

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 222
5498667

BETWEEN	RAPUA TIMOTI Applicant
AND	LEX HAMILL, LIMITED STATUTORY MANAGER OF TE KURA KAUPAPA MAORI O OTEPOU First Respondent
AND	TE KURA KAUPAPA MAORI O OTEPOU BOARD OF TRUSTEES Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Warwick Reid, Advocate for the Applicant Shima Grice, Counsel for the Respondent
Investigation Meeting:	23, 24 and 25 February 2015
Submissions:	At the investigation meeting with further submissions in writing from the Applicant on 27 February 2015 and from the Respondents on 3 March 2015.
Determination:	28 July 2015

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Rapua Timoti was unjustified.**
- B. In settlement of her personal grievance for unjustified dismissal, Te Kura Kaupapa Maori o Otepou Board of Trustees must pay Ms Timoti the following amounts, which have been reduced by 50 per cent due to conduct by her that contributed to the situation giving rise to her grievance:**
- (i) \$10,029 as reimbursement of lost wages; and**
 - (ii) \$10,000 as compensation for humiliation, loss of dignity**

and injury to her feelings.

C. Costs are reserved with a timetable set for memoranda.

Employment relationship problem

[1] Lex Hamill dismissed Rapua Timoti from the role of Tumuaki or Principal of Te Kura Kaupapa Maori o Otepou (the Kura) on 22 August 2014. The Kura's Board of Trustees (the Board) was her employer but at the time of Ms Timoti's dismissal the Kura was under the control of Mr Hamill, a Limited Statutory Manager (LSM). He was appointed by ministerial direction with authority to exercise the powers of the Board as an employer.¹ He used those powers in his decisions to investigate concerns about Ms Timoti and then dismiss her.

[2] In a letter of dismissal dated 22 August 2014 Mr Hamill wrote that Ms Timoti had breached acceptable standards of conduct and had "*seriously and detrimentally*" affected the level of trust required in her position. Mr Hamill's conclusion followed an investigation into what Ms Timoti had, or had not, done about continuing the employment of her husband, John Beilby, as a teacher at the Kura during the first quarter of 2014 and about payments made to him while he was teaching there during 2013. Mr Hamill decided Ms Timoti had "*created an opportunity*" for herself and Mr Beilby to "*gain pecuniary advantage*" through payments made to her personal bank account and she had employed Mr Beilby in 2014 "*contrary to a directive*" from Mr Hamill.

[3] In light of the reasons given for her dismissal and Ms Timoti's argument that those reasons and how she was treated were unjust, the Authority's investigation (to put it plainly) had to consider whether her employer could have fairly found she acted in a deliberate and – in effect – corrupt way over the employment of her husband as a teacher at the school and how he was paid for his work, rather than accepting that, at worst, she had been careless or incompetent in carrying out certain administrative duties.

¹ Education Act 1989 s78M and s78Q and Notice of Direction to Appoint a Limited Statutory Manager for the Board of Trustees of Te Kura Kaupapa Maori o Otepou, *New Zealand Gazette, no 44, 18 April 2013 page 1358.*

[4] The Authority investigation had, firstly, to consider whether the employer's conclusions – that Ms Timoti actions were deliberate and knowing – could reasonably have been reached on the basis of the inquiries on which Mr Hamill relied, measured against the statutory test of justification required for such conclusions.² Where serious misconduct is said to have occurred and to have justified dismissal, the evidence in support of such accusations of wrongdoing by the employee must be as convincing as the charge is grave.³ Teachers and principals are said to face the 'double jeopardy' of potential loss of registration or professional standing in such cases of alleged serious misconduct. Consequently their employers are – in turn – required to meet a high standard in making disciplinary decisions, with a corresponding need for the Authority to examine such cases with great care.⁴

[5] Secondly, if Mr Hamill's actions fell short of those standards, the assessment of remedies due to Ms Timoti had to be tempered by consideration of the extent to which her own conduct had contributed to the situation in which her grievance arose.⁵

How those issues arose

[6] The immediately relevant background to how concerns about Ms Timoti's conduct arose related to employment and professional issues for Mr Beilby rather than her.

[7] Around the time he was appointed as LSM of the Kura (April 2013) Mr Hamill was told by a School Trustees' Association (STA) advisor that Mr Beilby – who was then working at the Kura as a relief teacher – was the subject of a Teachers' Council investigation. The Council's investigation concerned an incident that occurred in October 2011 at a different school where Mr Beilby had previously taught. That other school's mandatory report about the incident was referred to a Complaints Assessment Committee (CAC) of the Teacher's Council. The CAC considered the report on 19 July 2012 and decided to censure Mr Beilby. The most serious of the allegations made was that Mr Beilby had held a boy down on the ground and put his hands on the boy's throat. Mr Beilby denied that allegation. He

² Section 103A of the Employment Relations Act 2000 (the Act).

³ *Honda NZ Limited v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA) and *NZ Shipwrights Union v Honda NZ Limited* [1989] 3 NZILR 82, 85 (LC).

⁴ *Lewis v Howick College Board of Trustees* [2010] NZ EmpC 4 at [5] and [6] and *Edwards v Bay of Islands College Board of Trustees* [2015] NZEmpC 6 at [14].

⁵ Sections 123 and 124 of the Act.

said he had been attacked by the boy and had tried to defend himself using techniques he had been taught in a school-arranged course. The CAC subsequently referred the matter to the Teachers Disciplinary Tribunal because Mr Beilby did not accept the basis of the censure (particularly in relation to the alleged physical assault on the boy).⁶ The Tribunal's hearing of Mr Beilby's case did not occur until 14 May 2014. It found the charges of assaulting and swearing at the boy were not made out on the evidence available to it but censured Mr Beilby on other charges relating to the incident.

[8] However back in April 2013 Mr Hamill did not appear to have been aware of the details of the allegations about Mr Beilby or that the Council's investigation might be ongoing. Mr Hamill's evidence to the Authority was that the Kura's Board chairman Keepa Smallman had told him that the issue had already been resolved. Mr Hamill only learnt that was not so in late October 2013 when, during a conversation about another matter, a newspaper reporter asked Mr Hamill why Mr Beilby was employed at the Kura when he was facing a disciplinary hearing.

[9] As a result of the reporter's comments Mr Hamill promptly sought a meeting with Mr Beilby to find out what was happening. Mr Beilby agreed to meet with Mr Hamill and Mr Smallman on 1 November but said he would also notify his advocate, Rachel Rolston. Ms Rolston – who later also acted for Ms Timoti – sent Mr Hamill an email cancelling the meeting and asking him to “*advise immediately the nature of your request to meet my client in relation to these matters and on what authority you have made your request*”. She also wrote that Mr Beilby would not meet Mr Hamill at any time unless she was also present.

