IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 69
5517981

	BETWEEN	CHRISTINE JONES Applicant
	AND	BOARD OF TRUSTEES FOR KIMI ORA SCHOOL Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Peter Barrett and Matthew Brown, Counsel for Applicant Carolyn Heaton, Counsel for Respondent
Investigation Meeting:	14 April 2015 at Wellington
Submissions Received:	On the day of the Investigation Meeting
Determination:	22 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christine Jones was employed as a Deputy Principal (DP) at Kimi Ora School before her resignation on 8 September 2014 on the provision of eight weeks' notice. She claims she was constructively and unjustifiably dismissed, citing breaches of her employment agreement; of the employer's obligations of trust, confidence and fair dealing; and of its statutory duties to her.

[2] Ms Jones seeks remedies of lost wages, compensation and costs. She asks the Authority to impose a substantial penalty on her former employer for breaches of its obligation of good faith towards her.

[3] The Board of Trustees for Kimi Ora School rejects all Ms Jones' claims and says her resignation was not caused by a breach of duty on its part.

Relevant background and evidence

[4] Kimi Ora is a special needs school catering for a diverse range of students from the Wellington region aged from five to twenty one years of age with high and very high complex special needs. Ms Jones began teaching at Kimi Ora in 2000. She was appointed an Acting DP from 2005 and later that year was permanently appointed to the position. From 2011 she was one of two DPs at the school.

[5] In March 2012 Ms Jones was appointed Acting Principal on the departure of the then Principal. She remained in that position until the beginning of 2013 when a new Principal, Shirley Jones (no relation) was appointed Principal. Ms Jones' evidence was that she happily returned to her role as DP when Ms Shirley Jones took up the role of Principal.

[6] While she was Acting Principal, Ms Jones implemented new systems to remedy what she saw as the school's poor management systems. She was commended for that work by Kimi Ora's Limited Statutory Manager (LSM)[1] at the time, Helena Barwick, who gave evidence that Ms Jones worked hard and systematically in addressing some school management issues.

[7] In the course of that work Ms Jones identified some irregularities in remuneration payments to a teacher and to one of Kimi Ora's administration employees (I shall refer to the latter as the administrator). In both cases there had been payments made in excess of the individuals' entitlements. Ms Jones alerted the LSM and the Chair of the Board of Trustees, Anne McKegg, both of whom gave evidence to the Authority about the investigation Ms Barwick had carried out. Ms McKegg said she was satisfied the matter was resolved as a result of Ms Barwick's investigation. Ms Jones, however, was dissatisfied with the outcome and says from that time forward, there was a concerted effort to coerce her to resign from her employment.

[1] A statutory officer appointed by the Secretary for Education at the direction of the Minister of Education to exercise specified power(s) of the board of trustees for a temporary period. During this time the board of trustees continues in existence.

[8] Ms Shirley Jones had not commenced her employment at Kimi Ora at the time Ms Jones discovered financial irregularities. She was aware of the matter from a Confidential Briefing document prepared by the LSM and signed by Ms Jones, Ms Barwick and the administrator. The briefing document recorded the signatories' acceptance that there was no evidence the administrator had been aware of the irregularities in her employment arrangements, which had been put in place by a previous Principal. The document noted the matter had caused a fracture in the relationship between Ms Jones and the administrator. It recorded the wish of the parties to heal that relationship and to put the matter behind them so it did not affect the important relationships the incoming Principal would need to forge with both Ms Jones and the administrator.

[9] Ms Shirley Jones said she was aware from conversations with Ms Jones in 2013 that she was having difficulty putting the issue with the administrator behind her. She said Ms Jones had told her the administrator must have known she was being overpaid. Ms Shirley Jones says she recalled telling Ms Jones she needed to draw a line in the sand over that issue.

[10] Ms Jones claims that from January 2013, when she resumed her role as DP, her role substantively changed from what she expected and what it had previously been. She says she was no longer based at Kimi Ora's Evans Bay campus. Her time was now divided between the school's Naenae campus and Evans Bay. Instead of primarily teaching her own class of senior students, she says her role changed to one that was largely classroom relief. Ms Jones claims her responsibilities were lessened and her management opportunities limited. She says she found out about the changes to her role at the first senior management team (SMT) meeting of 2013 and had the impression she was the only one hearing about the changes for the first time.

[11] It was her evidence that it was other members of the SMT who brought in these changes which left her feeling "*rejected, helpless and well and truly isolated by other members of the senior management team"*. Ms Jones says she raised these matters with the Principal who seemed not to understand or care about her concerns. As a result she says she acquiesced to her downgraded role during 2013.

[12] The Principal has a different perspective on events and discussions with Ms Jones. In relation to Ms Jones' claim regarding changes to her role, Ms Shirley Jones referred to a document formulated by the LSM which was headed "*Proposed*

leadership structure for Term 1 2013". The document, which was dated 18 October 2012, included the following:

> "*In talking with Shirley and Christine over the break and again this week we have all reached agreement that there is value in keeping some flexibility in Term 1 next year so that Shirley can get a feel for how the school works on two sites and what leadership structure would work best*."

[13] A table setting out the proposed leadership structure followed. Immediately after the table there was reference to Ms Jones having "*3 days release, two days to manage the Evans Bay site as she has in the past, and one day to be spent working alongside Shirley either at Naenae or Evans Bay*". Ms Jones did not deny she had engaged in the discussions that led to this document, but maintained under questioning that she was unaware of the detail until the beginning of 2013.

[14] The Principal says Ms Jones did not raise issues that concerned her in a way she could address. She says Ms Jones did not ever express to her that she felt her role had been downgraded or that there was an issue with the manner in which other members of the SMT were treating her. What Ms Jones had told her was that she did not think she (Ms Jones) had the full respect of her colleagues. The Principal said that when she asked why Ms Jones thought that, Ms Jones declined to elaborate. She acknowledged being aware from late 2013 onwards that Ms Jones was unhappy but said she was unsure of the cause of her unhappiness as Ms Jones had not spoken in any detail about her concerns.

[15] In August 2013 Ms Jones applied for unpaid refreshment leave from 31 March 2014 until 13 June 2014. Her application, which was approved by the Board, made no mention of any concerns regarding her employment. In it she referred to her wish to walk the Camino Way in Spain and run the Paris marathon. She also referred to a family situation which had made it difficult to take holidays in the past but which was now changing so holidays were feasible.

[16] Ms Jones took her unpaid refreshment leave and says she did a lot of reflecting, concluding she should seek a role in another school. She said she had come to this decision because she believed it was what the other members of the SMT wanted and that was not going to change.

[17] She returned to work on 16 June 2014 and met with the Principal the same day. The two disagree about the content of their discussion. Ms Jones claims they discussed the downgrading of her DP role. The Principal denies any such discussion took place. She says Ms Jones told her that she felt, after 13 years at Kimi Ora, it was time for her to leave and she had decided to do so.

[18] The Principal said Ms Jones gave her no indication that her intention to leave was because she was unhappy in her employment. She said Ms Jones was animated and excited although vague about her future plans. Both agree Ms Jones indicated her intention to resign without formally giving notice, and signalled she was hoping to leave at the end of Term 3 (late September).

[19] The same day (16 June) Ms Jones' school-allocated i-pad was returned to her by the teacher who had been Acting DP during her absence. The teacher, who was one of the two employees whose remuneration Ms Jones had ascertained to be irregular while she was Acting Principal in 2012, had been using Ms Jones' i-pad while acting in the DP role.

[20] Ms Jones says she began to delete emails in the open in-box that evening and inadvertently discovered that she was the subject of some of the emails between the teacher who had been using her i-pad, who was a member of the SMT, and another member of the SMT. She inferred from the content of the emails, which were derogatory about aspects of her professional ability, that the senior management team wanted her to resign and was willing to act on that desire. She also inferred a total lack of respect for her both personally and professionally within the school's management.

[21] The following day Ms Jones attended Kimi Ora. She said in the course of the Authority's investigation that she did so only because she was scheduled to relieve for another teacher that day and did not wish to let that person down. Ms Jones said she contacted that teacher, whom she considered to be a friend, during the day and told her she could no longer remain at the school. She informed her of the existence of the emails and of some of their content.

[22] Ms Jones acknowledged under cross examination that on 17 June she also informed one other person that she would not be returning to the school. She said she wished to thank that person for the respect he had shown her over the years. Ms Jones

did not inform the Principal of her decision, or of the email exchanges she had found on her school i-pad and the effect they had on her.

[23] Ms Jones did not return to Kimi Ora after 17 June. She visited her GP on 20 June and obtained a medical certificate which certified she was medically unfit for work from 18 June and might be fit to resume on 7 July. She submitted further medical certificates on 18 July and 16 August 2014. Ms Jones says she was diagnosed with reactive anxiety during this time although she provided no evidence of this.

[24] On 10 July 2014 Ms Jones' solicitor, Mr Barrett, wrote to the Board of Trustees, care of Ms McKegg, stating Ms Jones' view that the school's management had embarked on a course of conduct to pressure her to resign. The letter conveyed Ms Jones' concern that this pressure would continue if she returned to work. The letter traversed Ms Jones' employment history with Kimi Ora and stated that her duties had changed drastically in January 2013 under the new SMT.

[25] Additionally, the letter stated that Ms Jones had had to endure *"negative comments from members of the senior management team, who have shown a lack of professional courtesy in their dealings with her".* It conveyed Ms Jones' belief that there was a direct correlation between her observations in regard to financial irregularities during the time she was Acting Principal, and this hostility. The effect on Ms Jones was described as humiliating but no specific examples were given of her colleagues' negative comments or their lack of professional courtesy.

[26] Mr Barrett's letter said that, as a result, Ms Jones had found herself in a situation where she felt her only options were to resign or take unpaid refreshment leave. He said "*Christine has reluctantly come to the conclusion that she does not wish to return to her employment if she can negotiate suitable exit arrangements*". The arrangements Ms Jones sought were:

a. a farewell event to recognise her fourteen years of service;

b. a written reference;

c. payment of more than $38,000 equating to what she would receive if she were eligible for redundancy compensation;

d. payment of $5,000 compensation for humiliation, loss of dignity and injury to her feelings; and

e. a contribution of $3,000 towards her legal costs.

[27] Mr Barrett's letter did not refer to the email exchange between two members of the SMT that Ms Jones had discovered on her i-pad on 16 June 2014. The letter was headed "*Without Prejudice*". However, as it was included in the applicant's documents attached to her statement of problem, and was not objected to by the respondent, I conclude that any privilege attaching to the letter was waived.

[28] In its response of 25 July 2014 the Board rejected many of the allegations of fact arising from Ms Jones' claims. In a letter signed by Ms McKegg the Board expressed disappointment that Ms Jones had chosen to take this approach to address issues she perceived in the employment relationship. It expressed the view that this manner of raising such concerns was not in keeping with her obligation of good faith towards her employer.

[29] The letter answered many of the concerns raised by Mr Barrett on behalf of Ms Jones. One concerned Ms Jones' claim that her duties changed drastically under the new SMT. The Board's response referred to the staffing structure and employment of staff for 2013 having been decided between the LSM and Ms Jones in the fourth term of 2012. It further explained that all staff were employed on the understanding they could be asked at any time to work at either of the school's sites.

[30] Ms Jones' assertions that she had been omitted from key management communications; relieved of key responsibilities; and excluded from SMT management decision making were addressed and rejected for reasons that were specified. The Board gave full responses to all matters raised by Mr Barrett other than those for which it noted insufficient detail had been provided to allow a response.

[31] Ms McKegg ended the letter by expressing the Board's hope that its response would settle Ms Jones' concerns and that she and the Board could now move on in good faith with their employment relationship.

[32] Mr Barrett wrote to the Board by letter dated 12 August enclosing the email exchanges between the two teachers that Ms Jones had discovered on her i-pad on 16 June. He noted that the emails corroborated, and partly explained, "*Christine's experience*". The parties attended mediation on 15 August 2014 but were unable to resolve the issues between them.

[33] Two weeks after the unsuccessful mediation, Ms McKegg wrote to Ms Jones on 29 August 2014 under the heading "*Matters of Serious Concern*". She raised the Board's concerns about actions Ms Jones appeared to have undertaken that could amount to a serious breach of her colleagues' privacy. She referred to Ms Jones' lawyer's letter of 12 August and quoted statements from it which indicated Ms Jones had taken it upon herself to go through another colleague's email account on a school i-pad.

[34] Ms McKegg referred to this as *"unlawfully accessing private information and subsequently disclosing this private information to third parties"*. The latter was in reference to a written statement dated 14 August 2014 by the teacher whose class Ms Jones covered on 17 June. The teacher had stated Ms Jones had called her that day and had read parts of the email exchange between two SMT colleagues which contained derogatory references to Ms Jones.

[35] Ms McKegg's letter referred to Kimi Ora's Code of Conduct which the Board was concerned Ms Jones' actions appeared to have breached. The letter noted that:

> "*If these concerns are proven and deemed to be misconduct they may result in disciplinary action such as a verbal or written warning. If proven and deemed to be serious misconduct then a further penalty option is instant dismissal from your employment.*"

[36] The Board required Ms Jones to provide a written response to its concerns within five working days. The Board would then consider her response and decide if it needed to speak with others or investigate the matter further. If the Board considered Ms Jones had a case to answer she would then be invited to a disciplinary hearing with the Board.

[37] With regard to the concerns Ms Jones had expressed about the email exchange between two members of the SMT, the Board reassured her that her concerns had been taken seriously. It informed her those concerns had been resolved in accordance with clause 10.1 of the Primary Teachers Collective Agreement (PTCA) by discussion between the Principal and the employees concerned without the need to take the matter any further.

[38] On 8 September 2014 Ms Jones resigned from her employment in the following terms:

> "*After receiving your letter of 29 August 2014 I believe I have no choice but to give you this notice of my resignation.*

> *In accordance with clause 2.9.1 of the current Primary Teachers Collective Agreement, this letter gives you notice that my employment at Kimi Ora School will come to an end on 10 November 2014.*
>
> *It is with deep sadness and regret that I tender my resignation. The reasons for my resignation are set out in the accompanying letter from my solicitor.*"

[39] Mr Barrett wrote to the Board the same day raising a personal grievance for constructive dismissal on Ms Jones' behalf. In providing the facts giving rise to the grievance, the letter referred to correspondence between the parties from 10 July 2014 onward, and the Board's responses to the employment problem Ms Jones had notified at that time.

[40] The parties attended further mediation in October 2014 but were unable to resolve the matter.

Issues

[41] The main issues for the Authority to determine are:

(a) Whether Ms Jones was constructively and unjustifiably dismissed; and

(b) If so, what remedies are appropriate.

Discussion

[42] It is well established that an employee may be constructively dismissed by the employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[2] held that constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice of resigning or being dismissed.

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer causes an employee to resign.

[43] Ms Jones bases her claim to have been constructively dismissed on breaches of duty by her employer. She says it was the Board's actions and/or inactions after

[2] [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

she had notified an employment relationship problem on 10 July 2014 that resulted in her accepting her employer's repudiatory breaches of its employment obligations by resigning. To succeed in her claim Ms Jones must establish that her resignation was caused by such a serious breach of duty by her employer that it was reasonably foreseeable to it she would resign as a result of the breach.[3]

[44] Ms Jones claims the Board failed to meet its obligations to her in a number of ways. These included breaching her employment agreement and her privacy; breaching its duties to her under employment, health and safety, and state sector legislation; breaching its common law duties of trust confidence and fair dealing and breaching its own Code of Conduct.

[45] Mr Barrett stressed in his oral submissions that Ms Jones' personal grievance arose from the way the employer dealt with her concerns after they had been raised in his letter of 10 July. He submitted the Board had not sufficiently investigated the matters he had raised in his letter. Nor had it made a reasonable effort to discuss the problem and resolve it by mutual agreement, as required by the provisions of the PTCA. Mr Barrett submitted the Board had also failed to investigate what he described as "*malicious correspondence*" between the two teachers whose emails Ms Jones had read on her school i-pad on 16 June 2014.

[46] The Board had breached the Privacy Act 1993, in his submission, by failing to provide evidence of steps it had taken to protect Ms Jones' personal information relating to her employment problem once she had raised it. It had breached the State Sector Act 1988 by failing to operate a personnel policy that complied with the principle of being a good employer. Mr Barrett submitted the Board's failure to take disciplinary and rehabilitative action against the two teachers constituted a breach of both the Health and Safety in Employment Act 1992 and the employer's common law duty to provide a safe workplace.

[47] Ms Heaton, counsel for the Board, submitted Ms Jones had provided no evidence of the breaches she alleged. Nor was there any evidence that she raised any of her concerns with her employer before Mr Barrett's letter of 10 July 2014. Ms Heaton noted that, as an experienced senior employee, Ms Jones must have been aware of Kimi Ora's Code of Conduct and its complaints policies and procedures.

---

[3] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 CA at 172

During the Authority's investigation Ms Jones confirmed she was familiar with the school's policies and had in fact drafted many of them.

Did the Board sufficiently investigate the matters raised in the letter of 10 July 2014?

[48] There was a fifteen day gap between the date of Mr Barrett's letter and the Board's response. This delay, coupled with the comprehensive nature of the Board's letter in reply which I have referred to above, suggests the Board took some time to investigate the allegations. Each matter Mr Barrett raised was addressed by the Board which provided information to support most of its responses. Where there was insufficient detail to support some matters, the Board's reply included denials on the basis of paucity of information. Its letter of 25 July, signed by Ms McKegg, was concise but provided substantive responses to the matters that had been raised.

[49] At the time of responding to Mr Barrett's letter the Board had not sighted the emails between the two colleagues of Ms Jones that had affected her so adversely. Nor had Mr Barrett referred to those emails. The Board was therefore unable to address that issue. It was not until 12 August 2014, three days before scheduled mediation, that Mr Barrett informed the Board of them. The Board attended mediation with Ms Jones on 15 August and I presume both parties attempted in good faith to resolve matters. The fact that the mediation, details of which are confidential to the parties, did not succeed cannot be interpreted as a failure by the Board or as a breach of duty to Ms Jones.

Was there a breach of the State Sector Act?

[50] Ms Jones' claim in this regard concerns the requirement under section 77A of that Act for the Board to operate a personnel policy that complies with "*good employer*" principles, and to comply with that policy. Mr Barrett's submissions on this point related to the Board's failure to comply with its own Code of Conduct and apply it in an even-handed manner. In particular this concerned the apparent lack of any disciplinary sanction by the Board against the two teachers who engaged in email correspondence on a school i-pad during Ms Jones' absence on refreshment leave. The inference Mr Barrett drew was that the Board failed "*to acknowledge the problem's validity or make reasonable inquiry into it*."

[51] The Board's response was that it had followed the process set out in clause 10.1 of the PTCA and resolved the matter by discussion between the Principal and the

two teachers concerned without the need to take the matter any further. The PTCA provision in question concerns the principles to be used in addressing complaints against employees and matters of discipline and competence "*to ensure that such matters can in the interests of the parties be fully and fairly addressed*". It provides that many complaints will be able to be resolved by discussion between the Principal and the employee concerned without the need to take the matter any further.

[52] This raises the question why the Board chose to address its concern over Ms Jones accessing emails about school issues on a school i-pad in a very different manner. The Board's letter of 29 August 2014 to Ms Jones did not refer to the possibility of resolving its concerns through discussion with her. It referred to potential serious breaches by her of the school's Code of Conduct and of the privacy of the teachers who had exchanged emails about her.

[53] The Board's invoking of its disciplinary process in the first instance was in stark contrast to the low key manner in which it said the issue of the conduct of the two authors of the emails had been resolved. Whereas their conduct was resolved by discussion with the Principal, Ms Jones was required to make a written response to the Board's concerns in the first instance. Following that she could, depending on the Board's view of her response, be invited to a disciplinary meeting. The outcome of that could be a finding of misconduct or serious misconduct and the imposition of disciplinary action which could be instant dismissal.

[54] The email exchange concerning Ms Jones that took place between two of her colleagues could, at best, be described as unprofessional and non-collegial. I agree with Mr Barrett that the Board did not act in an even-handed manner in this matter. I find it did not act "*fairly and properly*" as required by its Code of Conduct in subjecting Ms Jones to a far more heavy-handed, disciplinary approach than that accorded to the two teachers. I view this as a failure by the Board to comply with its contractual *good employer* obligation[4]. I will return to this later.

[4] Clause 2.1 of the *Primary Teachers' (including Deputy and Assistant Principals and other Unit Holders) Collective Agreement*, which also forms the basis of terms and conditions of employment for those on individual employment agreements, references Part 7A of the State Sector Act 1988.

Privacy concerns

[55] The allegations relating to breaches of the Privacy Act are more properly matters for Ms Jones to pursue by way of complaint to the Privacy Commissioner and will not be considered further.

Did the Board breach its duty to provide and maintain a safe working environment?

[56] I do not find Mr Barrett's submissions persuasive regarding breaches by the Board of its legislative requirement, and common law duty, to provide and maintain a safe working environment. The thrust of his argument concerns the Board's failure to take disciplinary action against the two email authors; to provide rehabilitative action in respect of them or facilitated reconciliation between them and Ms Jones; and to take adequate steps to prevent a repetition.

[57] Those submissions would have been more compelling if Ms Jones had not delayed for so long in communicating to her employer the effect her discovery of the email exchanges between two of her colleagues had on her. I accept that reading the emails may have genuinely distressed Ms Jones. If so, her failure to inform her employer of their existence and effect for eight weeks is difficult to understand.

[58] Ms Jones returned to the school the day after reading the emails (17 June) only, by her evidence, because she was reluctant to let down the colleague for whom she was relieving. She told two people that day of her decision to leave, neither of whom was the Principal. When asked why she had not told Ms Shirley Jones about the emails, Ms Jones said she did not feel safe to talk to her as the Principal had never supported her. She did not explain why she had not contacted the Board if she was uncomfortable talking to the Principal, or why she had not used the school's complaints procedure with which she was familiar.

[59] Ms Jones was in text communication with the Principal over the next two days, telling her she would not be at work because she was unwell and would organise a doctor's visit. She spoke with the Principal when Ms Shirley Jones telephoned her on 20 June. Ms Jones had every opportunity during this time to inform the Principal about the email messages and the effect that reading them had had on her. When cross examined about her failure to do so Ms Jones responded that she thought the Principal should have known what her problem was. I find that an unsatisfactory explanation for her silence on an issue of such significance to her.

[60] Importantly, the letter from Mr Barrett to the Board on 10 July made no mention of the emails. That letter was written more than three weeks after Ms Jones had left Kimi Ora and commenced the sick leave from which she did not return. It was the first indication the Board had of Ms Jones' belief that the school's management had embarked upon a course of conduct to coerce her to resign.

[61] I find Ms Jones' actions, or lack of action, in this respect disregarded the mutual obligation of good faith which requires parties to an employment relationship to be responsive and communicative. It deprived her employer of the opportunity to address as soon as possible the issue of the emails, which apparently had such a distressing effect on Ms Jones that she felt she could not return to her employment. By the time she did inform the Board, she had made it clear that she had already taken the decision to leave. For these reasons I find no basis to Ms Jones' claim that the Board failed to act to provide a safe workplace for her.

Was Ms Jones constructively dismissed?

[62] Ms Jones acknowledged in the course of the Authority's investigation that she knew she could not return to Kimi Ora after reading the email exchanges on her school i-pad. She also acknowledged telling two people of this on 17 June. I find that, and her silence about the emails which caused her to leave her employment on 17 June, makes her claim to have been constructively dismissed problematic.

[63] I do not underestimate the shock Ms Jones would have felt on reading adverse comments about herself in her colleagues' emails. However, her failure to inform the Principal or Board about the emails, and their effect on her for eight weeks seems at odds with a wish to have her employer address her concerns and remedy the situation. Ms Heaton submitted that the withholding of the emails until just before the scheduled mediation was a strategy to affect the negotiation of the "*exit arrangements*" Ms Jones sought. I make no finding on this but it does provide a plausible explanation for an otherwise inexplicable omission by Ms Jones.

[64] I am not persuaded that her resignation was caused by the actions and inactions of the Board following receipt of Mr Barrett's 10 July 2014 letter. In my view, and by her own acknowledgement under questioning, Ms Jones had already made the decision to leave her employment before that letter was sent. The intention to resign that she had conveyed to the Principal on 16 June was converted into a

decision to leave either the same evening after discovering the email exchanges about her or the next day when she spent her last day at Kimi Ora relieving for a colleague.

[65] In the eight weeks before Ms Jones shared the emails with the Board she instructed her lawyer who raised a personal grievance based on her constructive dismissal. Although Mr Barrett did not use that phrase in his letter of 10 July, that is in essence what he was alleging on Ms Jones' behalf. His letter referred to Ms Jones' belief that the school's management had embarked on a course of conduct to pressure her to resign. He also referred to her conclusion that she did not wish to return to her employment "*if she can negotiate suitable exit arrangements*". The exit arrangements she sought included a compensatory payment for humiliation, loss of dignity and injury to her feelings, which is one of the discretionary statutory remedies available where an employee is found to have a personal grievance.

[66] Mr Barrett did not ask the Board to address and remedy the issues he had raised and gave the Board no indication that Ms Jones wished to return to her employment. The focus of his letter was to obtain a suitable exit package for Ms Jones. I agree with Ms Heaton's submissions that where an employee claims the employer has embarked on a course of conduct or breached a condition of employment by failing to take steps to address a problem, or allowing a state of affairs to exist, it is necessary first that the employer has been made sufficiently aware of the problem to be able to do something about it. In this instance Ms Jones appeared to want only a satisfactory exit arrangement to address the problem she notified.

[67] I conclude she had already decided she would not be returning to her employment, the only issue for her being the terms upon which she would leave. I do not accept Ms Jones' claim that her resignation of 8 September 2014 was caused by the Board's letter of 29 August 2014. The letter merely formalised the decision she had made some weeks earlier. The fact that she failed in her endeavour to negotiate exit arrangements of her choosing does not validate her claim to have been constructively dismissed.

Effect of the Board's breach of its contractual good employer *obligation to Ms Jones*

[68] I have found the disparity between the treatment the Board accorded to the two colleagues whose email exchanges upset Ms Jones, and the treatment the Board accorded her for accessing the emails to have been a breach of the Board's contractual

obligation to treat Ms Jones fairly and properly. However, that breach occurred after the event that triggered Ms Jones' decision to leave her employment. I have found she had concluded, by the date of Mr Barrett's 10 July letter to the Board, that she did not wish to return to Kimi Ora. By the time she learned how the Board had treated the two employees Mr Barrett had, two months earlier, conveyed that conclusion to the Board together with her condition for leaving, which was the negotiation of satisfactory exit arrangements.

[69] The parties' failure to agree to those arrangements at mediation did not result in Ms Jones returning to her employment. This is unsurprising given her clear acknowledgement that she had earlier decided she could not return. I find Ms Jones' departure from Kimi Ora had been accomplished before the Board's letter of 29 August 2014.

Conclusion

[70] Ms Jones has failed to establish that her resignation was caused by any action or inaction of the Board following the raising of her personal grievance on 10 July 2014. The difference in treatment accorded by the Board to Ms Jones and to the two employees who exchanged emails about her occurred after Ms Jones had made clear her intention not to return to her role at Kimi Ora. Therefore, while the Board did not act as a good employer in that respect, its failure was the catalyst only for the formalising of Ms Jones' resignation and not for her decision to leave her employment.

[71] In those circumstances no remedies are appropriate and no penalty for breach of its contractual duty will be awarded against the Board.

Determination

[72] Ms Jones' claim to have been constructively dismissed by her employer fails.

Costs

[73] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority