

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Paul Young (Applicant)  
**AND** Board of Trustees for Aorere College (Respondent)  
**REPRESENTATIVES** Aseri Bale, Counsel for Applicant  
Paul Robertson, Advocate for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 5 May 2006  
**SUBMISSIONS** 19 May 2006 for Applicant  
12 July 2006 for Respondent  
**DATE OF DETERMINATION** 18 August 2006

DETERMINATION OF THE AUTHORITY

Paul Young, the applicant, says that he has been unjustifiably dismissed by the respondent, the Board of Trustees of Aorere College (“the Board”). Mr. Young seeks compensation for his lost salary increment, full registration as a teacher, reinstatement to his position at Aorere College from term 3 2006; and an apology. He also alleges that the principal, Mr. Mike Williams, attempted to get rid of him “by unlawfully using and/or tampering with competence procedure results” and that he has been harassed and bullied by the principal.

Mr. Young was employed as a woodwork teacher in December 2003. His employment was terminated on 19 December 2005.

There are two issues: a performance issue which was dealt with by the headmaster, Mr. Mike Williams. This process commenced on 3 September 2004 and continued until early November 2005. The second issue, which Mr. Young believes arose only because of the performance issues, was an investigation carried out by the Board into assessment irregularities. This arose from a routine process where assessment results are checked prior to a final submission to the NZQA

Performance Issues

It is clear that Aorere College endeavored to provide Mr. Young with assistance to improve his performance and that actions he perceived as “vicious” and discriminatory were nothing other than attempts to help him. He was sent on a Teacher Effectiveness Training course and Mr. Young was asked whether there was any additional support and development he would like in terms of the clause 4.2.4 of the Collective Employment Agreement.

After Mr. Young attended the course he met with Ms Phillipa Woofindin, the Director of Learning and Teaching. They discussed strategies Mr. Young had learned during the course and it was

agreed he would write an action plan and there would be a further meeting to discuss the plan. Ms Woofindon's position was taken over Ms Leeana Kent and Mr. Young experienced difficulties with her. There were further meetings with the PPTA being involved and a list of professional standards and performance indicators was drawn up. A report on progress towards the expected outcomes was to be completed by the end of week 4 of term 3 2005. On receipt of this report the principal was to meet with Mr. Young and the PPTA, discuss the report and decide how to proceed: further guidance or competency.

At the time the assessment irregularity issue was raised in late November Aorere College had not instigated competency procedures pursuant to clause 3.3.2 (a) although Mr. Young had been informed on 15 September that the matter would be proceeding to competency procedures.

On 15 September there were discussions between Mr. Williams, Mr. Young and the PPTA during which Ms Pamela Hill, a PPTA Field Officer, suggested that Mr. Young would prefer to resign rather than go through the competency procedure. A draft agreement was drawn up with input from the PPTA and this was signed in October. It was agreed that Mr. Young would resign, the resignation to be effective from the end of the 2005 school year upon receipt of the renewal of his practicing certificate with registration being either full or subject to confirmation. Part of the agreement was that the school would advertise for a replacement but that no appointment would be made until Mr. Young's resignation was received.

Mr. Young agreed to this proposal without any threats or improper action on the part of Mr. Williams. Mr. Young had the assistance of Ms. Hill, throughout.

The agreement was not able to be implemented because the New Zealand Teachers Council indicated that the "Subject to Confirmation" option was not available at that time.

Mr. Young alleged that Mr. Williams had told him he had only two options: to resign and have his practicing certificate subject to confirmation or to go through the competency procedure and be deregistered. I am satisfied that Mr. Williams did not tell Mr. Young that he would be deregistered as a result of the competency procedure but rather that he ran the risk of being deregistered. It is clear that Mr. Young found himself in an uncomfortable situation: he would have to go through the competency procedure with the risk of dismissal or deregistration or he could negotiate a settlement. The unpleasantness of this situation for Mr. Young does not mean that he was harassed or bullied or subjected to any improper pressure.

I am satisfied that the performance issues were dealt with as a separate process from the disciplinary proceedings which were instituted as a result of the concern about the assessment procedures used by Mr. Young. They were properly considered and the relevant procedures in the collective employment agreement were followed. It was the assessment irregularities that led to the termination of Mr. Young's employment.

### Assessment Irregularities

On 14 November all staff were notified by Mr. Van Etten, the deputy head, that they were to check and verify all internal assessments and to sign them off as being correct.

