IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 549
3096512

BETWEEN	SHANE WEST Applicant
AND	KOWHAI INTERMEDIATE SCHOOL BOARD OF TRUSTEES First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Kalev Crossland and Tony Sung, counsel for the Applicant Simon Mitchell, counsel for the Respondent
Investigation Meeting:	26 – 29 October and 3 November 2021
Submissions and/or further evidence	9 and 17 November 2021 from the Applicant 15 November 2021 from the Respondent
Determination:	09 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Shane West, claims that he has been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Kowhai Intermediate School Board of Trustees (the Board).

[2] Mr West further claims that the Board breached the duty of good faith it owed to him.

[3] The Board denies that Mr West was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct and the action it took was justifiable in all the circumstances at the relevant time.

The Authority's investigation

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[5] The issues requiring investigation are whether or not Mr West :

- was unjustifiably dismissed by the Board?
- was unjustifiably disadvantaged in his employment by the Board?
- Did the Board breach the duty of good faith it owed to Mr West during his employment?

Background

[6] Kowhai Intermediate School (the School) caters for students in Years 7 and 8.

[7] Mr West commenced employment at the School in 1990 as an Art Specialist teacher at the School. Apart from teaching, Mr West was an active member of the School community: involved in school-wide art teaching activities, clubs, camps, assemblies, and sports events. He ran weekend and school holiday Art workshops for pupils from local schools and organised and supervised Art camps in New Zealand and overseas.

[8] Mr West was a member of the New Zealand Educational Institute Te Rui Roa (NZEI) and covered by the provisions of the Primary Teachers' Collective Agreement (the Collective Agreement). Part 10 of the Collective Agreement was entitled Complaints/Discipline/Competency and stated at the following clauses:

> **10.4 Discipline**
>
> a) The employee must be advised of the right to request representation at any stage.
>
> b) The employee must be advised in writing of the specific matter(s) causing concern and be given a reasonable opportunity to provide an explanation. Before making a final decision, the employer may need to make further enquiries in order to be satisfied as to the facts of the specific matter(s) causing concern.

c) The employee must be advised of any corrective action required to amend their conduct and given a reasonable opportunity to do.

d) The process and any disciplinary action are to be recorded, sighted and signed by the employee, and placed on their personal file.

10.5 Suspension

a) If the alleged conduct is deemed sufficiently serious an employee may be either suspended with or without pay or transferred temporarily to other duties.

b) The employer shall not, unless there are exceptional circumstances, suspend the employee without first allowing the employee a reasonable opportunity to make submissions to the employer about the alleged misconduct and the appropriateness of suspension in all of the circumstance The employer shall take into account any submissions made to the employee before determining the matter of suspension. …..

10.6 Instant Dismissal

Nothing in clauses 10.2, 10.3, 10.4 or 10.5 prevents instant dismissal without notice in the case of serious misconduct.

Events 23 March 2017

[9] On 23 March 2017 Mr West taught the Pounamu group, a bilingual group of students who had recently joined the School. It was their fifth lesson with Mr West. During the lesson Mr West said the students were unco-operative and had a negative attitude to the project on which he had instructed them to work. Instead of doing the work they were allocated to do, some of the students had painted their hands with black paint and were acting disruptively.

[10] By the end of the class Mr West said he had been very frustrated and asked them why they thought they could treat him: "like shit".

[11] Mr Tom Mackintosh, who was at that time the Deputy Principal and ICT Director at the School and Mr West's senior teacher, said he had been contacted by another teacher after Mr West's class had finished. The teacher is the whanau leader for the students who had attended Mr West's Art class. She told him that she had spoken to a group of the students after the class and they had complained that Mr West had sworn at them and touched them inappropriately.

[12] Mr Mackintosh immediately went to see the Principal, Ms Louise Broad, to inform her of the complaints. Ms Broad had been in a meeting and came out of it to speak to him. Mr Mackintosh said Ms Broad had been alarmed that the students had been spoken to as a group, and she asked him to meet with Mr West and find out what had occurred during the class.

Meeting between Mr Mackintosh and Mr West 23 March 2017

[13] Mr Mackintosh said he had felt uncomfortable with being asked to speak to Mr West and thought it advisable to have someone with him at the meeting. He had therefore asked the NZEI delegate to accompany him as an observer.

[14] Mr West said that Mr Mackintosh had arrived at his classroom during a lesson and requested a 'chat'. He had asked if Mr Mackintosh could return following that class's conclusion.

[15] When they spoke subsequently Mr West said Mr Mackintosh would not tell him the nature of the complaint, and said he only wanted to hear about what had happened during the Art class attended by the Pounamu group. Mr West said he had anticipated his use of a swear word might have been reported, but he was upset Mr Mackintosh did not explain the nature of the complaint.

[16] During the meeting Mr Mackintosh said he had made notes of what Mr West was telling him had occurred in the Pounamu group class earlier. He had emailed the notes to Mr West later that day asking him to confirm what was recorded, but did not subsequently receive a reply.

[17] The notes taken by Mr Mackintosh record Mr West's statement of the Pounamu group class occurrences and the acknowledgment by Mr West that he had sworn, the notes concluded:

> Shane has acknowledged that the process has started with this statement and he requests a confirmation as to what the accusations are as soon as possible.

Student A meeting with Ms Broad 23 March 2017

[18] Ms Broad said she had read through the notes prepared by the whanau leader teacher and after having done so, decided to interview Student A, one of the Pounamu group who had complained about Mr West, after the school day had finished. Student A had told her that the students had painted their hands during the class and that Mr West had touched some of the female students inappropriately.

[19] When the School bell had rung signalling the end of the school day, she told the student to go home, advising her that she would need to speak to her the following day. Ms Broad did not advise the student not to discuss the allegations.

[20] Ms Broad said that she telephoned the Board Chairman, Mr Wade Gillgooly, advised him what was alleged to have occurred in the Pounamu group class, and said that she believed an independent investigator might be needed because she did not think she had the necessary skill to undertake such an investigation.

Mr West's meeting with Ms Broad 23 March 2017

[21] Mr West said that after the end of the school day on 23 March 2017 he had gone to see Ms Broad for information about the complaint about him. He had assumed the conversation with Mr Mackintosh had been taking place because he swore during the Pounamu group class and he had been upset at not being told the specifics of the complaint.

[22] He said Ms Broad had told him that several of the Pounamu group students who had been in his class had made allegations of sexual misconduct about him. He had been told that it was alleged he had touched several girls on their breasts and used profane swear words to address them.

[23] Mr West said he admitted to a momentary lapse in using one expletive, but was shocked to be told about what he regarded as completely fabricated allegations of sexual touching. He denied the allegations of inappropriate touching to Ms Broad, saying that they were totally false.

[24] Ms Broad said she had been specific about the allegations, and in respect of the allegation of swearing in the class Mr West had agreed that he had used the word 'shit' but denied that he had said 'fuck' as alleged in the complaint. In respect of the allegations of inappropriate sexual touching, Mr West told her he had been at the front of the class throughout the lesson and the allegations were completely fabricated by the students.

Events 24 March 2017

[25] The day following the complaints, 24 March 2017, Mr West said he attended the School and commenced teaching his classes for the day. On or about midday Ms

Broad arrived in his classroom and said there had been further complaints and asked him if he would go on leave. He agreed to do so. Mr West said Ms Broad did not ask him for any submissions on the proposed suspension.

[26] Ms Broad said she had told Mr West that in light of what had happened he was to be on leave with pay and advised that he contact the NZEI and seek EAP support.

[27] She had then contacted the parents of two of the students identified in the incident on 23 March 2017 to advise that the School needed to interview their daughters. A third student's parents were unable to be contacted by telephone so she had left a message.

[28] Ms Broad said she had also contacted Mr West later that day and asked him to write up his account and response to the allegations. She stated in the emails; "I need your recollection of the events yesterday by the end of the day."

[29] In response she received a detailed email from Mr West at 12.09 p.m. setting out the Pounamu group class proceedings and stating:

> …. While the group were at the table painting with the girls, they began to coat their hands with black paint. I remained at the front of the class observing them paint their hands ….
>
> After waiting and waiting for them to clean themselves up and the equipment … I was finally forced to yell at the group to return and sit at separate tables.
>
> During this time I was standing near the table at the front of the class.
> When the group finally sat at the tables, I asked why they thought they could treat me the way they do! And if they treated their teachers with as little respect or consideration. …
>
> The FIRST allegation of me swearing at the group is PARTLY true.
> When I had the group finally sitting at the individual tables after cleaning themselves I did ask the whole group "Why they thought they could treat me like shit?"
> I DID NOT in this sentence say fuck.
> The SECOND accusation of me touching/brushing the girls inappropriately across their breasts is TOTALLY FALSE.

[30] A short time later on 24 March 2017 Mr West emailed to Ms Broad stating:

> I have been in touch with the NZEI regarding yesterday's situation and complaint and after talking with them would appreciate it if you could forward the pupil's complaint documents for my and their reference.

[31] Ms Broad responded that Mr West would receive the documentation once the students interviews were completed, however the investigation was not complete.

[32] Ms Broad also advised Mr West that: "the investigation will be taken over and conducted by the Multi Allegation Investigation team and not myself". In the email Ms Broad also asked Mr West to maintain confidentiality and not to have contact with the students, the School staff or within the community.

Student Interviews 24 March 2017

[33] Ms Broad said that she interviewed the three Pounamu group students involved in the complaints against Mr West on 24 March 2017 with another staff member present to take notes. As a result of what the students told her she referred to the Board of Trustees Child Protection Policy for advice and considered that given the nature of what the students alleged, there was sufficient information and level of disclosure to seek the assistance of the New Zealand Police Force (the Police).

[34] The day following the student interviews, Ms Broad received an email from the parent of one of the Pounamu group students interviewed. The email dated 25 March 2017 stated that her daughter had not, as she had told Ms Broad, experienced any inappropriate touching by the teacher involved, but that her daughter's friend had been touched. Ms Broad said she had forwarded the email to the Board.

[35] Ms Broad said she attended a meeting between the Board, the Ministry of Education, Children Young Persons and their Families (CYF, now known as Oranga Tamariki) and the Police, as a result of which a Multi Allegation Investigation Team (the MAT Team) was initiated to investigate the allegations against Mr West.

[36] Ms Broad said she had also contacted a New Zealand School Trustee Association (NZSTA) Advisor who mentioned that Mr West had a history that might be relevant. Ms Broad did not find any relevant documentation on Mr West's file and only found information by searching the server and to locating documentation which she considered related to previous behaviour by Mr West which followed a similar pattern of inappropriate touching.

Historical Documentation

[37] The documentation found on the server referred to allegations in 2000, 2001, and 2002 which had not been substantiated and had resulted in no disciplinary action.

[38] There was a final written warning dated 20 May 2003 issued in regard to a complaint that Mr West had inappropriately disciplined a student. The warning letter stated:

> This final written warning will be removed from your personal file on Friday 24 April 2004 provided there are no further incidents. In the event there is a similar incident that is substantiated a consequence could be summary termination of your employment.

[39] Mr West had subsequently attended a two hour training session incident regarding harassment in January 2003.

[40] In accordance with the statement in the final written warning letter dated 20 May 2003 it was removed from Mr West's personal file after a year without further incident.

[41] On 27 March 2017 a letter was sent to the School parents of the students Mr West had taught in 2017 and 2016 inviting them to attend a meeting to be held on 28 March 2017 at which the Police and CYF would be explaining the situation involving: "possible inappropriate behaviour by a member of our staff."

[42] The day following the meeting with the parents Ms Broad received an email from a parent concerning content they had found upon reviewing their daughter's phone. The email attached screen shots of the speculation contained in the chats expressed in what the parent described as "arrogant and ugly language". The parent said the emails clearly identified Mr West. Ms Broad said she had passed the email on to the Police and the Board.

Police Investigation March 2017

[43] Ms Broad said the Police and CYF commenced an investigation on 28 March 2017 (the MAT investigation).

[44] She had asked Mr Mackintosh for his notes but said he had been reluctant to provide them, advising her in an email dated 2 April 2017:

> Hi Louise, my understanding via the advice given by NZEI is that this can only be 'released' by Shane and that officially he doesn't have to say anything until he had a written statement detailing the alleged offences (his statement is the response to these). … We run the risk of jeopardising the process if I release these to you without his consent.

[45] Ms Broad said on the evening of 2 April 2017 she had contacted Mr Carl Anderson, Industrial Officer for the NZEI, and asked him to clarify on the advice provided to Mr Mackintosh by the NZEI.

[46] Mr Anderson responded by email on 3 April 2017 stating:

> I cannot provide formal advice, you might want to ask [the NZSTA Advisor] for assistance in that regard.
>
> However, my view is that it would be inappropriate for these notes to be released to you or the Board, on the following grounds:
>
> 1) Shane is exercising his rights in terms of Section 25 of the Bill of Rights Act to have a fair hearing, and not to be compelled to provide testimony on a matter which is the subject of a Police investigation. As such, he is exercising his right not to provide the notes at this time, to ensure his ability to engage appropriately in the investigation if and when it develops.
>
> 2) Given that the notes relate to an informal meeting which took place prior to Shane being aware of the nature of any allegations, or the possible outcome of any process arising from them. As such, the disclosure of these notes might prove prejudicial either to Shane's right to a fair process, or to the School's ability to undertake a fair and impartial process in due course. Specifically, any future process the School might undertake could effectively be prejudiced or undermined by this information being obtained prematurely.
>
> In our view, a far more appropriate next step would be for the School to allow the Police to undertake their own investigation, and then for the School to take appropriate steps once the outcome of that investigation is known. In our view, that would be fairer to Shane, and safer for the School.

[47] Ms Broad said she checked her position and then relayed her advice to Mr Mackintosh that he should provide his notes. Mr Mackintosh said he had felt compelled to do so because Ms Broad inferred that they were required as part of a legal process.

[48] Between 29 and 30 March 2017 the MAT Team interviewed the girl students Mr West had previously taught.

The Board process

[49] On 27 March 2017 Mr Gillooly said a sub-committee of the Board consisting of himself, Mr Nicholas Taylor, and Mr Frank Po-Ching was formed to deal with the allegations concerning Mr West.

Principal's report 3 April 2017

[50] Ms Broad provided a report for the Board dated 3 April 2017. In the report Ms Broad set out the incident as reported to the whanau teacher on 23 March, the

subsequent interview with Mr Mackintosh and the interviews she had conducted with the students.

[51] Ms Broad stated that: "Contact was made with the BOT Chair to inform him that I believed we may need an independent investigator."

[52] Ms Broad also outlined Mr West's response to the allegations on 23 March 2017, the fact that Mr West had been placed on leave with pay, and the parents of the students involved contacted.

[53] Ms Broad set out details of the previous historical allegations which she stated: "follow a similar pattern to recent allegations of inappropriate touching."

Board letter 5 April 2017

[54] Mr Gillooly wrote to Mr West on 5 April 2017 advising that the Board had received a report from the Principal, a copy of which was stated to be attached. In fact it had not been attached and was sent by email to the following day to Mr West and to Mr Anderson. However Mr West said he had not received it which may be explained by the fact that it was set to Mr West's School email address and he was suspended and no longer at the School.

[55] The letter stated:

> We have received a report from the Principal …
> Of major concern to the Board is the fact that these complaints follow similar complaints put to you in previous years. …
>
> It is extremely disturbing that we now have fresh concerns of the same nature.
> …
> The Board has empowered a committee comprising myself, Frank Po-Ching and Nicholas Taylor. This committee is empowered to investigate this matter and to make any determination as to outcome from taking no further action through to termination of employment without notice. It will be supported by The [NZSTA Advisor] and will proceed in accordance with our obligations under s 10.4 of the Primary Teachers Collective Agreement.
>
> You are asked to attend a meeting before the committee on 10am, Tuesday 11th April, 2017…
>
> Prior to that meeting you are invited to respond in writing. At this meeting this and/or any explanation or submission you provide will be given careful consideration….

Response on behalf of Mr West 10 April 2017

[56] Mr Anderson responded to the letter on behalf of Mr West by letter dated 10 April 2017. Mr Anderson stated that it was inappropriate for Mr West to attend the proposed disciplinary meeting because:

> Mr West has a legal right under s 25 of the Bill of Rights Act 1990 (BORA), not to be forced to provide testimony regarding all allegations against him, and to be the subject of a fair process of investigation. Should he be required to attend the proposed disciplinary meeting, he would effectively be forced to provide testimony in relation to the allegations which are the subject of the MAT investigation.
>
> Any decision by the Board to proceed with any disciplinary action against Mr West, given his decision to not provide testimony until the conclusion of the Mat Process would also be in violation of the clear case law providing that employers ought to allow criminal law processes to be concluded prior to initiating any employment law investigation.
>
> There is case law providing clear authority that an employer ought to wait until the conclusion of any criminal law process prior to undertaking its own investigation, in the interests of protecting the employer's right to silence, the right to a presumption of innocence, and the right to a fair employment process.

[57] Mr Anderson cited a number of cases for reference, including one as authority for his statement that it was a basic requirement: "of procedural fairness and natural justice" that an employer not undertake disciplinary action without having all the relevant facts. The case referenced by Mr Anderson included the case of *Shone v Gisborne Intermediate School Board of Trustees.*[1]

[58] Mr Anderson noted the concern that many of the allegations contained in the Principal's report were of an historical nature, and stated that: "it is inappropriate and unjustifiable for the Board to initiate any investigation which takes consideration of such matters."

[59] Mr Anderson also brought the attention of the Board to available funding:

> Finally, we note that there is a clear and well-established funding stream under Ministry of Education policy, the Special Reasons Teaching Allowance (SRTA), which ensures that the Board need not be financially disadvantaged by Mr West remaining on paid leave while the matter is investigated.
>
> I have no doubt that the Board's representative, [the NZSTA Advisor], is well placed to advise on the Board's options in gaining access to this funding while the MAT investigation continues. There is also an Employment Relations

[1] *Shone v Gisborne intermediate School Board of Trustees (2007) 8 NZELC 99,055.*

> Authority decision which covers in some detail the desirability of teachers being placed on paid leave using the SRTA policy, which may be of some use.

[60] Mr Gillooly said that the sub-committee of the Board had considered the letter from Mr Anderson. There had been consideration of the exercising by Mr West of his right to silence in accordance with the NZBORA and of using the SRTA. Mr Gillooly said the sub-committee had taken advice from the NZSTA Advisor on both issues.

[61] Mr Gillooly said he did not read the cases which had been referenced and cited by Mr Anderson in his letter dated 10 April 2017 before reaching a decision. Mr Po-Ching said he also had not read the cases.

[62] Mr Taylor, a barrister by profession, said he had not needed to read the cases in order "to find guilt beyond reasonable doubt", although he said that had Mr West attended the requested meeting, his responses may have informed the decision.

[63] Mr Gillooly said that the Board had considered what it could do as an employer and decided it could not safely ignore what had happened. Whilst use of the SRTA had been considered, it was decided that the Board's duty of care was paramount. The Board had a full account of what had occurred and could safely move to making a decision including credible evidence from the students and the previous historical allegations.

[64] Mr Po-Ching said he believed that the sub-committee had carried out a robust process.

[65] Mr Taylor said he believed that all the elements relevant to a decision were present to the Board at the time the decision was made, the statements made were credible, and the previous allegations provided propensity evidence.

[66] Mr Gillooly said that the disciplinary process in respect of Mr West had been discussed at the Board Meeting held on 10 April 2017. The Minutes state:

> The sub-committee had determined that on the balance of evidence in front of it, specifically the behaviour of inappropriate touching in this incident, the fact that Shane had sworn at the children and the prior incidents of inappropriate touching, that a misconduct had occurred.
>
> The sub-committee believes that the evidence of the children is highly credible and this is supported by the prior complaints on record, indicating a pattern of inappropriate behaviour which is difficult to ignore….

> The Sub-committee has made every effort to get Shane's version of events in the interest of natural justice and fair process. However Shane chose not to participate in our investigation process and any of our meeting requests….
>
> So the recommendation from the sub-committee is that the Board now needs to make a final decision to accept or reject the recommendation from the sub-committee of termination of Shane's employment at the school.
>
> …
>
> The Board unanimously agrees that the decision is termination.

[67] Mr Gillooly said that the Board considered that in light of the seriousness of the allegations against Mr West, and the report it had received from Ms Broad together with the statements obtained from Mr West, it had sufficient information on which to rely on the recommendation of the sub-committee, and to proceed to make a decision.

Dismissal Letter 11 April 2017

[68] The letter sent by Mr Gillooly on behalf of the Board set out its view that the Board had a duty of case to initiate the employment investigation based on the serious allegations against Mr West. The letter continued to state:

> In the absence of either a written or verbal response to the allegations, the Board and its sub-committee is therefore entitled to review the evidence that it has before it and assess the credibility and reliability of the allegations made and to assess any response made by you previously.
>
> This evidence has now been carefully reviewed by the Board and its sub-committee. The Board has reached the view that the evidence provided to it from the complaints in this matter are highly credible. These multiple recent complaints have been considered in light of a relevant pattern of historical behaviour that has been previously documented.
>
> The Board has found that the current allegations are not inconsistent with these documented historical matters and are therefore highly relevant to its deliberations and final decision.
>
> As such Kowhai Board of Trustees has found that a gross misconduct has occurred and therefore has resolved to take disciplinary action against you and as a result your employment at Kowhai School is terminated effective immediately from today's date `being 11th April, 2017.

[69] On 13 April 2017 Mr Anderson wrote to Mr Gillooly to advise that Mr West was raising a Personal Grievance in relation to his dismissal which was regarded as being unjustifiable.

Criminal Trial and Acquittal

[70] On 28 May 2017 Mr West was charged by the Police with seven counts of indecent assault. He was briefly taken into custody before being released on bail.

[71] The jury trial into the charges against Mr West commenced on 5 March 2018 and concluded on 15 March 2018.

[72] The jury found the witness evidence not credible and Mr West not guilty, acquitting him fully on all seven charges.

Refusal to sign practicing certificate

[73] Ms Broad said she completed a mandatory report to the Education Council (now known as the Teaching Council) on 28 March 2017 which resulted in an investigation by the Complaints Assessment Committee (CAC) in 2018.

[74] Following the conclusion of the criminal trial Mr West said that the Complaints Assessment Committee of the Education Council proposed to conclude its process by reaching an agreement with him and the School on his future teaching practice.

[75] The letter from the CAC dated 27 June 2018 stated that it had considered the Mandatory Report which included the allegation that Mr West had sworn at three students. It set out its decision:

> The CAC concluded that Mr West's behaviour reaches the threshold for misconduct and requires a disciplinary response. The CAC has resolved to conclude this matter with an Agreement to Censure. The Agreement includes a condition to undertake positive guidance professional development.

[76] Mr West said he was prepared to accept the Agreement to Censure, however Ms Broad had refused to sign his practicing certificate.

[77] Ms Broad said that she had been alarmed that Mr West had done even more that what he had admitted and noted Mr West had accepted that his conduct in swearing amounted to misconduct which reflected adversely on his fitness to teach.

[78] Ms Broad emailed the Education Council on 23 July 2018 and advised that she was not satisfied: "as to the level of detail or specifics provided by the CAC in the document to professionally develop Mr West".

[79] On 17 August 2017 Ms Broad sent a further email stating:

> Previously in my email to you on 23 July, I indicated I would sign the agreement notice once I had a better idea of the professional development and action plan contained in the Agreement to Censure.
>
> This morning I had a meeting with my BOT chair. One item on the agenda was the Agreement to Censure. On reflection I need to inform you that I will not be signing the Agreement to Censure document.
>
> The BOT and I have had full disclosure of background information that the CAC have not been privy to in reaching their decision, background which I cannot ignore.

[80] As a result it was necessary for the Education Council to refer the matter to the Teachers Disciplinary Tribunal.

[81] On 28 July 2020 the Disciplinary Tribunal released its decision:

> The CAC has made out its charge that the respondent swore at students in the classroom, and by the very narrowest of margins, we make a finding of misconduct. That said, we reiterate our earlier comments that we find it perplexing that this matter is even before the Tribunal and that a teacher with an otherwise blemish free career has had his career end in this way. This could have been handled in a far more mana enhancing way.

Was Mr West unjustifiably dismissed from his employment by the Board?

[82] It is not for the Authority to substitute its view for that of the Board. It is the Authority's role in accordance with S103A of the Employment Relations Act 2000 (the Act) to make an assessment of whether the actions of the Board were those of a fair and reasonable employer in all the circumstances at the relevant time. The assessment includes examining the reason for the dismissal but also how the Board acted in the process leading up to the dismissal.

[83] In s 103A(3) of the Act a range of factors are set out for consideration by the Authority when assessing the employer's procedural actions at the time of dismissal, these include:

> a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[84] Genuine consideration means that an employer should approach an investigation into alleged wrong-doing by an employee with an open mind rather than having a pre-formed view from the outset. Accordingly the fair and reasonable employer should assess all the evidence before arriving at a decision based on the probabilities.

[85] The duty of good faith as set out in s 4 of the Act is also relevant. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of an employment of an employee, he or she is required to provide to the employee access to information relevant to that proposal and an opportunity to comment on it prior to a decision being made.

A fair investigation

[86] The allegations made against Mr West were serious. It was incumbent upon the School to take them seriously, however the nature of the allegations did not infer that the School could act without having reasonable grounds for finding the allegations substantiated following a fair and reasonable investigative process. On the contrary, given its responsibility to act fairly towards Mr West as its employee it had responsibility to carry out a full and fair investigation.

[87] In accordance with s 103A(6) of the Act any defect in the process which was minor and did not result in the employee being treated unfairly should not render a dismissal or other action by an employer unjustifiable. However in this case I find that the defects were more than minor and did result in Mr West being treated unfairly.

[88] The process defects began at the onset of the investigation, from the initial conversation between Mr Mackintosh and Mr West and continued to the point of dismissal. I find the errors were, as stated by the then Chief Judge Colgan in *Lewis v Howick College Board of Trustees*: "pervasive, multi-dimensional and, together, meant that the procedure was so unfair and unreasonable that it does not meet the s 103A test"[2]

[89] The reasons for this are set out below:

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[2] *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4 at [75].

a) Outset of the Investigation

[90] The School had provided the teaching staff with no training in how to deal appropriately with allegations of a sexual and harassing nature. On 23 March 2017 the students were initially spoken to as a group by a teacher with no training in how to deal appropriately with the ensuing allegations which included not only swearing, but sexually inappropriate conduct, to emerge.

[91] The teacher tried to act responsibly in the situation by advising the students not to discuss the matter. However the students had been spoken to as a group rather than individually and there was the real possibility that the students would discuss the situation despite being told not to, thereby raising the possibility of co-witness contamination of their evidence.

[92] When Ms Broad asked Mr Mackintosh to speak to Mr West, she did not have full details of the allegations but had sufficient knowledge of their nature to be concerned that the students had been spoken to as a group.

[93] Ms Broad asked Mr Mackintosh to obtain Mr West's account of what had occurred but did not advise him to tell Mr West he was entitled to have a representative present or the details of the allegations made against him in accordance with clause 10.4 of the Collective Agreement.

[94] Mr Mackintosh was sufficiently concerned about what he was being asked to do that he obtained an impartial witness to accompany him when he spoke to Mr West.

[95] I have considered whether or not this was an informal step, not part of the formal disciplinary process, such that this step does not attract the same standards of procedural fairness.[3]

[96] I am not persuaded this is the case for two reasons: one being the statement recorded by Mr Mackintosh in the notes he made of that meeting that: "Shane has acknowledged that the process has started with this statement", and the other reason being that Ms Broad asked for the meeting notes subsequently and provided them, together with the notes provided by the whanau teacher, with her report to the Board.

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[3] *Green v Wellington Zoo Trust* [2011] NZERA Wellington 157.

[97] I also note as relevant that Mr Mackintosh records in his notes that in their meeting on 23 March 2017 Mr West requested a copy of the 'accusations' as soon as possible in the same sentence in which he set out his understanding that a disciplinary process had commenced.

(b) Meeting between Ms Broad and Mr West 23 March 2017

[98] Mr West approached Ms Broad after school that same day because he had been concerned by the meeting with Mr Mackintosh. Whilst Ms Broad verbally told him of the allegations, she did not provide him with those in writing either at that meeting or subsequently when she wrote to Mr West on 24 March 2017 asking for his account of what had occurred during the lesson the previous day.

[99] Mr West had requested the student's complaints documents in the email dated 24 March 2017. This was the second time he had done so. However neither Ms Broad nor the Board provided the students' complaints in writing either prior to Mr West's request for Mr West's recollection of events on 24 March 2017, or at any stage prior to dismissal.

[100] Ms Broad requested that Mr West provide his recollection of events by the end of 24 March 2017, the day following him being made aware of the allegations. Mr West was entitled in accordance with clause 10.4 of the Collective Agreement to have a "reasonable opportunity to provide an explanation".

[101] I find that the request to Mr West to provide his explanation in such a short time frame, especially given the lack of a written record of the complaints, was not the action of a fair and reasonable employer and a breach of s 10.4 (b) of the Collective Agreement.

[102] I find it was also a breach of the good faith duty pursuant to s4(1A)(c) of the Act which requires an employer who is proposing to make a decision which could have an adverse effect on the employee's continuity of employment to provide "access to information, relevant to the continuation of the employee's employment".[4]

[4] Section 4 (1A)(c)(i) Employment Relations Act 2000.

[103] Mr Anderson in his email dated 3 April 2017 commented on the inappropriateness of Ms Broad requesting a statement from Mr West stating: "Specifically any future process the School might undertake could effectively be prejudiced or undermined by this information being obtained prematurely."

(c) Proposed meeting with Mr West

[104] The Board proposed to meet with Mr West in the letter dated 5 April 2017. Prior to this letter, Ms Broad had been advised by Mr Anderson in the email dated 3 April 2017 that Mr West, in light of the criminal investigation, was exercising his rights in accordance with s 25 of the NZBORA. Mr Anderson further advised that it would be appropriate for the School to allow the criminal process to conclude before proceeding any further.

[105] The Board in the letter dated 5 April 2017 proposed meeting with Mr West on 11 April 2017. In his response dated 10 April 2017 Mr Anderson repeated his previous advice to Ms Broad that Mr West was exercising his right to silence. In his letter Mr Anderson referred to a number of legal cases in support of his advice to assist the Board. However no member of the sub-committee had taken the time to read and consider the cases.

[106] Mr Anderson had referred the Board to the case of *Shone v Gisborne Intermediate School Board of Trustees.*[5] In that case a teacher was suspended without pay pending a criminal process, and similar issues regarding the application of the NZBORA to the employers process and the availability of the SRTA were considered by the Authority. The Board may have been assisted in its decision making process by the reasoning in that case had the sub-committee read it.

[107] In particular by the statement by the Authority Member in *Shone* that:

> [49] The presumption of innocence is a principle important to the rule of law in our society. Whether or not the presumption is true in any particular case is not the issue. It is not open to a school board, or this Authority, to put aside the rule of law and usurp or pre-empt a decision that properly rests with the criminal courts.
>
> [50] For that purpose the Applicant must be presumed innocent until the decision in his trial on criminal charges, when the decision of the Court will either confirm or displace that presumption. A teacher innocent of the charges should not have to bear the financial burden of losing his or her income while

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[5] *Shone v Gisborne Intermediate School Board of Trustees* (2007) 8 NZELC 99,055.

> awaiting trial - and that is the benefit of the presumption to which the Applicant is entitled until the Court makes its decision. [6]

[108] The Board, as other school boards, is a crown entity and as such has obligations in that capacity which include the need to act consistently with New Zealand legislation including the NZBORA.

[109] The NZBORA states the right at s25(c): "to be presumed innocent until proven guilty according to law".

[110] The right is subject to reasonable limits prescribed by law as set out in s 6 of the NZBORA, however the powers and obligations of a board under the Act, the State Sector Act and the Education Act are to be interpreted consistently with the NZBORA provided such meanings do not render the provisions of those statutes invalid or ineffective.[7]

[111] Therefore, unless there are other compelling reasons against it, a board as a good employer acting in accordance with the duty of good faith, should give effect to those rights, including the presumption of innocence.

[112] I accept that a primary consideration for a School in the situation faced by the Board is the financial cost of maintaining a teacher on full pay whilst they are suspended awaiting the outcome of a criminal process which could be protracted. In addition a school may be unable financially to replace the teacher in the classroom, a major consideration.

[113] In his letter Mr Anderson outlined for the Board the availability of the SRTA which if granted, would have removed that consideration. However the Board considered the availability of the SRTA but did not apply for it, moving instead to the dismissal decision confirmed by letter dated 11 April 2017.

(d) The dismissal decision

[114] The Board has accepted that it should have waited and not proceeded until the criminal process was concluded, that concession was made during the Investigation Meeting.

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[6] Above n 5 at [49] and [50].

[7] Section 4 NZBORA.

[115] On behalf of the Board it is however submitted that the standard of proof in a criminal process and in an employment process are different and that different standards of conduct apply. Citing the case of *Hallright v Forsyth Bar Limited* it is submitted that the position is not absolute and Mr West was not entitled to fail to attend a disciplinary meeting.[8]

[116] I note that in *Hallright* the employer commenced its process after a criminal court had found Mr Hallright guilty. In this case, the criminal process which resulted in Mr West being found not guilty, had not commenced.

[117] Mr Anderson referred the Board to the case of *Shone*.[9] As observed, the Board may have been assisted in its decision making process had the sub-committee read it.

[118] A fair process requires that an employee is given an opportunity to provide an explanation which is considered before any decision is made. Mr West had made two statements in writing about his account of what had occurred in the classroom on 23 March 2017 and these were before the Board.

[119] Each statement had been made without Mr West having written notification of the actual complaints, and without him having representation. In the first statement recorded by Mr Mackintosh, Mr West admitted that he had sworn during the class by saying 'shit' but `no other swear word', and the second written statement made at Ms Broad's request strenuously denied any claims that he had acted in an sexually inappropriate manner to the female students.

[120] The letter from Mr Gillooly dated 5 April 2017 advised Mr West that any explanation he provided or submissions made would be given careful consideration, but nowhere in the letter does it warn Mr West that a failure to attend the meeting might result in the termination of his employment.

[121] The dismissal letter dated 10 April 2017 comments that: " Shane chose not to participate in our investigation process" but makes no reference to Mr West having chosen to exercise his right to silence in accordance with the NZBORA in the face of an impending criminal trial.

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[8] *Hallright v Forsyth Bar Limited* [2013] NZEmpC 202.
[9] *Shone v Gisborne Intermediate School Board of Trustees* (2007) 8 NZELC 99,055.

[122] The reasons provided for the decision do not appear to have given consideration to Mr West's express and vehement denial in the verbal and written statements to Ms Broad that he had not committed the allegations of sexual misconduct, instead the Board's letter stated it accepted that: "the evidence of the children is highly credible".

[123] I note that one of the parents had written to the School advising it that her daughter had retracted her statement that Mr West had inappropriately touched her. Whilst Mr Gillooly said he had read this email, there is no evidence that the Board genuinely weighed that retraction and Mr West's denial against the evidence of the children.

[124] I also observe that had the Board delayed its process until after the criminal process conclusion, it would have had some information as a result of that process. Although I accept a different standard of proof applies in each process, the information may have informed the Board's consideration when the disciplinary process resumed.

[125] At that time, it would also have had the opportunity to hear Mr West's explanation and question him. It has been submitted that Mr West could have attended the disciplinary investigation meeting and addressed some areas of concern.

[126] I accept that Mr West may have been able to discuss the swearing allegation, but not the allegation of sexually inappropriate touching which was significant and the focus of the criminal investigation. In those circumstances it is difficult to see what benefit such a meeting would have been to the Board.

[127] The Board stated in the letter dated 10 April 2017 that it had been unable to ignore "a pattern of inappropriate behaviour" by Mr West. That referred to incidents prior to 2002 which had not been substantiated and to an expired warning from 2003. There had been no repeated incidents in the 14 years since the warning had been issued and removed from Mr West's file. I note also that the previous incidents did not involve touching of a sexual nature.

[128] Employers are expected to enter into a disciplinary process with an open mind, the inference being in this case that from the outset the Board had formed a view of Mr West's credibility based on the historical incidents and an expired warning from 14 years previously which it had described as "Of major concern" in the letter dated 5 April 2017.

[129] I find that the Board did not conduct a fair and reasonable process.

Substantive Justification

[130] Mr West admitted at the first meeting with Mr Mackintosh that he had sworn **in** the class, but notably not that he had sworn **at** a particular student, or at a group of students. Of itself that incident would have resulted in a finding of misconduct, as was noted by the Disciplinary Tribunal in its report of 28 July 2018.

[131] The Board dismissed Mr West on the basis of serious misconduct based on is view:

> … that the evidence provided to it from the complaints in this matter are highly credible. These multiple recent complaints have been considered in light of a relevant pattern of historical behaviour that has been previously documented.

[132] Allegations of sexually inappropriate behaviour by any teacher are a serious matter for any school and if substantiated would rightly be regarded as serious misconduct. The more serious the allegation and potential outcome, the more important that the evidence in support of the allegation is of equal weight.

[133] The Board and Ms Broad believed the evidence of the students was more credible that than of Mr West, a teacher who had taught at the School for almost 28 years and a respected member of the teaching profession.

[134] This was despite the fact that one of the parents had informed Ms Broad at the outset that one of the students had retracted her allegation, and another parent had reported gossiping between the students on social media fuelling the rumours which were already circulating from the outset of the process.

[135] The benefit of expert evidence which was provided during the Authority's Investigation Meeting had not been available to the School at the time it reached its decision to dismiss Mr West, and therefore the Board cannot beheld to have considered it.

[136] I have observed that no teacher at the School had been trained on what to do if presented with a complaint of this nature. I consider this deficiency was acknowledged

by Ms Broad's in her suggestion to Mr Gillooly that an independent investigator be appointed by the School.

[137] That did not occur, however the School did engage with the MAT Team which embarked on its own investigation. The criminal trial which ensued resulted in Mr West being found not guilty on all charges.

[138] I observe that had the Board awaited the outcome of the criminal trial, it may have taken into consideration, whilst acknowledging the different standards of proof in both processes, the implications for the credibility of the students from their evidence given at the trial.

[139] The Board also placed great weight on the historical matters. As observed only one was substantiated and resulted in a written warning of inappropriate discipline by Mr West which had been removed as expired from Mr West's file 14 years earlier. The incident giving rise to the warning had not been of sexually inappropriate touching, nor had the unsubstantiated earlier incidents.

[140] I accept that the Board had a duty of care to the children in its charge and this was a consideration in its finding of serious misconduct by Mr West.

[141] However it is notable as regard the fairness of the process and decision that from 24 March 2017 Mr West had been on suspension and therefore not in contact with any student at the School.

[142] In that situation I do not accept that the consideration of its duty of care to the students should have outweighed the Board's responsibility to reach a finding of serious misconduct following full consideration of the allegations against Mr West, and an explanation from him.

[143] I determine that Mr West was unjustifiably dismissed by the Board.

Was Mr West unjustifiably disadvantaged by the Board?

[144] Mr West was suspended by the School on 24 March 2017. In accordance with clause 10.5(a) of the Collective Agreement, an employer may suspend if an allegation: "is deemed sufficiently serious". I find it reasonable for the School to consider that the allegations of sexually inappropriate touching were sufficiently serious to suspend.

[145] Clause 10.5(b) states that an employer should not suspend an employee without first allowing him or her: "a reasonable opportunity to make submissions to the employer about the … appropriateness of suspension in all of the circumstances." This provision may be excluded and a suspension can take place without the employee being provided with the opportunity to make submissions first provided there are: "exceptional circumstances".

[146] It is submitted for the School that the circumstances, being the nature of the complaints, were exceptional and that the circumstances on that day made it necessary to suspend Mr West, both to protect students and to protect him.

[147] It is unclear why Ms Broad did not put the prospect of suspension to Mr West when he met her after the school day on 23 March 2017 but it is clear that Mr West agreed to the suspension when Ms Broad spoke to him.

[148] However given that no opportunity was given to Mr West to provide any comments to the proposal, Ms Broad having told Mr West he was on suspension while the investigation took place, it is not surprising that Mr West agreed to leave.

[149] In *Graham v Airways Corporation of New Zealand Ltd,* the Employment Court noted that there is no immutable rule requiring an employee to be told about the proposal to suspend without giving the employee an opportunity to persuade the employer not to do so.[10]

[150] I find that this was a situation in which, given the serious nature of the complaints, the School could suspend Mr West without giving him the opportunity to comment on that decision first.

[151] In the email dated 24 March 2017 in which Ms Broad confirmed the suspension she advised Mr West: "Please do not have any contact with the students or discuss this matter with staff or within the community while the investigation is taking place."

[152] I find that the effect of this aspect of the suspension was to isolate Mr West, who had worked at the School for 28 years and who lived in the community in which the School was based, from any support during the period of the investigation.

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[10] *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587 at [104].

[153] It is clear that rumours were circulating in the School and local community on social media from the outset of the process: the comments on social media which identified Mr West were noted in the parent email to Ms Broad on 29 March 2017 as being : “arrogant and ugly”. Given the context, the effect of the directive from Ms Broad was to deprive Mr West of much needed support.

[154] I find Mr West was unjustifiably disadvantaged by the directives in the notice of suspension.

Did the Board breach the duty of good faith it owed to Mr West during his employment?

[155] As set out above the failures in the process by the School represented a breach of the good faith the School owed to Mr West from the point of the suspension through the investigation and disciplinary process. Significantly:

b) From the outset the School accepted the evidence of the students rather than that of Mr West: Ms Broad made it clear in the Authority’s investigation that she believed the students, (“children don’t lie about big things”) and the Board stated decisively that it considered the “evidence of the children to be highly credible”;

c) The Board also owed a duty of good faith to Mr West as his employee to act in a fair and reasonable way towards him by considering his evidence carefully before reaching a decision. Throughout the initial stages of the process Mr West had strenuously denied the allegations against him apart from having sworn in the class, and I find it was incumbent upon the Board acting in good faith to carefully consider that explanation prior to reaching the decision to dismiss, especially in light of Mr West’s extensive service at the School;

d) The Board failed to investigate any third party potential evidence: I note the evidence of Ms Cohen who was teaching in the next classroom to Mr West during the Pounamu group class who had expressed her surprise that she had not been interviewed by the Board given her physical proximity to the alleged events;

e) The Board failed to delay its decision-making process once made aware that Mr West was exercising his right to silence in accordance with the NZBORA, and

f) The Board appeared to reject the suggestion that it apply for the SRTA allowance which, if granted, would have alleviated any financial pressure to hasten a decision without giving Mr West the opportunity to provide an explanation to the sub-committee.

[156] I find that the Board did breach the duty of good faith it owed to Mr West.

Remedies

[157] Mr West has been unjustifiably dismissed and unjustifiably disadvantaged by the Board and he is entitled to remedies.

Lost wages

[158] It is submitted on behalf of Mr West that he should be awarded lost wages from the date of his dismissal until the date of the Authority's investigation meeting or for any longer period as determined by the Authority.

[159] Mr West was dismissed by the Board on 11 April 2017 when he was age 62. The date of the Authority's Investigation Meeting was 19 October 2021, approximately four and a half years later.

[160] The Authority's power to award reimbursement to an employee who has suffered financial loss as the result of a personal grievance is set out in s 128 of the Act. In accordance with that provision the Authority may, "at its discretion" set an award greater that a sum equivalent to 3 months' ordinary time remuneration.[11]

[161] In considering this matter I observe that in *Telecom New Zealand Ltd v Nutter* the Court of Appeal approved the principle that compensation for lost wages is discretionary and that there is no automatic entitlement to an award equivalent to the balance of the expected working life of the employee.

[162] The Court of Appeal in *Nutter* stated at paragraph [73]:

> The longer the period in respect of which compensation is sought, the more uncertain and speculative the assumptions underlying the eventual award

[11] Employment Relations Act 2000 s128 (3).

> become …. The idea that full compensation in this sort of case can ever be assessed with anything like precision is a fallacy.

[163] In *Sam's Fukuyama Food Services v Zhang* the Court of Appeal stated:

> [24] We now deal briefly with the applicable principles. In *Telecom New Zealand Ltd v Nutter*, this Court approved the principle that compensation for lost remuneration is discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee. The Court said:
>
> > … it is now well-established in New Zealand that a "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to "full" compensation.
>
> [25] The Court said that moderation is appropriate in setting awards for lost remuneration because:
>
> > 1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring "full" compensation to be awarded.
> >
> > 2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.
> >
> > 3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).
> >
> > 4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes.
> >
> > 5. A community expectation of "full" compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.
>
> [26] The Court said that the employee's actual loss sets an upper ceiling on any award and it is plainly a logical starting point for assessment. The assessment of compensation in any particular instance must be individualised to the circumstances of the case and the assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment‖ (that is, counter-factual analysis). [12]

[164] Mr West stated in his evidence that he had an expectation of working until the School's Centennial due in 2022. That expectation was reliant on a number of factors such as Mr West's health and other exigencies of life.

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[12] *Sam's Fukuyama Food Services v Zhang* [2011] NZCA 608.

[165] What is known is that Mr West was unable to obtain a teaching practising certificate at the conclusion of the criminal trial and was not in a position to do so until the Disciplinary Tribunal issued its decision on 28 July 2020. The delay in his being able to do so resulted from Ms Broad's refusal to sign the proposed Agreement to Censure on 17 August 2018 which meant that the matter had to be referred to the Disciplinary Tribunal.

[166] Having given the matter due consideration I find that the appropriate date to which an award of lost wages should relate is from the date of Mr West's dismissal on 11 April 2017 to 28 July 2020.

[167] Mr West's evidence was that he was unable to obtain any other work than odd jobs including doing manual work as a landscaper as a result of both the rumours widely circulating in the local community and the public criminal trial, and the fact that he did not have a practising certificate until after the disciplinary Tribunal produced its report on 28 July 2020. I consider that in the circumstances of his dismissal and the criminal trial that is credible evidence.

[168] **I order that Mr West is to be paid lost wages for the period 11 April 2017 to 28 July 2020 by the School pursuant to a 128 of the Act.**

[169] From that amount is to be deducted income earned during that period. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority,

[170] Mr West suffered a loss in the Kiwisaver contributions which would have been paid by the School during the period 11 April 2017 to 28 July 2020.

[171] **I order that Mr West is paid the applicable Kiwisaver contributions on the amount ordered as lost wages to be paid by the School pursuant to s 123(c)(ii) of the Act.**

[172] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Interest

[173] Mr West is seeking interest on the sums owed to him as lost wages and Kiwisaver contributions.

[174] The Authority has the power to award interest if it thinks fit pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Money Claims Act 2016.

[175] **I order that the School pays interest on the sums ordered as lost wages and Kiwisaver contributions from the date of this determination until payment is made in full in accordance with the Interest on Money Claims Act 2016.**

Compensation

[176] Mr West gave evidence that the termination of his employment had a profound effect on him. He suffered a significant amount of stress and anxiety and his health suffered. Evidence given by his son and other family and friends described Mr West's high level of stress, his inability to sleep, and his weight loss.

[177] There was evidence provided that Mr West was embarrassed at having to tell his parents and family about the nature of the accusations. Mr West's son described the media camping on their doorstep and there was a level of public scrutiny due to the press involvement resulting from the nature of the criminal charges. All of this added to Mr West's level of anxiety and stress.

[178] The level of anxiety, stress and the adverse impact on health and well-being suffered by Mr West is understandable given the circumstances in which Mr West's employment came to an end. As a teacher of many years standing at the School, from the date Mr West was suspended he lost contact with his colleagues and their support. In addition he lived within the community in which the School was located and experienced a level of public opprobrium, the perception of which made it extremely difficult for him to go out and conduct daily tasks.

[179] I am satisfied that Mr West has suffered significant hurt, humiliation and injury to feelings as a result of his personal grievance.

[180] However I consider it important when addressing the appropriate level of compensation to take into account the fact that the criminal process rather than that of the School was responsible for part of the public perception and media scrutiny that arose.

[181] Nonetheless the School does bear a responsibility for the personal consequences of its unjustifiable actions on Mr West's well-being.

[182] I find that Mr West suffered significant hurt, humiliation and injury to feelings as a result of the situation giving rise to his personal grievance.

[183] **The Board is ordered to pay Mr West the sum of $45,000.00 as compensation for his unjustifiable dismissal and unjustifiable disadvantage pursuant to s 123(1)(c)(i) of the Act.**

Contribution

[184] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[185] The approach to assessing contribution including quantification has been addressed in both *Xtreme Dining Ltd v Dewar.*[13] More recently the Employment Court also considered contribution in *Maddigan v Director-General of Conservation.*[14] In that judgment the Chief Judge summarised the approach to contribution stating*:*

> (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
>
> (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
>
> (c) Third, what is a fair assessment of the extent of the contribution?
>
> (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?[15]

[186] The allegations against Mr West included that he had sworn in the class, which he had admitted. Swearing in a class of students was unprofessional behaviour for a teacher and to that extent it was blameworthy behaviour by Mr West, albeit something that could have been handled by the Principal as a misconduct offence, as stated by the Disciplinary Tribunal in the report dated 28 July 2020.

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[13] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[14] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

[15] Above n12 at [73].

[187] I find that the misconduct offence, which was minor, did not contribute to the situation giving rise to Mr West's personal grievances of unjustifiable dismissal and unjustifiable disadvantage, and there is to be no deduction for contribution.

Penalty for breach of good faith

[188] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith and fidelity.

[189] Section s.133A of the Act outlines the matters the Authority and Court must have regard to in determining the amount of penalty, these are:

(a) The object stated in s.3; and

(b) The nature and extent of the breach or involvement in breach; and

(c) Whether the breach was intentional, inadvertent or negligent; and

(d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and

(e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and

(f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and

(g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[190] The Board did not act in good faith throughout the process as outlined in the preceding paragraphs.

[191] It is submitted by counsel for Mr West that the breach of good faith was deliberate, serious and sustained.

[192] In considering this issue, I have regard to the fact that in addition to the s133A considerations, the Employment Court has given guidance on the factors to be taken into account when assessing penalties in *Borsboom and Preet PVT Limited*.[16] I have taken these principles into account when considering what penalty may be appropriate in this case.

The objects stated in s 3 of the Act

[193] The object stated in s 3 of the Act is: "to build productive employment relationships through the promotion of good faith …". I find that the Board failed to act in good faith throughout the investigation process, in particular in relation to the significance placed on the expired warnings, and failing to apply for the SRTA when advised that it might be available so that Mr West would have been on paid leave pending the outcome of the criminal process.

The nature and extent of the breaches

[194] I find that the nature of the breaches was serious, leading to a lack of fairness in the process adopted by the Board.

Whether the breaches were intentional, inadvertent, or negligent

[195] I find that the breaches were intentional and exacerbated by the Board failing to give due consideration to the information provided in Mr Anderson's letter dated 10 April 2017.

The nature and extent of any loss or damage suffered

[196] I find that Mr West has suffered financial and emotional damage as a result of the breach of good faith by the Board.

Whether there has been any mitigation

[197] I do not find the Board has tried to mitigate the breach of good faith.

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[16] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

The circumstances of the breach and any vulnerability

[198] I find no particular vulnerability on the part of Mr West.

Previous conduct

[199] There is no evidence of relevant previous conduct by the Board.

[200] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith.

Preet step 1: nature and number of the breaches

[201] For globalisation purposes there is one breach of the statutory breach of a statutory duty. Based on this the starting point for quantification of penalties for the Board is $20,000.00.

Preet Step 2: Severity of the breaches

[202] In accordance with this step I must also consider additional factors of culpability and deterrence. The Board had the opportunity following Mr Anderson's letter dated 10 April 2017 to consider its position as regards the process. It failed to take that opportunity and I find this was a breach of the good faith duty it owed to Mr West.

[203] There is also a need for deterrence. Employees and employers should behave towards each other in a contractual duty of good faith. The imposition of a penalty for failures to do so act as a deterrent both against any future similar offending by the Board and to others.

[204] I note that school Boards are in general part-time volunteers, parents of students at the school, and may be inexperienced in employment law. However that makes it even more important that they take advice and act in good faith towards their employee because of the serious consequences for a teacher who may have their teachers certification affected adversely by its decision and as a consequence be unable to obtain alternative employment in his or her vocational field.

[205] Having considered the severity of the breaches and any mitigation by the Board, the penalty assessment remains at the maximum amount of $20,000.00.

Preet Step 3 – Ability and ability of the respondents to pay

[206] Whilst there is no specific evidence of the Board's ability to pay any penalty award, I note that the employer of Mr West, the School, is a Crown agency and a substantial costs award against it may affect the operations of the School.

[207] Counsel for the Applicant submits that there may be appropriate funding available from the Ministry of Education to address this potential detriment.

[208] While I have taken note of this submission in regard to level of the remedies awarded to Mr West, I consider it is relevant to the issue of the penalty. I am mindful of the impact of a substantial penalty award in addition to a substantial remedies award would have on the School operation and the consequences as a result for the students who attend the School.

[209] I consider at this stage that a reduction of 75% is appropriate.

Preet Step 4 - Proportionality

[210] At this step I consider the final amount of any penalty is proportional to the breaches.

[211] I have considered two Authority determinations which addressed breaches of good faith and penalty issues. [17]

[212] I take cognisance of the fact that the Board was dealing with a difficult situation involving serious allegations, however it owed a duty to behave towards Mr West in good faith. It failed to so by failing to follow a fair process. On that basis I find a penalty is warranted in this case to deter other employers from similar behaviour.

[213] I have considered the submissions that a proportion of the penalty is paid to Mr West, however I have addressed the wrong done by the Board to Mr West in the remedies awarded to him.

[214] **I order that the Board pay a penalty of $5,000.00 to the Authority within 28 days of the date of this determination. On recovery that is to be paid to a Crown bank account pursuant to s 136 (1) of the Act.**

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[17] *Woolford v Tech Data Advanced Solutions* [2021] NZERA 197; *Ward v Samson Hill Forest Harvesting Ltd* [2021] NZERA 97.

Costs

[215] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[216] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[217] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[218] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[18]

Summary of orders

[219] I have made the following orders:

- I order that Mr West is to be paid lost wages for the period 11 April 2017 to 28 July 2020 by the School pursuant to a 128 of the Act.

- I order that Mr West is paid the applicable Kiwisaver contributions on the amount ordered as lost wages to be paid by the School pursuant to s 123(c)(ii) of the Act.

- I order that the School pays interest on the sums ordered as lost wages and Kiwisaver contributions from the date of this determination until payment is made in full in accordance with the Interest on Money Claims Act 2016.

[18] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- The Board is ordered to pay Mr West the sum of $45,000.00 as compensation for his unjustifiable dismissal and unjustifiable disadvantage pursuant to s 123(1)(c)(i) of the Act.

- I order that the Board pay a penalty of $5,000.00 to the Authority within 28 days of the date of this determination. On recovery that is to be paid to a Crown bank account pursuant to s 136(1) of the Act.

Eleanor Robinson
Member of the Employment Relations Authority