

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 233
5599036

BETWEEN KATENE PAENGA

Applicant

A N D

BOARD OF TRUSTEES, TE
KURA KAUPAPA MAORI, O
PUAU TE MOANANUI-A-
KIWA

Respondent

Member of Authority: Nicola Craig

Representatives: Richard Harrison, Counsel for Applicant
Frances Linde, Counsel for Respondent

Investigation Meeting: 29, 30 and 31 August and 1 September 2016
at Auckland

Submissions received: 9 and 30 September 2016 for Applicant
23 September 2016 for Respondent

Date of Determination: 8 August 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Katene Paenga was unjustifiably dismissed by the Board of Trustees of Te Kura Kaupapa Maori, o Puau te Moananui-a-Kiwa**
- B. A timetable is set for further submissions on the issue of reinstatement.**

Employment relationship problem

[1] Katene Paenga was employed by the Board of Trustees, Te Kura Kaupapa Maori, O Puau Te Moananui A Kiwa (the Kura Board or the Board), as Tumuaki/Principal from 2006 until 24 September 2015, when he was dismissed.

[2] The Kura is a Maori language immersion school in Auckland. When Mr Paenga was appointed the Kura was a primary school for Years 1 to 8 students. It was extended and by 2010 had become a full composite school for Years 1 to 13. The school had grown significantly in size in the time which Mr Paenga had been principal, going from around 60 students to around 150.

[3] Mr Paenga claims that his dismissal was unjustified both substantively and procedurally. The Board says that the dismissal was justified.

[4] An investigation meeting was held on 29, 30 and 31 August and 1 September 2016. I heard from Mr Paenga and five witnesses with varying involvement in the Kura: Aroha Mane, Sandra Walker, Jean Davis, Sarah Mackie, Raukura Ratapu and Tania Daniels-Hopa. I also heard from Lynley Paenga, Deputy Principal and teacher at the Kura, as well as being Mr Paenga's wife.

[5] On behalf of the Kura Board I heard from Chairperson Pereniki Tauhara, board members Mere Austin and Keith Morris, and the Kura's Executive Officer Hemi Austin.

[6] This determination, reserved at the conclusion of four days of investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions from the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided that, as permitted by s 174C(4) of the Employment Relations Act 2000 (the Act), that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in s 174C(3)(a) of the Act.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the

parties 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.

Issues

[8] The issues for investigation and determination are:

- i. Was Mr Paenga unjustifiably dismissed by the Kura?
- ii. If so, what remedies (if any) should he receive, including consideration of reinstatement?
- iii. Should either party have to contribute to the others' costs?

[9] Mr Paenga's personal grievance claims were originally raised by a different representative to that who represented him in the Authority. At that stage aspects of the disciplinary process, as well as the issue of good faith, were identified as disadvantage grievances. However, in the Authority those issues were dealt with as part of Mr Paenga's unjustifiable dismissal claim, as so I do not list them above as separate grievances to be considered.

[10] Mr Paenga also initially claimed that he was subject to an unjustified action regarding comments by the Kura Board chair at a whanau hui. However, these comments were made after Mr Paenga's dismissal, and so instead were argued in submissions as part of the basis for establishing Mr Paenga's claim of humiliation, loss of dignity and injury to feelings as a result of his dismissal.

The Kura's governance system

[11] The Kura is established as a Kura Kaupapa Maori under s 155 of the Education Act 1989. This means that it must operate in accordance with Te Aho Matua, a constitutional and philosophical framework. This includes a greater involvement of whanau than might be the case in other schools.

[12] Although the Kura has a board of trustees there is also a tradition of having whanau hui as an opportunity for whanau and community members to be involved in what was happening at the Kura. Historically it appears that the whanau meetings had

played a more substantial role in governance of the organisation and on occasions there was no clear division between the Board and the whanau group.

[13] Mr Paenga saw himself as having responsibility to whanau as well as the Board. Sometimes board meetings seem to have occurred at or immediately after whanau hui. A former Board member Ms Daniels-Hope described the whanau hui as a double for board meetings.

[14] In recent times the Kura Board gradually became more involved and active in governance matters, especially financial matters. Board members placed this process as starting at times varying from 2011 to 2014. The process included appointing Mr Hemi Austin, Mere Austin's son, as the Board's executive officer in July 2015. Board members have undertaken significant professional development to upskill themselves.

[15] There were monthly or more frequent Board meetings. Mr Paenga also met with the Board Chair, Mr Tauhara, on a number of occasions, although not necessarily on a regular cycle. Sometimes in 2014 this was weekly.

Building development

[16] The Kura has substantially increased in size over recent years. This led to a multi-million dollar building project in 2013 to 2014. There was wide acknowledgement by witnesses for both parties that 2014 was a very busy year for the Kura.

[17] Mr Paenga described himself as the Kura's overseer of the building project for the new primary school buildings (Stage 1) and the new secondary school buildings (Stage 2). This involved extensive dealings with both the Ministry of Education and the construction company. The Ministry provided extra funding to enable Mr Paenga to become a walking principal (one with no teaching responsibilities) so that he could oversee the building work.

Reports

[18] In June 2014 the Kura received an Education Review Office (ERO) report, which identified further areas which needed reporting on.

[19] In July 2014 the Kura's auditors' annual report identified where policies and procedures were required for good governance and areas of legislative non-compliance.