[10] A phone conversation in the following week between Mr Hamill and Ms Rolston became the subject of disputed evidence. Ms Rolston provided a file note, dated 8 November, in which she wrote that Mr Hamill had said there was “*issues of disclosure*” about Ms Timoti's employment of Mr Beilby that he would address as an employment problem with her. She wrote that this was a clear “*threat*” that he intended to “*go after*” Ms Timoti. However her witness statement described what was said slightly differently. Her statement said Mr Hamill had referred to a conflict of interest and described his “*tone*” as having made clear his intention to create an

⁶ *Complaints Assessment Committee v John Alan Beilby* NZTDT 2014/53 (9 June 2014).

employment issue over the matter. Mr Hamill emphatically denied making any threat about Ms Timoti's employment in that conversation. He said that he had expressed concern, because of the potential risk to the Kura, about not being able to talk, in his capacity as the employer, directly to Mr Beilby. Mr Hamill said he had also referred to needing to clarify the situation with Ms Timoti and had told Ms Rolston that the matter would need to be discussed with the Board because he was not aware whether Mr Beilby's appearance in front of the CAC had ever been declared to the Board.

[11] Mr Hamill subsequently spoke with Mr Smallman about raising the matter with Ms Timoti. His evidence was that he had told Mr Smallman that he planned to tell Ms Timoti to end Mr Beilby's employment at the end of the year. Mr Hamill understood that was possible because Mr Beilby was working under a fixed term agreement. Mr Hamill, Mr Smallman and Ms Timoti met on 9 December 2013 shortly before a Board meeting. There was disputed evidence about exactly what Mr Hamill said in that meeting and specifically whether he gave a clear directive to Ms Timoti that Mr Beilby's employment must end in December 2013. The matter was then also discussed at the Board meeting that evening, with more disputed evidence about exactly what was said during that meeting on that topic.

[12] On 10 February 2014 Ms Timoti was sent what became referred to as the 'please explain' letter. The letter was written by Mr Hamill but was sent in the name of Mr Smallman and signed by both men. The letter questioned an explanation Ms Timoti was said to have given to Mr Hamill about how Mr Beilby had come to be employed on a fixed-term basis in 2013 and asked her to explain documentation that appeared to show she had authorised that arrangement. She was also asked to explain three matters: why Mr Beilby was then paid for the summer holiday period at the end of 2013 and employed as a relief teacher at the beginning of 2014, why arrangements to confirm the permanent appointment of another teacher – Ngaropo Farrell – had not been completed, and why a senior manager's position had not been advertised and remained vacant. The letter advised that the concerns raised might amount to serious misconduct and could result in disciplinary action.

[13] A reply sent by Ms Rolston on Ms Timoti's behalf, dated 25 February 2014, said Ms Timoti "*deliberately kept on*" Mr Beilby after his fixed term agreement ceased. It said she did so because she discovered only in late December 2013 that she

had no teacher available for one class at the start of 2014 and needed him “*at least temporarily*”. She also stated the Board supported Mr Beilby, referring to an email to Ms Rolston from one trustee that described the risk to the Kura pending Mr Beilby’s disciplinary tribunal hearing as “*low*”. Ms Rolston’s letter also accused Mr Hamill of “*seeking to find cause to target*” Ms Timoti and “*deliberately harassing*” her.

[14] Mr Hamill took the ‘please explain’ letter and Ms Rolston’s response to the Board. The trustees agreed with a proposal from him for an independent investigation of the concerns raised in the ‘please explain’ letter. On STA advice Mr Hamill appointed Yvonne Preece as his investigator. Ms Preece was an education consultant who has previously worked as an STA adviser and had been an LSM for three schools in Canterbury. She had recently moved to the Bay of Plenty.

[15] Ms Preece was provided with terms of reference for her role as investigator. Ms Rolston was sent a copy of those terms. Ms Rolston then requested further detail about the investigation in an email that included the following statement:

I will reiterate Mr Hamill, I have not forgotten your threat to Rapua Timoti’s employment. Should you attempt to force her from her employment, by unfair dismissal or by pushing her to resign, I will ensure that action is taken against the employer to recover appropriate compensation for her, and in addition I will support her in any action she chooses to take against you personally.

[16] Mr Hamill responded by sending Ms Rolston a three-and-a-half page memorandum setting out further details about the rationale for an independent investigation. It addressed concerns about the continued employment of Mr Beilby in 2014, the effect of his continued employment after the end of 2013 on school staffing entitlements and the cost of additional holiday pay for him, why arrangements appeared to have been made for Mr Beilby to get holiday pay but not for Ms Farrell, whether requested arrangements for Ms Farrell’s appointment to a permanent position were carried out, and why Ms Timoti had made arrangements for a senior manager’s position to be advertised rather than preparing a draft notice for that position to be circulated for consultation with the Board.

[17] Ms Preece began her investigation by attempting to arrange a meeting with Ms Timoti and Ms Rolston. At their request she provided a list of questions she wanted to ask. She met with Ms Timoti and Ms Rolston twice during her investigation – on 11 April and 25 June 2014. Ms Preece also asked Ms Timoti (through email

correspondence with Ms Rolston) to assist with providing information from within the school and from Novopay about payments made to Mr Beilby. On 6 June Ms Rolston sent Ms Preece an email stating that the “*constant backwards and forwards*” was costly for Ms Timoti (due to her advocate’s fees for attending to that correspondence) and was stressful and time-consuming. Her email included these comments:

Unless the Board wants a grievance on its hands I respectfully suggest that they take part in the gathering of this information for you or allow you to go and get it yourself. ... Please advise the Board that we are no longer able to assist and they will need to step up and get you the information you require to complete your investigation.

[18] Ms Preece then sought further information from the school’s accountants, its auditor and the Ministry of Education. In July 2014 she provided a ten page report to Mr Hamill (with various correspondence and documents attached) that set out her analysis of information gathered, listed “*matters requiring attention*” and ended with this conclusion:

This report defines the pecuniary advantage received by Hone Beilby and the lack of any action taken by the Tumuaki to acknowledge or correct the matters. The LSM employment (sic) should take decisive action to recover the funds and to protect the school interests. An estimate of the amounts involved is detailed in Appendix J. Wage advances were made to Hone Beilby and evidence of the repayments of these has not been provided. This requires further action. Questions of process and employment law should be raised and appropriate advice taken.

The Tumuaki has clearly not effectively managed the matters referred to in this report. The lack of action may have been deliberate or by omission. No explanation has been advanced for this lack of action.

The Tumuaki has altered documents such as the nova pay (sic) forms and the relievers book with an intention to mislead. Falsifying documentation is a serious matter. The Tumuaki has stated that the administrator had responsibility for payroll matters accepting no fiscal responsibility as Tumuaki of the school. This needs to be addressed.

Ms Rolston has made vitriolic comments about Lex Hamill as LSM. Given that the LSM has the role of the employer this was unacceptable. If the sentiments expressed are also the view of Ms Timoti then trust and confidence between employer and employee are severely challenged. This is a matter for the LSM to address.

[19] Not mentioned in her report was a discussion Ms Preece had with Ms Rolston by telephone on 10 June where she suggested that she could act as an “*informal mediator*” between Ms Timoti and Mr Hamill. Ms Rolston’s evidence was that Ms Preece suggested trying to make a settlement to end Ms Timoti’s employment. Ms Preece’s evidence was that she had initiated that conversation without prior discussion

with Mr Hamill but told him about it afterwards. Mr Hamill confirmed that Ms Preece had told him she might have to 'shut down' her investigation because of the stress Ms Timoti described herself as being under. He said he had told Ms Preece to use her judgement.

[20] By the time Mr Hamill received Ms Preece's investigation report in mid-July, Ms Timoti was on sick leave. On 21 July Ms Ralston raised a personal grievance on Ms Timoti's behalf for what she called "*the bullying hazard*" caused by the behaviour of Mr Hamill and Ms Preece in conducting the investigation. Mr Hamill responded by agreeing to a request to attend 'early intervention' mediation but proceeded with the next steps in the investigation of the concerns raised with Ms Timoti.

[21] On 27 July Mr Hamill wrote to Ms Timoti advising her of a disciplinary hearing to be held regarding 15 allegations that he set out in his letter. Most of those items concerned the employment of Mr Beilby and payments made to him, including an allegation that, in the first quarter of 2014, Mr Beilby was paid for ten days on which he did not work and was paid twice for 19 days on which he did work, that he was wrongly paid for the Waitangi Day holiday, and that he was paid "*two unwarranted cash advances of \$1900 and \$1200*" during 2013 that were authorised but not properly explained by Ms Timoti.

[22] On 11 August 2014 Mr Hamill met with Ms Timoti who was accompanied by her representatives, Ms Rolston and Warwick Reid. Further information was requested about some matters discussed in the meeting. Ms Rolston responded with an email on 13 August setting out responses to the allegations and other documents that she described as "*just a selection*" of errors made by the Kura's previous school administrator, Kitty Te Kanawa. Part of Ms Timoti's explanation of events suggested Ms Te Kanawa was responsible for errors or inconsistencies in school and Novopay records.

[23] On 15 August Mr Hamill sent Ms Timoti a seven page letter setting out eight conclusions about the particular allegations put to her and his overall conclusion that she had created an opportunity for herself and Mr Beilby to gain pecuniary advantage and had detrimentally affected the trust required in her position as Tumuaki. He proposed the penalty of summary termination for serious misconduct and sought her written submissions on that proposal. His letter was accompanied by a further 14-

page document in which Mr Hamill set out the basis for the 15 allegations that were made and his preliminary determination on each one.

[24] The conclusions (and the detailed allegations on which they were based) largely relied on complex and overlapping descriptions of payments made to Mr Beilby between later January and early March 2013. This determination has not needed to set out all those details. In summary the key concerns (in an approximate order of relative seriousness) were that Mr Beilby was:

- (i) paid twice for his work in the period from 29 January to 4 March (resulting in a net overpayment of around \$3700), once as a reliever and then again with back pay after Novopay was sent a form (on 4 March) confirming he was a fixed-term full-time employee, and Ms Timoti must have known about the double pay but had "*knowingly ignored*" it; and
- (ii) paid for ten days on which he had not worked (within that period); and
- (iii) paid in advance of having worked two days (18 and 19 February);⁷ and
- (iv) paid an advance of his wages (on 7 February and 6 March); and
- (v) paid for Waitangi Day (6 February).

[25] Mr Reid responded to Mr Hamill's 15 August letter with an email submitting that dismissal was not a fair and reasonable response to a situation where Ms Timoti had found she was "*out of her depth*". He wrote that while Ms Timoti admitted she made many errors, she was "*adamant that she did not deliberately do anything dishonestly nor did she seek to secure pecuniary advances for herself or her husband to which they were not entitled*". Mr Reid also sent a four page document said to be from Ms Timoti setting out a list of what were described as "*mitigating factors*". The primary feature of those factors was Ms Timoti's declaration that she knew nothing or little about a wide range of information needed for various school administration tasks, including the Kura's finances and budget system, how the Novopay system worked, how to read various financial and pay reports, and how to write employment letters and job descriptions.

[26] After considering those submissions and consulting the Board Mr Hamill made the decision to dismiss Ms Timoti, as communicated in his 22 August letter.

⁷ In some documents in the evidence those days were referred to as 18 and 19 March.

[27] In her application to the Authority for a finding that she was unjustifiably dismissed Ms Timoti essentially relied on three propositions:

- (i) While she admitted there were errors in processing her husband's pay, she did nothing deliberately that was capable of being construed as serious misconduct; and
- (ii) Mr Hamill had not conducted a sufficiently thorough investigation so that he did not have clear evidence on which it was open for him to conclude – on the balance of probabilities and to the standard of what a fair and reasonable employer could have done – that serious misconduct had occurred; and
- (iii) Mr Hamill had not listened to her explanations with an open mind.

[28] Ms Timoti initially sought reinstatement but during preparation for the Authority investigation limited the remedies she sought to reimbursement of lost wages and compensation.

[29] In reply to her personal grievance claim Mr Hamill and the Board denied the propositions on which Ms Timoti's dismissal was said to be unjustified. The Board sought, by way of counterclaim, an award of damages for losses said to total more than \$18,000 and to have resulted from Ms Timoti's actions in continuing the employment of her husband and authorising payments to him. Around \$5500 (gross) of that amount comprised double payments made to him for 19 days work. He was also said to have been paid for ten days he did not work; for Waitangi Day, for which he was said not to be entitled; and for an extra 19 days of holiday pay to which he was not entitled. The arrangements for his employment were also said to have caused the school to lose the value of around \$7500 from its 'banking staffing' entitlement.

[30] The Board also sought a penalty against Ms Timoti on the grounds she had breached her good faith obligations in a deliberate, serious and sustained way.

The Authority investigation

[31] For the purpose of the Authority investigation written and oral evidence was received, under oath or affirmation, from Mr Hamill, Ms Preece, Mr Smallman, Ms Timoti, Mr Beilby, Ms Rolston, Ms Farrell, Ms Te Kanawa (whose employment as

the Kura's office administrator ended on the basis of redundancy in mid-2013), and the following additional witnesses:

- (i) Melanie Karaitiana, the wife of Mr Smallman, who had worked as a kaiawhina at the Kura from 2006 and who was appointed its school administrator in 2013 after Ms Te Kanawa's employment ended; and
- (ii) Maia Wharekura, a teacher at the Kura from 2011 onwards; and
- (iii) Gavin Price, a former school principal who provides advice for principals on how to manage a staffing funding arrangement referred to as 'banking staffing' and has a detailed knowledge of school payroll operation issues; and
- (iv) Nikki Douglas, the Board's secretary who confirmed she had taken handwritten notes for the Board's November and December 2013 meetings that were included in evidence for the investigation; and
- (v) Hoti Waikaho, a member of the Board from 2007 to August 2013.

