

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 489
3016611
5644230

BETWEEN DIANE MARY SMITHSON
 Applicant

AND WELLINGTON COLLEGE
 BOARD OF TRUSTEES
 Respondent

Member of Authority: James Crichton

Representatives: Barbara Buckett, counsel for the Applicant
 Carolyn Heaton, counsel the Respondent

Investigation Meeting: 19 September 2017, 20 September 2017, 9 July 2019
 and 10 July 2019 all at Wellington

Submissions Received: 15 July 2019 and 22 July 2019 from the Applicant
 10 July 2019 from the Respondent

Date of Determination: 20 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Smithson) was employed by the respondent (Wellington College, the college or the school) in November 2002 and worked for Wellington College from that date.

[2] On 30 March 2015, there as an incident at Wellington College involving Ms Smithson and another female employee of Wellington College.

[3] That incident resulted in a complaint from the other teacher to Wellington College and a referral of the matter by Ms Smithson to a member of the senior management team of the school.

[4] There was an investigation and a report instigated by Dave Thorp, one of Wellington College's deputy principals. That report issued on 22 April 2015 and concluded with a recommendation that the two protagonists "undergo mediation as soon as possible to ensure their working relationship can be civil and professional".

[5] There followed a series of exchanges between both protagonists and Mr Thorp, wherein each of the protagonists expressed a reluctance to engage in mediation.

[6] As a consequence, Wellington College decided to ask Bruce Murray to investigate the incident and the working relationships and practices within the English language department. Wellington College regarded Mr Murray as an objective and external observer, and it is acknowledged that Mr Murray has a distinguished career as a senior and well respected member of the teaching profession.

[7] On 15 May 2015, the protagonists were advised of the Murray investigation and that report from Mr Murray issued on 1 June 2015. Three days later, Mr Roger Moses wrote to Ms Smithson seeking a meeting to discuss the Bruce Murray report.

[8] On 10 June 2015, the school's senior leadership team received an email from Michael Ellett another staff member of Wellington College who indicated that Ms Smithson had given him permission to tell the college that she was going on medically certified leave, would use up her sick leave and then "consider formally resigning".

[9] Medical certificates were then provided and on 14 July 2015 counsel for Ms Smithson first wrote to Wellington College referring to the "distress" that the college's actions had allegedly caused to Ms Smithson.

[10] Counsel for the college responded on 22 July 2015 seeking further and better particulars of the allegation of causing distress in order that the school could address those issues and promote a return to work.

[11] A personal grievance was raised by Ms Smithson on 3 September 2015. That notification of personal grievance included the allegation that the other protagonist in the

30 March 2015 incident had circulated “unmeritorious and defamatory comments”. The school sought further and better particulars of the nature of the unmeritorious and defamatory comments.

[12] Medical certificates were provided to justify a continuation of Ms Smithson’s sick leave in the latter part of 2015 and a letter from Ms Smithson’s medical practitioner dated 30 September 2015 indicated that the work situation would not improve while the “collegial difficulty exists”. Not surprisingly, that observation encouraged the college’s counsel to write to Ms Smithson’s counsel pointing out that the college needed to address those “collegial difficulties” which Ms Smithson had herself identified to her general practitioner and sought some agreed mediation or facilitated discussion or other process with the other protagonist to enable Ms Smithson to return to duty.

[13] Then on 17 December 2015 a further medical certificate was provided wherein Ms Smithson was indicating that she would feel able to return to work at the beginning of the new school term provided “a safe work environment was present”.

[14] On 24 February 2016 the college wrote to Ms Smithson seeking to understand what made the workplace unsafe and how that could be addressed and suggested a facilitated discussion. There was no response.

[15] Then on 10 March 2016 a further letter was sent indicating that the college would have to put Ms Smithson off pay if she would not engage with them and this provoked an immediate response from Ms Smithson suggesting a meeting between the headmaster and Ms Smithson and indicating that the difficulty was the college’s “lack of support” for Ms Smithson and its preference for the other protagonist in the 30 March 2015 incident. The school was told by Ms Smithson’s counsel that it ought to have firmly put the other protagonist in her place such that she understood her obligations in the matter.

[16] On 11 March 2016 the school’s counsel set out a proposed way forward and in the second paragraph of that letter sets out the following statement of principle “in determining how best to manage Ms Smithson’s return to work, the school has an obligation to consider the interests of all potentially affected employees (and students) and to make fair and reasonable decisions that are justified in all the circumstances”.

[17] That letter goes on to set out a process by which the school would work its way through the determination of those issues so that it could in fact make “fair and reasonable decisions that are justified in all the circumstances”.

[18] Notwithstanding those efforts, Ms Smithson’s counsel referred to that letter as “menacing” and further suggested that the continued reliance on the Murray report must be for “sinister purposes”. Counsel’s letter then goes on to allege that Ms Smithson was being “bullied” by the other protagonist in the 30 March 2015 incident.

[19] Then by an undated report from the headmaster of Wellington College, Mr Roger Moses, which was received by his counsel on 14 April 2016, the headmaster sets out what he has endeavoured to do to put matters right but his inability to engage directly with Ms Smithson reflects the unsatisfactory nature of the whole proceeding.

[20] Moreover, when the headmaster’s report was provided to Ms Smithson, her counsel raised a further personal grievance based on the school’s intention to proceed to implement some of the recommendations of the Bruce Murray report. The letter from counsel for Ms Smithson does however confirm Ms Smithson’s willingness to meet with Mr Moses and that meeting took place on 24 May 2016.

[21] Mr Moses’ evidence to me was that after that meeting, he was genuinely hopeful that the matter could be resolved by agreement but sadly that was not Ms Smithson’s position at all. Witness for instance the letter from Ms Smithson’s counsel to the school’s counsel dated 13 June 2016 where it is alleged that other staff members of the school, being members of Ms Smithson’s department and including the other protagonist of the 30 March 2015 incident, were “dictating the terms of our client’s return...”. Moreover, it was alleged that the headmaster had said (as he did in his undated report) that there was no fault attributed in respect to the 30 March incident when according to counsel for Ms Smithson, there was fault on the part of the other protagonist in the 30 March incident “which remains unchecked”. It is suggested by counsel for Ms Smithson that another investigation be undertaken in respect to the other protagonist’s alleged behaviours.

[22] Counsel for Wellington College then suggested that the school needed further and better particulars of the alleged bullying of Ms Smithson by the other protagonist and those continuing exchanges carried forward until the investigation meeting that I first convened on 19 September 2017, with Wellington College maintaining that it would require the Authority

to investigate the employment relationship problem and make some determination on it rather than continue with the exchanges *inter partes*.

The Authority's Investigation

[23] When this matter first came on to my list for investigation, I proceeded to commence the investigation during the September 2017 dates referred to in the intituling, but it became evident to me that, after hearing some of the evidence and in particular the evidence of Ms Smithson, that her central desire was to return to her role at Wellington College.

[24] Moreover, Wellington College appeared to continue to think well of Ms Smithson at least to the extent of actively contemplating a return to work, if the basis of that could be agreed.

[25] After carefully questioning Ms Smithson about her desires in the matter and pointing out to her that none of the powers given to the Authority enabled me to require Wellington College to take her back into her role, I recommended to the parties that they consider a period of intensive mediation to see if the return to work could be achieved.

[26] That is the reason why the investigation meeting was effectively parked after only part of the evidence had been adduced.

[27] In the result, although the parties actively undertook mediation with the private mediator that I had recommended to them, the matter remained unresolved and accordingly was set down for further investigation and ultimately this determination.

The Pleadings

[28] The first statement of problem filed in this matter is dated 10 October 2016 and that identifies two unjustified disadvantages and an allegation of a breach of obligation under the Health and Safety and Employment Act 1992.

[29] The two disadvantage grievances are respectively identified as a failure to address “the inappropriate conduct of” the other protagonist in the 30 March 2015 incident and secondly a “slavish adherence” to the findings and recommendations from the college’s independent investigation into that incident.

[30] Those claims were all resisted by Wellington College.

[31] Then on 3 August 2017 a further statement of problem was filed by Ms Smithson alleging first an unjustifiable disadvantage because of the college's decision to suspend Ms Smithson together with an allegation that the college had failed to act as a fair and reasonable employer.

[32] The college resisted those claims.

[33] Then by amended statement of problem dated 10 August 2018, Ms Smithson further alleged that the college had determined to dismiss her for reasons of incompatibility and that its actions anticipated "an actual or constructive dismissal". Again, the college resisted those claims.

[34] By way of summary then, this whole employment relationship problem had its genesis in an incident between two staff members on 30 March 2015. That incident was investigated by a deputy principal of the college who proposed that the protagonists should meet in mediation and resolve their differences. That proposal was not accepted by either party. Ms Smithson's submissions proceed on the basis that only the other protagonist refused mediation; that is simply not true. Ms Smithson made it abundantly clear to Mr Thorp the deputy principal who conducted the first investigation was told in no uncertain terms that "*the fundamental issue of X not accepting my professional judgment on matters that are fair in the first case must be addressed before anything else is discussed*".

[35] Moreover, in an earlier email dated 24 April 2015 Ms Smithson said to the deputy principal that "...I am not prepared to discuss any 'lack of collegiality' as that has nothing to do with the incident on the Monday in question. The incident was to do with X not following procedures and then forcing me into a 'discussion'".

[36] It is because of the refusal of both protagonists to accept the recommendation of Mr Thorp that they meet in mediation to resolve their differences and develop a return to the collegiality that he quite properly identified as appropriate, that the college determined on an independent investigation of the issue.

[37] This independent investigation was conducted by Mr Bruce Murray and that investigation resulted in a report which again Ms Smithson rejected.

[38] Amongst other things, she accuses the college of a slavish adherence to that report and she was critical of Mr Murray's personal engagement with her and alleged that he preferred the evidence of others to the evidence that she herself provided.

[39] Ms Smithson has insisted that the Murray report be set aside, and she justifies that position in part by indicating that some of the principal actors, including the former headmaster Mr Roger Moses, have now left the college.

[40] For its part, the college maintains that the Murray report is balanced and sensible, that it contains appropriate recommendations which ought to be adopted by the college and that it is not willing to set it aside and/or replace it with another investigation simply because Ms Smithson says she does not agree with its conclusions or even its process.

[41] As a consequence of this stalemate, Ms Smithson has been away from the workplace now for four and half years and despite various engagements on a counsel to counsel basis and several face-to-face meetings between the professional leader of the school and Ms Smithson, the matter remains unresolved.

[42] At its heart, the issue for determination by this Authority is the propriety of the decision made by the college to require a proper restorative process of reconciliation between Ms Smithson and other affected staff at the college. The college is required to maintain a safe workplace not just for Ms Smithson but for all of the other staff at the college and of course for the student community as well. Put shortly, would Wellington College be failing in its duty if it simply allowed Ms Smithson to return to duty without addressing and seeking to restore the relationships that had been breached by the original 30 March 2015 incident and by subsequent conduct?

Issues

[43] It will be convenient if I consider and respond to the following questions:

- (a) Was the college's response to the 30 March 2015 incident appropriate? and
- (b) Was the college a safe workplace? and
- (c) Was Ms Smithson suspended? and
- (d) Has the college behaved inappropriately in suggesting that the employment relationship had irretrievably broken down?

Was the College's response to the 30 March 2015 incident appropriate?

[44] I have not been persuaded that the college's response to the 30 March incident was in any way inappropriate. Put shortly, there was an altercation between Ms Smithson and a subordinate. Both protagonists raised the matter with senior management of the college. It is inconceivable that the college could have fulfilled its obligations as a good and fair employer without conducting an investigation.

[45] In fact, forthwith on the matter being referred to senior management by both protagonists, the college commissioned Dave Thorp, one of the deputy principals to conduct an inquiry. That inquiry required Mr Thorp to engage with both protagonists and with a third staff member who was in the vicinity.

[46] Mr Thorp was unable to reach any conclusion about which of the protagonists was responsible for the altercation but he did conclude that the grievance between the two parties was "deeply felt", that each felt bullied by the other, and that "a rift has been developing between (the parties) for some time and will require real effort from both parties to put this right".

[47] Mr Thorp's conclusion was that the protagonists "should undergo mediation as soon as possible to ensure their working relationship can be civil and professional".

[48] I have already made plain that I am satisfied neither party agreed to the proposed mediation. So far as the other teacher is concerned, her rejection of mediation was unequivocal; she said *inter alia* "...it is not just about an isolated incident, but about the way the department is being run and mediation will not solve this underlying problem".

[49] Ms Smithson on the other hand seems to want to maintain that she did not reject mediation out of hand although it is difficult to get that message from carefully reading her emails to Mr Thorp. What is abundantly clear though is that even if the email traffic can be read as contemplating mediation, from Ms Smithson's perspective it would be mediation only in respect to the very narrow issue of the other party not doing as Ms Smithson required. She says for example that the incident resulted from the other party "not following procedures" and then later said that "the fundamental issue (was the other party not accepting my professional judgment) ...".

[50] Ms Smithson is effectively saying that until the college gets the other party into line and has her obey Ms Smithson's instructions, then nothing will change. Needless to say, the college was reluctant to follow that approach. This was especially so because it was by no means clear from Mr Thorp's investigation who (if anybody) was actually at fault in the altercation.

[51] In any event, given that the school's sensible proposal, that there be an attempt to restore the professional relationship between the protagonists was rejected by both parties, the school's decision to commission an independent investigation by Bruce Murray can hardly have been a surprise. Nor do I accept Ms Smithson's contention that the focus of the Murray report was exclusively on her as she alleges at paragraphs 41 and 42 of her initial brief of evidence at my investigation. In fact what Mr Murray was asked to do was to look at the incident which started this whole chain of events and to look at the working relationships within the particular department of the school that was affected, with a view to making some recommendations that would enable the college to appropriately restore the situation.

[52] While I do not accept for a minute Ms Smithson's contention that the Terms of Reference of the Murray report were targeted at her I am forced to conclude that the reason that she found it difficult to accept Mr Murray's recommendations was because he disagreed with her.

[53] But even if it were the case that Ms Smithson rejected the Murray report and particularly its recommendations because she did not agree with them, it is important that I record that she wrote a lengthy rejoinder to the Murray report which effectively became an attachment to the report and which the headmaster, Mr Moses had digested as part of his reading of the report itself.

[54] Equally importantly, it was not clear to the college until these proceedings were on foot that Ms Smithson regarded the Murray report as fatally flawed and in particular that she took exception to the way that Mr Murray allegedly treated her. Ms Smithson's evidence was that Mr Murray was curt and apparently dismissive of her when they met and that as a consequence, she "did not feel heard". But the school did not know that was her position until this present proceeding this present proceeding was on foot.

[55] This led to Mr Moses, entirely innocently suggesting to Ms Smithson that she and he meet to discuss the implementation of the recommendations in the Murray report. Mr Moses'

evidence that was that he regarded those recommendations as “benign”. By that description I took it that Mr Moses meant that he did not think the recommendations were in any way controversial.

[56] So, it was in that context that he wrote to Ms Smithson by letter dated 4 June 2015 and sought to meet with her to implement the recommendations.

[57] Instead of accepting Mr Moses’ request to meet, Ms Smithson left the college on sick leave six days later, and has never returned.

[58] I conclude that the college had to investigate the 30 March 2015 incident because it had had a dual referral of the incident to senior management and it would have been a dereliction of its duty for the college not to undertake a proper inquiry of the incident.

[59] That inquiry by Mr Thorp resulted in a recommendation which neither protagonist accepted and so a further independent review of the same issues became inevitable. Again, I am not persuaded that in asking Mr Murray to investigate matters for it, the college was doing anything other than any good or fair employer in that situation would have to do.

[60] Moreover, I am not persuaded that Ms Smithson has established any unjustified disadvantage grievance concerning the failure of the college to address what she calls the “inappropriate conduct” of the other party to the 30 March 2015 incident. What Ms Smithson says happened on that date is contested evidence; the other party has a different view. Neither of the investigations, either the Murray report or the Thorp report, reach any conclusion as to blame or indeed contributions to blame. That being the case, the college is unable to take matters any further and certainly it is unreasonable of Ms Smithson to continue to maintain an expectation that the college will act entirely on her say so, when the evidence is at best equivocal.

[61] In order for Ms Smithson to satisfy me that she has suffered a personal grievance for unjustified disadvantage there would need to be evidence that the employer has behaved inappropriately; there is none. Moreover, there would need to be evidence that Ms Smithson was disadvantaged and again I find no evidence that she was. The college quite properly sought to have her, and the other protagonist, engage so that the matter could be dealt with restoratively; Ms Smithson would not co-operate in that approach.

[62] Nor am I attracted by Ms Smithson's claim that she has suffered an unjustified disadvantage because the college has adopted a slavish adherence to the Murray report and its recommendations. As I have been at pains to point out, the college was obliged to investigate and the results of that investigation were, at the time that the report issued not seen to be controversial. Certainly, Ms Smithson did not make clear her objection to the report and its findings until much later and given that she states her views in opposition to Mr Murray's findings in the addendum to his report it would seem that Ms Smithson has had a full and proper opportunity to be heard notwithstanding the fact that the conclusions reached in the Murray report are not to her liking.

[63] I am satisfied the college was entitled to seek to implement the Murray report. The college felt that the Murray report made some important contributions to understanding how to better organise the particular part of the school that Ms Smithson worked in and it sought to engage with her at an early stage to talk about how that report might be implemented. But as I have made clear, rather than engage with Mr Moses in talking about that report and whatever reservations she had about it, Ms Smithson simply left the school on sick leave and never returned.

[64] Looking at this allegation in a strictly legal sense, I have not been persuaded that the college has done anything wrongly in its attempt to implement the recommendations of the Murray report and if that is the case then there is no unjustified action that can be sheeted home to the college in respect to this allegation. Moreover, I have not been persuaded that any of the recommendations advanced by Mr Murray would have any negative impact on Ms Smithson and so I am unable to see any disadvantage to her. Accordingly, both legs of the test for unjustified disadvantage must fail.

Was Wellington College a safe Workplace?

[65] Ms Smithson not unnaturally sought in her initial claim to have Wellington College provide her with a safe workplace. Her first statement of problem refers specifically to the college's obligations under the Health and Safety in Employment Act 1992 which was the operative statute when that statement of problem was prepared and filed.

[66] While I absolutely understand Ms Smithson's concern about being provided with a safe workplace I also understand the evidence of Wellington College to the effect that it has

obligations under the health and safety legislation not just to Ms Smithson but also to other staff, the student body and any contractors that may be present on the school site.

[67] It is absolutely central to this dispute that the college, throughout this protracted process, had to ensure not only that Ms Smithson was safe and secure, but that the other party involved in the 30 June 2015 incident was similarly protected.

[68] In order to achieve that desirable state, I am satisfied that the college actively sought Ms Smithson's engagement to work collaboratively with the school so that relationships could be repaired and everybody in the school as a workplace and an educational facility, could feel safe.

[69] But it is my assessment of the evidence that Ms Smithson resisted the college's attempts to engage on this basis. My questioning of Ms Smithson at the investigation meeting suggested to me that her concern was exclusively about her safety and she seemed to have little realisation that the safety of others was every bit as important.

[70] More importantly still, so far as the school was concerned, its obligations were multi-lateral; it had obligations to Ms Smithson, to other staff, and to students; indeed its obligations stretched to include everybody who had legal access to the school buildings, grounds and facilities and it would be a dereliction of the college's duty under what is now the Health and Safety at Work Act 2015 if Ms Smithson were permitted to return to the workplace without working through a process of trying to mend the damaged relationships.

[71] Right from the very beginning of this dispute, the college's focus was on the restoration of the collegial relationships between the two protagonists in the 30 March 2015 incident. To the contrary, Ms Smithson wanted the college to effectively discipline the other party to that incident in apparent reliance on her own status as the head of department.

[72] Given that neither the Thorp report nor the Murray report identified who was at fault in the incident, or indeed who was primarily at fault, it is difficult to see how the school could have done anything other than seek to repair the obviously bruised and damaged relationships.

[73] But contrary to what Ms Smithson now says through counsel, it was her that put the road blocks in the way of repairing those relationships. It was Ms Smithson who said to the

college that she would not engage in a restorative process with the other protagonist until the school had effectively backed Ms Smithson up as head of department.

[74] I am satisfied that a good and fair employee infused with the good faith principle would not have taken this stance and that this stance is not the stance of an employee working constructively and openly with their employer to resolve an employment relationship problem.

[75] At its heart, Ms Smithson has taken a very rigid view based exclusively on her rights and her attempts to return to teach at the school have always been progressed in the context of her requiring that matters are put right for her without any apparent realisation that she has duties and obligations to assist the college to fix and repair relationships where other folk are legitimately demanding the school provide them with a safe workplace too.

[76] Illustrative of this point is the evidence I heard from another teacher employed at Wellington College who had been nearby during the altercation of 30 March 2015 but had retreated to his classroom, shut the door, and tried to talk to his students to drown out the noise of the argument between the two protagonists in the 30 March 2015 incident.

[77] His evidence about his relationship with Ms Smithson was not encouraging; he said in so many words that the relationship was not good and put shortly, he preferred the college when she was not there.

[78] That evidence I cite as no more than an example of the effect that people may have, no doubt unwittingly, on colleagues and without a genuine and open commitment to try to repair those rifts, little progress can be made.

[79] Quite clearly, it is not just the school's obligation to repair such rifts; the school must have a willing partner in the other party, and I have not been persuaded that Ms Smithson has ever been such a willing partner.

[80] Accordingly, while I agree with her to the extent that she says that the provision of a safe workplace is important, what I do not agree with is her apparent conviction that that safe workplace need only be provided for her.

Was Ms Smithson suspended from duty?

[81] This allegation is made in the statement of problem filed on 3 August 2017 and added to somewhat in the amended statement of problem filed on 10 August 2018. It is said that by reason of the college's failure to allow Ms Smithson to return to work, it has effectively suspended her from the employment.

[82] I do not accept that proposition at all; for reasons that I hope I have already made clear, I am satisfied that Ms Smithson would never properly openly and collaboratively engage with the college to repair and restore the professional relationships that had been damaged as a consequence of this dispute and in the absence of that open and collaborative engagement, the college was quite unable to take Ms Smithson back.

[83] Unless and until the relationships that had been damaged could be repaired, and that required the engagement of both Ms Smithson and the college, there could be no return to work.

[84] As a matter of fact, Ms Smithson absented herself from the workplace with effect from 10 June 2015 and she has never returned. On her departure, I am satisfied on the evidence that she spoke to a colleague Mike Ellett, told him that she intended to take sick leave until she had run out of sick leave and at that point contemplated resignation. She further told Mr Ellett to tell the senior management team that that was her position. She now denies saying that, but I am satisfied that is what happened.

[85] In the first part of the investigation meeting, when I was examining Ms Smithson, she said to me quite explicitly that she was not able to return to school because there were "too many outstanding issues to resolve".

[86] Certainly at that point, those observations of Ms Smithson give the lie to any suggestion that she was somehow ready willing and able to return to the workplace and was being actively prevented from doing so by the school. It is just disappointing that she did not readily grasp that the remedy was at least in part, in her own hands.

[87] Certainly, at an early stage in the proceedings, there was every chance that the relationships could be repaired. Mr Moses' evidence for example is that when he first saw the Murray report which would have been in June of 2015, he felt that the relationships were "very fixable at that point". And at that early stage, the relationship issues were

fundamentally between Ms Smithson and the staff member she had an altercation with on 30 March 2015.

[88] In mid-December of 2015, one of Ms Smithson's medical certificates recorded that she would be able to return to the workplace if there was a safe work environment. Reiterating a point that I have already made earlier in this determination, the college innocently believing that the Murray report was uncontroversial, thought that the adoption of the recommendations from that report would, with Ms Smithson's buy-in, produce the desired outcome of generating a safe and secure workplace for all of the participating parties. It was not until some time later that it became clear that Ms Smithson regarded the Murray report as part of the problem rather than part of the solution.

[89] Consistent with that developing stance, Ms Smithson then began a succession of course changes which did nothing to assist the process of resolution. On 10 May 2016 she requested "a truly independent investigation".

[90] Then on 13 June 2016 after a meeting between Mr Moses and Ms Smithson which the headmaster thought was very positive, Ms Smithson took offence at comments from two colleagues and maintained again that the workplace was "unsafe".

[91] Following that claim, on 28 June 2016 counsel for Ms Smithson proposed another change of course this time to bring in specialist bullying HR consultants to investigate Ms Smithson's concerns, notwithstanding that the allegations of bullying remained unspecific and devoid of particulars.

[92] Then on 7 June 2017 Ms Smithson provided yet another course change by suggesting that an independent facilitator, Keith McGregor be engaged to try to resolve matters.

[93] Then on 30 June 2017 Ms Smithson notified the school of her intention to return to duty the following Monday. This is so notwithstanding her apparently considered view that the workplace was unsafe and her complete failure to engage with the school appropriately to resolve issues between her and other staff members.

[94] For the avoidance of doubt, I confirm that I am not persuaded that Ms Smithson was suspended from duty. The factual position is that Ms Smithson absented herself from the workplace in June 2015 and never returned. During that extensive absence, she variously

claimed that the workplace was unsafe, that various new professionals should be engaged to address issues and that she was unilaterally returning to duty having never agreed at any stage with the school on how to resolve the interpersonal issues with other staff.

Has the College behaved inappropriately in suggesting that the employment relationship had irretrievably broken down?

[95] The first point to make is that Ms Smithson has not been dismissed. Her substantive role remains at the college. If the college could have agreed terms to restore the relationships that had broken down with Ms Smithson, then she could have returned to her substantive role, but that agreement has never been achieved.

[96] Indeed, looking at the dispute as an outsider, it is difficult not to conclude that Ms Smithson's primary contribution to the interminable engagements between the parties is, rather than focussing on how to come to terms with the college so that the relationships can be restored, Ms Smithson has concentrated on suggesting different facilitators or mediators to address the issues between the parties.

[97] The college has resisted attempts to involve yet another mediator or facilitator on the basis that changing the name of the presiding individual is not going to achieve any fundamental shift in the parties' views.

[98] In their closing submissions, the school listed the number of attempts the parties have made to resolve matters. Along with a voluminous amount of correspondence, there have been a number of face-to-face meetings between the parties, two MBIE mediations, three months of facilitation with Paul Hutchison, and another formal mediation with Paul Hutchison and none of those engagements had achieved any fundamental change.

[99] In addition, the college has drafted a return to work plan but instead of being active and constructive in engaging with her employer, Ms Smithson has continued to refuse engagement, and instead criticise the college and its staff. contribute to the debate by fuelling the fires.

[100] For instance, Ms Smithson claims that she was "the subject of a very successful smear campaign that has been, I believe, championed by my senior management". Such a statement hardly endears Ms Smithson to the school's senior leadership team. Nor does her dismissive approach to the issues raised by her immediate colleagues do her any credit.

[101] At its heart, Ms Smithson has insisted that the school ought to have backed her as the head of department and brought the other protagonist of the 30 March 2015 incident into line. The school could not and would not do that because it had insufficient evidence or understanding about what actually happened in that incident and who, if anyone, was responsible.

[102] There were effectively only two individuals involved and each of them has told an entirely different story about what happened. Ms Smithson's view is that her view ought to predominate simply because she is more senior than the other person involved. But in the absence of any independent evidence, that was simply never going to happen.

[103] It was always available to Ms Smithson to adopt a conciliatory approach, to take some responsibility for some of the issues but there is no evidence of that anywhere in this dispute.

[104] Worse than that, she has contributed to widening the dispute by distancing herself from the school's leadership group, as I noted earlier in this determination, and worse than that making specific allegations against Mr Thorp by calling him "dishonest" and "duplicitous".

[105] To summarise then, I have not found that the college has behaved inappropriately in maintaining that the employment relationship has irretrievably broken down. I think that such an observation is a statement of fact. Moreover, I agree with counsel for the school to the effect that the principal reason that employment relationship has irretrievably broken down is because of the attitude taken throughout this dispute by Ms Smithson.

Conclusion

[106] I have not been persuaded that Ms Smithson has any personal grievance or any other justiciable claim against the college. It follows that Ms Smithson's claim fails in its entirety.

Costs

[107] Costs are reserved but as Wellington College has been completely successful in resisting Ms Smithson's claim, the college can look to Ms Smithson for a contribution to its costs. I urge the parties to try to resolve costs on their own terms.

[108] If they are unsuccessful in that regard, Wellington College is directed to file a memorandum asking the Authority to fix costs and fourteen days after that memorandum has

been filed and served, Ms Smithson is to file her memorandum in response; the Authority will then fix costs on the papers.

James Crichton
Chief of the Employment Relations Authority