Appraisal

[20] With the possible exception of one performance appraisal some years earlier, there had been no performance processes in place for Mr Paenga, until an appraisal was suggested by the Board in 2014. An appraiser was arranged by Mr Tauhara but the time suggested by her was term break time between terms three and four when Mr Paenga wanted to spend time with his family, so he asked for a change.

[21] The appraiser was then not available and Mr Tauhara could not find anyone else who was available in term four. No appraisal was carried out.

Issues with Mere Austin

[22] An issue arose at a board meeting in November 2014. Mr Paenga believed that he had heard Board member Mere Austin swear at him in a serious manner. Mr Paenga became upset and called in writing for Ms Austin's resignation. Ms Austin's explanation was that she was using a Maori phrase. This sounded like a English swear word. Other meeting participants agreed. Mr Paenga subsequently apologised to Ms Austin and retracted what he had said.

[23] Ms Austin says that there were other times when Mr Paenga became agitated and started pacing at meetings, but she was unable to clearly identify when these were. Mr Tauhara was aware of some tension with Mr Paenga although his comment related to Mr Paenga speaking at a Board meeting before a relevant document had been tabled with the Board, resulting in another member objecting.

[24] Mr Paenga accepts and acknowledges that he was under stress, largely as a result of the building project, which possibly influenced his behaviour. Ms Austin acknowledges that Mr Paenga became stressed and exhausted in 2014 and says that she talked to both him and Lynley Paenga about that. She says that the building project was a big job for one person.

[25] Ms Austin's sense was that she had had been raising issues or concerns with Mr Paenga for some time but meeting resistance from him. She says that she wishes that there was a paper trail of her actions as she was unable to provide details of them.

Sabbatical leave and holiday

[26] In August 2014 Mr Paenga discussed with the Chair the possibility of studying for his masters' degree in 2015 and taking sabbatical leave to do that. This was partly as Mr Paenga considered that he needed time out from the busy Tumuaki role. Mr Tauhara signed Mr Paenga's sabbatical leave application. In early September 2014 Mr Paenga requested to the Board that he be allowed to take leave to enable that study. The Kura Board agreed. There was some evidence from Board members of being shocked at having to find a replacement so soon.

[27] In December 2014 Mr Paenga was contacted by a Board member proposing that the Board assist with some of the costs of a trip to Australia for Mr Paenga and his family, partially as an acknowledgement of the work done on the building project. The Board minutes of 23 December 2014 note that "*the decision was made as a gesture of goodwill supporting the Tumuaki and his whanau after a year that included the development of the Wharekura and reshaping of Kura Tuataki*".

[28] Mr Paenga finished work around 19 December 2014.

Appointment of an acting principal

[29] In Mr Paenga's absence members of the Kura Board took on a more active role in the day to day running of the Kura. The Board needed to appoint an acting replacement for Mr Paenga.

[30] Mr Paenga recommended that his wife, Lynley Paenga, a senior teacher at the Kura, be considered, without her knowledge. A formal process was later started and Mr Paenga's son, who was a deputy principal at another school, applied for the position. An interview panel recommended his son's appointment, but this was not accepted by the Board.

[31] Instead the Board appointed Ngaire White to the role. She is Mr Tauhara's sister. She initially attended a Board meeting on 13 January 2015 to answer questions and was appointed on an interim basis until the end of February to allow a formal appointment process to proceed.

Meetings in early 2015

[32] In January 2015 Lynley Paenga went to a meeting with two Board members about a situation of own situation. Mr Paenga went as her support person. Mr Tauhara and Ms Austin were unhappy with Lynley Paenga's behaviour at that meeting although this matter was later resolved. There was a sense of Mr Paenga's involvement contributing to tension with Board members, although his own behaviour was not at issue.

[33] A meeting was held between Mr Paenga, Mr Tauhara and Ms Austin on 28 January 2015. Mr Paenga's notes for a meeting, which were not disputed, show him stating that he has felt tired, fatigued and stressed over the last 18 months for several reasons including the ERO process and the building development. He notes that there are areas at the end of 2014 that need closure. He offers to provide information to the acting principal/s for guidance and support.

[34] Mr Paenga also offered to work one day a week with the acting principal but that offer was rejected. It was agreed that Mr Paenga would have the first three terms of 2015 off on sabbatical.

Approach to Mr Paenga and the McDonalds meeting

[35] At some point a decision was made by Mr Tauhara to approach Mr Paenga. There is no reference in the Board minutes for the 13 January, 11 February or 17 February 2015 to what was about to happen.

[36] By letter dated 13 March 2015 the Board Chair wrote to Mr Paenga. This letter makes broad reference to “*some obvious and serious systems failure*” without specifying what those are. There is reference to the Board considering that there has been a breakdown of trust and confidence within key relationships and that the Board is increasingly of the view that it was “*time to refresh at the senior management level*”. The prospect of a “*leadership change process*” is mentioned.

[37] The Chair invited Mr Paenga to meet to put its concerns to him “*kanohi ki te kanohi*”¹. The discussion was agreed to be a confidential, without prejudice process. Mr Tauhara accepts that the meeting was carried out under his own mana rather than as a Board decision. A meeting was arranged at McDonalds.

[38] There was no resolution forthcoming from the McDonalds meeting.