[32] In preparing this determination I reviewed the written and oral evidence of those 13 witnesses along with around 680 pages of related documents lodged by the parties and their representatives' written and oral submissions about the relevant law and the facts. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[33] From my review of the evidence and submissions I considered the following issues required determination:

- (i) Were the inquiries on which Mr Hamill relied in making his decision (including Ms Preece's investigation and the subsequent disciplinary proceeding he conducted) thorough and fair?
- (ii) Was Mr Hamill's finding that Ms Timoti had breached a clear directive (by employing her husband as a reliever in 2014) reasonable?
- (iii) Was Mr Hamill's finding that Ms Timoti had deliberately made (or knowingly ignored) improper payments to Mr Beilby reasonable?

- (iv) If the answer to any or all of (i), (ii) (iii) was ‘no’, was Mr Hamill’s decision to dismiss Ms Timoti justified in all the circumstances?
- (v) If the answer to (iv) was ‘no’, what remedies were due to Ms Timoti, considering her claims for lost wages and distress compensation?
- (vi) Should any remedies awarded to Ms Timoti be reduced due to conduct by her that contributed to the situation giving rise to her grievance?
- (vii) Should an award of damages be made for losses said to have been incurred by the Board as a result of Ms Timoti failing to exercise reasonable care in carrying out her duties?
- (viii) Should a penalty be awarded against Ms Timoti for breach of good faith?

A sufficient investigation?

[34] Mr Hamill’s actions as LSM at the Kura in conducting a disciplinary investigation of Ms Timoti’s conduct and his decision – exercising the Board’s powers – to dismiss her had to be assessed against the statutory test of justification. The test asks whether what he did and how he acted (including through his investigator, Ms Preece) were “*what a fair and reasonable employer could have done in all the circumstances at the time*” of, firstly, the investigation and, secondly, the dismissal. As stated in s103A of the Employment Relations Act 2000 (the Act):

- (3) *In applying the test [of justification], the Authority ... must consider—*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority ... may consider any other factors it thinks appropriate.*
- (5) *The Authority ... must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[35] Justification for a decision must be established on the basis of the information known by the employer but also on information that would also have been reasonably available to an employer who had conducted a proper investigation and decision making process.⁸ However information that could only reasonably have become available to the employer, and did become available, after the dismissal is not to be used in determining justification of the decision at the time it was made.

[36] The evidence of Mr Hamill confirmed he had – at least superficially – met the requirements of the test at s103A(3)(b), and (c) of the Act. He raised his concerns with Ms Timoti quite clearly and gave her ample opportunity to respond.

[37] Despite the allegations of bias or pre-determination stridently made by Ms Rolston from the outset of the inquiry into the issues raised with Ms Timoti (in the correspondence referred to earlier in this determination), there was no credible evidence that cast any real doubt on Mr Hamill's *bona fides* in the consideration he sought to give to Ms Timoti's explanations. As a matter of context, I accepted his evidence that he had every reason as LSM for wanting Ms Timoti to succeed in her role as Tumuaki. Mr Hamill's appointment as LSM was made to assist the Kura's Board deal with issues that arose during the term of the previous principal, Ms Hita, and her departure. Ms Timoti has been acting principal since September 2012 and her appointment on a permanent basis to the role of Tumuaki in February 2013 was part of a process in which the LSM appointment was due to end and which Mr Hamill had no wish to extend. The issues that arose with Ms Timoti over Mr Beilby's disciplinary issues, his employment and his pay were unexpected.

[38] However, while the balance of the evidence suggested Mr Hamill was genuine and well-intentioned in trying to fairly consider Ms Timoti's responses to the concerns he raised, there were deficiencies in the sufficiency or thoroughness of the investigation that Ms Preece and subsequently he carried out that, in turn, led to fundamental flaws in what was done. Those defects, in the process and the substance of the information that Mr Hamill had to rely on, were more than minor and, ultimately, resulted in Ms Timoti being treated unfairly.

⁸ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [27].

Flaws in Ms Preece's investigation

[39] Ms Timoti's closing submissions fairly criticised Ms Preece's investigation as overly focussed on an examination of documents held in the school records. There were plainly inconsistencies in what could be seen from Novopay records (comprising forms submitted and the Staff Usage and Expenditure or SUE reports of intended and actual pay runs), the eTap attendance and 'roll' records, cheque records and email records. The issues disclosed could not, in a sufficiently thorough investigation, be resolved solely by a document audit. Ms Preece made enquiries of Ms Timoti, through Ms Rolston, for various additional documents to be provided and met with her twice. More needed to be done by directly asking other people about various points of concerns.

[40] An example of the inadequacy of relying on, and drawing conclusions based on the analysis of, the available documents was Ms Preece's conclusion that "*more likely than not*" Mr Beilby had not taught on ten days for which he was paid. She reached that view by comparing information from Novopay with a 'logbook' used in the school office to record relieving teachers' days of work. The source information for both set of documents ultimately came from recording that both Ms Timoti and Ms Te Kanawa could or did do, but had not necessarily done completely or accurately. Both sets of documents were then, inherently, unreliable and one could not realistically be preferred over the other. Subsequent information, at least that provided in evidence to the Authority, suggested Mr Beilby was most likely at work on those days – and that information, with more inquiry, would probably have been available to Ms Preece at the time.

[41] Ms Preece did eventually visit the school office herself (more than two months after her investigation began) and usefully spoke with Ms Karaitiana about what she knew and got help locating some more relevant documents. However Ms Preece conducted no formal interview with Ms Karaitiana and made no notes of their conversation. Similarly she spoke informally with Mr Smallman and Ms Farrell at various stages of her inquiries but took only some skeletal notes. Those notes, and whatever other information or impressions Ms Preece gleaned from those conversations, was not properly and fully put to Ms Timoti for comment.

[42] Ms Te Kanawa was clearly a central figure in the various transactions but Ms Preece made no attempt to speak to her although Ms Te Kanawa, now retired, lived locally. Ms Te Kanawa indicated during the Authority investigation meeting that she would have been reluctant to speak to Ms Preece in 2014 because she had still felt annoyed about how her employment at the Kura had come to an end. However Ms Preece may have been able to get useful information from Ms Te Kanawa at the time if she had tried and her failure to attempt to do so indicated a defect in the process of how rigorously Ms Preece sought to gather and test relevant information. It was important to understand more of what had happened as Ms Timoti and Ms Te Kanawa dealt with the to-and-fro of administration of pay matters at the time because Ms Timoti suggested she had merely (and carelessly) signed off various documents prepared and provided by Ms Te Kanawa without properly checking them, including for inconsistencies. This included what Ms Timoti said was her error in signing a Novopay form authorising Mr Beilby's pay as a reliever just a few days after she had signed another form authorising his back pay as a fixed-term employee. On her argument such careless oversight was not satisfactory performance but fell short of being a deliberate scheme to get money for her husband. The prospect of that explanation being true – and that Ms Te Kanawa had contributed to the mistake that caused the double up of pay and had not properly kept records that would have shown Mr Beilby was at work on days he was later said not to have been – should have been more thoroughly explored.

[43] Others whom Ms Preece did not seek to speak to, but who likely had information that should have at least been gathered and considered, included Mr Beilby himself (who could have helped cast light on issues such as whether he taught on particular days), Mr Wharekura (who was a teacher and had a child in the class from which Mr Beilby was alleged to have been absent some days) and Mr Price (who had provided some advice to the Kura and could have assisted on the technicalities regarding the staff banking issue). Without inquiries having been made of them at the time, none could now be said to have definitely have been able to provide information then that would necessarily have changed the conclusions Ms Preece reached, but her failure to ask more of the people involved and who may have had relevant information illustrated the unduly narrow scope of her inquiry.

[44] In the Authority investigation Ms Preece's riposte to this point was that her

role was to get information from Ms Timoti. It was not a limit set by her terms of reference. Those terms authorised her to interview any additional people she deemed necessary to assist her investigation. She accepted, with hindsight, that she should have been more assertive in how she carried out her inquiries and that difficulties encountered over getting documents she sought were possibly, as she put it in her oral evidence, “*because the school filing was so random*”. Ultimately, however, the relatively passive approach Ms Preece took to her role proved unfair to Ms Timoti because it did not adequately explore such alternative explanations to what became her predominant theory that Ms Timoti had dealt with documents in a way that was intended to mislead and had failed to acknowledge or correct ‘pecuniary advantage’ Mr Beilby got as a result. In turn that hypothesis formed the basis on which Mr Hamill pursued the issues raised as a disciplinary matter.

[45] In reaching that view of the inadequacies of Ms Preece’s inquiry and its conclusions, I have not overlooked a degree of frustration she was caused by the unhelpful approach taken by Ms Rolston or what Ms Timoti’s own closing submissions referred to as “*Ms Rolston’s indiscretions*”. As Ms Preece accepted in the Authority investigation meeting, she felt ‘stonewalled’. In the context of all the evidence, it was not an unreasonable impression for her to have formed. One example concerned the records about relievers’ working days. Ms Timoti had kept her own spreadsheet of that information which could have been useful in reconciling information about Mr Beilby’s work days. Ms Rolston’s response (4 July) to a request from Ms Preece for that spreadsheet was that Ms Timoti had kept it unofficially for her own records and Ms Preece could collate the information from other sources. It exhibited a lack of openness and co-operation that contributed to what Ms Preece acknowledged in her evidence were adverse inferences she drew about Ms Timoti’s actions. Ultimately however I concluded that inadequate co-operation from Ms Rolston and Ms Timoti should be dealt with in the assessment of contributory conduct (under s124 of the Act regarding remedies) rather than something that justified the method and outcome of Ms Preece’s inquiry.

Flaws in Mr Hamill’s disciplinary inquiry

[46] Two aspects of the disciplinary procedure Mr Hamill conducted after receiving Ms Preece’s report amounted to flaws or defects in the process he followed

(and on which he drew his conclusions) that were more than minor and resulted in Ms Timoti being treated unfairly.

[47] Firstly, Mr Hamill relied on his memory and view of the discussion on 9 December with Ms Timoti about Mr Beilby's employment at the school. In that respect he was both the key witness and the decision maker on an important of fact. While the degree of separation fairly required will vary in different circumstances (taking into account, for example, the resources of the employer), the allegation about 'ignoring a directive' reasonably required more objective assessment.⁹ Mr Hamill's early proposal to get an independent investigator look into the facts wisely avoided the *ad hominem* response Ms Rolston initially made about the concerns he sought to have addressed. However Ms Preece's subsequent inquiries did not really test or examine the assumption that Mr Hamill had given an instruction of the clarity that he later described. Some assessment (independent of Mr Hamill's recall and, no doubt, sincerely held belief) was required to establish that a fair and reasonable employer could have concluded the direction or expectation created by the 9 December discussions was as Mr Hamill said and could not reasonably have been said to have changed as a result of later events. Those events involved a discussion with two trustees (15 December) and an email one of them sent Ms Rolston (16 December) – explained later in this determination – and a later unexpected change of staff availability. The latter point refers to Ms Timoti's explanation that she arranged for Mr Beilby to continue as a relief teacher in the first term of 2014 only because she found out late in December 2013 that another relief teacher she had expected for work at the Kura at the beginning of 2014 was no longer available.

[48] Secondly, Mr Hamill's disciplinary proceeding continued the document-based focus of Ms Preece's report and did not make sufficient enquiries of other people who may have provided important information on contended points.

[49] At the Authority investigation meeting Mr Hamill said he had made some inquiries of an NZEI advocate about the prospect of talking to Ms Te Kanawa but took that no further because he was told that she blamed him for her redundancy and was unlikely to talk to him. His summary of information considered before making his decision (provided to Ms Timoti with a letter dated 15 August after the

⁹ *Edwards*, above, at [255] and [256] and *Allen v C3 Limited* [2012] ERNZ 478 at [27].

disciplinary meeting of 11 August) referred to Ms Timoti's explanation that the allegations were "*the result of multiple errors made by the administrator*". He discounted that explanation with this declaration: "*The LSM cannot comment on the alleged competence of the administrator and had instead focused on the evidence presented and what is expected of a CEO of a school*". It was not sufficient investigation of a central point in Ms Timoti's response to the allegations.

[50] Neither did he seek to make inquiries of Mr Beilby or other teachers at the school who might have assisted with the information that could have resolved the disputed issue of Mr Beilby's attendance on certain days. Mr Hamill's oral evidence did however disclose that he questioned Ms Karaitiana and Ms Farrell about various aspects and "*their version of events was different*" from that of Ms Timoti but whatever information he gathered in that way was not recorded in any form that Ms Timoti then had an opportunity to comment on.

Breach of a clear directive?

[51] Central to Mr Hamill's finding of serious misconduct by Ms Timoti was his conclusion that she ignored what he called his "*clear directive*" that Mr Beilby's employment was to end on 16 December and that she was "*not to re-employ Hone Beilby in 2014*". The alleged 'ignoring' of his directive was said to have seriously and detrimentally affected the trust and confidence Mr Hamill, as LSM, could have in Ms Timoti as Tumuaki of the Kura.

[52] Acting contrarily to a clear and direct instruction from an LSM could clearly be serious misconduct – assuming the instruction was about a matter within the LSM's powers (as it was here with Mr Hamill's authority on employment matters) and nothing unexpected had occurred that might have made it reasonable and necessary to ignore the instruction (in circumstances where it would not have been possible to first talk to the LSM about the need to do something other than as previously instructed).

[53] Because the evidence in support of such an accusation of serious misconduct must be as convincing as that charge is grave, Mr Hamill could not justify the decision to dismiss without establishing – on the balance of probabilities – that he

had, in fact, given a direction as clearly as he claimed to have done.

[54] However his own evidence, and that of other witnesses, proved to be somewhat more equivocal about whether he had given such a clear instruction. He agreed, in answer to a question during the Authority investigation, that the evidence of him having done so was not compelling.

[55] In his written witness statement Mr Hamill said that when he and Mr Smallman met Ms Timoti on 9 December he had told her that he did not want Mr Beilby employed at the Kura in 2014 and that Mr Beilby's employment "*was to finish at the end of his current fixed term in December 2013*". He said Ms Timoti had raised no objection to what he called his "*directive*". Mr Smallman's evidence was that Mr Hamill had said Mr Beilby "*should finish up that day*".

[56] However Ms Timoti's evidence was that on 9 December Mr Hamill had only asked her when Mr Beilby's employment ended and she said had answered "*tomorrow*", because 10 December was the last day of the school year for him and other staff.

[57] Mr Hamill also said, in his written statement, that he "*again instructed*" Ms Timoti in front of the trustees at the Kura's Board meeting on the evening of 9 December that Mr Beilby's employment was to end. However the Board Minutes record a single phrase about that discussion: "*Hone's position ends tomorrow*". Those words do not constitute a direction or a record of one. They simply describe a state of affairs – recording the fact that Mr Beilby's term of employment ended then.

[58] There does appear to have been some discussion at the Board about what that might mean in 2014, depending on what happened in the Teachers' Council investigation of Mr Beilby's conduct. Mr Smallman's evidence was that "*everyone in the room agreed*" that Mr Beilby's employment could be "*revisited*" in March. Although Mr Hamill had said that his directive was that Mr Beilby was not to be employed at the Kura in 2014, he accepted there was some discussion, in response to trustees' questions, about Mr Beilby returning to teach at the Kura. Mr Hamill described what he said in answer to trustees' questions about that prospect as "*just a polite comment about possibilities*". It was a different formulation to the description that Mr Hamill gave in his August 2013 summary of allegations. In that summary he

referred to Ms Timoti being told not to re-employ Mr Beilby “*until the NZTC matter had been resolved*”. During the Authority investigation he referred to that description as “*slightly loose*”.

[59] Telling, in my view, was how Mr Hamill described those conversations in the letter of 10 February 2014 he wrote to formally raise his concerns with Ms Timoti about her conduct. The letter referred to Mr Beilby’s employment having been discussed on 9 December and the board’s in-committee minutes confirming its “*understanding that Hone Beilby’s employment would cease on the 10th of December 2013*”. Significantly there was no reference to any directive or instruction. The specific concerns he then raised in that letter do not mention any ignoring or breach of the supposed directive given.

[60] As a matter of the close and careful scrutiny required of the Authority in such cases I was not persuaded Mr Hamill gave as clear a direction or instruction as he alleged he gave Ms Timoti. The discussions on 9 December – before and at the Board meeting – were probably less direct or plain than later suggested by Mr Hamill. While he, no doubt, believed his intention or expectation was understood, some ambiguity remained about if or when Mr Beilby might teach at the Kura in 2014.

[61] A subsequent meeting that two trustees – Pahu Akuhata and Areta Gray – had with Mr Beilby and Ms Rolston on 15 December 2013 further contributed to that ambiguity. Those two trustees (and Mr Smallman) had been delegated at the Board’s November meeting to meet with Mr Beilby to find out about his situation with the Teachers’ Council investigation. For various reasons those trustees did not arrange that discussion with Mr Beilby until after their December Board meeting. Mr Smallman did not attend that 15 December discussion with Mr Beilby but Ms Gray subsequently wrote an email to Ms Rolston (copied to Mr Smallman) in which she referred to the Teachers’ Disciplinary Tribunal hearing as due to be held in March 2014 and included this statement: “*We will be recommending to the Board that the risk to our kura is low and we need to let the Disciplinary Tribunal process run its course before reviewing again*”. It was a message that was not consistent with what Mr Hamill has subsequently claimed were his clear directions at the recent 9 December Board meeting that Mr Beilby was not to be employed at the Kura because of potential risk associated with the Council’s disciplinary inquiry.

[62] Ms Timoti subsequently arranged for Mr Beilby to teach one class at the Kura at the beginning of 2014 because arrangements to appoint a Deputy Principal (who would have been an addition to the permanent teaching staff) were delayed and another reliever Ms Timoti had expected to be available in early 2014 had commitments at another school. While Ms Timoti's initial explanation (25 February 2014) about what had happened said she had "*deliberately kept on*" Mr Beilby, it was not – in light of the evidence discussed above – an act of deliberate defiance of a directive.

Creating an opportunity for pecuniary advantage

[63] The second reason given for Ms Timoti's dismissal – that she had created an opportunity for pecuniary advantage for herself and her husband – derived from seven "*conclusions*" Mr Hamill reached about payments made to Mr Beilby in the period from 29 January to 8 March 2013. Each of the conclusions related to an aspect of those payments and overlapped in respect of the facts and dates involved. Taken together Mr Hamill's conclusions expressed the view that Ms Timoti "*knowingly*" either arranged or allowed payments to Mr Beilby that he was not entitled to receive. This was described as "*personal pecuniary advantage*" because those payments were paid into what was referred to as her "*own personal ANZ account*". Ms Timoti and Mr Beilby had a joint bank account into which both had their salaries paid.

[64] As Ms Timoti submitted, the allegation that she had deliberately misappropriated school funds, for her personal advantage and that of her husband, was one of the most serious allegations that could be made about a school principal. It required a commensurate level of proof that could have allowed a fair and reasonable employer to reach the conclusions Mr Hamill did about Ms Timoti's conduct in the relevant period. It was not, on the evidence about the investigation and disciplinary proceedings he conducted, a standard reached in this case.

[65] In part this was because of some assumptions or presumptions Mr Hamill made that were not rational or fair in the circumstances.

[66] There was an overstated emphasis on the fact that Ms Timoti and Mr Beilby had a joint bank account and the suggestion that she consequently must have known

of and chosen to ignore the double payments made to him in error in February and March 2013. Many couples choose to have joint bank accounts. It was not improper for Mr Beilby to have his pay direct credited to that account but Ms Timoti could not fairly be said to have gained pecuniary advantage solely on the basis that it was her account too. Similarly her explanation that she did not pay close attention to the amounts going in and out because their household expenses were largely dealt with by direct debits and she was too busy with her school duties at that particular time to pay much attention were not implausible but were dismissed by Mr Hamill because of his personal opinion of whether that was likely to have been so.

[67] There was also insufficient account taken of an important element of the context at the time that the various suspect payments (the double pay, the wage advance and the pay in advance) occurred. During this period the notorious systemic failures of the Novopay system were still affecting the reliability and accuracy of pay records for, and payments made to, school staff.¹⁰ A cumbersome and error-ridden *ad hoc* system of manually scanning and sending forms and approving interim and final SUE reports was in place because a totally online process had proved unwieldy and unreliable. Many school boards and principals had to make a range of interim measures to ensure staff got paid each fortnight. In that context and against the required high evidential standard, a fair employer acting reasonably could not have relied solely on Novopay documents and other school records to draw inferences that Ms Timoti's actions or omissions were deliberate.

[68] My conclusion on that point solely concerned whether Mr Hamill could reasonably have inferred that Ms Timoti's conduct in these pay matters was done deliberately and knowingly – because that was the ground given for her dismissal that had to be justified by the employer. It is not intended to suggest or to be taken as accepting that it was in any way satisfactory or acceptable for Ms Timoti to have allowed herself to get into a situation of approving payments for her husband (among other staff) without having arranged some system to manage that conflict of interest and to protect against the risk of accusations of impropriety.

¹⁰ See, for example, “Inside the Novopay debacle: Principal speaks out against ‘disaster’ situation” by Geoff Lovegrove, Principal, Lytton Street School, Fielding and a former president of Principals Federation, *Manawatu Standard*, 7 February 2013.

[69] While I reached that conclusion about deliberate behaviour from the evidence available to the Authority assessed on the statutory standard of justification, it was a useful cross check to see that the CAC decision (4 February 2015) – applying its standards regarding professional conduct and considering what was probably similar evidence – came to the following view:

The CAC did not find the evidence sufficiently probative to establish that the Principal had deliberately engaged in a scheme to gain pecuniary advantage. Her actions appeared to be due to incompetence.

[70] The CAC recommended Ms Timoti be censured for failing to meet professional responsibilities to put in place measures to address the conflict of interest, check documentation before signing it and to change her practice when a new administrator was appointed. It also concluded she should be subject to a condition of registration that she not hold a senior leadership position at a school until she satisfactorily completed at least two years as an assistant or deputy principal at an approved school.

[71] I have not considered it necessary to address further details of the evidence about each of the allegations and conclusions about errors or queries on the pay that Mr Beilby received. I have already noted the relevant points about the issues of double pay and whether he was paid for some days he did not work. On the issue of payments made in advance, similar arrangements were made for other staff because of difficulties or uncertainty caused by Novopay problems and the Kura's Board had approved those measures. The valid concern therefore was about the lack of a system to manage the conflict of interest in Ms Timoti signing off payments for her husband (when doing so for other staff) rather than deliberate, improper conduct.

[72] Ms Timoti had initially admitted an error in approving payment to Mr Beilby for Waitangi Day. However later in the disciplinary process, and by the time of the Authority investigation, an alternative argument was made about his entitlement to pay for that day. Surprisingly, even among the number of experienced education professionals involved, there remained some debate about whether Mr Beilby should have been paid for the statutory day (not worked) dependent on his employment status at the time. It was not necessary to resolve that particular interpretation issue but the differences of opinion expressed were sufficient to confirm Ms Timoti's conduct in

approving the payment at the time could not reasonably have been held to be a deliberate act of wrongdoing.

[73] One incidental point illustrated the level of uncertainty and error in play at the time about which Mr Hamill had reached some negative conclusions of Ms Timoti's conduct, based on his and Ms Preece's review of the available documentation. Mr Beilby had subsequently paid back \$3649 that had he received in double pay but soon after completing that exercise (in October 2014) he was paid backpay of \$6762 because Novopay found he was put on the wrong salary step during his employment at the Kura.

Was the dismissal justified in all the circumstances at the time?

[74] On the evidence available Mr Hamill might reasonably have found Ms Timoti was either careless or had performed poorly in carrying out her duties (including properly managing potential conflicts of interest) but he failed, I have concluded, to meet the standard required of a fair and reasonable employer in how he investigated his concerns and what he decided about her misconduct being of a more serious and deliberate nature. Having declared the reasons for her dismissal as being for those more serious grounds and having failed to establish the justification for it to the statutory standard, Mr Hamill's actions in dismissing Ms Timoti were unjustified. The grounds for her personal grievance were consequently established and Ms Timoti was entitled to an assessment of remedies.

Remedies

[75] As noted in the closing submissions of Mr Hamill and the Board the liability for any remedies awarded lies with the Board and not the LSM.

Reimbursement of lost wages

[76] Ms Timoti sought an award of lost wages for the period from her dismissal on 22 August 2014 to December 2015, totalling \$56,866. From 20 October 2014 she had obtained work as a day reliever at a school in Opotiki. She was later appointed to a position at that school for the 2015 school year (until November 2015). Her lost

wages claim was based on an initial period when she had no wages, then for the difference between what she was paid for teaching at the school in Opotiki and what she would have been paid if she was still Tumuaki of the Kura, and for the 2014-15 summer holiday period for which she would have been paid if she had still been employed at the Kura.

[77] An award for lost wages had to take account of contingencies that might otherwise have affected Ms Timoti's earnings, such as by leaving her position as Tumuaki at the Kura.¹¹ Relevant factors included her previous experience of poor health (which included having a third major heart operation in 2011); her experience of feeling stressed and tired due to the demands of her role as principal, including once she was under investigation, so that she had stopped work from 21 July 2014 until she was dismissed; and previous discussions where she had suggested she might resign as principal. A further factor was the conclusion of the CAC in February 2015 that Ms Timoti should not hold a senior leadership position for at least two years in light of its findings about her performance as Tumuaki at the Kura.

[78] Against that background I considered the period for assessment of lost wages should be limited to the end of the 2014 school year. According to Ms Timoti's evidence that totalled about \$20,059. The Board must pay her that amount in reimbursement of lost wages under s123(1)(b) of the Act. It comprised her lost wages from 22 August until she began work at Opotiki on 20 October 2014 – around \$15,063 – and from then until 10 December 2014, the difference between her former principal's salary and her pay at a teacher – that was \$4996.

Compensation for humiliation, loss of dignity and injury to feelings

[79] Ms Timoti gave evidence that her dismissal caused her to lose confidence and self-esteem, avoid people and experience extreme tiredness. She felt hurt and resentful at the effect on her career and her reputation. It damaged her connections with families associated with the Kura that she had come to consider as part of her own family over her years there. Given the nature of the Kura and her role there, I accepted she lost dignity and felt deeply humiliated. While her description of herself as having been "*branded a thief*" was somewhat overstated, she clearly felt the sting

¹¹ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36] and [37].

of being accused of what amounted to deliberate dishonesty in relation to her husband's pay and her feelings were unfairly injured as a result.

[80] The Employment Court's recent decision in *Hall v Dionex Pty Limited* noted learned commentary on the average level of compensatory awards having remained stagnant for the last 20 years, despite the inflationary effect that might otherwise be expected to have increased them.¹² The Court observed that while there was a need for a degree of consistency with other cases, there was a danger of using consistency to keep awards at an artificially low level. It emphasised the particular circumstances of each case was the starting point for an appropriate level of compensation. Applying the Court's formulation in exercising the discretion to award compensation in the *Hall* case – to be mindful of the need not to keep compensatory payments artificially low, balanced against the expressed need for moderation – I concluded the particular circumstances of Ms Timoti's case warranted an award of \$20,000 as compensation under s123(1)(c)(i) of the Act.¹³

Contribution

[81] I have not accepted the three arguments Ms Timoti advanced against the remedies awarded being reduced because her conduct contributed to the situation giving rise to her grievance. Firstly, she submitted her "*reliance on others and her failure to check documents*" was not sufficiently culpable to require such a reduction under s124 of the Act. Secondly, she submitted her "*failure to manage a conflict of interest with her husband's employment*" was a performance matter that should have been managed properly and was not sufficiently serious to warrant a reduction. Thirdly, she submitted it would be "*improper to reduce remedies on the basis of Ms Rolston's indiscretions*" as they "*were not causative of any failure of process*".

[82] Her first and second arguments correctly characterised conduct by her that was inherently deserving of blame for someone at the level of responsibility that she held as Tumuaki of the Kura. It was a conclusion that the CAC also reached when assessed against professional standards. I did not accept Ms Timoti's evidence that her oversights in checking documents were the result of insufficient support and

¹² *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87].

¹³ *Hall*, above, at [90].

training in her role. While she was a new Principal, she had access to support from a range of people and experience gained from having performed the role in an acting capacity on more than one occasion prior to her permanent appointment. Her failure to put in place some means of having someone else check off or approve her husband's pay was culpable conduct because it was so clearly something that created such an obvious risk of the very kind of accusation that eventuated. It is a risk that has been long recognised in guidance given to principals and boards about managing conflicts of interest.

[83] Her third argument was at odds with even the evidence of Ms Rolston and Ms Timoti about what happened. Ms Rolston accepted, during questioning at the Authority investigation, that her threat of personal action against Mr Hamill (when he first sought information about what was happening with Mr Beilby's case) was "*far too harsh*" and her approach "*could have been toned down*". Ms Rolston's initial suggestion that Mr Hamill was 'after' Ms Timoti was, in my assessment of all the evidence, nothing more than supposition. However what she then told Ms Timoti about that view, as fact, resulted in Ms Timoti fearing that his inquiries were really a conspiracy to get rid of her. How Ms Timoti and Ms Rolston then participated in Ms Preece's inquiry and Mr Hamill's subsequent disciplinary proceeding contributed directly to the negative inferences taken about what Ms Timoti had done and what appeared to be stonewalling or 'shielding' of some information. Two examples were Ms Timoti's reluctance to provide her spreadsheet on relievers and her removal from school premises of the originals of various roll register forms that Mr Beilby had filled in. Both items related to the issue of whether he was paid for days that he was allegedly not at school. Inferences made on that point affected the conclusions on other issues to do with payments made to him. Ms Timoti's explanation for having taken the attendance forms off site was that Ms Rolston had asked for them. So had Ms Preece and the fact that they could not be found at the school led to some of the negative inferences drawn about what Ms Timoti had done.

[84] If Ms Timoti had been more co-operative and open in response to the inquiries of Ms Preece and Ms Hamill, the disciplinary outcome was just as likely (in my assessment) to have been significantly less severe than it was (with some possibility Ms Timoti might have remained in her role as Tumuaki). In part responsibility for that failure rests with Ms Rolston, but Ms Timoti bears the burden of the

consequences for how her representative handled the matter. In part Ms Timoti simply bears the responsibility for not having adequately separated out her professional duties and personal feelings about her husband's situation. As she candidly explained in her oral evidence, Ms Timoti had been reluctant to talk with Mr Hamill and trustees about her husband's disciplinary matter (and had continued his employment) because she was sure "*deep down*" that Mr Beilby had not assaulted the boy at the other school. She said she held that view as "*a wife and as a mother*" of her and Mr Beilby's own children. However she also accepted – from how an outsider looking in might see the situation – that in her role as Tumuaki, she had not properly handled the resulting conflict of interest and the risk to the Kura.

[85] Taking the elements covered in those three arguments, I concluded a fifty per cent reduction of the remedies awarded to Ms Timoti was required to mark how substantially her culpable conduct had contributed to the situation in which her grievance arose.

Counterclaim – damages for breach of contract

[86] The Board sought an award of damages against Ms Timoti, for losses said to have been caused by her employment of Mr Beilby and her handling of pay arrangements for him. Those losses were said to result from Ms Timoti's failure to use reasonable skill and care. In that respect the Board's claim did not relate to its view that her conduct was deliberate (which has been determined to be unjustifiable) but rather that she was negligent in what she did.

[87] For two reasons I was not persuaded such an award could or should be made in those circumstances on that basis. One reason was about the applicable legal principles. The other, if an award of damages for Ms Timoti's carelessness was a legally available option, concerned whether the facts of the claim were sufficiently established.

[88] While the House of Lords decision in *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 125 is regarded an authority for the proposition that employers may sue employees for damages caused by careless performance of their duties, the

Employment Court has expressed doubts about its present day application:¹⁴

... [I]t is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.

[89] The Court has further described the rationale for that analysis in this way:¹⁵

... There is some attraction to [the] argument that if a reasonable bystander had asked the parties at the outset of their employment relationship: “What happens if the employee does not perform his/her duties to a satisfactory standard?” the answer would be: “disciplinary action which could result in dismissal”, rather than “the employer could undertake disciplinary action which could result in dismissal and also sue the employee for damages for the losses associated with the poor performance”.

[90] In that light I doubted a school principal, dismissed for actions said to have caused loss by failing to use reasonable care and skill in carrying out her or his duties, could then also be subject to an award of damages. The dismissal was the sanction for the negligence. Something more would be needed to warrant an order to pay money – such as fraud or some other deliberate action the principal knew should not be taken.

[91] However, if that conclusion on the application of legal principle was wrong, the Board had not – on my assessment of the evidence – established all the necessary facts of the loss. Mr Price’s evidence suggested any loss of entitlement in respect of staff banking (because Mr Beilby was paid holiday pay through the 2013-14 summer) could have effectively been mitigated by those since in charge of the Kura’s financial management approaching the Ministry of Education for a correction. Similarly Mr Beilby’s evidence about having repaid amounts double paid to him suggested there was no ongoing loss in that respect.

¹⁴ *George v Auckland Council* [2013] NZEmpC 179 at [147].

¹⁵ *Rainbow Falls Organic Farm Limited v Rockell* [2014] NZEmpC 136 at [57].

Counterclaim – penalty for breach of good faith

[92] There were elements of how Ms Timoti either directly, or through her representative Ms Rolston, acted during Ms Preece's inquiry and Mr Hamill's disciplinary proceeding that could arguably be considered likely to mislead or deceive and so warrant a penalty for breach of the duty of good faith. However the applicable facts concerning how she participated and what happened with various documents has been considered in relation to contributory behaviour and the substantial reduction of remedies already imposed. Even if those elements of the evidence were sufficient to support a penalty, it would amount to a form of double counting to award one. Other grounds advanced by the Board for a penalty related to findings of deliberate behaviour that this determination has found were not justifiably reached. Accordingly the claim for a penalty is dismissed.

Costs

[93] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are not able to do so, Ms Timoti may lodge and serve a costs memorandum within 28 days of the date of this determination. Once served the Board would then have 14 days to lodge a reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[94] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors required an adjustment upwards or downwards.¹⁶

[95] It may assist the parties to resolve costs themselves to know that one factor I would expect to apply would reduce the daily tariff by \$500 to account for investigation meeting time wasted due to the Applicant's jumbled contribution to the common bundle of documents.

Robin Arthur
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.

