown the commendable willingness of school principals to obtain external collegial assistance for staff in circumstances such as Mr Lewis's. That is especially where there is a level of conflict between staff members within the same school. It is regrettable, whether because of his apparently frequent absences from the school or otherwise, that the Principal did not do so for Mr Lewis.

[91] Mr Henry, counsel for Mr Lewis, was very critical of the defendant for using its Chairperson, Mrs Simmons, to deliver to Mr Lewis the first formal written advice of the complaints against him and the implementation by the Board of its investigative process. I consider that this could have been done better by the Principal or his Deputy. There are, however, other elements of that incident that were unfair to Mr Lewis in more significant ways.

[92] The Board attempted to send messages to Mr Lewis in his classroom requiring him to come to the Principal's office. There is no evidence whether these messages were delivered or received by Mr Lewis. The Board Chairperson then herself sought out Mr Lewis and directed him to come to the Principal's office where he was handed a sealed envelope without explanation. No collegial support or representation was arranged or offered to him. Instead, he was expected to resume teaching for the remainder of the day. It is significant in my assessment that senior professional teaching personnel were apparently not involved at all in the first announcement to Mr Lewis of a formal inquiry into serious allegations made against him. He was treated insensitively and in my assessment it is hardly surprising that he thereafter took an increasingly jaundiced view of the Board's proceedings against him. This was an occasion on which a fair and reasonable employer would have taken steps to ensure that Mr Lewis was supported and represented.

[93] Howick College was, at the time, a large state secondary school of more than 1,800 pupils and with about 180 staff. It had educational and managerial structures, the latter including a Principal and a number of Associate and Deputy Principals. The Principal appears to have been absent overseas on a large number of occasions including at important times affecting Mr Lewis. It seems remarkable that in the Principal's absence, a process of delegation of the school's professional leadership to deal with an important staff issue could not be arranged. This meant that the complaints policy was deliberately ignored and important functions that were the responsibility of professional school management were left to the Board Chairperson and its solicitor to carry out. Other reasons for this state of affairs included an assessment by the Principal or the Board that the Deputy Principal, to whom these tasks might have devolved, was friendly with Mr Lewis and so apparently incapable thereby of acting professionally and neutrally. It was also considered that the complaints made by Mrs Reyneke and her husband were just the latest in an ongoing series of complaints of misbehaviour by Mr Lewis that would not be resolved collegially as the complaints policy required.

[94] It is also significant that the school was placed under some pressure by Mrs Reyneke's husband (a company health and safety officer) who was the author of the written complaints to the Board about Mr Lewis. Although acting to protect his wife, Mr Reyneke made it clear to the Board that if it did not do something effective about Mr

Lewis that he, Mr Reyneke, would take his own legal proceedings against him. In my assessment this placed the school under undue pressure at a vulnerable time including after the death of a pupil on an overseas school trip, when the Principal was about to travel overseas again, and when the Associate Principal was about to take leave before resigning. These circumstances, combined with the increasingly erratic and even bizarre behaviour of Mr Lewis, caused the school to move very promptly and decisively to avoid dealing with the plaintiff as it was required to under its policies.

[95] It is correct, as the school says, that Mr Lewis failed or refused to engage with his employer on the issues that eventually led to his dismissal despite not only being invited to do so but after opportunities were rearranged to suit his convenience. Mr Lewis's case is that he did so because he was disillusioned that the school appeared from the outset to have acted both unlawfully and unfairly so that the plaintiff believed that even if he had engaged with his employer, the outcome of summary dismissal would have been inevitable.

[96] The truth, as usual in such cases, lies somewhere between the two positions. While it is correct that the school exhibited from an early stage an intention not to follow its own policies and to provide very short timeframes within which Mr Lewis was expected to answer complex allegations, the plaintiff himself did not make reasonable efforts to communicate with his employer as employment law now requires. It now emerges that although Mr Lewis took advice from a number of lawyers about his predicament and what he should do, he elected not to follow that advice, probably because it was not what he wanted to hear, and so surrendered fatalistically to the prospect of his eventual dismissal. It is very regrettable that the evidence now shows that he had sympathetic supporters who gave him sound advice including considering seriously retirement on medical grounds with the prospect of a later return to teaching in better health. Mr Lewis both rejected that advice and increased the nature and range of his complaints against the school and others whom he perceived to not support him.

[97] All these were unusual factors that disadvantaged Mr Lewis significantly. For these reasons I have concluded that a fair and reasonable employer in all the circumstances would have done more to have attempted to ensure representation of, or professional support for, the plaintiff. Even if for no other reason, it would have been in the Board's own interests to have done so as the sorry saga of this case for the school shows. Had this been the sole process flaw, it would not alone have caused Mr Lewis's dismissal to have been unjustified. After all, the Board fulfilled its contractual and policy obligations to the letter in this regard. But, combined with the other process failings identified, the Board's omission to honour its commitment in spirit as well as to the letter creates an added sense of unfairness in the events leading to the plaintiff's dismissal.

An unbiased investigation?

[98] There were two flaws in the constitution and operation of the Board's subcommittee delegated by it to investigate the complaints against Mr Lewis and to report to it. The first was the inclusion on the committee of the Principal who is a member of the Board ex officio. There is no need to explain in detail why the Board erred in appointing Mr Dimery to the subcommittee because it acknowledged that his role was as professional adviser to it and not, as well, as decision maker on it. I do not accept the Board's account that, contrary to its minuted decision and to its initial advice in writing to Mr Lewis, Mr Dimery was never a member of the committee. He was, but the Board acknowledged this error and corrected it before he took part in deliberations affecting Mr Lewis to any substantial degree. Thereafter Mr Dimery continued, at least theoretically, with his appropriate role as professional adviser to the Board and its subcommittee when he was in New Zealand and this preliminary error was not a procedural irregularity affecting the justification of Mr Lewis's suspension and dismissal.

[99] That is not the case, however, with participation of the Chairperson of the Board, Mrs Simmons. Although her appointment to chair the subcommittee investigating the allegations against Mr Lewis was unexceptional, her continuation in that role, and indeed as one of the decision makers of the full Board which dismissed Mr Lewis, became untenable after she became a significant complainant and witness against Mr Lewis. Mrs Simmons did nothing to invite that status in the sense that Mr Lewis behaved gratuitously and inappropriately towards her. She relayed to other Board members her serious concern that she had been deliberately intimidated by Mr Lewis. That too was unexceptional.

[100] However, she then took part in and indeed led the decision to suspend him in substantial reliance on that incident, and then subsequently to dismiss him. Her roles as witness, complainant, and decision maker were in such conflict that she could not have been seen to have brought an objective and unbiased mind to the important decisions, as employer, to first suspend, and then dismiss the plaintiff summarily. There was no necessity for Mrs Simmons to have remained in her decision making role after disclosing to her colleagues on the Board subcommittee Mr Lewis's intimidatory conduct towards her. There were other members of the subcommittee who were competent to decide these issues and to report to the full Board who were not so conflicted in their roles. Teaching cases in which this necessary avoidance of the appearance of bias is illustrated, include *NZPPTA v Board of Trustees of Kelston Boys' High School* [1].

[101] Mrs Simmons's continued participation as a decision maker, and even more particularly as an influential decision maker, in her role as subcommittee and Board chairs, is not how a fair and reasonable Board of Trustees employer in these circumstances would have acted in a process leading to suspension and then summary dismissal of the plaintiff. This element of the process that led to Mr Lewis's dismissal, when combined with other procedural

deficiencies, fails to meet the [s 103A](#) fairness and reasonableness test.

Disclosure of relevant information and opportunity to respond

[102] Both the complaints policy and [s 4](#) of the Act required the Board to inform Mr Lewis of its relevant inquiries and to give him an opportunity to respond to these. Indeed, in its early correspondence to him, the Board assured Mr Lewis that it would do so. Unfortunately, it did not. On two occasions members of the subcommittee and/or the Principal met with Mrs Reyneke when they discussed her written complaints with her and she augmented these. No record was kept by the Board of these discussions as its policies required. Not only was Mr Lewis not informed of what had transpired that was relevant to its investigation against him, but he was not even told of the meetings with the Reynekes, either before they took place or afterwards. He was not told of what transpired at those meetings.

[103] In addition, although some additional correspondence was copied to Mr Lewis, this was attached to letters relaying an outcome that relied on that information. In this sense, although Mr Lewis was made aware of additional factors that had been taken into account, this was after the event and meant that he had no opportunity to respond or affect decisions made that led to his dismissal.

[104] That was neither a fair nor a reasonable way for the Board to go about investigating serious complaints against an employee who was subsequently dismissed in reliance on those complaints. Indeed, in respect of those events of which he was not told at all, it was an unfairness that deceived and misled Mr Lewis and was therefore in bad faith. This was a significant procedural unfairness. The natural justice obligation to fully and fairly inform an employee in Mr Lewis's position of information gleaned from the complainant before acting in reliance on it, is fundamental and was an obligation that the Board had imposed upon itself in its policies. It was also a breach of [s 4](#) of the Act.

[105] For the foregoing reasons, I conclude that Mr Lewis was dismissed unjustifiably in terms of [s 103A](#) of the Act.

Remedies - Contributory conduct

[106] Even if Mr Lewis establishes compensable losses caused by his unjustified dismissal, [s 124](#) of the Act requires the Court to reduce remedies to reflect culpable conduct that gave rise to the circumstances leading to the dismissal. In this case, there was substantial culpable contributory conduct by Mr Lewis. Some was by overt action and some by omission. Mr Lewis failed to take fair and reasonable steps that could have enabled his position to have been considered fairly by his employer. This culpable contributory conduct will already have been apparent from the account of relevant events that led to his dismissal and need only be summarised. Although not to the extent or in the same manner as Mrs Reyneke (and her husband) alleged in their complaints to the Board, Mr Lewis did nevertheless treat some colleagues and his supervisor, unprofessionally and discourteously. Mr Lewis responded to the Reyneke complaints with insufficient seriousness. Rather than attempting to address the merits of them, he retaliated with his own complaints that amounted to a barrage directed at many others within the school on a broad range of topics.

[107] Although much of Mr Lewis's conduct is now attributable to his illness at the time, it is nevertheless clear that he had good and sympathetic advice from friends and supporters that he chose, unwisely, to ignore. This included the necessity to take legal advice, although, when eventually he did so, ignoring that advice because it was not what he wanted to hear. Mr Lewis says that he disengaged from the Board's investigation of the complaints against him because he had lost faith in the fairness of that process from a very early stage. However, I consider that he both disengaged prematurely and absolutely to his foreseeable detriment. Although, as it transpires, Mr Lewis was right in his early assessment of failure or refusal by the Board to follow its processes, his complete rejection of the procedure designed to allow his participation and input, contributed culpably to his eventual dismissal.

[108] Even if Mr Lewis had better established compensable remedies for his unjustified dismissal, these would have had to have been reduced substantially by his contributory conduct. Even those losses that have been proved must be reduced under [s 124](#).

Remedies – Remuneration loss

[109] Although, in conjunction with the remedy of reinstatement, Mr Lewis seeks compensation for all remuneration lost as a result of his unjustified dismissal, insufficient evidence has been presented about the extent of that loss or whether there has been any mitigation of it by alternative employment since April 2008. Section 128(2) of the Act provides for the reimbursement of three months' lost remuneration in the event of a dismissal being found to have been unjustified, but any greater award is both discretionary and subject to proof of loss and mitigation. In the absence of any evidence and to reflect the need under [s 124](#) to reduce remedies, the Court is unable to make any greater award than a sum equivalent to three months' remuneration. Such an award also takes account of the conclusion that even if Mr Lewis's dismissal had been justified, summary dismissal was not and any termination of his employment ought to have been on notice or with payment in lieu. I imagine that the precise sum representing three months' remuneration will be readily calculable for payment to Mr Lewis but leave is reserved to fix this if required.

Remedies – Compensation for non-pecuniary losses

[110] Likewise, although Mr Lewis has sought unspecified compensation under s 123(1)(c) of Act, little evidence has been adduced of the statutory consequences to him of his unjustified dismissal. One of his colleagues in the school said in evidence that in the absence of other staff being given any reasons for his dismissal, there was a rumour that Mr Lewis had been dismissed for sexual misconduct. That is, of course, patently untrue but, in terms of remedies, there is no evidence that he was ever aware of this rumour and thus none to find that he could have ever been affected adversely by it. In all the circumstances I accept from the manner of Mr Lewis's evidence, that he suffered non-economic consequences of his dismissal from a long-established position in his chosen career, but in the absence of particular evidence and to reflect the need under s 124 to reduce remedies, the award for this can only be modest and is accordingly set at \$10,000.

Remedies – Reinstatement

[111] His reinstatement to the staff of Howick College is a holy grail for Mr Lewis. That is opposed trenchantly by the Board. It says that reinstatement of Mr Lewis to the role of economics teacher at Howick College would not be practicable. Mr Henry, for Mr Lewis, submitted that the right to reinstatement (with compensation for all remuneration lost) is the only appropriate remedy for the wrong of unjustified dismissal perpetrated upon the plaintiff. To the extent that there may be any possibility of ongoing or new conflict between Mr Lewis and other staff members, or with the school's management or with the Board of Trustees, Mr Henry's submission was that the school would have to adapt and accommodate and deal with such management issues properly in the way that it had failed to do previously. Counsel submitted that it could not be said that reinstatement is impracticable. Since the hearing, Mr Henry advised the Court, without objection from Mr Harrison, that the school's Principal Mr Dimery has retired, prematurely and in ill-health, so that it is said that reinstatement cannot now be opposed on grounds of the manifest inter-personal conflict between the two men.

[112] The statutory test for reinstatement is in s 125 of the Act. Subsection (2) provides that the Authority (or in this case the Court) "must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a)." It was accepted by the defendant that, as worded, the statute places the onus on an employer to establish impracticability before the Court can refuse an order of reinstatement claimed by an unjustifiably dismissed employee.

[113] The important element of practicability has long attached to the remedy of reinstatement. It was first considered by the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*^[2]. The Court confirmed the decision of the Labour Court that reinstatement of an unjustifiably dismissed deputy principal of a school was not practicable because there had been and were serious longstanding problems in the working relationship between the school's principal and the grievant. The Court of Appeal confirmed the Labour Court's conclusion that:

... practicability is not the same as possibility. Whether the respondent has established on the balance of probabilities that it would not be practicable to reinstate Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[114] Subsequent cases during the last 15 years have reiterated that approach.

[115] In this case relevant considerations include the following. Mrs Reyneke continues to be employed at the school in a managerial position and would have perhaps even a direct supervisory role over Mr Lewis if he was reinstated. It is unreasonable to suggest, as Mr Henry did when this matter was put to him in submissions, that the school should rearrange its managerial hierarchies to avoid that reporting relationship. There remains substantial and intense antipathy between Mr Lewis and Mrs Reyneke and a re-establishment of an employment relationship involving them both would, in my assessment, carry a very real risk of further destructive conflict affecting not only the two teachers but the school and potentially its pupils.

[116] The same would have gone for Mr Dimery, the Principal, had he not resigned. He has been, and continued to be, one of the targets of Mr Lewis's dissatisfactions expressed in a variety of serious complaints to a number of authorities. Mr Dimery in turn had, colloquially, had enough of Mr Lewis. He so admitted candidly in evidence. Although the plaintiff would not be in as close a working relationship with the (now new) Principal as he would be with Mrs Reyneke, the gravamen of his complaints is that he was not dealt with by the Principal as he should have been between professional educators. If there are lessons in this case for the school, one of them is that its professional management team and, as professional educational leader in particular, the Principal, cannot avoid dealing with relationships between staff members. There would be a considerable risk of the Principal being drawn into ongoing or further serious conflict with Mr Lewis that would have similar risks as I have outlined in

the case of conflict between Mr Lewis and Mrs Reyneke.

[117] One of the members of the Board subcommittee that was very influential in Mr Lewis's summary dismissal is now the Chairperson of the Board of Trustees which would again be his employer if reinstated. That does not bode well for a professional co-operative relationship with the Board.

[118] Although not a determinative factor, 18 months has elapsed since Mr Lewis's dismissal and the evidence is that the tone of the school, or at least those aspects of it in which Mr Lewis was engaged, has improved over that time. Although there was no suggestion that Mr Lewis has been replaced so that there is now no longer a teaching role for him, commonsense and experience of school cases indicate that the school will now have made its staffing and teaching arrangements for 2010 so that an order for reinstatement is very likely to be at least disruptive and possibly prejudicial to other staff.

[119] This is an unusual case in the sense that I consider that there is a very real prospect that if Mr Lewis is reinstated to his previous role or to one no less advantageous to him, there will be such conflict that employment (his or another's or others') will be in jeopardy. I consider it is preferable that if Mr Lewis is eligible to teach and well enough to do so (a necessary precondition for teaching, whether at Howick College or anywhere else), his opportunities for a successful resumption of his career are better at another school altogether than at Howick College. In that regard, it is clear from the evidence that Mr Lewis is capable of coexisting professionally with other teachers if he is treated fairly and sensitively and he himself determines to so act towards others. Subject to maintaining his current good health with the assistance of his medical practitioners as he now has, and with continued professional registration, I consider, although I appreciate paradoxically from Mr Lewis's point of view, that better prospects for his career lie elsewhere than at Howick College.

[120] The test for reinstatement is practicability and I am satisfied that it would now be impracticable to direct Mr Lewis's reinstatement at Howick College.

Costs

[121] These are reserved to enable the parties to attempt to agree on them and, if necessary, for the Court to determine, including the effect of any cost considerations not yet revealed for proper reasons. If it assists the parties, my preliminary thinking is that to reflect Mr Lewis's success in establishing an unjustified dismissal but in view of the modesty of the awards for this, he should have his actual and reasonable costs of his professional representation. I appreciate, however, that there may be other considerations that will affect that decision. If they cannot be settled between the parties, any application for costs should be made by memorandum within 2 months of the date of this judgment with the respondent to any such application having 28 days, within which to address the Court by memorandum.

Observations

[122] This is the second recent teacher employment case in which this court has been moved to comment on the procedural domination of lawyers, legal issues and legalism at the expense of professional education input. Although these circumstances are quite different from those in the other case in which I have referred^[3], the phenomena are the same. Whether as a consequence of indemnifiers' caution or for other reasons, both cases illustrate the potential for dealings between parties to teaching employment relationships to become prematurely and unduly legalistic. In this case, although perhaps for understandable reasons because of what was perceived to have been Mr Lewis's intimidatory and manipulative dealings with his employer's representatives, the Board's lawyer assumed personally and almost from the outset, the conduct of the process that led to Mr Lewis's dismissal. Whilst, for reasons set out in this judgment, that did not ensure compliance by the Board of its obligations towards its employee, my concern is that it deprived those with expertise in education from even having a substantial advisory involvement.

[123] As in the other case referred to, in this the individual teacher was not a member of the relevant union at critical times. As noted in the earlier case also, the involvement of either the New Zealand Education Institute ("NZEI") or the PPTA allows for detached professional assistance and counsel for parties. So too does the beneficial input of the New Zealand School Trustees Association in such difficult matters. It is regrettable that the inclusion of such bodies was not allowed for or was unable to take place in this case. Those involved in the field of education law may care to consider how the imbalance between those two disciplines can be restored to equilibrium in which law is not the predominant, or at least the primary, element.

[124] The other feature on which I wish to comment generally concerns how schools may address circumstances such as Mr Lewis's to avoid the unfortunate consequences for all illustrated in this case. Although I am not aware whether such arrangements were in place in this case, its unfortunate circumstances may illustrate a need for teachers, principals and boards of trustees, with the assistance of their professional organisations, to consider putting in place collegial support systems for increasingly isolated teachers in circumstances such as Mr Lewis's. Although I imagine that the professional teacher unions do so for their members, not all teachers have access to the member welfare services provided by the PPTA or the NZEI. It would probably not be unusual if teachers in the circumstances of Mr Lewis resigned from such organisations in any event so that the desirability of independent assistance is apparent. Although there are, no doubt, a number of models that might be considered and adapted,

the scheme providing for welfare officers in the Police and the Friends' Panel amongst lawyers are two with which this Court is familiar. I commend consideration of such a scheme by the New Zealand School Trustees' Association, the teacher unions and the relevant school principals' organisations.

G L Colgan
Chief Judge

Judgment signed at 10.00am on 19 January 2010

[1] [\[1992\] 2 ERNZ 793](#)

[2] [\[1994\] NZCA 509](#); [\[1994\] 2 ERNZ 414](#)

[3] [McKean v Board of Trustees of Wakaaranga School \[2007\] ERNZ 1](#)

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