Follow up letters

[39] The Kura Board wrote to Mr Paenga on 22 April 2015 in a similar vein to the 13 March 2015 letter, but including this time a reference to resolution of the problems “*most likely*” involving a performance management process with a number of senior staff, including him. The Board was said to be increasingly of the view that it was time to refresh at senior management level. Reference is also made to cl 4.3 of the relevant collective agreement².

[40] Mr Paenga’s representative replied. On 20 May 2015 the Kura Board wrote to Mr Paenga’s representative seeking to discuss a number of matters regarding the running of the Kura. Although more specific than the previous letter the references are still relatively broad, for example, to “*questions around financial management systems and prudent decision- making*”. It was noted that Mr Paenga’s response had

¹ Face to face

² Referred to at [66] below

simply been to inform the Board of his intention to return to work at the conclusion of his study leave.

[41] In the letter Mr Paenga was invited to attend mediation with the Ministry of Business, Innovation and Enterprise. Mediation was attended but did not result in an agreed outcome.

Letter of 10 August 2015

[42] The Kura Board's next letter to Mr Paenga was dated 10 August 2015. A disciplinary process is invoked, alleging potential misconduct or serious misconduct. There is a list of concerns namely the recent ERO report, student achievement rates, lack of reporting to the Board, apparent unprofessional conduct by Mr Paenga and actions which appeared to expose the Board to legal liability. Those topics are expanded on in about five pages of points.

[43] The letter clearly identifies that it forms part of the disciplinary procedures set out in clause 6.2 of the collective agreement and that an explanation is sought.

[44] Mr Paenga is invited to attend a disciplinary meeting to respond to these allegations on 20 August 2015 at the Board's lawyers' offices. He was informed that dismissal was a possibility. As an alternative the letter offers Mr Paenga the opportunity to provide written submissions "*if that is his preference*".

[45] Over the next few weeks Mr Paenga's representative sought more details of matters in the 10 August letter, such as the names of staff. These were provided. Subsequently Mr Paenga changed representatives. The Board's representative then asked Mr Paenga's representative when the written response would be provided and sought to set a meeting date.

[46] Over fifteen documents were provided by the Board's lawyer on 9 September at the request of Mr Paenga's representative.

[47] Mr Paenga's representative asked on 10 September for an extension, preferably until 18 September. The Board was informed that Mr Paenga would not be attending a disciplinary hui but instead would be responding though his counsel in writing. The Board granted an extension to 16 September.

[48] Mr Paenga answered the 10 August allegations in a 20 page letter to the Kura Board dated 16 September 2015. The letter notes Mr Paenga's view that the way that the 10 August letter was set out and the lack of detail regarding some allegations made it difficult to deal with the allegations. He also notes the age of some of the matters, including before 2013, making them difficult to recall.

[49] On 17 September, the Chair asked two questions to Mr Austin in his role as Administration Supervisor which Mr Austin was not able to provide answers for.

The decision to dismiss

[50] A Board meeting was held on 18 September 2015. Six of the nine trustees attended at the start of the meeting. Two (Ellanor Maihi-Rupapera and Keith Morris) had provided emails on the issue of Mr Paenga's employment supporting his removal.

[51] Attending initially was Ms Ratapu, a very newly appointed staff representative on the Board. She was informed that NZSTA³ had advised that as an employee she had a conflict of interest and could not be involved in the decision regarding Mr Paenga's dismissal. She was also new and did not consider that she had enough information to be involved.

[52] Ngaire White, the Acting Tumuaki/Principal also withdrew as having a conflict of interest. Ms Daniels-Hopa left during the meeting due to work commitments. This was during a discussion regarding Mr Paenga but before a decision was made.

[53] Those remaining were the Chair, Ms Austin, and Mr Heslop. The Authority did not hear evidence from Mr Heslop. The discussion in the minutes indicates that a decision was made to dismiss, although the formal motion is that the Board "pay Katene out without returning to Kura as well as his holiday pay".

[54] On 22 September 2015 Mr Tauhara met with Ms Daniels-Hopa and another trustee Kowhai Tamariki, who had not been at the meeting.

[55] Minutes of that meeting record Ms Daniels-Hopa saying that her decision has never changed from the beginning and the Chair asking how "*we can get you to*

³ NZ School Trustees Association

engage in the decision-making” Ms Daniels-Hopa is then noted to have agreed to move with the decision that the Board have decided. Ms Tamariki, who did not give evidence to the Authority, is recorded as having supported the decision to terminate.

[56] On 24 September 2015 the Kura Board provided a lengthy written response to Mr Paenga. The letter concludes advice of the decision to terminate his employment based on inadequate reporting to the Board, issues identified by the ERO and annual audit reports and failure to respond to those, and inappropriate employment of teaching staff. These concerns were identified as misconduct and inconsistent with the maintenance of trust and confidence between the parties. Mr Paenga was dismissed for misconduct and paid out two months’ pay in lieu of notice.

Whanau hui in October 2015

[57] Mr Paenga objects to statements made about him by Mr Tauhara at the whanau hui on 14 October 2015, when Mr Paenga was not present. He alleges that Mr Tauhara informed the hui that Mr Paenga had been dismissed for serious misconduct and had misappropriated funds in the Kura’s investment account containing \$270,000.

