

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 125
3006851

BETWEEN MARGIE ORMSBY
 Applicant

A N D THE LIMITED STATUTORY
 MANAGER, POUTO PRIMARY
 SCHOOL
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Fiona McMillan, Counsel for Applicant
 Briar Webster, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 27 April 2017

**INTERIM DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] This determination addresses an application by Margie Ormsby (Ms Ormsby) for an interim injunction reinstating her to her position as Principal of Pouto Primary School. Ms Ormsby applies on the grounds that she was suspended from her position on 19 March 2017, which she says was not justified either substantively or procedurally.

[2] The respondent, the Limited Statutory Manager, Pouto Primary School (the LSM) opposes Ms Ormsby's application for interim reinstatement. It denies Ms Ormsby was suspended. The position it takes is that Ms Ormsby was transferred temporarily to other duties, from home, in accordance with Clause 8.5.1(a) of the Primary Principals' Collective Agreement. Alternatively, if she was suspended, then it was substantively justified.

[3] Whilst both parties have framed their respective positions in terms of an application for interim reinstatement, as Ms Ormsby's position has not been terminated, I have proceeded on the basis that Ms Ormsby's application is for an interim injunction restraining the respondent from continuing with her suspension and reinstating her to her duties as Principal at her place of work at Pouto Primary School.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this preliminary determination has not recorded all the evidence and submissions received from the applicant and respondent 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.

[5] By the consent of the parties, this matter has been determined on the papers.

Legal Framework: interim orders

[6] The basis upon which applications for interim injunctions are to be determined are settled and well established¹. In order for the Applicant to succeed the Authority must first be satisfied that there is a serious issue to be tried, or in other words an arguable case that the Applicant will succeed at the substantive hearing.

[7] Second, and if so, the Authority must determine whether the balance of convenience favours the making of the orders sought. The strength of the Applicant's case is one element of that balance of convenience, as is whether damages or other relief may subsequently be an adequate remedy for the ultimately successful party.

[8] Finally, the remedy of injunction being discretionary, the Authority must assess where the overall justice of the case lies in the meantime. There may be a variety of discretionary considerations that are applied to this test.

Background

[9] Ms Ormsby is employed as the teaching Principal at Pouto Primary School, a position that she has held since the later part of Term 3 of 2013. The terms and conditions of Ms Ormsby's employment are governed by the Primary Principals' Collective Agreement (the Collective Agreement).

¹ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142

[10] Ms Ormsby is currently away from her employment. The applicant's position is that Ms Ormsby has been suspended. The respondent maintains she has been temporarily transferred to other duties, from home, whilst an investigation is undertaken into various concerns including the management of the school, emotional safety of students, community concern over what they see as a low standard of education for the children and overall, dissatisfaction with Ms Ormsby's running of the school.

[11] Pouto Primary School (the School) is a small rural school located 60 kilometres south of Dargaville on the North Head of the Kaipara Harbour. The school currently has a roll of 24 students from Year 1 to 8. Ms Ormsby is supported in her role by one part-time teacher and one teacher aide/administration officer.

[12] The School received unfavourable Education Review Office (ERO) reviews in both 2013, prior to Ms Ormsby's appointment, and in June 2016. In June 2016 the ERO recommended that the Secretary for Education consider intervention under Part 7A of the Education Act 1989 in order to bring about various improvements to the school including, inter alia, the development of a school curriculum, developing teaching programmes that will promote students' active engagement in their learning, and strengthening aspects of governance of the school.

[13] On 22 September 2016, the Minister of Education, by virtue of his powers under s 78M of the Education Act 1989, appointed a Limited Statutory Manager to the School (the LSM). Pursuant to that appointment, the LSM was granted all functions, powers and duties of the School's Board of Trustees (the Board) as an employer (whether statutory or otherwise), curriculum management including teaching and assessment practice (whether statutory or otherwise), and advisory functions in communications, Board systems and processes.

[14] As at 22 September 2016, the LSM became Ms Ormsby's employer.

[15] Between June 2016 and November 2016, an appraisal of Ms Ormsby's performance was undertaken by Colin Davidson. His report was provided to the Board, who had engaged him prior to the appointment of the LSM, on 3 November 2016. The report made comment on the degree to which Ms Ormsby was meeting professional standards based on the appraiser's experiences and observation while within the school during three full-day visits, comments solicited from staff, from

trustees, parents and from documentation. The outcome of this appraisal was that, whilst Ms Ormsby was meeting some of the professional standards and others were under development, she was not meeting some of the critical standards, particularly those relating to management of the school.

[16] On 17 February 2017, a meeting took place between Ms Ormsby, the LSM and the Board to discuss Mr Davidson's Appraisal. The meeting was difficult as Ms Ormsby's role as principal was being called into question.

[17] Ms Ormsby's evidence is that she felt belittled, overwhelmed and distraught by the manner in which questions were asked of her. She felt her mana was not respected and says she had to leave the meeting early. The LSM acknowledges that it was a difficult meeting and that Ms Ormsby was crying.

[18] At 5pm that day Mr Mackie, the Board's Chairperson, arrived unannounced at Ms Ormsby's house. He had with him, in his vehicle, his two grandchildren who attend the School whom Ms Ormsby deposes could hear the conversation. Ms Ormsby's evidence is that Mr Mackie told her, despite her objections, that she had to take leave from the School and he would organise a relief teacher for the following week. An email from the LSM to Ms Ormsby on 21 February 2016 confirms that the LSM was aware that Mr Mackie had asked Ms Ormsby to take leave. That email confirmed that it was the role of the LSM to make staffing decisions and not Mr Mackie and asked Ms Ormsby to advise what type of leave she was taking.

[19] After an exchange of correspondence, Ms Ormsby provided a medical certificate which placed her on sick leave from 17 February 2017 for a period of four weeks.

[20] On 15 March 2017, a meeting took place between Ms Ormsby, Mr Vern Stevens (Ms Ormsby's Principal support person), Roy Fletcher (Ms Ormsby's NZ Educational Institute Representative), the LSM and Eric Woodward (NZ School Trustees Association) to discuss concerns which Ms Ormsby and the LSM had. The outcome of this meeting was that the LSM apologised to Ms Ormsby and the parties agreed to move forward with agreement reached that Ms Ormsby would return to work on 20 March 2017 and a plan would be put in place to provide her with support and guidance.

[21] That day the LSM advised the Board of Ms Ormsby's return. Her advice was met with a call from Maryanne Davies (Ms Davies), a Board Member, expressing concern about Ms Ormsby's return. What was said by Ms Davies to the LSM differs in the affidavits filed by Ms Davies and the LSM. Ms Davies' evidence is that she told the LSM that she had received a number of reports from others in the community that their children did not want Ms Ormsby to come back to school and if she did they would remove their children from the school. Her evidence is that members of the Pouto community had commented that literacy and numeracy for some children had been going backwards, but had improved since the temporary teacher was brought in; that children were now wanting to go to school; that one student had said that Ms Ormsby made her feel dumb; and that many members of the community were concerned and did not want her back.

[22] The LSM's evidence however goes further. The LSM deposes that Ms Davies told her that her children, as well as others, were saying they did not want Ms Ormsby back as she "*got angry and grumpy when they could not do the work*". In addition, the LSM deposes that Ms Davies told her that "*she never allowed her partner to come to School as she was concerned what he might do as he was angry with the way Ms Ormsby treated everyone*".

[23] On 17 March 2017 Ms Ormsby deposes she was advised by Mr Fletcher that Mr Woodward had contacted him and advised that Board members did not want Ms Ormsby back at school and that she was asked to stay away from work a bit longer.

[24] The following day Ms Ormsby emailed the LSM reminding her she had medical clearance to return and that it had been agreed she would be returning on 20 March 2017. She asked the LSM why she was being asked to stay away, how long she was being asked to stay away for, and what the conditions of her being on leave were.

[25] On 19 March 2017, following attempts by Mr Woodward to contact Mr Fletcher by phone, Ms Ormsby was forwarded an email from Mr Woodward. This email stated (verbatim):

Tried phoning. I can confirm that LSM has serious concerns for emotional safety of principal and also concern for safety. Community disquiet seems strong & reports are they do not want principal back. Concerns also for emotional safety of students, possible lack of educational progression, lack of structure, age/level appropriate subject matter, claims students (some at least)

are “put down” and claims that students are happily attending school now because they feel safe, respected, receive interesting lessons and are realising just how rewarding school can be. Parents claiming they see more progress in their children in last four weeks than last few years.

LSM asks that principal work from home, this coming week (she will need to talk to principal about work to be done at home) to provide time for. LSM to inquire into all of the concerns raised and ensure safety of principal and students. LSM will engage independent expert to interview students, maybe staff and parents also, to ascertain depth of disquiet, whether claims have substance or not and provide a report to LSM.

Can you advise if principal will agree to work from home, or not. If not LSM will be at school early Monday to instruct principal to work from home for safety reasons.

[26] In response to concerns raised by Ms Ormsby, the LSM wrote to Ms Ormsby on 19 March 2017 explaining her concerns and the reasons for her decision to instruct Ms Ormsby to remain at home on discretionary leave for one week while an investigation into the various concerns was undertaken.

[27] The LSM’s letter of 19 March 2017 set out the following concerns:

- (a) The Board were concerned about Ms Ormsby’s return to work because they had not had the chance to address a number of concerns relating to the management of the School, emotional safety of the students, community concern regarding low standard of education for their children, and dissatisfaction with Ms Ormsby’s running of the school;
- (b) Threats by parents to remove their children from the school if Ms Ormsby returned because in the last four weeks they had seen what a difference another teacher could make;
- (c) The feedback in the community is that children are happy and wanting to come to School, which many had not seen before;
- (d) Children were saying on the bus that they did not want Ms Ormsby back, that she gets angry and grumpy if they cannot do their work and that one child had said that Ms Ormsby made her feel dumb when she could not reach the levels Ms Ormsby wanted;
- (e) The school community was angry and she was not confident that Ms Ormsby would be emotionally safe if she went into that environment.

Ms Ormsby's physical safety could also be at risk although there was no real evidence to support this;

- (f) That a longer term concern for the Board was that if Ms Ormsby returned one and possibly more families would be ready to leave on Monday and that the role could drop dramatically meaning the School could close.

[28] On 20 March 2017, the LSM engaged an external independent consultant, Larry Forbes (Mr Forbes), to conduct an independent review into how the Board is meeting its obligations in relation to Health and Safety. The review was to include a specific focus on safety based concerns raised by children, staff and parents. As part of his review, inter alia, Mr Forbes' report says he met with members of staff, parents, children and trustees and read the June 2016 ERO report. The information he obtained raised, in his view, several "red flags" which he felt needed immediate attention. These red flags were addressed in his preliminary report of 23 March 2017 and final report of 25 March 2017.

[29] On 24 March 2017, the LSM wrote to Ms Ormsby advising that an independent inquiry had commenced and the preliminary interviews of students and some parents had resulted in several allegations of serious misconduct. This conduct included an allegation of Ms Ormsby throwing dusters (or whiteboard erasers), angrily slamming desks shut, shouting or yelling at students, telling some students that they would not succeed, creating a classroom atmosphere or culture of fear by students of her, and parents having similar claims including fear or reluctance to approach Ms Ormsby. On the basis of these allegations, the LSM advised Ms Ormsby that she was required to continue to work from home until further notice.

[30] On 27 March 2017, Ms Ormsby notified the Respondent of a personal grievance, sought immediate reinstatement to her position as principal and sought a public acknowledgment that her suspension had been unjustified. She also sought a halt to the investigation being undertaken by the LSM pending consultation with her about appropriate terms of reference for any investigation that may be necessary.

[31] On 27 March 2017, the LSM's solicitor wrote to Ms Ormsby's solicitor enclosing a copy of Mr Forbes' report dated 25 March 2017. The letter sought her reply to the following:

- (a) The concerns raised about her behaviour in the classroom;
- (b) The concerns raised about child/teacher/principal relationships;
- (c) What actions she believes are necessary to promote a safe and happy environment for everyone, specifically the children;
- (d) How she can engender trust and confidence within the community about her teaching practices; and
- (e) The parental concerns noted in Mr Forbes' report about learning and lack of progress.

[32] This letter also proposed that Ms Ormsby be suspended on full pay and feedback was sought on that proposal. To date Ms Ormsby has not provided her response to the concerns raised by the LSM as she says requests for information from the Respondent to enable a response have not been provided.

[33] Ms Ormsby remains away from work on full pay.

Serious question to be tried?

[34] As is standard practice with interim injunctions, the evidence before the Authority for the purpose of determining this application has been presented in affidavit form by witnesses and is untested. Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[35] To determine whether or not an arguable case is made out, the onus is on Ms Ormsby to establish that her employment condition(s) have been affected to her disadvantage. The burden then shifts to the LSM under s 103A to establish that her actions, and how she acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for Ms Ormsby's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Has the Applicant been suspended?

[36] There is a dispute between the parties as to whether or not Ms Ormsby is suspended. After careful consideration of the untested evidence I find that Ms Ormsby was suspended from her position on 19 March 2017 and that she remains suspended. My view is reinforced by the following:

(a) The LSM records in her letter of 19 March 2017 that Ms Ormsby was being placed on discretionary leave for one week while an investigation into the various concerns was undertaken.

(b) Discretionary leave is addressed in the Collective Agreement at Clause 7.8 which provides:

7.8.1 The employer may, where there are special circumstances, grant discretionary leave with or without pay to any principal during periods when the school is officially open for instruction, provided that such leave does not unreasonably impinge upon the operational requirements of the school. Before approving any discretionary leave, the employer shall ensure that the granting of such leave complies with any funding arrangements applying to the school in respect of such leave.

(Note: Where leave is granted for family reasons, family shall include: partner, child, sister, brother, parent, grandparent, grandchild, kaumatua, mokopuna, tamaiti whangai, matua whangai, near relative, near relative-in-law, a member of the household or a person dependent on the principal.)

(c) I accept the Applicant's submission that "Discretionary Leave" is something which requires mutual consent. There is nothing in the Collective Agreement to suggest Discretionary Leave can be imposed by an employer without an Employee's consent.

(d) Discretionary leave was neither requested nor consented to by Ms Ormsby. The documentary evidence is that on 19 March 2017 Ms Ormsby told the LSM that she was not happy taking leave and on 26 March 2017, after the LSM instructed her to remain away, she told the LSM that she did not want to be away from the School on discretionary leave.

(e) I do not at this preliminary stage accept the Respondent's argument that Ms Ormsby was "temporarily transferred to other duties" rather than suspended. Any duties Ms Ormsby performed from home appear to be those which she ordinarily performed rather than "other duties" as required by Clause 8.5.1 of the Collective Agreement.

Is the Suspension Justified – s 103A?

[37] The reasons for the LSM suspending Ms Ormsby's position have been addressed earlier in my determination and are set out in her letter of 19 March 2016.

[38] All but the LSM's claims for Ms Ormsby's emotional and physical safety, and that of the students, are claims regarding Ms Ormsby's competency. The parties have agreed the process to be followed when considering matters of competency at Clause 8.3 of the Collection Agreement. Suspension is not an option under this provision. Clause 8.3.2(f) provides that if any of the steps (a)-(e) in Clause 8.3.2 fail to resolve the matter(s) of competency concern, the Board may, where justified, dismiss the principal in accordance with clauses 8.6 (dismissal) or 8.7 (instant dismissal) and without the need to follow the provisions of Clause 8.4 (discipline). Any suspension on the grounds of competency alone is accordingly unjustified.

[39] The grounds for suspension were, however, wider than competency. The LSM's correspondence of 19 March 2017 specifically stated that her immediate concern was that "*the school community was angry and that she was not confident that Ms Ormsby would be emotionally safe if she went into that environment*". She also noted that it was possible that Ms Ormsby's physical safety could be at risk, although she acknowledged she had no real evidence to support this. In addition, she addresses concerns for the emotional safety of students.

[40] The LSM deposes that she reached her conclusions based on a telephone conversation with Ms Davies and "*the strengths of Maryanne's concerns*". The difficulty I have is that Ms Davies does not depose as to speaking with the LSM about any safety concerns relating to the children or Ms Ormsby. The focus of Ms Davies' evidence is on Ms Ormsby's competency. Mr Forbes' reports post-date the decision to suspend and did not therefore form part of the LSM's decision to suspend. I am therefore satisfied that a suspension on the grounds of concern as to Ms Ormsby's emotional and/or physical safety or that of the students' emotional safety was also unjustified.

[41] In its submissions, the Respondent submits if the Authority finds that Ms Ormsby was suspended that it is arguable that it did not follow the process required by the Collective Agreement. I agree.

[42] There is no evidence of any investigation taking place before the LSM made her decision to suspend. A fair and reasonable employer could and should have considered the following circumstances which were available to her and which call into question the complaints being made:

(a) The 2016 ERO report. This report made no mention of any safety concerns despite recording that during its review the ERO checked “*emotional safety of students (including prevention of bullying and sexual harassment)*” and the “*physical safety of students*”. The report identified, inter alia, that Ms Ormsby “*has been effective in supporting students’ identity as Maori and maintaining positive relationships with the community*”.

(b) Mr Davidson’s Appraisal. Ms Ormsby’s performance had been appraised by Mr Davidson, who spent 3 full days at the school over a 6 month period. Mr Davidson described Ms Ormsby in his November 2016 report as “*a caring teacher, and her background in special education is evident in the way she deals with children with diverse needs*”. He commented “*One parent I spoke to, spoke very highly of the change in her child since Margie’s arrival at the school, and of how parents regarded her as tumuaki...All felt that there was a new feeling of positivity coming from the top and being transferred to the children*”. When considering her performance in relation to the Principal Professional standards his comments included “*The general environment is safe, and the basic ingredients for learning are in place*” and “*...I saw nothing to suggest there were any teacher-learner issues*” and “*the teaching staff I saw were all cheerful, and enjoyed good relationships with the children...*”.

(c) Mr Davidson’s letter to the Board in June 2016 where he recorded his preliminary findings including:

“A comment from a parent (and made directly to me) that her children now wanted to come to school since Margie had arrived means some of her passion and personal interest is being used to empower learning at Pouto School.”

“...my first impressions were very much of a happy school.

(d) The LSM's own observations. The LSM does not depose to having viewed any safety concerns during the 3 month period from October to December 2016 when she observed the classrooms.

[43] Ms Ormsby was not provided with any opportunity to dissuade her employer from the course of action it had decided upon, which was to remove her from the workplace immediately. The Collective Agreement creates a contractual expectation of consultation prior to a decision for suspension being made unless exceptional circumstances existed. There were no exceptional circumstances relating to the situation which required immediate suspension without consultation. In addition, the defects in the process followed by the Respondent were not minor and did result in Ms Ormsby being treated unfairly.

[44] On the basis of the untested affidavit evidence, I am satisfied there is a strongly arguable case that the LSM's action in suspending Ms Ormsby was not what a fair and reasonable employer could have done in all the circumstances. I am also satisfied that it is arguable that Ms Ormsby has suffered a disadvantage as a result of this action. Whilst she remains on full pay during the course of her suspension, and may not have suffered financial disadvantage, it is evident that the suspension and the way in which it was affected has disadvantaged Ms Ormsby.

Balance of Convenience

[45] The Authority is required in considering the balance of convenience to assess the relevant detriment or injury the parties will incur as a result of the interim injunction being granted or not.

[46] Ms Ormsby has deposed that it is important that she returns to work and that her return is announced as soon as possible. The longer she is away the greater damage she says is done to the school and to her standing as the professional leader of the school. Ms Ormsby deposes that she is willing to cooperate with a fair process for identifying and resolving any issues at the school and is able to work with the LSM.

[47] The LSM has a number of objections to Ms Ormsby returning to the workplace. It submits that the Authority must take into account the potential impact on students if Ms Ormsby was to return before a Child Psychologist has been appointed to address the concerns raised. It submits the Authority needs to take into

account that parents will withdraw their children from the School which will result in the School and community suffering and funding being decreased. It further submits the school culture has markedly improved whilst Ms Ormsby has been absent and that it is important that this improvement is maintained until the investigation is completed. Once the process is complete, it submits they will know how students can be protected and supported and if there is to be a return to work by Ms Ormsby it can be arranged with appropriate consultation with Ms Ormsby, the community, parents and Students.

[48] I have considered both parties' positions. I find it likely that Ms Ormsby's reputation has been damaged. If Ms Ormsby was to return to her duties as principal then she could reduce the impact of the suspension on her reputation. In addition, there may be professional consequences to Ms Ormsby of remaining suspended which can be mitigated.

[49] In reaching this view I have been influenced by the contact which Ms Davies has had with other parents following Ms Ormsby's suspension. Ms Davies is a Board member with knowledge of Ms Ormsby's suspension, as well as being a parent and a member of the school staff. On 10 April 2017, Ms Davies drafted a letter expressing concerns with Ms Ormsby's performance. This letter was then circulated to parents and board members for their signatures. The letter stated, inter alia, the "collective of Pouto school student parents" who signed the letter were not willing to keep their children at the School if Ms Ormsby was allowed to return to the School as Principal. The letter, which is an annexure to Ms Davies' affidavit, was signed by 7 people; a number of which I understand are board members. Ms Davies also annexed another letter from another parent who she had contacted.

[50] I have carefully considered the Respondent's concerns regarding the students' safety, and the potential impact on students if Ms Ormsby was to return before a Child Psychologist has been appointed to address the concerns raised in Mr Forbes' report. I am concerned by the alleged comments made by the children in Mr Forbes' report particularly the comment by one child who stated "*I felt terrified inside but I didn't want to show it*". However, when I have viewed this comment in the context of the following evidence, it has resulted in me giving this less weight than I might otherwise have done:

- (a) Mr Forbes has not sworn an affidavit;
- (b) At the time of Mr Forbes' review, Ms Ormsby had only worked approximately two weeks of the school year, having been away from the school from 17 February 2017. It is likely therefore that any comments made by the children interviewed by Mr Forbes related to the previous year. In that previous year Mr Davidson, and the LSM (from October to December 2016), had spent time observing the classrooms. No inappropriate behaviour or safety issues were raised by them nor were they raised by the ERO during its review in June 2016.
- (c) Mr Forbes' was not provided with a copy of Mr Davidson's report;
- (d) Mr Forbes' report states he predominantly spoke with the children in the senior class. According to Mr Forbes, Ms Ormsby teaches the junior class.
- (e) No safety concerns have been raised by Ms Davies in her affidavit or in the letters which she exhibits signed by parents of children at the school. Her concerns, and those of the other parents, appear to be focused on Ms Ormsby's competency.

[51] I have no evidence that a reduction in the School role, if children were withdrawn, will result in either the School closing or its funding being reduced and have therefore given this submission no weight.

[52] I have taken into account that I am able to offer the parties an early substantive hearing date during June or July 2017. This is just over two months from now and takes into account a timeframe for mediation. A decision will be issued either orally at the time, if this is practicable, or within three months from the date of the conclusion of the investigation meeting process.

[53] For the reasons set out above I find the balance of convenience favours an order restraining the Respondent from continuing with the Applicant's suspension.

Is there an adequate alternative remedy?

[54] The Applicant submits that damages would not be an adequate alternative remedy in this case. The longer Ms Ormsby is away from the School the more her reputation in the small community suffers, the more stress she suffers, and the more difficult her return to her role becomes.

[55] The Respondent submits that any financial loss or detriment can be adequately met by an award of damages. It submits that any community knowledge as to the reason for Ms Ormsby's absence is due to her disclosing this and not the School so it should not be penalised.

[56] While financial remedies can, to some degree, compensate for what may be an unjustified suspension I do not consider this is an adequate remedy in this case. As found earlier, Ms Ormsby's reputation has been damaged and will continue to be damaged whilst she is away. There is currently no evidence that supports the Respondent's submission that Ms Ormsby is responsible for the community knowing of the reasons for her suspension. I refer to my earlier findings regarding Ms Davies' contact with the Pouto Community.

[57] I am therefore satisfied that damages are not an appropriate remedy and that an order restraining the Respondent from continuing with the Applicant's suspension is appropriate.

Where does the overall justice lie?

[58] I must now stand back and consider where the overall justice lies. I have found that Ms Ormsby has a strongly arguable case and that the balance of convenience favours her. I find that the overall justice of the case requires that an interim injunction be granted. I will make the order effective from Monday 1 May 2017 being the first day of the second school term.

Non Publication orders

[59] Before issuing this determination I made enquiries of the parties as to whether non-publication orders were being sought. The Applicant advised the Authority that she was opposed to non-publication orders being made. The Respondent sought non-publication orders prohibiting the names of the parties being published together with any particulars that might identify them.

[60] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of the Court's discretionary powers has been traversed by a full Court in *H v A*² and recently addressed by Judge Inglis in *XYZ v ABC*³ where she considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*⁴

[61] In *Erceg* the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. The Supreme Court said:⁵

... the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

[62] After considering the parties' submissions, and balancing the respective considerations identified by each of the parties, I am satisfied that the requisite high standard has not been reached so as to grant a non-publication order. Ms Ormsby is the Principal of the only school in Pouto, and the School is the focal point of the community alongside the Marae. The public has a legitimate interest in knowing the identity of the parties. I am not satisfied that adverse consequences would flow from publication at this stage of the proceedings. I do not accept as likely the Respondent's

² *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78]

³ [2017] NZEmpC 40, EMPC 69/2017

⁴ *Erceg v Erceg* [2016] NZSC 135.

submissions that witnesses will change their evidence, or withdraw their children from the school, if they know this determination concerns Ms Ormsby or Pouto School.

Determination

[63] On the basis of the signed written undertaking as to damages provided by Ms Ormsby, and pending the determination of this proceeding or earlier order of the Authority, I make orders restraining the Respondent from continuing with the Applicant's suspension and ordering that Ms Ormsby be reinstated to her duties as Principal of Pouto Primary School from Monday 1 May 2017.

[64] In light of this interim determination the parties may now benefit from attending another mediation to resolve the substantive issues. I direct the parties to attend mediation prior to 7 June 2017.

Further Steps

[65] Should the parties not settle the substantive issues at Mediation, the Applicant is to advise the Authority in order that a telephone conference can be arranged to organise a date for a substantive investigation. It is likely that an early hearing date in June or July 2017 will be able to be accommodated.

Costs

[66] Costs are reserved and will be dealt with when dealing with costs relating to substantive matters.

Jenni-Maree Trotman
Member of the Employment Relations Authority