On 21 November Mr. Young signed and returned his woodwork grade printouts as being correct. Mr. Van Etten spoke to Mr. Williams about concerns he had regarding Mr. Young's assessments and Mr. Williams asked Mr. Young to provide the assessments for verification. Mr. Williams then received a memo from Mr. van Etten about serious concerns regarding the assessments:

*As part of the check of standards and marks I am concerned at the achievement attained of the 11TEW students with Mr. Young.*

*Almost all the students have passed the assessment, even students with very poor attendance.*

*I reviewed the student assessments that Mr. Young had provided to Mr. Williams with another staff member and am concerned that there appears to be a problem with the authenticity and validity of the student assessment.*

*In brief I am concerned that th4e student handwriting is different in different parts of the same assessment. There is also concern about the similarities in handwriting on different assessments and the spelling of some words.*

*I feel we need to inform NZQA of our concerns in relation to this.*

*Please look into this urgently and advise me what to do next.*

Mr. Williams spoke to Mr. Young with Mrs. Peters, the PPTA Branch Chair in attendance, and formally told him about the concerns regarding his assessments. Mr. Williams then sent him home on other duties.

Mr. Bale complained that the provisions of the Collective Employment Agreement had not been complied with. At clause 3.4.3 (c) the agreement provides:

*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 been finally 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*

Mr. Misilei, the Board Chairperson, said that Mr. Williams spoke to him about concerns regarding Mr. Yung and the assessment processes and they agreed that Mr. Young should be transferred to other duties pending the outcome of a proper investigation.

### 22 November

In a letter sent to Mr. Young by Mr. Williams on 22 November 2005 Mr. Williams stated:

*I have spoken to the Chairperson of the Board of Trustees this morning and it was agreed that I should suspend you on alternate duties until the Board has had an opportunity to decide whether a full investigation is needed or not and the matter is dealt with. The Board of Trustees will be meeting on the afternoon of Tuesday 22 November and will consider this matter at the meeting.*

*The Board of Trustees will inform you of their decision to investigate further or to refer the matter back to management to deal with.*

*While you are on other duties you are not to be in the school or to contact any students or parents. During this time I would like you to work on finishing any marking you have and*

*to then work on scheme development and unit planning. Should you need any resources to assist with this please contact me.*

*I have taken this action to preserve the integrity of any investigation the Board of Trustees may instigate.*

The intention of this was to transfer Mr. Young from teaching duties to other duties. It was unfortunate that the word “suspend” was used rather than “transfer”. Mr. Young was clearly instructed to carry out non-teaching duties but his employment per se was not suspended. The rationale provided for the transfer to alternative duties, while wholly understandable, was not on its face in accordance with the provisions of the Collective in that there is no direct reference to the welfare or interests of students. However, I think it is clear that the concern was that Mr. Young would attempt to contact students about the assessment procedure and that that would place the students in a difficult and awkward situation. The respondent was entitled to protect the students from such approaches at that stage.

Mr. Williams reiterated the points raised in his meeting earlier that day with Mr. Young. He said that the concerns were sufficiently serious to be raised with the Board which would meet the same day, consider the matter and then advise Mr. Young whether the Board intended to investigate further or refer the matter back to management to deal with. Mr. Young was advised to seek advice.

#### 23 November

Mrs. Shortt, a Board member, wrote to Mr. Young informing him of the Board’s concerns. He was told that an investigation had been started and was asked for a response to the concerns. He was also asked to provide all assessment material to the delegated investigators. Ms Shortt wrote:

*We would also request from you a written report regarding the authenticity of the assessments (are all assessments the students’ own work?), and the validity of the assessments (were proper assessment procedures followed?).*

Mr. Young was advised to seek assistance as the matter was serious.

#### 25 November

A teacher aide who had been approached by Mr. Young spoke to Mr. Williams about a colleague being pressured by Mr. Young to write a letter supporting him.

Mr. Young said he spoke to Mr. Williams and asked to see any report done by the industry assessor and moderator and was told there was no report. When I asked for clarification about the industry assessor and moderator it became evident that Mr. Young was quite confused and that there was no industry assessor or moderator.

Mr. Young handed Mr. Williams the practical assessment sheet about 2.40pm. Mr. Williams said he wanted more information and went with Mr. Young to his office. Mr. Williams took documents (the year 11 records) and photocopied them, giving Mr. Young copies and not the original. Mr. Young said this meant that he had been “robbed”. This is just one example of the many instances of unfortunate hyperbole that permeated both Mr. Young’s evidence and the communications made by his representative, Mr. Bale.

#### 26 November

On 26 November Mr. Young wrote to the Board saying that in June he had phoned and emailed Mr. Misilei about the principal's behaviour. He had alleged that Mr. Williams had acted illegally, lied, treated Mr. Young unfairly and complained that Mr. Misilei had passed his letter on to Mr. Williams. He said that as Mr. Williams was a "defendant" he could not be an investigator and that the serious concerns about the assessments were due to malice arising from the principal's unfair treatment of him. The unfair treatment complained of was Mr. Williams' involvement in Mr. Young's performance assessments and the negotiations that led to Mr. Young's signing of the termination agreement. As I have previously stated, there was nothing unfair about Mr. Williams' dealings with Mr. Young.

### 30 November

On 30 November Mr. Bale wrote to Mr. Williams and the Board accusing Mr. Williams of not following procedure regarding the "suspension", asserting that another person should be appointed to carry out the competency procedure and that Mr. Williams was biased.

### 1 December

On 1 December the Board replied to Mr. Bale saying that the two issues were separate and the competency matter had been put on hold. The Board also wrote to Mr. Young outlining the next steps in the process and asking that he attend a meeting on 8 December at which the Board would consider the report received from Mr. Williams and Ms. Shortt, Mr. Young's response and give him an opportunity to add further comments. The letter to Mr. Young enclosed the report received from Mr. van Etten. Mr. Williams and Mrs. Shortt had been empowered to investigate the matter and a subcommittee, chaired by Mr. Misilei, had been empowered to investigate and determine the matter.

### 7 December

Mr. Young received the investigation report prepared by Mr. Williams and Mrs. Shortt. Mr. Young rang Mr. Misilei asking for an adjournment. Mr. Williams emailed Mr. Young declining an adjournment. Mr. Williams phoned Mr. Young urging him to go to the meeting. Mr. Bale was also spoken to and it was clear that Mr. Young had not been given Mr. Bale all the information he had been supplied with.

### 9 December

Mr. Misilei wrote to Mr. Young about his failure to attend the meeting. He also addressed issues that had been raised by Mr. Bale, such as the allegation that the meeting was illegal and that Mr. Williams had no right to advise Mr. Young of the time of the meeting or of the rejection of the adjournment request. Mr. Young was told the Board had decided to have a further meeting on 15 December, that his written submissions had been considered and that he was welcome to provide additional submissions, either oral or written.

Mr. Misilei also wrote:

*Mr. Bale alleged that you had not been provided with appropriate documentation to enable you to prepare for the meeting. This is incorrect you have been given copies of all the documents the Board Sub Committee will be considering at the meeting.*

### 11 November

Mr. Young wrote to Mr. Misilei explaining why he had not attended the previous meeting. He said:

*I rang you about 9:00 last Thursday. I said, "Mike did not deliver the exam papers I expected and it's impossible for me to respond without seeing those papers.*

He said that there had been confusion and he enclosed a written response and asked the Board members to dinner. In his written response he said:

*Since I can't recall those hundreds of exam papers, I can only guess with the following possible reasons for the suspicions:*

*1. Different colours on one page is due to – some students did not bring their pens and borrowed pens of different colours*

On the same day Mr. Bale wrote a letter to the Board in which he referred to Mr. Williams as "the rogue principal" who was pressuring the Board to rubber stamp his actions of bullying and harassment. There were also irrelevant references to the Local Government Act and to HSE Act. Mr. Bale wrote:

*As we understand it the BOT meeting of the 08/12/2005 at 5pm is unlawful and so is the proposed meeting on 13/12/2005 because the BOT did not follow suspension procedures preceding it and such breaches of Procedural Law make Management issues very sloppy indeed.*

*Please be advised that I have advised our client, Mr. Paul Young, not to attend this meeting. ...*

*Please advise other Trustees not to attend as well as they have been blaming my client in the past for wrong-doing. May we also remind the BOT that our client's Collective Employment Contract is still running and the BOT should seriously consider appointing and [sic] independent assessor to take over the Principal's role in this case, and if this is not done we will have no alternative but to petition the Minister re: appointing an Independent Commissioner to take over this case from the School.*

### 15 December

Mr. Young and Mr. Bale did attend the 15 December Board meeting. I asked Mr. Bale whether he had taken notes. He told me he had. When I enquired why they had not been produced he told me had not kept them. No explanation was provided for this failure.

The meeting started at 4.15pm. The Board heard from Mr. Young and Mr. Bale and adjourned at 8.25pm. After considering matters the Board decided to terminate Mr. Young's employment.

Mr. Misilei said that Mr. Young mentioned that he had interviewed students. The Board asked him to provide any notes he had but he refused. It also appears he did not tell the Board what any of the students were alleged to have said. Had he indicated that his discussions with the students cast a different light on matters the Board would have been obliged to take the matter up with the students.

Mr. Misilei said the Board did not ask for any further information but that they would consider the issues and make a decision. Mr. Young and his representative were given the opportunity to make submissions as to penalty should there be a finding against Mr. Young.

Mr. Young admitted that he had filled in check sheets all on the same day when there should have been a gradual process as students learned. This was for a class of around 25 to 28 students. He admitted he had written the answers up on the board and not removed them until 5 or 10 minutes before the exam.

19 December

Mr. Young was sent a letter of dismissal. The reasons for dismissal were stated to be:

*That you had:*

*Failed to keep adequate records of practical assessment.*

*Given marks based on personal judgment, rather than the stated performance criteria.*

*Given the assessment questions and answers to students prior to assessment, thereby making assessment invalid.*

*Left assessment Questions and Answers on the blackboard until the day of the test.*

*Given filled in test papers to students to study until they felt ready to sit the test later that period.*

*Confirmed that he had filled in a blank exam paper to replace "lost" student work. Had used a final mark from a list of results that did not indicate which performance criteria had already been achieved.*

*Not provided adequate supervision during assessment.*

In his closing submissions Mr. Young complained that he had "puzzled for months as to what are the real reasons for my dismissal." He also asserted that "there is nothing wrong to tell students answers before the test". In my questioning of him he also stated that he could see no problem with filling in a replacement exam paper for one the student had lost even though he had no way of knowing what the student's actual answers had been. Mr. Young was dismissed for the reasons set out in the dismissal letter; they are the real reasons for the dismissal. It was clear from the evidence that Mr. Young had admitted to the Board that he had done much of what was alleged. Mr. Young's issue was that he could see nothing wrong with what he had done. Mr. Young did not appear to understand the distinction between learning and revision on the one hand and giving students answers in a test situation on the other.

Mr. Young asserted that he had been asked to provide further evidence at the Board meeting and that the decision to dismiss had been made before he had the opportunity to provide it. Mr. Young had alleged that other teachers at the school also carried out assessments in the same manner. The Board asked Mr. Young to supply their names so it could investigate them as well. Mr. Young did not supply any names.

Mr. Young had interviewed some students and the Board asked him to provide the information obtained in his interviews. He refused to do so.

Had he supplied the requested information and had it been relevant the Board would have been under an obligation to carry out further investigations.

Mr. Young referred me to Wanganui College Board of Trustees v Lewis [1999] 2 ERNZ 1006. This case involved an investigation by a principal and assistant deputy principal into allegations that an art teacher had falsified marks for assessments which never occurred. Seven students were interviewed by the Assistant Principal who wrote a written report which was not provided to the teacher until the disciplinary meeting. The teacher had objected to the Assistant Principal's

investigation on the basis that it lacked independence and she had not been permitted to be present during interviews with the students.

That case and the instant case are clearly distinguishable. Mr. Young made admissions which clearly constituted serious misconduct and could provide no satisfactory explanation for his actions. Furthermore, he could not see that his conduct was problematic.

Where there are conflicts in the evidence of Mr. Young and the respondent's witnesses I accept the respondent's evidence. This is not because I think Mr. Young was setting out to tell lies but because he had a propensity to exaggerate and was often confused. I am referring, for example, to descriptions of people and actions as "vicious", assertions that the principal was trying to pressure him to resign by "digging up dirt on him", an allegation that he had been "robbed", claims that Mr. Williams "deliberately sent a Director [Ms Kent] to harass me rather than help me" (a totally unsubstantiated allegation – Mr. Young admitted this was an assumption only) and allegations that his appraisal results had been tampered with, also a claim with no evidential basis.

I have no doubt that the Board was able to find that Mr. Young had not carried out the assessments in a fair and accurate manner and this jeopardised the validity of the assessment procedures and the students' test results. These actions clearly constituted serious misconduct and the penalty of dismissal was the one which a reasonable employer would have applied.

Mr. Young was justifiably dismissed. There was no unfairness in his performance assessment and no disadvantage.

#### Costs

If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of Employment Relations Authority