[58] Ms Mackie was at the whanau hui and made a complaint to the Board that the Chair had implied that Mr Paenga had taken money from an account for his personal use. She thought that there were upwards of 60 people at the hui. Ms Mackie had been involved with the kura for many years, but was unaware before this hui of any issue about a large sum (such as \$270,000) being unaccounted for. Ms Davis also gained an impression from the hui that money had been misused and that Mr Paenga was suspect. Ms Mane recalls the word “misappropriation” being used and this being connected with Mr Paenga.

[59] The Board denied that the Chair said that money had been taken for personal use.

[60] The minutes of the hui record He korero n ate Heamna (a talk from the chair) Mr Tauhara, which includes:

There is much speculation going around about Katene.... When the Board was first elected, it inherited a lot of historical issues. For example, there was said to have been \$270,000 that was not there. We learned that the money have been recovered by the Ministry. The Board has a deficit of \$100,000. The school was audited by five auditors who identified concerns. There has been a backlog of audit matters over the past seven years. We have been brought to task by the Ministry of Education and Auditors. In terms of personnel, employment agreements were not accurately documented. The recent Education Review Office Report states that that Principal had not been transparent with the Board.

All these matters have now been settled. The Board could not discuss these concerns with whanau because they are employment issues. The Board need to be extremely careful when making statements about employees, in public.

Given this understanding, the Board has prepared a formal statement regarding the termination of Katene Paenga.

[61] Mr Tauhara accepted that he made all of the quoted statement at the hui and then read the formal statement. That statement included reference to Mr Paenga being dismissed for serious misconduct and the Board having lost trust and confidence in him.

[62] Mr Tauhara denied using the word “misappropriation of funds” at the meeting and said someone tried to put that word in his mouth by asking whether he was saying that Mr Paenga had misappropriated funds. Mr Tauhara reported that his response at the hui was that no, he had not said that. Mr Tauhara denied that his words could have the implication that Mr Paenga was at fault regarding money.

[63] Ms Mackie complained to the Board that the implication at the meeting was that Mr Paenga had misappropriated the money.

[64] On behalf of the Kura it was accepted that it was an error to refer to “serious” misconduct when the Board had only found misconduct. This stemmed from the written statement read by the Chair. It was suggested that the mistake caused no prejudice to the applicant.

[65] There was evidence suggesting that a suggestion of financial misconduct had spread after the hui, but this was very much hearsay.

Employment Agreement

[66] Mr Paenga's terms of employment were governed by the Area School Principals' Collective Agreement 2013 to 2016.

[67] Part 2 of the collective agreement contains general provisions including cl 2.1 which sets out the following Board responsibilities:

2.1.2 The board shall ensure that a performance agreement with the Principal is in place and undertake an annual performance review as outlined in part four of this collective agreement.

2.1.3 The Board shall take all reasonable steps to ensure that the Principal is provided with adequate resources to fulfil the responsibilities and duties required of the Principal under this agreement.

[68] The Kura Board had not established a performance agreement with Mr Paenga.

[69] Part Four of the collective agreement focuses on professional leadership and annual performance review. It envisages an annual performance agreement being put in place and the principal being appraised against that each year.

[70] The collective agreement at Part 6 covers complaints, discipline and competence. Under cl 6.5.1 competency matters, for example, failing to meet the appropriate professional standard, allow the Board to put in place "*appropriate assistance and personal guidance to assist the Principal*". There is then a process if such assistance does not remedy the situation. This includes written provision of specific matters of concern, the corrective action required and the timeframe allowed.

[71] The disciplinary track is covered by cl 6.2. The Board was then required to put in writing the specific matters causing concern to enable the Principal a reasonable opportunity to respond⁴.

[72] Clause 6.2.1(c) gives the Board the opportunity to advise of corrective action required, but that was not something which the Kura Board took up.

⁴ Cl 6.2.1(b) of the collective agreement.

[73] Mr Paenga's job description from when he started in 2006 was still in place.

Unjustifiable dismissal claim

[74] Mr Paenga's unjustified dismissal claim had a number of bases. He challenges the reasons for his dismissal, saying that there were insufficient grounds to find misconduct on, and at most there may have been performance issues which were capable of remedy by Mr Paenga. He also challenges the process involved, including saying that there was inadequate inquiry and an absence of natural justice. Mr Paenga also alleged that the Kura Board breached various provisions of his employment agreement and the requirements of good faith.

[75] Having requested and received, during the course of the proceedings, minutes of Board meetings, reliance is also placed on the Education Act and the requirements on boards and board meetings contained there.

[76] The Kura Board says that Mr Paenga's dismissal was justified. When issues became apparent there was an attempt to address these informally but Mr Paenga is said not to have engaged or else take responsibility. Having carried out a process to assess the conduct, the Board found that misconduct was established and that it lost trust and confidence in Mr Paenga's ability to carry out his functions as Tumuaki.

[77] The Board relies on *Chief Executive of the Department of Corrections v Imo*⁵ where the Court listed factors to assist in determining where behaviour fell on the spectrum between what was described as the two extremes of poor performance and serious misconduct. These included whether the employee's actions were deliberately inimical to the employer's interests, the effect of the actions on the business and whether the employee could reasonably have been given the opportunity to improve.

[78] The Board considers that the combined effects of the findings of the ERO Report, the lack of student achievement rates, inadequate reporting to the Board and actions concerning staff were inimical to the Board's interests. The Board lost trust and confidence in Mr Paenga.

⁵ EC, Auckland, AC57/07, 14 November 2007 at [49]

[79] The Board submits that any procedural defects were minor, did not result in Mr Paenga being treated unfairly and were attributable to his refusal to engage with the procedural steps taken by the Kura Board.

[80] I must decide whether I am satisfied that dismissal was one of a range of justifiable actions open to a fair and reasonable employer in these circumstances, considering the matter objectively⁶. I must not substitute my opinion for the employer's opinion.

[81] I note the statement in *Lewis v Howick College Board of Trustees*⁷:

As in the cases of other professional employees whose very livelihoods are affected by a dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence ... affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professionally registered to practice. Dismissals of teachers...trigger automatically a vocational or professional registration investigation. As with any other professions there is little, if any, opportunity for employment in New Zealand without registration... Put simply, allegations of misconduct or incompetence place teachers... in double jeopardy of their livelihoods.

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

[82] I will look firstly at the reasons for dismissal. My impression from the dismissal letter and the submissions on behalf of the Board is that the loss of trust and

⁶ S 103A of the Act

⁷ *Lewis v Howick College Board of Trustees* [2010] ERNZ 1 at [122]

confidence resulted from the findings of misconduct, so the misconduct findings are the focus.

Reasons for dismissal

[83] In terms of how the Board characterised the broad reason for dismissal, I note that there was no finding of serious misconduct. The Board produced to the Authority a draft discussion document where comments were inserted into Mr Paenga's 16 September 2015 letter. Attached to that document is material "referenced" from a communication from its representative. In it there is a reference to whether the Board finds there is "*misconduct and/or serious misconduct*". So it must be assumed that it had those options in its mind. The dismissal letter does not refer to serious misconduct, only misconduct.

[84] There is also reference in the dismissal letter to Mr Paenga falling short on the good faith duty to be active, communicative and responsive. Other than as could be seen as part of the lack of reporting or other category set out below, that allegation was not put to Mr Paenga in the 10 August 2015 letter for his response, and I therefore disregard it.

[85] There are a large number of issues and incidents covered in the Board's 10 August letter and thus in Mr Paenga's lengthy response. Some of the issues under different categories overlapped. So, for example, under the lack of reporting to the Board heading, was reporting about student achievement. There was also a student achievement rates heading which covered the same reporting issue, as well as others.

[86] I will focus on the Board's findings towards the end of the dismissal letter. The Board concludes:

- (a) Inadequate reporting to the Board. This appears to relate to student achievement, as reference is made to whanau hui and student report cards. It also seems to relate to financial reporting;
- (b) Education Review Office (ERO) Report and annual audit reports. This also concerned policies not being in place; and

[87] Inappropriate employment of teaching staff, namely employment of staff who were not registered to teach and staff whose terms and conditions were not approved by the Board.

Reporting on student achievement

[88] The Kura Board had concerns about a lack of student achievement information being available to it and whether some groups of students were being assessed. At times in the bulky material there were hints that this was about actual achievement rather than reporting, although that was not the focus. Sandra Walker, who was on the 2014 ERO panel assessing the Kura, says that in terms of NCEA the Kura was doing very well at the time of the ERO Report.

[89] This issue, at least in part, came down to where reporting was being done to. Mr Paenga says that reporting was done to the whanau through whanau hui and to the Board. He saw them as running together, although accepted that some matters, particularly relating to employment, were to be kept confidential to the Board.

[90] Mr Paenga says that reporting on student achievement occurred when the Deputy Principal in charge of the wharekura (secondary school) provided information to the whanau or Board. That was usually done in February or March for the previous year.

[91] Ms Daniels-Hope says that during her time on the Board Mr Paenga reported to whanau hui on a wide range of matters, including student achievement.

[92] Ms Walker says that in her experience individual kura have their own governance and management models. Some use the whanau group solely as governance, some have solely a board of trustees and some have both, as was the case here.

[93] There was lack of documentation, policy or direction about what was to be reported to the whanau as distinct from the Board, or in what order. Mr Paenga was working on the basis of his understanding of historical practices. The Board may well have been entitled to require a change in those practices, however, Mr Paenga should

have been given notice of that with the opportunity to amend the way he was reporting. This did not occur.

ERO Report

[94] Partly for ease of reference I have dealt with this under a separate heading as the 10 August and 24 September 2015 Board letters do. However, at the investigation meeting Mr Tauhara accepted that the two issues (student achievement reporting and ERO Report) were the same.

[95] The ERO Report is dated 19 June 2014 and the Board received it around that time. The Board considered that the ERO Report was critical of the kura. There was no indication that they sought any educational advice on that question. Few, if any of the Board members had been on the Board at the time of the previous ERO Report into the Kura.

[96] Ms Walker gave evidence on behalf of Mr Paenga. Until shortly before the investigation meeting Ms Walker was the co-manager of Te Tari Tautoko, the school support arm of Te Runanga Nui o nga Kura Kaupapa Maori o Aotearoa. This is the organisation contracted by the Ministry of Education to provide governance support for kura kaupapa. In this capacity she had worked closely with Mr Paenga and the Kura as a whole. In her view no other kura principal had achieved as much in five years as Mr Paenga had in building a new primary school and then developing the wharekura (high school).

[97] Ms Walker was also one of the panel members who conducted the 2014 ERO review. In her opinion the report was a very good one.

[98] The Report notes that the Board were not well informed about the progress and achievement of students across the Kura. The Report has one recommendation for the school; that the principal and staff review and improve the use of student achievement information. Ms Walker says that the ERO's approach was to provide a minimum of one recommendation as it gave the school something to aim for. Mr Tauhara agreed with this. The Kura was returned to the regular reporting cycle, namely a three year review, which was seen as positive.

[99] The Board seemed to see the Report differently. I took the implication of the 10 August 2015 letter and some Board members' evidence to be concern that the ERO had chosen to publically criticise them. I found this surprising given that the ERO's reports are public documents. Any comments in the report are going to be of a public nature.

[100] One recommendation appears to have been an improvement on the previous ERO Report. As far as Mr Paenga could recall the previous report had two recommendations.

[101] Mr Paenga said that steps had been taken in response to the ERO Report. The annual Charter would capture how the ERO recommendation would be dealt with. The Charter is approved by the Board and signed off by the Chair.

[102] Mr Paenga also drafted a document dated 20 October 2014, along with other senior management, on proposed strategy including what was needed to meet the needs of the ERO report.

[103] Ms Walker found it difficult to understand that the ERO Report was used as one of the reasons for Mr Paenga's dismissal. She did not see the recommendation as a criticism of Mr Paenga, rather simply a suggestion as to how improvements could be made. Ms Walker had offered to assist the Board in 2015 when the issue arose regarding Mr Paenga's ongoing employment but that offer was refused.

Annual audit reports

[104] The Board criticised Mr Paenga for not having policies in place concerning the Protected Disclosures Act, loans to staff, sensitive expenditure and fraud. This was based on the auditor's report which identified the need for such policies. Mr Tauhara accepted this issue had not been raised previously.

[105] There was some evidence of a policy portfolio group operating, which included Mr Paenga, although not all Board members seemed familiar with it. There were no separate board policies as distinct from school policies. Mr Tauhara accepts that there was confusion about policies and that the Board has subsequently had professional development on this issue.

[106] Mr Paenga's position in the 16 September 2015 letter was that policies on certain matters including sensitive expenditure and fraud were governance matters which the Board should deal with. This is an understandable response as those types of policies could be seen to keep the principal in line as well as other staff.

[107] The Board expected Mr Paenga to bring these issues in the auditor's reports to its attention. Mr Paenga considered that as the Board, or at least its chair, had to sign off these reports, it should have been aware of them.

Reporting regarding finances

[108] The Board was dissatisfied with Mr Paenga's financial reporting. This included wanting figures instead of graphs. This issue also related to wanting to ensure that the Board received a more detailed report than the whanau.

[109] Mr Paenga received finance reports from Education Services⁸. These were around 30 to 40 pages and were provided monthly. They were available at Board meetings, but not provided to each Board member. The Board members instead got a summary, which was taken from the finance reports. The finance reports were provided to the Finance Portfolio (or sub-committee) of the Board. Mr Paenga says that the reports were also available at the office if the Board wanted to access them.

[110] The Board was entitled to specify how it wanted the Principal's financial reporting to it to occur. However, provisions of reports and summaries from the Ministry of Education approved agency does not appear to be an unreasonable approach to take until such time as some other arrangement was reached.

[111] The Board did not earlier specify how it wanted financial reporting to take place.

Reporting on staffing and salaries

[112] The Board said that it had not been receiving a summative report on staffing usage entitlements regarding staff payments and the total cost of teacher salaries per

⁸ Accounting agency recognised by the Ministry of Education

fortnight. Mr Tauhara says that after Mr Paenga went on sabbatical leave the Board received clearer reporting from the acting principal.

[113] Again, if this was something which the Board wanted, then it could specify that Mr Paenga provide that information. However, it had not done so previously, and it is not evident that failure to provide that can be a matter of misconduct without a request.

Employment Issues

[114] The Board says that Mr Paenga acknowledged employing three teachers when they were not registered to teach. The evidence was somewhat sparse regarding these people and their situations. It appears that at least some of them were graduates. One had worked for a year at another school prior to being appointed at this kura. One of these instances is from 2011. All of them appear to have progressed to get registration, at least provisionally.

[115] The other issue which the Board upheld was a lack of action or timely response to staff concerns leading to problems escalating into untenable working relationships. The 10 August letter refers to three personal grievances having been brought. Mr Paenga denied that two of the people named had raised personal grievances. The dismissal letter does not identify which staff member/s are being referred to and no longer mentions personal grievances.

[116] The Board concluded that Mr Paenga had employed staff whose terms and conditions were not approved by the Board. Generally the bulk of conditions of teaching and other school staff are covered by collective agreements. In terms of the governance /management split, usually the terms of employees (other than the chief executive or equivalent) would be determined by the organisation's management rather than it being a matter of governance.

[117] The Board appears to have been aware of these various employment issues, and not to have expressed any concern to Mr Paenga until the 10 August letter.

Predetermination

[118] Moving from the reasons for dismissal onto other areas, Mr Paenga's claim initially raised an issue about whether the Board's decision to dismiss was predetermined, on the grounds that it had, in earlier correspondence of 13 March 2015 and 22 April 2015 indicated its desire to meet with him over possible changes to the senior management structure of the Kura. However, this was not a matter which was emphasised in closing submissions made on his behalf.

[119] The Board says that those letters do not disclose a pre-determined idea of dismissal and that suggestion was strongly denied by the Chair at the investigation meeting. It emphasises that the six month time frame between the first of those letters and the dismissal, and the seven week period between when the allegations were formally put and the disciplinary process finished, indicate that pre-determination is not a factor.

[120] It was not established that the Kura Board pre-determined the decision to dismiss Mr Paenga.

Education Act

[121] The Kura is a state school for the purposes of the Education Act 1998. The Kura Board is the employer of all staff, including the principal.

[122] Mr Paenga claims that there were aspects of non-compliance with various Education Act requirements which I may take into account in determining whether his dismissal was justifiable. These concern a lack of any delegation to smaller groups or individuals on the Board, failure to record decisions in the minutes and the absence of a quorum at the 18 September 2015 meeting where the decision to dismiss was made.

[123] Mr Paenga relies on Employment Court decisions in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*⁹ and *Richardson v The Board of Trustees of Wesley College*¹⁰.

⁹ [1992] 3 ERNZ 243,

¹⁰ (unrep) AEC 60/98, 24 September 1999 per Travis J

[124] There was an acknowledgement by the Board that its meeting minutes had at times been kept poorly in the past. Any defects were minor, relying on *Campbell v Commissioner of Salford School*¹¹. There a delegation of the power to investigate would not have altered the outcome.

[125] I am satisfied that non-compliance with Education Act requirements are a matter which I can consider in determining whether Mr Paenga's dismissal was justified. However, if those matters are minor, technical defects that can be disregarded in light of *Campbell*.

[126] The earlier inadequacies in terms of keeping of minutes of decisions or delegation for actions prior to the 10 August 2015 letter which begins the disciplinary process are matters which I regard as technical and not making any difference to the outcome.

[127] However, I am not satisfied that the same can be said of the decision to dismiss. At the time the decision to dismiss was made only three Board members were present: Mr Tauhara, Ms Austin and Mr Heslop. Ms Ratapu, Ms White and Ms Daniels-Hopa had left by that point.

[128] Under Schedule 6 of the Education Act no business must be transacted at any Board meeting unless more than half the trustees then holding office are present¹². Questions before the Board are to be decided by a majority of votes cast¹³. A Board meeting may be held by more than half the trustees then holding office being assembled together at the time and place appointed for the meeting¹⁴.

[129] Clause 11 requires a physical presence to be involved in decision making, allowing audio and electronic participation providing all wishing to participate have equipment and communication can occur.

[130] The board numbers were 9 at the time of dismissal. A quorum therefore requires five board members to be present or in communication via audio or electronic means. The Board accepted that the earlier emails from Mr Morris and Ms Maihi-Rupapera were insufficient for those purposes.

¹¹ *Campbell v Commissioner of Salford School* [2015] NZEmpC 122

¹² Cl 8(4) of Sch 6 of the Education Act

¹³ Cl 8(6)

¹⁴ Cl 11(A)

[131] The Board's position was that the Authority may look at substance over form, and find that the outcome would not have been different were there written delegations or every trustee was at the Board meeting on 18 September 2015. However, I note the evidence from Ms Daniels-Hopa that she felt intimidated at the later meeting where she and Ms Tamariki were canvassed about their views. Mr Tauhara strongly denies that any intimidation occurred.

[132] One of the reasons that meetings are required rather than people merely sending in their vote is to allow discussion to occur. The requirement to gather also attempts to avoid any suggestion of inappropriate behaviours influencing people's voting.

[133] There is a real prospect that Ms Daniels-Hopa would not have agreed had the process occurred at meetings where behaviour was witnessed and perhaps more regulated. I have not heard from Ms Maihi-Rupapera or Ms Tamariki so the prospect remains that they may have adopted a different position had there been face to face discussion.

Conclusion on dismissal

[134] Despite the requirement in the collective agreement and reference in Mr Paenga's job description, the Kura Board did not have a performance agreement with Mr Paenga. It therefore was not appraising him based on such an agreement. No appraisals had been undertaken for some years.

[135] The Board chose to base its disciplinary action on a wide range of issues. Matters over several years were included, some of which had been discussed between the parties without any indication that they would be raised against Mr Paenga at a later date.

[136] From Mr Paenga's perspective the Kura Board was happy with his performance leading into 2015. They had assisted with arrangements for a holiday for himself and his family at the end of 2014. Mr Tauhara complimented him when he was leaving and wished him well for his study the following year.

[137] The impression which the Board Mr Paenga says that he received from the Board was supported by Ms Daniels-Hope who was on the Board from 2012 until 2015.

[138] Although some board members gave evidence of having had concerns with Mr Paenga's performance earlier than that, there was little clear evidence of when and how these were raised with Mr Paenga.

[139] No grievance were pursued specifically about the letters of 13 March and 22 April 2015, however, I agree with the submission on behalf of Mr Paenga that they were a high risk strategy. The letters make it clear that Mr Paenga was not wanted, possibly along with other staff. The Chair accepts that the letter suggests that the discussion was to be about Mr Paenga leaving the school.

[140] If the Board were hoping for agreement from Mr Paenga to a negotiated exit, it did not receive it.

[141] The Board made reference in the 13 March letter to cl 4.3 of the collective agreement which refers to the Board appointing a "*suitably qualified independent person to mediate or facilitate between the parties and/or undertake an impartial and objective assessment*". The parties went to mediation with an MBIE mediator.

[142] The Board could have chosen to appoint an independent person to investigate and report on the findings. That is not unusual in the schools context. Here in particular several Board members had conflicts of interest making their involvement in decision-making problematic. Ms Walker, who had been involved in assessing the kura for the ERO resort, offered to assist but the Board rejected that offer.

[143] Having been unable to resolve the matter at the meeting on 30 July 2015 the Board met in committee. It agreed to take the steps indicated by the lawyer. However, what those were are privileged.

[144] The letter of 10 August 2015 letter was then sent, seeking Mr Paenga response to a number of specified matters. The letter has a number of difficulties. Firstly, there are a large number of issues raised, some of which are covered in more than one of the issue headings used. Not surprisingly Mr Paenga described feeling swamped by the allegations.

[145] The letter covers issues over a span of as much as four years, from 2011 to 2014. Several of the issues raised were well known to the Board over the previous years. The ERO Report for example, had been known to the Board for over a year at the time when the disciplinary process was started. There was no indication to Mr Paenga when the Report came out that the Board were considering disciplinary action.

[146] Some issues, particularly those concerning reporting, were matters which the Board had not previously reached any agreement or given direction to Mr Paenga as what was required. The Board was entitled to set what it wanted but it had not yet done so.

[147] Some of the allegations did not provide sufficient particulars to allow Mr Paenga to properly respond. In some instances further information was sought and properly provided on behalf of the Board. However, Mr Paenga's response notes in some areas that he was not clear what was being referred to. Where Mr Paenga's letter dealt with an issue (for example regarding staff issues) but did not specifically address an aspect of the concerns in the 10 August letter, that was taken as a concession by Mr Paenga

[148] In the letter of 16 September, Mr Paenga largely denies the allegations against him, and makes only occasional acknowledgements of his own conduct falling short of expectations.

[149] There was little further inquiry on the issues after Mr Paenga's response. Although aspects of his letter suggest that further inquiry would be needed, this largely did not occur. Mr Tauhara accepts, for example, that there was no further investigation of Mr Paenga's 16 September response that he had reported various matters through the charter and to whanau hui. Mr Tauhara's explanation for the lack of further investigation was that there was more than one issue.

[150] The Board was without quorum when it made the decision to dismiss.

[151] Board member Ms Maihi-Rupapera's information provided in her email for the Board before the dismissal meeting was not provided to Mr Paenga, neither was Mr Austin's response to the questions put to him.

[152] In conclusion it appears that the Board gained a sense in the first half of 2015, after Mr Paenga went on sabbatical leave, that it could get better from a principal.

The issues which the Board raises are largely performance or competency issues which should have been addressed in that manner.

[153] In *Campbell v Commissioner of Salford School*¹⁵ the Employment Court found that where the parties “*have agreed on proscriptive arrangements for managing their employment relationship, the employee is entitled to expect adherence to those arrangements*”, There, somewhat similarly to the present case, a mix of performance and conduct issues were dealt with through a disciplinary process. The Court considered that a fair and reasonable employer could have treated many of the issues as performance ones, capable of being dealt with under the competency provisions, and not to be combined them with conduct issues¹⁶.

[154] The performance concerns were not raised as such with Mr Paenga when they occurred. There was no performance agreement in place, despite that being envisaged in the collective agreement and in his job description. He did not have appraisals, either against that performance agreement, or otherwise.

[155] For some reason which was not clear from the evidence, despite mentioning a performance management process in the 22 April letter, the Board chose not to go down the performance track. Given that Mr Paenga was on sabbatical leave during this period it seems unlikely to have been any new misconduct which triggered the Board’s approach.

[156] There was no second step to the process, once the misconduct finding was made, of giving the employee the chance to respond on the appropriate or preliminary outcome¹⁷. Admittedly Mr Paenga’s then representative had said, before Mr Paenga’s letter of 16 September was sent, that Mr Paenga will not be attending a disciplinary hui but rather responding in writing. However, a written response could have been sought.

[157] Under cl 6.2.1 (b) of the collective agreement the Board, having received a response, may need to make further inquiries in order to satisfy itself of the facts of the specific matters causing concern. Although Mr Paenga’s response should have led to further inquiries being made by the Board, that largely did not happen.

¹⁵ *Campbell v Commissioner of Salford School* [2015] NZEmpC 122 at [289]

¹⁶ *Ibid*

¹⁷ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [306]-[312]

[158] Considering all of the matters described above, Mr Paenga's dismissal was not something which a fair and reasonable employer could have done in the circumstances. He was unjustifiably dismissed.

Remedies

[159] Mr Paenga has sought reinstatement, reimbursement of lost wages and compensation under s 123(1)(c)(i) of the Act. These remedies are opposed by the Kura Board.

[160] In considering whether to grant reinstatement the Authority seeks further submissions from the parties regarding the issue of the Mr Paenga's practising certificate. Both parties have 14 days from the date of this determination within which to file any further submissions on that issue.

Costs

[161] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority