IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 6
ARC 64/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ELGIN EDWARDS Plaintiff
AND	THE BOARD OF TRUSTEES OF BAY OF ISLANDS COLLEGE (FORMERLY CAROL ANDERSON, LIMITED STATUTORY MANAGER OF BAY OF ISLANDS COLLEGE) Defendant

Hearing:	17, 18, 19, 20, 21 March and 5, 6, 7 May 2014 (Heard at Whangarei)
Appearances:	RM Harrison, counsel for plaintiff K Beck, counsel for defendant
Judgment:	3 February 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff was dismissed unjustifiably by the defendant pursuant to s 103A of the Employment Relations Act 2000.

B The plaintiff's reinstatement as Principal of Bay of Islands College would be impracticable and/or unreasonable and that remedy for unjustified dismissal is refused.

C The plaintiff is awarded compensation for lost remuneration caused by his unjustified dismissal. The amount of that compensation (taking into account a reduction made under s 124 of the Act) will be the equivalent of twelve months' remuneration and associated employment benefits.

D Also taking account of a reduction in s 124 of the Act, the plaintiff is entitled to compensation for non-pecuniary losses under s 123(1)(c) of the Act in the sum of $16,500.

E Costs are reserved with a timetable for any application by memorandum.

INDEX

Introduction .... [1]
The role of a school principal .... [4]
Standards of justification for dismissal .... [6]
The reasons for dismissal .... [20]
Statutory tests of justification for dismissal .... [24]
The employer's resources - s 103A(3)(a) .... [29]
The collective agreement's relevant provisions .... [35]
The scheme of the collective agreement in practice .... [42]
The defendant's case of justification for dismissal .... [54]
The leading personalities: the LSMs and the plaintiff .... [60]
Factual background to dismissal .... [72]
The staff survey information issue .... [106]
The NCEA data issue .... [125]
The 21 March 2013 meeting issue .... [150]
The PM complaint issue .... [161]
The assistance and guidance process to resolve issues .... [169]
The last (16 April 2013) meeting .... [174]
A trespass notice .... [182]
The defendant's submissions .... [188]
'Mobbing'? .... [218]
Decision of challenge .... [224]
Justification for staff survey data serious misconduct ground .... [226]
Justification for the NCEA data issue serious misconduct ground .... [238]
Justification for 21 March 2013 meeting events serious misconduct ground [253]
Justification for PM complaint serious misconduct ground .... [263]
Disciplinary consequences of performance issues .... [273]
Justification for general loss of trust and confidence dismissal ground ...... [277]
Consequence of partial support of conclusions of misconduct .... [283]
Remedies for unjustified dismissal
Reinstatement? .... [286]
Reimbursement of lost income? .... [293]
Section 124 considerations .... [300]
Compensation for non-pecuniary losses .... [302]
Costs .... [305]
Comment .... [306]

Reasons for Judgment

Introduction

[1] This judgment decides Elgin Edwards's challenge to the determination of the Employment Relations Authority given on 31 July 2013[1] that he was dismissed justifiably from the position of Principal at Bay of Islands College (what I refer to as the school or BOIC). In addition to a declaration that he was dismissed unjustifiably, Mr Edwards claims reinstatement to his role as Principal, reimbursement of remuneration lost by him as a result of his dismissal, compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of $25,000, and costs.

[2] As they were entitled to on a challenge by hearing de novo, the parties presented different cases to those which they had invited the Authority to investigate. A number of witnesses who were examined by the Authority did not give evidence in this Court and there were a number of new witnesses whose evidence was considered for the first time before me. It is clear, also, that the statutory document disclosure process between the parties unearthed a significantly larger volume of relevant documents than may have been called for, and considered, by the Authority. What consisted of a two day investigation in the Authority in July 2013 became an eight day hearing in this Court although, unfortunately, the parties' original time estimate was substantially short and about six weeks elapsed before the Court could resume and complete the hearing as the entituling shows. One remarkable difference between the case in the two forums was that the number of lawyers appearing halved in the Court despite the substantially increased number of witnesses, the complexity of evidence, and the volume of documents as compared to the investigation in the Authority. Finally, it is notable that a number of persons, whose acts or omissions were causative of, or at least closely connected to, Mr Edwards's dismissal, did not give evidence and their absence was not explained. The challenge by hearing de novo must, nevertheless, be decided on the evidence given to the Court.

[1] *Edwards v Anderson* [2013] NZERA Auckland 327.

[3] New evidence that was not available to the Authority has now been used by Mr Edwards to support his claim of unjustified dismissal. This evidence, documents possessed by, or within the control of, the Board, has been disclosed by it to Mr Edwards in preparation for the hearing in this Court. Although it was open to Mr Edwards to have asked the Authority to direct production to it of such documents or for the Authority to have required the Board to do so at the Authority's own instigation, that may not have occurred. Both generally, and in this case, I cannot emphasise enough the importance of recourse to contemporaneously generated documents, especially when resolving conflicts of oral evidence and considering the legislation's requirements of fair process.

The role of the school's Principal

[4] BOIC is a coeducational state secondary school located in Kawakawa whose students come from that town and surrounding areas. The legal identity of the defendant as Mr Edwards's employer has changed several times over the period relevant to these proceedings. When Mr Edwards was appointed as Principal of the school in January 2010, the school's then Board of Trustees (the Board) was his employer. Two years later, the Minister of Education appointed Beverley Pitkethley to be the school's Limited Statutory Manager (LSM). She then became Mr Edwards's employer. After only a few months in that role, Ms Pitkethley was replaced as LSM by Carol Anderson with effect from 25 June 2012. Ms Anderson was, in law, Mr Edwards's employer when he was dismissed on 18 April 2013. Ms Anderson was succeeded as LSM by John Locke and, more recently, the role of employer has been returned to the Board. The current Board is very differently composed to the Boards that appointed Mr Edwards and that which was in place when he was dismissed.

[5] A school principal is the professional leader of a school's teaching staff. In most secondary schools (including this) he or she does not undertake classroom teaching duties, at least regularly. Mr Edwards was and is nevertheless a registered teacher and subject to the statutory obligations and responsibilities of a registered teacher. His dismissal had to be, and was, reported to the New Zealand Teachers Council (NZTC). At least at the time of the hearing, any decision by the NZTC

affecting Mr Edwards's registration had not been given. He nevertheless faces professional educational consequences which may restrict significantly his ability to obtain another position in the public education system or may even prevent him from doing so. I was told that the NZTC had declined to postpone its professional disciplinary functions until after this case has been concluded. Although, to its credit, the current Board has recommended to the NZTC that Mr Edwards's registration to teach students should not be affected adversely by whatever sanction the NZTC may impose on his administrative or managerial roles, that decision is the NZTC's alone.

Standards of justification for dismissal

[6] The facts of this case highlight several particular considerations that must be acknowledged and applied in determining whether Mr Edwards's dismissal was justified. These factors, developed and expressed in judgments over a long period, do not detract from the primacy of the statutory test of justification under s 103A of the Employment Relations Act 2000 (the Act). Rather, as and when they arise in particular cases, these factors will affect the application of the s 103A tests to the particular circumstances of such cases. This proceeding brings together several of those particular considerations (dismissal of a professionally registered employee, allegations of very serious misconduct in employment, loss of trust and confidence by an accumulation of individually minor factors, and a new one, conveniently nicknamed "mobbing") which warrant repetition and/or explanation. They all affect the standards of proof of the s 103A tests of justification for dismissal or disadvantage in employment.

[7] As has been said before in relation to dismissals of teachers (and other occupational groups who require professional registration to be employed in their fields), the significant consequences of dismissal, and especially, as here, of dismissal for misconduct involving allegations of dishonesty, require very careful consideration of their justification in law.

[8] As this Court noted in *Lewis v Howick College Board of Trustees*:[2]

> [5] As in the cases of other professional employees whose very livelihoods are affected by a dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case, a summary dismissal for serious misconduct, affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professionally registered to practise. Dismissals of teachers (and a range of lesser sanctions in employment) trigger automatically a vocational or professional registration investigation. As with many other professions there is little, if any, opportunity for employment in New Zealand without registration. An employer dismissing a teacher is bound by law to advise the Teacher Registration Council. As in this case, it can be expected that there will be a level of inquiry into the teacher's fitness to be registered in light of the circumstances of the dismissal and other relevant considerations. So the effect of the dismissal of a teacher is especially significant. Put simply, allegations of misconduct or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods.
>
> [6] Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. So, too, independent courts and tribunals considering the justification for dismissals of teachers must be conscious of that consequence and the corresponding need to examine such cases with great care. It is an onerous responsibility that the legislation has placed on boards of trustees as employers who are very much part-time, nominally remunerated, and, for many board members, without appropriate expertise either in the teaching profession or employment relations. It is important, in these circumstances, that boards of trustees as employers take and follow correct professional advice and that they are advised independently and dispassionately on education matters by the school's professional leader, its principal, who must be ex officio a member of the Board.

[9] The courts have long recognised that the specific individual circumstances of both employers and employees must form part of the broad examination of justification now under s 103A, including the long-term outcomes of dismissal for an employee. The consequences for some employees such as teachers and school principals may be more severe than for others who can find replacement employment in their fields.

[10] There is nothing novel in this. Different standards of justification for dismissal from, or disadvantage in, employment are recognised not only in case law but also statutorily. For example, s 103A(3)(a) of the Act 2000 (the Act) requires the

---

[2] *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4, [2010] ERNZ 1 at [5]-[6].

Authority or the Court to consider "the resources available to the employer" in determining whether an employer has sufficiently investigated allegations against an employee. That means, in practice, that the Authority or the Court will expect the quantity and the quality of the employer's investigation and decision-making to be determined, in part, by the resources reasonably available to the employer to do so. That will mean that a large employer with in-house or otherwise available human resources and legal advice may be held to a higher standard than an employer who is the owner/operator of a small business which cannot afford such resources. I will address subsequently this consideration that arises in this case

[11] There is another factor affecting dismissals for particularly serious misconduct. As long ago as in *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd*,[3] the Labour Court established (and the Court of Appeal confirmed)[4] that the more serious an allegation against an employee said to justify dismissal, the higher the expected standard of proof of that allegation must be. That is a principle which has been followed consistently over decades including under the current personal grievance regime.

[12] As the Labour Court put it in the *Honda* case:[5]

> … however, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave. This does not involve proof beyond reasonable doubt, nor does it involve some kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt. It involves only an awareness on the part of the grievance committee of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the act of serious misconduct, that the proof of that act must be convincing in the way we have described. That is because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.

[13] The reference to a grievance committee in the foregoing passage was, in effect, to the independent tribunal at first instance under the Labour Relations Act 1987, effectively now the Employment Relations Authority.

---

[3] *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZILR 82 (LC) [*Honda* (LC)] at 85.
[4] *Honda New Zealand Ltd v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 at 395.
[5] *Honda* (LC), above n 3, at 85.

[14] Allegations that a school principal has deliberately or intentionally misled or deceived, or has attempted to mislead or deceive, that school's board of trustees must be amongst the most serious of allegations of serious misconduct that can be levelled against a school's principal. Such allegations go to the heart of the relationship of trust and confidence between a school's board of trustees and its professional leader, adviser on educational matters and in effect its chief executive, the Principal. The consequences of a dismissal of an experienced school principal for such dishonesty are very likely, as has transpired in this case, to mean the risk of the ending of that person's professional career. As already noted, such a dismissal must be referred to the NZTC for a professional investigation which may result in the cancellation of professional registration. Additionally, its disclosure by the former employee to any prospective employer in the education sector is likely to severely limit if not eliminate any possibility of further employment in that field, not only as a principal but even perhaps as a teacher.

[15] When Mr Edwards's dismissal, and the reasons for it, were notified to the NZTC, it required, as an interim measure pending the resolution of his personal grievance in the Authority, that he expressly advise any potential school employer of his dismissal, of the circumstances of that, and of the NZTC's requirement that this be disclosed. In these circumstances, it is unsurprising that Mr Edwards has not received any positive response to his interest in, or applications for, teaching positions in which he has expressed interest or which he has sought. This illustrates in an immediately obvious way the need for a high standard of proof of misconduct before a dismissal is effected and of a careful evaluation of the justification for that decision.

[16] There is another element to this case which I am satisfied requires the Court to scrutinise very carefully the justification for Mr Edwards's dismissal. Although not either a legally defined term or indeed yet a popular one such as its elder cousin "bullying", Mr Edwards described an important phenomenon that he perceived to lie behind his dismissal as "mobbing". In this case, mobbing is said to have been a concerted resistance by a group of other employees to the implementation of workplace changes proposed and directed by Mr Edwards as principal of the school. It was also claimed to be a more general undermining of his position, including the

bringing of dubious, groundless, or at least trivial complaints against him which contributed to a purported loss of trust and confidence in him and otherwise led to his dismissal. Later in the judgment I both define mobbing more generally and determine its presence or absence in this case. One view of some of the evidence of relevant events might tend to support that analysis of the motivations of staff opposed to Mr Edwards. This phenomenon also requires careful and thorough scrutiny of the justification for the dismissal.

[17] There is yet a further feature of employment law that is applicable to this case. It is exemplified by a case called *New Zealand Fire Service Commission v Reid.*[6] In that case, there was a history of repeated, albeit minor, infractions between a firefighter and his colleagues and immediate supervisors who were all engaged in work that required high degrees of cooperation, team work, and mutual trust and confidence. Although none of the individual incidents would have warranted dismissal on its own, in combination the Court found that they were sufficient to constitute a loss of trust and confidence in the employee by the employer and that the employee's dismissal was justified.[7] That finding was considered carefully by the Court of Appeal in *Reid v New Zealand Fire Service Commission* where the following was said which is pertinent to this case.[8]

> … The [Employment] Court, in looking at the matter more broadly [than the Employment Tribunal], came to the view that this was "an unusual and rare case in which an employer may justify dismissal of an employee because of an irreconcilable breakdown of trust and confidence in the employment relationship". The Judge contrasted such a case with the more usual basis for dismissal, namely "what is known colloquially as serious misconduct". He pointed out that in contractual terms an irreconcilable breakdown of trust and confidence could equally be described as a fundamental breach of contract.
>
> It is essentially this approach to which Mr Reid's implied term submission was directed, but we can discern no error of law in the Judge's reasoning. He was careful to emphasise that the irreconcilable breakdown basis for dismissal, of which he was speaking, will arise only in an unusual and rare case. There can be no doubt that the facts fully justify the conclusion that Mr Reid was substantially responsible for the irreconcilable breakdown. That is a necessary dimension, for an employer could not be justified in dismissal on this basis if it was itself substantially the cause of the breakdown. Similarly, there could be no dismissal on this basis, unless the facts were entirely convincing, as, in our view, they are in this case.

[6] *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250 (EmpC).
[7] At 280.
[8] *Reid v New Zealand Fire Service Commission* [1991] 1 ERNZ 104 (CA) at 107.

[18] It follows from these remarks that justification for a dismissal that relies upon a generalised loss of trust and confidence will require that this state of affairs is attributable to the employee and not to the employer. In a case such as this where serious misconducts are also alleged but may not be able to be established, an assertion of loss of trust and confidence otherwise than from those misconducts must also withstand close and independent scrutiny.

[19] All these factors that are engaged in this case do not replace the statutory test of justification under s 103A of the Act, but guide how it is to be applied in this particular case.

The reasons for dismissal

[20] Because the quality of the employer's dismissal of the plaintiff is the focus of the Court's inquiry, I begin with it and the stated reasons for it.

[21] The LSM's grounds for Mr Edwards's dismissal were said to have been a number of incidents of serious misconduct, contributing to his employer's loss of trust and confidence in him. From the letter to him of 18 April 2013 confirming his dismissal, these misconducts can be summarised as first, that Mr Edwards "fabricated" staff survey data; second, that he misled or attempted to mislead the school's LSM about its National Certificate of Educational Achievement (NCEA) results; third, his unacceptable behaviour at a meeting with the LSM on 21 March 2013 and his subsequently recorded recollection and assessment of the conversation that took place at that meeting; and, finally, the plaintiff's disrespectful response to a member of staff[9] who sought to rearrange his teaching workload.

[22] The first two grounds of misconduct (fabricating survey data and providing misleading NCEA results) were conclusions of particularly serious misconduct. That was because the LSM decided that Mr Edwards set out deliberately to mislead his employer by providing information that was not only false but that he knew to be

[9] The staff member was one of those persons whose absence as a witness was surprising, given the centrality of his complaint in the LSM's conclusion that Mr Edwards should be dismissed for his interactions with this teacher and his dispute about the teacher's account of their meeting. In the circumstances, and especially in view of evidence which was called about this staff member's health, I will refer to him anonymously in this judgment as "PM".

false and by which he intended to mislead the LSM, the Board, and the school's community.

[23] The LSM also relied upon a general loss of trust and confidence in Mr Edwards, both contributed to by these four specific misconducts, and also established independently by reference to other past events.

Statutory tests of justification for dismissal

[24] These are set out in s 103A of the Act. The Court must determine "on an objective basis" the subs (2) test and, in applying that, must consider the more particular tests in subs (3). Subsections (2)-(3) are as follows:

> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider—
>
> (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.

[25] Section 103A(4) makes it clear that the Court may consider any other factors that it considers appropriate in addition to those in subs (3). Finally, subs (5) provides that the Court must not determine a dismissal or action to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor, and did not result in the employee being treated unfairly.

[26] Counsel for the defendant, Ms Beck, reminded me appropriately of the guidance of the judgment of the full Court in *Angus v Ports of Auckland Ltd*[10] and, in particular, that it is not for the Court to substitute its decision for what a fair and reasonable employer in the circumstances could have done, and how such an employer could have done it. The judgment in *Angus* accepts that there may be a range of responses open to a fair and reasonable employer and that the Court's task is to examine objectively the employer's decision-making process and to determine whether what she did, and how she did it, were open to a fair and reasonable employer.[11] I propose to follow this principle.

[27] It is correct, as Ms Beck submitted, that the statutory test of justification under s 103A is to be determined by reference to "all the circumstances at the time the dismissal … occurred". But that is not just, as Ms Beck submitted, "on the information available to Ms Anderson at the time …". It has long been held to include the information that would also have been reasonably available to the employer having conducted a proper investigative and decision making process.[12] The test does not allow the Authority or the Court to determine justification by reference also to information that could only reasonably have become available, and did become available, to the employer after dismissal. But to confine the s 103A test only to information that the employer actually had, would permit employers to make significant dismissal and other decisions disadvantageous to employees, on the basis only of the information that they had actually obtained, including potentially, but wrongfully, as a result of an inadequate and unfair investigation. This interpretation of s 103A(2) is reinforced by the minimum requirements in the following subsections affecting the nature of an employer's inquiry and decision-making processes.

[28] Also relevant to the decision of the case is s 4(1A)(c) of the Act. The defendant accepts that the LSM was required to provide the plaintiff with access to information relevant to her proposal to make a decision likely to have an adverse

---

[10] *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, (2011) 9 NZELR 40.
[11] At [23]-[25].
[12] See *Brake v Grace Team Accounting* [2014] NZCA 541 at [97].

effect on the continuation of his employment, before making any such decision, and required her to allow him an opportunity to respond to that information.

The employer's resources - s 103A(3)(a)

[29] I deal first with this statutory consideration affecting justification for the plaintiff's dismissal because, in respect of one of the grounds for dismissal, the plaintiff says that the LSM alone should not have determined what amounted to a complaint by Ms Anderson herself of serious misconduct by Mr Edwards towards her. The plaintiff's case is that, in these circumstances, the LSM should have obtained an independent assessment of the disputed allegation, probably requiring the obtaining and deployment of external resources.

[30] Section 103A(3)(a) addresses the resources available to an employer to deal with matters that may lead to disadvantage in, or dismissal from, employment of an employee. The statutory intention is to require the Authority and the Court to recognise that the degree of adherence to standards will depend upon the resources reasonably available to the employer to do so. A large well-resourced employer can be expected to apply its human, financial, and other resources to the investigation and determination of allegations of misconduct to an extent that a small employer without a human resources department or access to more than rudimentary advice should be expected to do.

[31] The Board (and the LSM) had recourse to its professional advisory body, the New Zealand School Trustees Association (the STA). The evidence discloses that, at appropriate times, the LSM and the Board used the STA for the provision of legal and associated advice. Further, the evidence shows that important correspondence was copied by the LSM to the school's insurers' lawyers although, unsurprisingly, there is no evidence about what, if any, legal advice its insurers, it (the Board), or the LSM may have had from those lawyers. Third, the evidence discloses that Ms Anderson herself has had experience not only as a teacher and educational administrator, but also as a practising lawyer who now has a consultancy providing expert advice to schools on matters of governance.

[32] There were constraints on the financial resources that could be committed by the school to these issues involving Mr Edwards. Although the Ministry of Education appointed the LSMs, the school met the cost of those appointments from its operations budget which, in turn, meant that it had less to spend otherwise. Ms Pitkethley's appointment as the first LSM was fortuitous for the school in the sense that she was based relatively close to it and could attend at the school more frequently than Ms Anderson, who was based in Auckland. Although that inability to be at the school did not appear to be the predominant reason for the frequency, length, and detail of Ms Anderson's email communications to Mr Edwards, it was a contributing factor. It is also clear that Ms Anderson committed significant time and expertise to her role, even when she could not be present on site.

[33] Finally, Ms Anderson conceded that, in relation to those allegations where she was herself, in effect, both the complainant and the decision maker, it would have not been at much greater, if any, additional cost to the school for an independent investigator to have been engaged for the limited purpose of ascertaining the facts of what occurred during a short meeting between the LSM and the Principal.

[34] Overall, I do not consider that the defendant's resources were such that it was entitled, in reliance on s 103A(3)(a), to justify its dismissal of the plaintiff by any lower standard of decision-making because of resource limitations. Put another way, I conclude that the LSM had the resources reasonably available to her to have arranged for an independent investigation into the disputed factual basis of her own complaint of serious misconduct by Mr Edwards towards her, of which she was also to be the judge.

The collective agreement's relevant provisions

[35] The relevant provisions of the applicable employment agreement are important to the decision of this case. That is because employment law expects compliance with employment agreements and collective agreements by employers if

their dismissals of employees subject to those agreements are to be justified.[13] These provisions in this case are set out principally in a collective agreement which governed Mr Edwards's employment, the Secondary Principals' Collective Agreement. The plaintiff relies on its issues which address the parties' working relationship, competency and disciplinary provisions under parts 4 and 6.

[36] It is common ground that, in the particular circumstances of this case, references to "the Board" in the collective agreement must also be references to the LSM who was, in law, the Principal's employer at the relevant times.

[37] Under the heading "Working Relationship", cl 4.3.1 provided:

> 4.3.1 Where there is a problem in the working relationship between the principal and the board (including individual board members) that has not been informally resolved and is to the detriment of the school, the board, in consultation with the principal, may consider appointing a suitably qualified independent person to mediate or facilitate between the parties and/or undertake an impartial and objective assessment of the concern(s).

[38] Under the heading "General Provisions / Process", cl 6.1.1 provided:

> 6.1.1 The following principles shall be used in addressing complaints, discipline and concerns regarding competence, to ensure that such matters are, in the interests of all parties, fully and fairly addressed:
>
> (a) Where issues or concerns arise the board shall initiate informal discussions with the principal in an attempt to resolve the matter in an informal manner. This applies following receipt of a complaint and/or concern(s) being raised. This occurs prior to formally commencing a disciplinary or competency process, unless the nature of the complaint or concern(s) is such that this would be inappropriate;
>
> (b) Questions of competence, conduct and discipline should be handled in a manner which, as far as possible, protects the mana and dignity of the principal concerned. Principals may seek whanau, family, professional and/or other support in relation to such matters (refer Part Eleven).

[39] Under "Competency", the relevant parts of cl 6.2 of the collective agreement provided as follows:

---

[13] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [74], [77].

6.2.1 Where there are matters of competency which are causing concern (for example failing to meet the secondary principals' professional standards), the board shall put in place appropriate assistance and guidance to assist the principal and for that purpose, may seek such appropriate professional advice as may be required.

6.2.2 Where this assistance and guidance has not remedied the situation, the board shall initiate a competency process and the following provisions should govern the action to be taken.

(a) The principal must be advised in writing of the specific matter(s) causing concern and what, if any, corrective action is required.

(b) The principal is to be given a reasonable opportunity to remedy the matter(s) causing concern. The timeframe shall be determined by the board, may take into account any previous support or guidance and shall be relevant to the matter(s) causing concern;

(c) The process and results of any evaluation are to be recorded in writing, sighted and signed by the principal;

(d) A copy of any report made to the board shall be given to the principal;

(e) No action shall be taken on a report until the principal has had a reasonable time to comment (in writing, orally or both);

(f) If the above steps (a–e) fail to resolve the matter(s) of concern, the board may, where justified, dismiss the principal without notice and pay him/her two months salary in lieu, without the need to follow the provisions of 6.3 below; and

(g) A copy of any report given to the New Zealand Teachers Council shall be given to the principal.

[40] Under the heading "Discipline", cl 6.3 of the collective agreement provided materially:

6.3.1 For the purposes of this part, the term misconduct includes:

(a) Any material breach of the terms of this agreement; or

(b) Any continued non observance or non performance of any of the terms of this agreement; or

(c) Any offence for which the principal may be proceeded against by way of indictment; or

(d) Any conduct by the principal (whether within the principal's professional capacity or otherwise) that is unbecoming of a

principal or which demonstrates that the principal is unfit to remain in the position of principal.

6.3.2 The principal must be advised of the right to have representation at any stage.

…

6.3.4 If the misconduct is found to have occurred then the corrective action(s) that may be imposed, following an opportunity for the principal to comment, include:

(a) Counselling and/or mentoring intended to assist the principal amend his/her conduct and/or change particular behaviours;

(b) A verbal or written warning that includes advice of any corrective action required to amend his/her conduct and a reasonable opportunity to do so; and

(c) A final written warning which includes advice of any corrective action required to amend his/her conduct and given reasonable opportunity to do so.

6.3.5 The board may also consider that the misconduct warrants dismissal with or without notice.

6.3.6 The process and any resulting action(s) are to be recorded, then sighted and signed by the principal, and placed on his/her personal file.

6.3.7 A copy of any report made to the board or provided to the New Zealand Teachers Council shall be given to the principal.

[41] Under "Dismissal", cl 6.5.1 of the collective agreement provided:

6.5.1 The board may, after applying the principles and processes of 6.1 and 6.2 or 6.3 above, terminate the employment of the principal by giving two months' notice of termination or he/she may be dismissed without notice and paid two months' salary in lieu. In the case of a finding of serious misconduct, the board may dismiss without notice.

The scheme of the collective agreement in practice

[42] I interpret cl 4.3.1, in the circumstances of this case, to mean that there should have been informal attempts to resolve the problems in the working relationship between Mr Edwards and, initially, the Board and, subsequently, with the LSMs. Next, if such informal resolution had not been successful and any working relationship problem was manifesting itself to the detriment of the school, the employer was, in consultation with Mr Edwards, entitled to appoint a suitably qualified independent person either to mediate between the parties or to facilitate a

resolution of that problem. Alternately, the employer was entitled to consider appointing a suitably qualified independent person to undertake an impartial and objective assessment of the concerns about the problem.

[43] As it transpired in this case, none of the employers (the Board or the LSMs) appointed a suitably qualified independent person to undertake an impartial and objective assessment of their concerns. Nor was such an appointment made to resolve them by mediation, although there were mediations arranged under the auspices of the Ministry of Business, Innovation and Employment's Mediation Service which dealt with particular relationship issues. Although, belatedly in the process, the LSM arranged for a mentor to assist Mr Edwards and he was a facilitator between the parties, he was not engaged specifically to undertake an impartial or objective assessment of the employer's concerns

[44] As already noted, problems in the working relationship between the Principal and his employer were to be addressed, where it was appropriate to do so, informally in the first instance. There may be cases in which the nature and/or dimensions of such a problem make it inappropriate to attempt to resolve it informally. One of the questions for decision is whether this is one such case because it is common ground that informal discussion did not always take place before formal procedures were invoked.

[45] Next, the collective agreement sets out a number of general principles and processes to be followed in cases such as this where there are complaints about a school's principal, allegations of misconduct against a principal or concerns about the competence of a principal. The objective of these general principles or processes is to ensure that those complaints, allegations or concerns are fully and fairly addressed in the interests of all parties. Unless the circumstances mean that this would be inappropriate, following pursuit of a complaint by a principal or a concern being raised about a principal, the employer was required to initiate informal discussions with the principal in an attempt to resolve the matter or matters informally. All such procedures were required to be handled, where possible, in a manner which "protect[ed] the mana" and dignity of the principal. In such

circumstances, the Principal was entitled to seek appropriate professional or other support.

[46] At this point in the problem resolution scheme, the collective agreement differentiates matters of "competency" from matters of "discipline". In the case of matters of "competency" (that is failure to meet the standards of a competent principal), the employer is required to put in place "appropriate assistance and guidance" to assist the principal and, for that purpose, the board can seek such appropriate professional advice as may be required to do so. Next, where such assistance and guidance does not remedy the unsatisfactory position, the collective agreement requires the Board to initiate a competency process consisting of, but not exclusively or exhaustively, a number of steps. These include:

- advising the Principal in writing of the specific matters causing concern and the corrective action required;

- providing the Principal with a reasonable opportunity to remedy those matters causing concern, the timeframe for which is to be determined by the employer and could take into account any previous support or guidance;

- recording in writing the process and results of such an evaluation, seen and signed for by the principal;

- providing to the Principal a copy of any report made to the employer in this regard; and

- taking no further action on such a report until the Principal has had reasonable time to comment on such a report, either in writing, orally, or both.

[47] If the foregoing steps fail to resolve the matters of concern, the employer can, "where justified", dismiss the principal summarily but with the payment of two

months' salary without the need to follow the collective agreement's disciplinary provisions set out in cl 6.3.

[48] Finally, a copy of any report provided by the employer to the NZTC at the conclusion of such a process which had resulted in dismissal, must be given to the principal.

[49] So, it can be seen that matters of a principal's competence can lead to dismissal if they are not resolved by the collective agreement's competency processes.

[50] The collective agreement's other process, labeled "Discipline", deals with "misconduct" and defines it, although not exhaustively. It includes "[a]ny material breach" of the collective agreement or "any continued non observance or non performance of any of the terms" of the collective agreement, the commission of indictable offence or "[a]ny conduct by the principal … that is unbecoming of a principal which demonstrates that the principal is unfit to remain in the position of principal". Those descriptions are indicative of the sort of conduct that may warrant disciplinary intervention and distinguishes these from competency manifestations.

[51] At the outset of a disciplinary process the principal must be advised of the right to have representation at any stage of the process. If misconduct is found to have occurred, there is a range of consequences that can be applied by the employer following opportunity for the principal to comment. These consequences include:

- counselling and/or mentoring intended to assist in the amendment of conduct or change of behavior;

- a verbal or written warning which may include advice of corrective action required and provision of a reasonable opportunity to undertake this; or

- a final written warning including such advice of corrective action and the provision of a reasonable opportunity to do so.

[52] The collective agreement leaves open the ability of an employer to consider whether proven misconduct may warrant dismissal "with or without notice". Any disciplinary process and consequent actions are to be recorded, sighted by the principal and, after the record having been signed by the principal, placed on his or her personal file. As in the case of a dismissal for incompetence, a copy of any report made by the employer or otherwise provided to the NZTC, must be given to the principal.

[53] Finally, and generally in the sense of applying not only to dismissals for incompetence but also for disciplinary reasons, if an employer terminates the employment of a principal, it is required either to give two months' notice of intention to do so or to make a payment of two months' remuneration in lieu of notice. The collective agreement reserves the right of an employer to dismiss without notice for serious misconduct.

The defendant's case of justification for dismissal

[54] Because it is incumbent on the defendant to justify Ms Anderson's dismissal of Mr Edwards, I start with the employer's document formally recording that event and the reasons for it. This was Ms Anderson's letter to Mr Edwards dated 18 April 2013, two days after a final meeting between the parties and their representatives at the College.

[55] That letter refers to two earlier letters written by her to Mr Edwards on 27 March and 11 April 2013. The 18 April 2013 letter said that the meeting on 16 April 2013 had been "to provide you with an opportunity to respond" to Ms Anderson's earlier letters.

[56] In her 18 April 2013 letter of dismissal, the five "incidents of misconduct",[14] to which Ms Anderson said she had referred in her 27 March and 11 April 2013 letters, were recorded by her as follows:

---

[14] Arguably four incidents because (d) was the corollary of (c) - the judgment will treat these as four separate grounds accordingly.

(a) In my letter of 27 March 2013 I raised concerns about your provision to me of fabricated survey data. You have been provided with three opportunities to explain how you calculated the figures which were completely erroneous and significantly more favourable than they should have been (see paragraph 29 of the 27 March letter and my subsequent letter of 11 April 2013.) You have not provided a satisfactory response. I consider the provision of this false data to be serious misconduct.

(b) The letter of 11 April addresses a second issue in which you made claims about NCEA results which I considered to be incorrect. When challenged you told me that you could not verify the data before 2010. This was false and as an experienced principal you would have known that this was false. Because you attempted to mislead me this is accepted as evidence of serious misconduct.

(c) At a meeting on 21 March 2013 you became heated to the point where I felt I had to bring the meeting to a close. (I refer to my email of 25 March 2013). I directly experienced unacceptable behaviour from you that is similar to behaviour that staff have complained about. I am now unable to have a discussion with you on other than superficial matters. This is an untenable situation in any employment relationship but particularly between a Board/LSM and its CEO. Your inability to maintain a collegial and professional attitude is evidence of serious misconduct.

(d) On top of this your subsequent recorded recollection of our conversation was so distorted that I now consider it now necessary to tape all our conversations.[15] I refer to my email to you of 25 March 2013. This is also completely untenable in an employment relationship and amounts to serious misconduct.

(e) Your interaction with [PM] is also indicative of continuing disrespect to staff who raise concerns that you disagree with. On its own it might not normally be viewed as misconduct. However when seen in the context of previous similar misconduct and in a context where you have been requested, advised, warned and instructed to avoid this type of interaction with staff it confirms your refusal to follow an appropriate and lawful instruction. I refer to the letters of complaint by three staff members of 7 September 2012; the letter of complaint by the Deputy Principal December 2012 (subsequently mediated) and my and board correspondence with you dating back to April 2011. The repetition of these incidents constitutes an ongoing non-observance of your employment agreement. Again this is accepted as serious misconduct.

[57] Ms Anderson's letter of 18 April 2013 then recorded that, after having provided Mr Edwards with an opportunity to comment on the foregoing findings of misconduct and on the possibility of the termination of his employment, she had "reached the view that neither I nor the board can have trust and confidence in you and that your dismissal is the appropriate sanction".

---

[15] Although Ms Anderson attempted unsuccessfully to tape record one subsequent meeting (to which Mr Edwards did not object), she did not do so again including the 16 April 2013 meeting.

[58] Ms Anderson recorded that she had considered whether any mitigating circumstances might have warranted a lesser sanction and that she had also "weighed in the balance your positive contributions to the school, your efforts to improve this term, the improved working relationship with the SMT [Senior Management Team] and your contribution to improving accountability and student achievement in the school". She recorded her conclusion, however, that those "strengths" were "significantly outweighed by the intractable problems" that had been created in the school by Mr Edwards's management style and poor relationship management.

[59] The letter continued:

> 6. In addition, for reasons set out in my letter of 27 March 2013, I, the Board and staff do not have trust and confidence in your ability to manage staff and to repair the damaged relationship that you have with a significant proportion of staff.
>
> 7. I reject the comments in your lawyer's letter of 15 April and in particular the view expressed that the problems in the employment relationship are due to me. I do not believe that a change in, or the departure of, the LSM (as you have proposed) would make any difference to the fundamental relationship problems in the school.
>
> 8. The message I have received from the two senior managers who have worked hard with you is that they do not believe that it is possible for the dysfunctional culture and the breakdown in relationships with a significant proportion of staff to be repaired under your leadership, due to the entrenched attitudes towards you of those staff. Resignations and impending resignations of respected staff members are also adding to the negative spiral and hardening attitudes of staff.
>
> 9. For these reasons the proposal in your lawyer's letter of 15 April 2013 to allow you more time and to instigate another independent appraisal to improve the situation is not realistic. My view is that this breakdown in relationships no longer represents a "challenge" that you can overcome with more time, support and effort. It is an insuperable obstacle to the progress of the school. The problem has now reached a point where it is going to be difficult for anyone to fix but impossible for you personally because of the lack of trust and respect for your leadership by a majority of staff. The situation is causing serious harm to the school, is not repairable under your leadership and cannot be allowed to continue.
>
> 10. I and the Board would have preferred to negotiate an exit package with you that allowed for a more dignified departure. You have chosen not to take that opportunity.
>
> 11. I therefore inform you that I am terminating your employment at Bay of Islands College with two months salary in lieu of notice as of

> 5.00pm Friday 19 April 2013. The termination will remain confidential until that time but after then I will have to inform senior managers and other staff.

The leading personalities: the LSMs and the plaintiff

[60] The first appointed LSM, Beverley Pitkethley, was a retired experienced school principal who lived in Kerikeri, about 30 minutes' travel by road from the school. Differently from her successor, Ms Anderson, Ms Pitkethley approached her role of LSM and employer of the Principal, by drawing on her skills and experience as a teacher, principal, and educational administrator. Circumstances beyond her control meant that she had to relinquish her role as LSM after only about six months.

[61] Ms Pitkethley's successor as LSM, Ms Anderson, brought different attributes and approaches to the role of LSM. She is significantly younger than both Ms Pitkethley and Mr Edwards. Although Ms Anderson has been a teacher (but not a principal) and involved in school administration, including being on boards of trustees, she has also been a commercial lawyer in private practice and now operates as a consultant to employers in the education field on questions of school governance and management. Another significant difference between the LSMs is that Ms Anderson was based in Auckland about three hours by road from the school. That geographic difference necessitated a different approach to her role, as compared to Ms Pitkethley's.

[62] Although the Minister of Education appoints LSMs, the costs of their performance of that role are met by the school without any additional budgeted funds for that purpose. Ms Anderson was conscious of the need to spend wisely the school's money, which was necessary for the purpose of her appointment so that, for example, many of her dealings with the Principal, the Board, the community, and the staff were by email and telephone rather than face to face.

[63] Ms Anderson was careful to record her dealings with Mr Edwards in writing, including setting out her accounts in emails to him following face-to-face meetings or telephone calls. Ms Anderson's style, in her frequent and sometimes lengthy communications with Mr Edwards, was clinical and formal. It was described by

others as legalistic and not warm. It was certainly businesslike and, when she felt the need to do so, Ms Anderson did not shrink from giving Mr Edwards clear and even avuncular directions with which she required him to comply. Many of her requests of Mr Edwards for information or further information were in the form of what was described as "please explains". In such communications Ms Anderson tended to interpret and reach conclusions about events affecting Mr Edwards about which she had heard from others, before asking for his explanation of these. Her correspondence tended not to set out information as to the names of persons, dates of events, direct accounts of what was said, and other factual information in the nature of evidence. Rather, Ms Anderson's written correspondence with Mr Edwards was expressed in the form of what appeared to be at least a preliminary conclusion, although purporting to leave him with an opportunity to persuade her that some other conclusion should be reached. Ms Anderson's evidence-in-chief was likewise expressed as conclusory rather than simply factual.

[64] That is illustrated by the LSM's 25 September 2012 letter to the plaintiff (to which I will refer again) which was written in strong terms. It required him to attend a meeting within the following two weeks and set out the LSM's expectations of what would happen. As with her other correspondence, however, and tellingly, the manner in which she gave evidence, Ms Anderson expressed herself in the way which indicated a conclusion about a behaviour rather than a description of the alleged behaviour itself. So, for example, in her letter of 25 September 2012, the LSM required the plaintiff to refrain from "belligerent, and/or intimidating and/or bullying behaviour" without either describing sufficiently the events which she concluded amounted to such behaviours or describing the sorts of behaviours that were expected. So what the plaintiff considered to be a necessarily assertive managerial style risked both alienating the plaintiff but also left him ignorant of what sort of change was required by him. The LSM's assessments of the plaintiff contained in her subsequent letter of 10 October 2012 were similarly expressed as conclusions some of which Ms Anderson had to acknowledge subsequently were erroneous.

[65] Predictably, Mr Edwards reacted to this style of correspondence from Ms Anderson in a defensive manner, but his responses also tended to be generalised, conclusory, and lacking factual particulars.

[66] Because of Ms Anderson's management style and the circumstances of distance and cost, much of what passed between Ms Anderson and Mr Edwards and vice versa that is relevant to the determination of this case, is recorded in writing. An account of relevant events can, therefore, be confirmed substantially from those often lengthy emails that were exchanged between the two protagonists.

[67] Now to the plaintiff. Mr Edwards arrived at the school intent upon making it what he called "student-centric" and to improve the educational outcomes for its students. That was what he understood the Board that appointed him wished him to do. There could not have been and was not much, if any, opposition to that broad objective. Rather, the conflict that ensued between Mr Edwards and, to a greater or lesser extent, the Board, a not insignificant proportion of the school's staff, the LSMs, and sections of the local (particularly Maori) community, emanated from Mr Edwards's means of achieving those objectives. It focused on what was described as his inability to manage a substantial number of diverse but important relationships as Principal of the school. In particular, the problems concerned what others considered to be Mr Edwards's inability or refusal to acknowledge his weaknesses or failings and his unpreparedness or inability to change.

[68] Some members of the school's staff perceived Mr Edwards's prime goal of a student-centric college as one to remove what he considered to be a teacher-centred culture. There was probably a good deal of truth in that perception. For example, in 2010 some teachers had a substantial number of non-contact hours each week, that is non-teaching periods. That was associated with the school offering students fewer subject options than Mr Edwards considered it could and should offer. Mr Edwards said that a number of the staff were, in his view, too comfortable and insufficiently passionate about their students' learning outcomes. Although he had support from both teaching and, especially, non-teaching staff at the school, it seems likely that about one-third of the staff (including the two Deputy Principals) were very dissatisfied with his dealings with them and others. They considered that he was not

sufficiently consultative, was not seen to and did not lead the staff in the school professionally, and was dictatorial in an institution where collaborative leadership was appropriate and essential.

[69] In my assessment, Mr Edwards had what might be described as a traditional and hierarchy-based managerial philosophy and practice. As a secondary school principal approaching the end of his career in that role in his early 60s, Mr Edwards appears not to have adopted, or adapted to, the now prevailing philosophy of consultative and consensus based management of schools and relationships with their communities. Whilst not opposed to elements of that approach, Mr Edwards's philosophy was that where its application frustrated or even delayed his primary focus on educational outcomes for students, the latter was to prevail at the expense of the former. I did not understand Mr Edwards to disagree with the defendant's case that both principles can, and do in many cases, co-exist. Rather, Mr Edwards believed that recalcitrant elements on his staff and within the community threatened and stymied his plans for a student-centred and successful school. He could not and would not allow those goals to be impeded by those opposed to his methods.

[70] Confirming that emphasis upon compliance by persons lower in the hierarchy with the directions of those above them, on a number of occasions Mr Edwards, after disagreeing vehemently with Ms Anderson's directives (and on occasions also those of the Board's Chair), eventually said that he would obey orders given to him. That was in the same way, I consider, that he expected those to whom he gave orders or directions, to comply with them. That (sometimes belated) subservience to authority by Mr Edwards was itself one of Ms Anderson's criticisms of him. She was not impressed by what appeared to be his very reluctant agreement to do things only because she ultimately directed him to do so. Ms Anderson would have preferred Mr Edwards to agree with her ideas for the school and its management, because he endorsed these on their merits rather than because he had to do so as an obedience to orders.

[71] There was also a tense and difficult relationship between Mr Edwards and some members of the new Board that was elected into office only a few months after he started as Principal at the school. It was this Board that, in late 2011, requested

the appointment of an LSM as the employer of the Principal resulting in Ms Pitkethley's appointment in early 2011. Even although the LSM appointments removed the employer role from the Board, it still had necessarily frequent and important dealings with Mr Edwards during 2012 and 2013 and their strained relationship continued until the plaintiff's dismissal.

Factual background to dismissal

[72] I will deal subsequently in detail with the events leading to the four separate elements of misconduct or serious misconduct relied on by the LSM in Mr Edwards's dismissal. It is, nevertheless, necessary to give an account of Mr Edwards's employment history, not only to put those four particular instances in context, but also to enable an evaluation of the other ground of justification, a claimed general loss of trust and confidence in the plaintiff.

[73] Mr Edwards began secondary school teaching in 1976, having been a teacher and, more latterly, a principal. He was dismissed, from what was probably going to be his last role, in April 2013 after 37 years in secondary education. Before his appointment as Principal at the school in January 2010, Mr Edwards had been the Principal of two secondary schools, another small rural Northland school and, more latterly, a high school in a provincial town. There were some similarities between those three schools of which Mr Edwards was Principal. Their low socio-economic catchment areas meant that they had Decile 1 ratings. Their students were substantially Maori and came from areas of proportionately high Maori population.[16] In the case of Mr Edwards's principalship immediately before BOIC, that school had also been subject to limited statutory management while Mr Edwards was Principal.

[74] There is some suggestion that Mr Edwards was not the Board's first choice for Principal in 2010, but by his account he was appointed because of his commitment to academic excellence and raising standards generally. Although not a diagnosis accepted by all witnesses, Mr Edwards's evidence was that he was appointed after a period of unstable temporary leadership of the school.

---

[16] At the end of the 2012 academic year, Bay of Islands College's student roll was 380 of whom about 86 per cent self-identified as Maori. BOIC had an academic staff of about 40 together with other administrative and support personnel.

[75] Mr Edwards's avowed aim for his principalship of the school was to improve student learning and school administration. The school's staff in 2010 consisted of a number of long-term teachers. Under Mr Edwards sat a relatively small senior management team (SMT) consisting of the school's two Deputy Principals (DPs) and some other senior Heads of Faculty (HOFs). The Board of Trustees included a staff representative trustee and other trustees from a variety of fields and backgrounds. The union of post primary teachers, New Zealand Post Primary Teachers Association (the PPTA), had school staff as members although it was principally a Northland regional staff member of the PPTA who dealt with staff issues in relation to Mr Edwards and the LSM. The Board and the LSM were advised and sometimes represented in their dealings with the plaintiff, particularly at the latter stages, by the STA.

[76] Only months after Mr Edwards took up his appointment as Principal of the school on 28 January 2010, an almost entirely new board took office. Subsequently (in late 2011), the Board sought the assistance of the Ministry of Education to intervene statutorily in the College's governance. Relationship problems with the plaintiff caused the Board to make this application.

[77] On 12 January 2012 Ms Pitkethley was appointed by the Minister of Education as LSM of the College although she only held this position until her resignation with effect from 25 June 2012, at which time Carol Anderson was appointed as the College's LSM. It was Ms Anderson who held that role at the time of Mr Edward's dismissal and made the decision to dismiss him.

[78] The LSM appointment, initially of Ms Pitkethley and subsequently of Ms Anderson, included the responsibility to:

- manage the Principal;
- to undertake the appraisal of the Principal;
- to deal with complaints made to the Board;

- to address problems with Mr Edwards's change management strategies, including his "authoritarian and dictatorial" style of leadership and his absence of consultation;

- to deal with poor relationships between the Principal and the school's staff, the lack of engagement of the Principal with the school's community, the breakdown of relationships between the Principal and the school's community, and especially its Maori community, and the belief by the Principal of a conspiracy by others to resist his leadership and to deal with boundary problems within the Board between management and governance.

[79] Despite the shortness of its tenure, Ms Pitkethley's role nevertheless saw her undertake investigations and develop strategies to address these issues. Mr Edwards's 2011 performance appraisal required under his employment agreement, was completed and Ms Pitkethley began developing its 2012 successor. Mr Edwards disagreed with his 2011 performance appraisal and a different appraiser was agreed to for the following year.[17]

[80] The first LSM considered community complaints which she assessed should have been dealt with by Mr Edwards both sooner and in a lower key fashion than he did. Ms Pitkethley also began to deal with problems arising from Mr Edwards's modification of school policies in 2010.

[81] By June 2012 Ms Pitkethley was about to warn Mr Edwards formally about his leadership style which she assessed included elements of a "siege mentality, resistance and suspicion". She assessed Mr Edwards as being "non-defiant but resistant [and] prevaricating" and that his response to her suggestions for change had been "superficial but unsustainable". Ms Pitkethley's assessment was that Mr Edwards had denied having leadership problems and was unprepared to admit to the validity of the alternative views of others, particularly of his staff. Ms Pitkethley had concluded that Mr Edwards needed sustainable mentoring although she thought that

[17] In this case, at least, these appraisals were conducted by contracted, experienced former school principals whose identities were mutually agreed.

there would be problems of cost, acceptance of this by Mr Edwards, and in finding a suitable person to undertake that role. Ms Pitkethley concluded that Mr Edwards was not involved in ongoing professional development with the University of Auckland and, all in all, she would have implemented an advice and guidance process in conjunction with a mentor.

[82] By the time she relinquished her role in June 2012, the first LSM had reported twice to the Ministry of Education, for the periods 17 March to 24 April 2012 and 1 May to 20 June 2012. She had advised that there was continued resistance by school staff to principal-imposed requirements for accountability measures and improvement in student achievements although, in her assessment, 2011 student achievement results were "good".

[83] In her five months as his employer, the first LSM, Ms Pitkethley, made some positive assessments of Mr Edwards's principalship including, in particular, the pursuit of his goal of student achievement. However, she also formed unfavourable views about what she described as his authoritarian and dictatorial managerial style and the absence of meaningful consultation with others including staff, Board members and within the school's community. Ms Pitkethley's assessment included an unwillingness by Mr Edwards to acknowledge criticism of the significant aspects of his principalship and his tendency to dismiss those factors as being the responsibility of what he called "naysayers" amongst some of the school's staff. At the time of the premature conclusion of her statutory intervention, Ms Pitkethley was about to require Mr Edwards formally to change his leadership style and to accept and act on the recommendations of his 2011 Principal's Appraisal Report which had been critical of these aspects of his performance also. Ms Pitkethley was also concerned about the results of a PPTA workplace survey which confirmed deteriorating staff relationships. Her view was that "a formal pathway, together with substantial one-on-one mentoring by a suitable practitioner, [is] seen as the only way forward".

[84] Upon assuming the LSM role at the school in late June 2012, Ms Anderson both spoke to her predecessor and read Ms Pitkethley's accumulated written material about Mr Edwards. Ms Anderson did so for the purpose of making her own

assessment of the situation although, after an appropriate period of independent evaluation, she reached the same general conclusions as had Ms Pitkethley and chose to continue the same general strategies.

[85] Ms Anderson's first formal written communication with Mr Edwards about these matters was a letter dated 25 September 2012 to which I have already alluded. The predominant purpose of this letter was to both seek to persuade, and to direct, Mr Edwards to change his managerial style from that which both Ms Pitkethley and Ms Anderson had previously identified and criticised. Ms Anderson refuted, correctly in my assessment, Mr Edwards's assertion that Ms Pitkethley had not recommended that he make those same changes. The LSM's 25 September 2012 letter included the direction that: "Since your perception is that you have not been asked to change, I think it is important that I clarify at this point that you are required to change." The letter also criticised in detail his management methods and declined a discretionary salary increase that Mr Edwards might otherwise have expected.

[86] This criticism was added to and expanded upon in the LSM's letter of 10 October 2012 which referred, among other things, to his "invisible leadership", the provision of misleading information, and the plaintiff's alleged failure to advise the Board of legal risks, processes, and procedures.

[87] In her next letter to the plaintiff dated 2 November 2012, the LSM required corrective action of him and, significantly, referred to the possibility of a competency procedure (under the collective agreement) being implemented in the event of continued failure to improve.

[88] Following the 2 November 2012 letter in which the LSM suggested a competency programme in view of the plaintiff's refusal to acknowledge the validity of her concerns, an assistance and guidance programme under the collective agreement was proposed by her on 12 November 2012.

[89] Although Ms Anderson's approach may have been more direct and directory than Ms Pitkethley's had been, I accept the defendant's case that the message was the same from both LSMs. Any perceived differences in approach between them are

probably attributable to Mr Edwards's ongoing non-acceptance of Ms Pitkethley's persuasive and collegial messages resulting in Ms Anderson's more assertive and directive communication style.

[90] The plaintiff responded to the LSM's letters of 25 September 2012 and 10 October 2012 by his own letter of 12 November 2012.

[91] In late October 2012 events had first came to light regarding what the parties know as the staff survey results data issue. This, and the LSM's subsequent conclusion that Mr Edwards's advice to her constituted serious misconduct, was one of the grounds relied on for his dismissal. I mention it here only to put it in chronological sequence and as exemplifying what was generally a marked downturn in relations between the plaintiff and the LSM in late October/early November 2012. I will deal with the detail of the events that led to dismissal on this ground subsequently.

[92] In early November 2012 there arose what the parties know as the NCEA data issue. Because this also constituted one of the LSM's findings of serious misconduct for which Mr Edwards was dismissed, the detail of this development in the employment relationship will also be addressed subsequently.

[93] Following an unsuccessful attempt to resolve these and other issues in a confidential mediation, Ms Anderson wrote to Mr Edwards, again at length, by two letters dated 5 December 2012. These set out the LSM's summary of what she said was the history of the employer's attempts to engage with Mr Edwards and to get him to change his behaviours towards others. Ms Anderson advised that notwithstanding the informal support and guidance that had been provided to Mr Edwards to that point (largely by Ms Anderson herself and her predecessor), the persistent issues were ones of his competency as a principal and that his behaviour constituted "material breaches of your employment agreement". Ms Anderson brought to Mr Edwards's notice the prospect of his dismissal if these matters were not addressed and she invited his response.

[94] That response came in the form of a lengthy (55 page) letter, emailed to Ms Anderson after the end of the school year, on 19 December 2012. Given the seriousness of the situation and Mr Edwards's commitments as principal at that time of the year, no reasonable criticism can be levelled at him for responding how and when he did. Ms Anderson's subsequent categorisation of this response as obfuscatory, and her unpreparedness later to entertain further written responses from him, were unreasonable. Ms Anderson had been communicating formally in writing with Mr Edwards. In light of the geographic distance between them, he ought to have been allowed to respond, or at least not prohibited from replying, both in writing and at length, given the multiplicity and complexity of the issues, and what was at stake.

[95] Ms Anderson described Mr Edwards's 19 December 2012 55-page letter to him as "angry and belligerent" and considered that it made allegations against her rather than dealing with the problems that she saw were Mr Edwards's. However, I conclude that this could not reasonably have been an unexpected response following the LSM's two 5 December 2012 letters which were couched in strong and direct terms that were very critical of Mr Edwards.

[96] In 2012 Mr Edwards's performance appraisal had been conducted by an experienced retired school principal, Gail Thompson. Her appraisal attributed some responsibility for the unsatisfactory aspects of Mr Edwards's performance to others, including a disaffected group of staff numbering about one-third of the total teaching staff at the school. Whilst Mr Edwards was more pleased with Ms Thompson's appraisal of him in 2012 than he had been with its predecessor in 2011, Ms Thompson's was also critical of him and seriously so in some respects. Mr Edwards's general acceptance of Ms Thompson's appraisal of him in 2012 can be, and should have been, seen as an (albeit reluctant) acceptance of those criticisms that she made of his management style and of his dealings with colleagues.

[97] There was a further and substantially successful mediation between the parties in January 2013. This involved, in particular, one of the Deputy Principals (the other Deputy Principal having resigned) and her complaints about Mr Edwards's treatment of her and the unreasonably heavy workloads being put upon senior

management staff and other teachers at the school. This mediation concluded with agreed changes to the way in which the SMT operated and how the plaintiff related to the Deputy Principal. Subsequent events showed that Mr Edwards adhered to this agreed strategy, at least sufficiently, for SMT issues in the college to be the subject of favourable comment in reports (including by the LSM) in the first quarter of 2013.

[98] In late January 2013, the LSM prepared a formal support and guidance action plan about the contents of which she consulted with Mr Edwards. She directed that this programme was to commence with effect from 4 February 2013, the first day of the new school year. The plaintiff, through his solicitor who had, by then, become engaged frequently and in detail with these issues, expressed criticism and disagreement with some elements of the support and guidance plan. This was, however, a directive of the LSM and Mr Edwards had participated in a number of aspects of it, including the selection of, and preliminary discussions with, the mentor. Mr Edwards could not be said to have rejected the implementation of the support and guidance plan or resisted its application to him. As it was an agreed plan, he was entitled to debate the detail of it. The LSM's frustration at the delays in this process had more to do with the plaintiff's lawyer's unavailability than anything else.

[99] After consultation with Mr Edwards, Ms Anderson asked former principal Bryan Smith of Auckland to be the plaintiff's mentor, that is to provide him with advice, support, and guidance. Mr Edwards met Mr Smith first on 7 March 2013 in Auckland, as a result of which the mentor came to the preliminary conclusion that the plaintiff's support and guidance programme would take a considerable time to bear fruit. Mr Smith's assessment was that the remainder of the 2013 school year would be the appropriate timetable for this. Mr Smith was concerned about what he described as the huge quantity of email correspondence between the LSM and the Principal which he considered to be "bordering on harassment" of the plaintiff. Amongst Mr Smith's initial advice to Mr Edwards was not to get involved in detailed responses to Ms Anderson's emails.

[100] On 1 March 2013, the LSM received an intimation of a potential complaint by a staff member (PM) of the manner and outcome of his treatment by the plaintiff. That complaint was formalised by PM and submitted to the LSM on or about 13

March 2013, whereupon Ms Anderson forwarded it to Mr Edwards. The LSM made a number of inquiries of the complainant and other relevant persons about the subject matter of PM's complaint but disclosed only some elements of some of these inquiries to Mr Edwards. I deal subsequently and in more detail with this complaint as it formed one of the grounds of the plaintiff's dismissal.

[101] The LSM then sought to discuss the PM complaint with the plaintiff at a meeting in his office at the school on 21 March 2013. This meeting concluded prematurely in circumstances that I also describe in more detail subsequently because its ending also formed the basis of another finding of serious misconduct in reliance on which the plaintiff was dismissed. So too did the LSM's view of the plaintiff's account of the meeting with which she disagreed sharply and fundamentally.

[102] The LSM wrote again to the plaintiff by letter of 27 March 2013 which referred back to her previous correspondence (including the 5 December 2012 letters). The contents of this 27 March 2013 letter are also a significant element in the decision to dismiss the plaintiff and will be referred to in more detail subsequently.

[103] There followed two further letters from the LSM to the plaintiff, both dated 11 April 2013, setting out Ms Anderson's conclusions about the PM complaint and those relating to the staff survey and NCEA data misrepresentation allegations. She required the plaintiff to meet with her on 16 April 2013 to persuade her why he should not be dismissed.

[104] The LSM interviewed other persons including school staff members about Mr Edwards on 15 and 16 April 2013. She kept records of her interviews, particularly with senior staff members from the school's SMT conducted on the day before and on the morning of the final meeting with Mr Edwards. However, the fact and contents of these interviews about him were not disclosed by Ms Anderson to him.

[105] On 15 April 2013, the day before a scheduled final meeting between the parties, the plaintiff responded in detail, through counsel, to the LSM's 27 March

2013 letter. Again the content of this response will be considered in more detail because it was or should have been an integral element of the process leading to the decision to dismiss. That, too, applies to the events of 16 April 2013 when the parties and their representatives met to provide Mr Edwards with an opportunity to respond finally to the LSM's stated intention that his employment should be ended. Mr Edwards was dismissed by letter of 18 April 2013.

The staff survey information issue

[106] This is the detailed background to the first ground for dismissal characterised as serious misconduct in Ms Anderson's letter of 18 April 2013 setting out the reasons for Mr Edwards's dismissal:

> (a) In my letter of 27 March 2013 I raised concerns about your provision to me of fabricated survey data. You have been provided with three opportunities to explain how you calculated the figures which were completely erroneous and significantly more favourable than they should have been (see paragraph 29 of the 27 March letter and my subsequent letter of 11 April 2013.) You have not provided a satisfactory response. I consider the provision of this false data to be serious misconduct.

[107] At his previous school Mr Edwards had conducted an annual survey of staff to determine their satisfaction with the school and, in particular, its management. That survey had originally been a commercial software product and although it had ceased to be sold, Mr Edwards had continued to use its format and implemented it at BOIC in 2010 and 2011. In those years he insisted that all relevant staff complete the survey but it was not anonymous because in order to ensure that completion, the survey forms returned were numbered and checked off against a list of staff. Although Mr Edwards asserted that he did not know personally how any individual staff member had responded and that an office assistant only used the identification information to ensure completion of the survey, some staff were so dissatisfied with the lack of anonymity that they resisted completing the survey.

[108] As LSM in 2012, Ms Anderson did not favour the continuation of the staff survey but was prevailed upon by Mr Edwards to do so, if only to show changes in responses over time. She did, however, insist on anonymity and a proprietary product known as Survey Monkey was used in 2012 with the same questions, and

answer alternatives, as had applied previously. This was a qualitative survey in which the only answers that respondents could give were “Yes”, “Maybe”, or “No”. Whilst the first and last alternatives were a crude measure of answers to often quite sophisticated qualitative questions, at least the tenor of the response was clear. Just what the answer “Maybe” may have meant in any particular case was, however, very unclear and problematic. Its use was at the heart of the LSM’s conclusion of serious misconduct.

[109] Although Ms Anderson was responsible for the compilation of the data in the 2012 survey, with her agreement Mr Edwards undertook a comparison of the results with the previous years focusing on what he described as “significant changes or swings”. Because of the change to the anonymous Survey Monkey system in 2012, the format of the results of the survey provided to Mr Edwards differed from that of the previous years. Spontaneously, Mr Edwards presented Ms Anderson with what he said was his preliminary summary of these comparative data at a meeting on 29 October 2012.

[110] Ms Anderson was in the school for a series of meetings over two days and, finding Mr Edwards in his office, took the opportunity to speak to him. This was not a scheduled meeting and the staff survey data were not a planned topic for discussion then. Mr Edwards was working on the survey data on his computer. This was displayed on a large screen behind his desk facing Ms Anderson. Mr Edwards described briefly what he was doing and asked Ms Anderson whether she would like a copy of the material displayed on the screen. She accepted the invitation and Mr Edwards printed it out. After a brief look at the information Ms Anderson commented that it appeared to be flawed. Mr Edwards acknowledged immediately that this might be so and proposed that he check it. The information was intended eventually for the principal’s self-assessment report to be made to the Board in December. Ms Anderson took away the hard copy of the data that Mr Edwards had printed for her.

[111] Ms Anderson says that there was no indication that what Mr Edwards was providing her was in other than final form. She said that the promptness with which Mr Edwards acknowledged that his figures might be erroneous and with which he

agreed to re-check them, indicated to her that he had intended deliberately to provide her with false information. Mr Edwards's figures then appeared to disclose that staff surveyed were more positive about the school and its management than they had been previously.

[112] Ms Anderson emailed Mr Edwards on 19 November 2012, apologising for the delay in commenting on the document and making suggested amendments. These included, in particular, that the "Yes" and "Maybe" responses of staff should not be amalgamated as Mr Edwards's workings had done, but noted that "there is lots of interesting material in the document which would be good for the Board to consider".

[113] Mr Edwards reviewed and changed the data which were included in his self-review document that was tabled at the December 2012 Board meeting. In common with other elements of Board meetings at the time, there is no minute about the Board's receipt of this report, but the Board Chair (Mr Hooson) confirmed that it had no issue with the accuracy of the information and the report, including the corrected data, was accepted by it.

[114] In one of the two letters written by Ms Anderson to Mr Edwards on 5 December 2012, she raised formally her concern about the survey data shown to her in late October 2012 and, in particular, that the amalgamation of the "Yes" and "Maybe" categories was misleading. Ms Anderson sought Mr Edwards's explanation for this.

[115] In another letter also written to Mr Edwards by Ms Anderson on the same day, 5 December 2012, she asserted that if she had not undertaken her independent research about these data and the conclusions to be drawn from them, inaccurate information would have gone to the Board and would have misled and deceived it.

[116] In his letter of 19 December 2012 responding to Ms Anderson's letters of 5 December 2012, Mr Edwards said that the document he had supplied to Ms Anderson was a first draft, and that later versions edited by him and the school's office assistant had been accepted by her.

[117] The next formal dealing with the staff survey data was in Ms Anderson's letter on 4 March 2013, advising Mr Edwards that she was not satisfied with his response of 19 December 2012. She asserted that the document given to her in late October 2012 had not been presented as a draft, that she had not been asked to check the figures, and that the document in which the comparative data was included, had not been provided by Mr Edwards at her request as he claimed.

[118] Next, on 22 March 2013, Ms Anderson advised Mr Edwards formally in an email:

> I wrote to you on 4 March 2013 (paragraphs 4 to 9 of my letter) providing you with a further opportunity to respond to me by 26 March either verbally or in writing explaining how you calculated the figures that you provided me with. I have not had any response from you. If you do not respond I may be left with no alternative but to make an adverse finding in relation to the veracity of the data and such a finding is likely to result in a written warning. Please seek appropriate advice.

[119] Two days later, on 27 March 2013, Ms Anderson wrote again to Mr Edwards about a number of issues or allegations that had led her (and, she said, the Board) to conclude that there was an irreconcilable breakdown of trust and confidence between them as employer and employee. Included in this advice was Ms Anderson's claim in this regard that Mr Edwards had provided her with "fabricated survey data" which had not been adequately responded to or explained by him. Ms Anderson's letter continued that she considered that "… this alone to be grounds for concluding that the Board cannot have trust and confidence in you, and for a finding of serious misconduct".

[120] Ms Anderson's letter of 27 March 2013 was sent as Mr Edwards was finalising his reply to hers of 4 March 2013. On 28 March 2013 Mr Edwards responded to a variety of issues including the survey data issue. He re-asserted that the first document given to Ms Anderson had been a draft and denied that there was any intention to mislead her. He said that the data contained in it had not been edited or audited, and that she knew this to be so. He said that there had been errors in a draft copy which had since been corrected. Mr Edwards explained that the errors had occurred because he had been "flipping backwards and forwards from one year to the next, I clearly read from the wrong table". He acknowledged that there were

errors in the draft, that he had said so at the time that Ms Anderson first identified these, and that they were subsequently corrected.

[121] In response to Ms Anderson's request to provide any evidence that might support his claim, Mr Edwards said that he did not usually retain draft documents but that Ms Anderson was welcome to talk to the office staff about the usual processes employed in such situations. Ms Anderson had retained the copy of the document which Mr Edwards had printed out for her on 29 October 2012, which had been on his computer when she came to his office, but Mr Edwards's own electronic version had subsequently been overwritten by further amendments and then the final version of the same document.

[122] On 11 April 2013 Ms Anderson advised Mr Edwards that she did not accept his explanations, concluded that he had deliberately fabricated the data to make it look more favourable, and that his apparent motivation was to "hope that in a busy meeting I would not check them". This "serious misconduct" by Mr Edwards was one of the grounds for his dismissal.

[123] Some months later, during the Authority's investigation meeting, relevant documents were put to Ms Anderson in conjunction with Mr Edwards's explanation. After examining them, she conceded that Mr Edwards's initial explanation to her may have been correct. In these circumstances and, she said, "to protect his mana", she resiled from her rejection of Mr Edwards's explanation both leading up to dismissing him and in preparing her evidence for the Authority.

[124] Months later, in preparation for giving evidence in this case, however, and having further reviewed the issue, Ms Anderson changed her mind again. She came to the conclusion that Mr Edwards's original explanation could not have been credible. In the course of giving evidence before me, however, Ms Anderson conceded yet again that not only might Mr Edwards's explanation have been credible, but indeed it may well have been correct.

The NCEA data issue

[125] The plaintiff's alleged deliberate falsification of student achievement data with the intention of deceiving or misleading the LSM, the Board, and the school's community, formed the second in time of the grounds of serious misconduct for which Mr Edwards was dismissed. As with the other three specific grounds, a detailed evaluation of these events is necessary to determine whether a fair and reasonable employer, in all the circumstances, could have concluded that what Mr Edwards did was serious misconduct, justifying his dismissal, and how a fair and reasonable employer could have reached that conclusion and outcome.

[126] This is one of two largely contemporaneous elements of serious misconduct for which Mr Edwards was dismissed. As with the staff survey data events, also, Ms Anderson concluded that Mr Edwards intentionally made false claims about the school's NCEA results for the purpose of misleading her, the Board, and others. This was expressed in the letter of dismissal of 18 April 2013 as follows:

> The letter of 11 April addresses a second issue in which you made claims about NCEA results which I considered to be incorrect. When challenged you told me that you could not verify the data before 2010. This was false and as an experienced principal you would have known that this was false. Because you attempted to mislead me this is accepted as evidence of serious misconduct.

[127] The first formal reference to this issue is in Ms Anderson's email of 19 November 2012 questioning Mr Edwards's statement in a Starpath report that "the 2011 achievement rates were … the best the school has achieved under the NCEA system". Ms Anderson's initial cause for concern was that the Principal's earlier December 2011 Te Kotahitanga report contained 2006 and 2007 NCEA results that appeared to be better than the 2011 ones.

[128] The Starpath report made by Mr Edwards was for a research project undertaken by University of Auckland staff/students based on data audit or interviews conducted with school staff in August 2012.

[129] Mr Edwards telephoned Ms Anderson in response to this email of 19 November 2012, saying that he could not explain that discrepancy but that he had

been advised of the superiority of the latest results by a staff member whom he did not identify.

[130] In one of her 5 December 2012 letters to Mr Edwards containing a number of other allegations, Ms Anderson referred to his claim recorded in the Starpath report, said that the statistics that he had provided to the Board did not support that claim, and recorded that she had raised this matter with him.

[131] As part of his lengthy and detailed formal response on 19 December 2012, Mr Edwards commented that whilst he had "provided detailed verifiable statistics that do support this …", he had "… not been able to get verifiable data prior to 2010". After having expanded on some of the detail, Mr Edwards wrote:

> … So over all the NCEA results appear to be the best since the start of NCEA. If I am wrong about this I am happy to be corrected. (your letter 5 Dec 11 pages – page 3 paragraph j)

[132] The next formal correspondence dealing with this question was in Ms Anderson's email of 4 March 2013. She said that Mr Edwards could not claim that the results were the best since NCEA began and that:

> … it is not correct to say that the school does not have verifiable data before 2010. NCEA results are available through the NZQA website back to 2004.
>
> 18. You say that you are happy to be corrected. You were corrected on 19 November. Your persistence in making these claims after it has been clearly demonstrated to you that they cannot be correct is a risk to the school and creates distrust.
>
> 19. I therefore instruct you that unless you can provide me with verifiable NCEA data to prove this claim any repetition of the claim will result in disciplinary action. The provision of accurate data is essential for the Board to perform its function. Student achievement in NCEA is of central importance to the Board.

[133] Next, on 14 March 2013, Ms Anderson corresponded with the school's Principal's Nominee (Ken Smyth) in relation to the NCEA data. Amongst Mr Smyth's advice to Ms Anderson on 15 March 2013 (but none of which was made known to Mr Edwards before his dismissal) was that as between the 2007 and the 2011-2012 results, "you can use the stats to argue that both ways".

[134] Next, on 19 March 2013, Ms Anderson emailed the Board Chair, Gary Hooson (although this, too, was not made known to Mr Edwards until after his dismissal) as follows:

> Elgin [Edwards] should be providing a report in more detail of annual achievement data. (From memory this was requested/promised at the last meeting.) This might be a time when someone might comment on the information on the newspaper blog appearing to show our best year was 2007 not 2011 and giving Elgin a chance to explain.

[135] Mr Hooson responded by email:

> Don't you now have concerns that the data could have been read by him to be accurate therefore the possible misleading/lying accusation may not be worth pursuing? If no-one comments I am not going to bring it up.

[136] Mr Edwards responded to Ms Anderson's letter of 4 March 2013 by letter dated 28 March 2013. This included a report prepared by him and contributed to by Mr Smyth, in which he continued to maintain the accuracy of his original claim, although saying that the data were "unverifiable".

[137] In her 11 April 2013 letter to Mr Edwards, Ms Anderson categorised Mr Edwards's claims and his refusal to withdraw them as serious misconduct, expressed her view that there was no basis for making the sweeping claim that 2011 was "the best since NCEA began", and concluded that Mr Edwards's claim that relevant data were unverifiable, was also false.

[138] When Mr Edwards took up his role in 2010, the qualifications system known as the National Certificate of Educational Achievement (NCEA) was still in its developmental stages. The NCEA system had been adjusted regularly throughout its existence. For example, whilst it had, from the outset, consisted of two types of standards (unit standards and achievement standards) for each of the final three years of secondary school education (known as NCEA levels 1, 2 and 3), assessment standards measured by external examinations did not include, initially, what was later to become the dual grading of merit passes and excellence passes. The then unit standard system, essentially an internally assessed process, was considered by some in the profession to be a lesser measure of student achievement, one more

easily attained by non-academic students undertaking more practically orientated subjects.

[139] Unlike other similar Northland secondary schools whose students' results were perceived to have been improved by the inclusion of unit standards, the BOIC's Board decided that all students would undertake only achievement standards so as to focus on academic excellence. Although it appears that this instruction was ignored effectively by the school's academic leadership (pre-dating Mr Edwards's appointment), this may have distorted comparative tables of successful achievement of NCEA qualifications between BOIC and other similar Northland schools. These, and other elements in the early life of the NCEA system, made it difficult and inaccurate to compare student achievement at the school with other similar secondary schools in the region. They also made comparisons between year cohorts of students at the same school of questionable accuracy and, therefore, of limited value.

[140] Associated with the issue of validity of NCEA comparisons between academic years was whether the data which produced the comparative statistics were, and should have been, verifiable. The results of individual students' marks, both internally assessed for unit standards and for achievement standards from annual external examinations, were assembled in a computer program operated by the school known as KAMAR. After a number of student, teacher, and managerial checks of the accuracy of those data, they were sent by the school's Principal's Nominee to the New Zealand Qualifications Authority (the NZQA) and published on the latter's website. Internally assessed data were sent monthly to the NZQA and external examination data were posted annually early in the year following the end-of-year examinations. Except in rare cases of significant error, those NCEA data recorded by the school and displayed by the NZQA's website became, if not officially, then widely accepted as accurate records for purposes including of comparison with other schools.

[141] At some indeterminate time before Mr Edwards began at the school, its NCEA data on its KAMAR system were lost. Because of the time and expense involved in attempting to re-constitute those electronic records, and because the primary source material was still available in teachers' hard copy records in the

school and, summarily, on the NZQA website, a decision was taken not to restore the lost KAMAR data at BOIC.

[142] The plaintiff also relies on the subsequently revealed email communications between Ms Anderson, the Board's Chairman, and Mr Smyth. The latter noted that the relevant statistics on the NZQA website were difficult to interpret because of changes to standards with particular reference to extensive use of unit standards to ensure easier NCEA completion. Mr Smyth's concluding comment to Ms Anderson that "You can use the stats to argue that both ways", was significant. The plaintiff says that this information, shared by the LSM with the Board Chairman Mr Hooson, revealed the possibility that Mr Edwards's assertion could be justified and that Mr Hooson identified precisely that to Ms Anderson.

[143] Mr Edwards's account in evidence of why the data was unverifiable (because the school's own records had been lost) included an example where there were instances of 100 per cent pass rates displayed on the NZQA website which were unlikely to have been accurate but which he said might have been verified by the school's own data if these had been available. The plaintiff said that the Starpath project researchers confirmed this to be the case.

[144] What I understand to have been Mr Edwards's reference to "verifying" student achievement data and, therefore, his comment that what appeared on the NZQA website as unverifiable, arises from the following. These conclusions are drawn from the evidence presented by the defendant about the practice of BOIC at the time.

[145] At times, the pre-2011 data included intuitively-unlikely achievement rates of close to, or even in some cases of, 100 per cent, indicating that all relevant students had apparently achieved a standard in a particular year. Mr Edwards's view was that such data were probably not correct or at least were misleading, and therefore needed in his view to be verified against the school's own results in its KAMAR database. This data had, however, been lost, leaving Mr Edwards to conclude that some NZQA website statistics might be inaccurate but would be unverifiable.

[146] An explanation for the achievement of 100 per cent pass rates by a school at an NCEA level was proffered in evidence for the defendant. It was to the effect that if students who do not pass an NCEA standard in one year can be persuaded to return to school to undertake the next level of study for the same standard and then achieve that next level standard, such students will be credited with passing the previously failed standard, albeit in the subsequent year. This may account for higher percentages of attainment of certain standards, including as high as 100 per cent, or even potentially higher than 100 per cent. Without knowledge or an explanation of how this came about, it could be misleading, especially to Board members, the school's community, and others without insiders' knowledge of the NCEA system.

[147] It is difficult to disagree with the defendant's fundamental submission, however, about verification. That was that, even if Mr Edwards did genuinely believe that the NZQA website data was unverifiable and perhaps unreliable, he should not logically have made the comparative claim based on those data that BOIC student success rates under his principalship were the best ever. It is correct, as the defendant submitted, that Mr Edwards had used the results published on the NZQA's website previously for the preparation of reports and to compare the performance of the school's students with those at other comparable Northland schools. It was, therefore, at least inconsistent for him to subsequently question the validity of them to oppose the defendant's claims, but still to use them nevertheless to support them.

[148] When Mr Edwards made his claim that the 2011 NCEA results were the "best ever", this was made to support his opposition to criticisms of his management of the school. I accept, also, that when queried about the statement, it was important for Mr Edwards to be accurate and not to mislead the LSM in what was more than a trivial matter, not least because the information was intended to be provided to the Board, to the Ministry of Education, and to the University of Auckland as part of its Starpath research in which BOIC was involved.

[149] Finally in this regard, Mr Edwards pointed to his preparedness to be corrected about his understanding of these matters but that Ms Anderson's response was to direct him not to repeat the claim at the risk of being disciplined. He did not do so publicly or indeed other than to Ms Anderson, although he stuck largely to his

original explanation in ongoing correspondence with her. He complains that doing so was regarded improperly and unfairly by the LSM as a prohibited repetition by him of his claims.

The 21 March 2013 meeting issue

[150] This third event constituting a finding of serious misconduct by Mr Edwards was summarised in cls 3(c)-(d) of the dismissal letter of 18 April 2013 as follows:

> (c) At a meeting on 21 March 2013 you became heated to the point where I felt I had to bring the meeting to a close. (I refer to my email of 25 March 2013). I directly experienced unacceptable behaviour from you that is similar to behaviour that staff have complained about. I am now unable to have a discussion with you on other than superficial matters. This is an untenable situation in any employment relationship but particularly between a Board/LSM and its CEO. Your inability to maintain a collegial and professional attitude is evidence of serious misconduct.
>
> (d) On top of this your subsequent recorded recollection of our conversation was so distorted that I now consider it now necessary to tape all our conversations. I refer to my email to you of 25 March 2013. This is also completely untenable in an employment relationship and amounts to serious misconduct.

[151] The meeting of 21 March 2013 was unscheduled, or at least there was no forewarning of the subject matter of that discussion, the complaint by staff member PM with which I will deal subsequently.

[152] The circumstances of the meeting must be seen in context. It was held against a background of increasingly detailed, legalistic, and fraught correspondence and other dealings between the parties in which Mr Edwards was then represented by a lawyer and Ms Anderson was acting on the advice of the STA in critical correspondence, overseen by the school's insurer's lawyer. In hindsight and in these circumstances, it was unfortunate that an obviously contentious topic was raised by Ms Anderson unannounced and at a meeting at which only she and Mr Edwards were in attendance and of which no complete record was created contemporaneously or immediately afterwards. It was, nevertheless, the informal raising for informal discussion of a complaint as the collective agreement required the LSM to do, although it could have been raised both informally with an appropriate degree of forewarning.

[153] There was then also an established and agreed process for dealing with staff complaints. This had been recorded in Ms Anderson's letter to Mr Edwards of 2 November 2012. The LSM said that she would continue to refer staff complaints to Mr Edwards and that the "proper channels" for dealing with these would be to first raise concerns "verbally" with him. The second step, if there was no satisfaction with the initial response, would be to put concerns in writing to Mr Edwards who would attempt to resolve them, including discussion with his mentor, an adviser, the STA, or Ms Anderson, before there was a response to the staff member. Third, if the complainant staff member was still not satisfied, that staff member was entitled to complain to the SLM or to the Board who or which would discuss the complaint with Mr Edwards before reaching any decision about it. This process was repeated in the LSM's support and guidance programme for Mr Edwards which had commenced on 4 February 2013. There can, therefore, be no substantial criticism of the LSM for raising this issue informally with Mr Edwards.

[154] As Mr Edwards himself acknowledged, the 21 March 2013 meeting deteriorated when he criticised Ms Anderson for the way in which she was dealing with him (and, indirectly, affecting his family). He compared it to the way in which he was alleged to have dealt with PM. Ms Anderson did not take kindly to direct and confrontational criticism of her treatment of Mr Edwards. She accused him of intimidating behaviour by the facial appearance that he adopted, telling him that this was what others had complained of, and she was now experiencing for herself.

[155] Ms Anderson said that Mr Edwards's voice became strident, he began to "glare" at her, which consisted of leaning forward with a red face and with his eyes focused on her intently. She said that although he did not raise his voice, it became "stronger" and increasingly vehement.

[156] Mr Edwards took these comments as a personal affront to his appearance and the meeting was then rapidly concluded. Each party has a very different account as to who brought the meeting to a close and how, but in the end I do not think that either protagonist's account can be preferred or indeed that it matters much, if at all for the purpose of this judgment.

[157] On the following day, 22 March 2013, Ms Anderson emailed Mr Edwards referring to the previous day's meeting recording: "… as the matters are quite detailed and as you became heated and vehement in your response I felt I had to draw the meeting to a close". Later that day Mr Edwards responded, disagreeing with Ms Anderson's description of events and saying it was she who had become "agitated and personal".

[158] On 25 March 2013 Ms Anderson provided Mr Edwards with what she described as a record of her experience and said that this meeting was destructive of her trust and confidence in him and that it seemed to her that "[w]e have a fundamental breakdown that has become irreconcilable".

[159] Such evidence of what happened at the meeting, that is independent of each of the protagonists' subjective accounts, does not assist significantly. Ms Anderson's text message to the Board Chair, Mr Hooson, later that morning described the meeting as "difficult" which understates the account that she now gives of it. Office staff member Debra Russell's evidence of what Mr Edwards said to her after he emerged from the meeting ("Oh dear, that didn't go well, she (Carol Anderson) got up and walked out") tends to contradict Mr Edwards's account that he brought the meeting to a close.

[160] Ms Beck invited the Court to find that, on the plaintiff's evidence, things deteriorated when he compared his treatment by Ms Anderson to what she told him was PM's treatment by the plaintiff. Counsel submitted that this shows that it is more likely that he became upset and took things personally rather than vice versa. I am not prepared to draw that inference. Although it is clear that Mr Edwards was upset by his treatment and told Ms Anderson so, she, equally by her own account, became upset about Mr Edwards's manner. There is some evidence that Ms Anderson may have subsequently told others that she feared for her safety in the meeting but that has not emerged from her accounts of it, including that given to the Court. What is significant about the meeting is the way in which the LSM treated it subsequently and particularly the plaintiff's account of it which she disputed.

The PM complaint issue

[161] This is the fourth conclusion of serious misconduct which the defendant says justified Mr Edwards's dismissal. It lead to the 21 March meeting ground for dismissal, but it was only finalised by the LSM later than that date. It began as a complaint lodged by a teacher in relation to his timetabled teaching requirements. As expressed in the dismissal letter of 18 April 2013, Ms Anderson's findings were expressed as follows:

> (e) Your interaction with [PM] is also indicative of continuing disrespect to staff who raise concerns that you disagree with. On its own it might not normally be viewed as misconduct. However when seen in the context of previous similar misconduct and in a context where you have been requested, advised, warned and instructed to avoid this type of interaction with staff it confirms your refusal to follow an appropriate and lawful instruction. I refer to the letters of complaint by three staff members of 7 September 2012; the letter of complaint by the Deputy Principal December 2012 (subsequently mediated) and my and board correspondence with you dating back to April 2011. The repetition of these incidents constitutes an ongoing non-observance of your employment agreement. Again this is accepted as serious misconduct.

[162] PM taught "performance music" and some other subjects part-time. Performance music means the playing of instruments but did not include formal music theory. PM could not read music and was therefore unable to teach a significant part of the formal music curriculum. As a part-time teacher whose value as a performance musician and musical teacher was acknowledged by the school, he nevertheless had a reputation as being somewhat inflexible on previous occasions in relation to timetable issues.

[163] As with all staff, PM submitted what was described as a teaching wish list, before the start of the 2013 academic year, which indicated his willingness to take Years 9 and 10 music. The school's timetabler, Mr Smyth, attempted to accommodate teachers' wish lists, including PM's, although, for reasons that are unclear but perhaps because he may have been unaware of PM's lack of formal of music qualifications, PM was timetabled to teach music theory. Albeit a month after the start of the school year, PM took issue with this and sought to be relieved of his allocated Year 10 music responsibilities. That concern was elevated to Mr Edwards

to deal with. In anticipation of a meeting with Mr Edwards about this, PM discussed the issue and obtained the support of a first year music teacher, Marie Higgins. She was agreeable to taking his Year 10 music theory class, although to have done so in addition to her other timetabled duties, would have breached the secondary teachers collective agreement so that PM's/Ms Higgins's proposal was not practicable.

[164] At a meeting between the two teachers and Mr Edwards, the Principal pointed out this problem to them and, subsequently, to each on his/her own. In an attempt to preserve PM's employment status in the school and to avoid his becoming a lower paid itinerant teacher, Mr Edwards suggested that year 10 students might do music by correspondence. It was also clear that PM was having difficulties with students' behaviour in class, perhaps attributable to the default nature of the music election for some year 10 students. To address this problem, Mr Edwards agreed to attend PM's class.

[165] PM was very trenchantly critical of, and upset by, the manner in which he said Mr Edwards dealt with these issues at the meeting. PM went on stress leave, eventually saying that he would not return to work unless and until Mr Edwards was no longer Principal. Ms Higgins was less condemnatory about Mr Edwards's conduct towards PM at the meeting about which PM had complained of this. Her assessment of Mr Edwards's behaviour was that he was "very forward and direct to the point where I was a bit shocked – with a hint of rudeness".

[166] PM initially wrote to Ms Anderson on 1 March 2013, complaining of his treatment by Mr Edwards but declining at that point to make an official complaint, although he did so a fortnight or so later (again in writing), which Ms Anderson immediately forwarded on to Mr Edwards for his response. PM's initial complaint email to Ms Anderson was sent on 1 March 2013 although this and associated material gathered by her in the following fortnight was not ever disclosed to Mr Edwards until in this litigation.

[167] In response to being forwarded PM's complaint on 15 March 2013, Mr Edwards responded to Ms Anderson four days later, on 19 March 2013, and included a report from Mr Smyth, the timetabler, about the background events leading to

PM'S timetabling complaint. There was little, if any, response by Mr Edwards to the elements of PM's complaint about the Principal's manner of dealing with him. By 27 March 2013 when these events were referred to in her letter of that date, however, the matter was then being dealt with by Ms Anderson as potential misconduct.

[168] The other events between 1 and 15 March 2013 not disclosed to Mr Edwards included:

- discussions with PM's PPTA representative, Gavin Kay;
- discussions between Ms Anderson and Mr Smyth which were recorded by Ms Anderson;
- discussions with one of the Deputy Principals which were also recorded;
- discussions with other teaching staff about PM's interactions with Mr Edwards which were likewise recorded in notes made by Ms Anderson;
- other communications with Mr Kay of the PPTA; and
- handwritten and typed notes made of a meeting with Ms Higgins and changes to notes made of a meeting between Ms Anderson, PM and Mr Kay.

The assistance and guidance process to resolve problems

[169] The imposition of this programme by the LSM played a significant role in the case and it warrants some description. This process reflected two provisions in the collective agreement. The appointment by the LSM of Mr Smith as a mentor for the plaintiff followed cl 4.3.1 of the collective agreement. Problems in the working relationship between the Principal and the LSM (acting instead of the Board) had not been resolved informally and their continuation was to the detriment of the school.

In early 2013 and after consultation with Mr Edwards, the LSM appointed Mr Smith as a suitably qualified independent person to attempt to facilitate a resolution of the problems in Mr Edwards's working relationship with the LSM under cl 4.3.1.

[170] The other related collective agreement provision engaged was cl 6.2 ("Competency"). There were, by early 2013, matters of competency which were the cause of concern to the LSM including, as was indeed the example given in the collective agreement, "failing to meet the secondary principals' professional standards". In these circumstances, the LSM put in place the assistance and guidance programme, pursuant to cl 6.2.1 of the collective agreement, to help Mr Edwards. This was done in January 2013 and was intended to take effect from the start of the school year in early February 2013. Appropriately, Ms Anderson consulted with Mr Edwards about the detail of this assistance and guidance programme and he referred that matter to his solicitor who, whilst not rejecting the LSM's intention to put in place a programme, disputed some of the proposed detail of how that would operate. Although this disagreement was not resolved by the start of the school year, it is clear that the LSM insisted that the assistance and guidance programme was to take effect and it did so. There was consultation with Mr Edwards about the independent person who would undertake the programme with him and Mr Smith, a retired school principal in Auckland, was agreed to and appointed by the LSM.

[171] The collective agreement contemplated that if the assistance and guidance programme did not remedy the situation, the employer would initiate "a competency process" under cl 6.2.2 of the collective agreement. This, in turn, provided that if a series of evaluative and remedial measures failed to resolve the matters of concern, the employer was, where justified, entitled to dismiss the Principal and report to the NZTC. In this case, however, the assistance and guidance programme implemented by the LSM under cl 6.2.1 of the collective agreement was overtaken by her implementation of what the collective agreement describes as a "disciplinary" process under cl 6.3.

[172] Following consultations between Ms Anderson and Mr Smith about his appointment, Messrs Smith and Edwards met for the first time on 7 March 2013 in

Auckland. Mr Smith's assessment was that, in all the circumstances, significant time would be required to implement and progress a support and guidance programme and he established timeframes for doing so for the balance of the 2013 year. There was no criticism of Mr Smith's assessments in this regard. His mentorship with Mr Edwards concluded, however, effectively only about six weeks after it commenced when Mr Edwards was dismissed for serious misconduct.

[173] As in the case of Ms Anderson as LSM, the distance between the school and Mr Smith proved to be problematic. The school funded the assistance and guidance programme and, from the start, Mr Smith felt constrained economically from undertaking the appropriate level of face-to-face consultation with, and advice to, Mr Edwards. This resulted in Mr Smith proposing that he travel to the Bay of Islands at his own cost over Easter 2013 to meet with Mr Edwards, but the latter's dismissal intervened before that planned meeting could occur.

The last (16 April 2013) meeting

[174] I now deal with the important last meeting between the parties. I find that at the conclusion of this meeting, the LSM resolved to dismiss Mr Edwards in reliance in part on what took place (or, perhaps more pertinently, what did not take place) on that day.

[175] This meeting came about as a result of the invitation or direction contained at the end of Ms Anderson's letter of 27 March 2013 to Mr Edwards. The conclusion set out in that letter did not address the four grounds of dismissal subsequently relied on. Rather, it stated a more general conclusion that there had been a complete and irreconcilable breakdown of trust and confidence as between the Principal on the one hand, and the LSM and the Board on the other. Ms Anderson set out her conclusions supporting that contention in the following paragraphs from the 27 March 2013 letter:

> 30. In summary, neither I nor the Board Chair feel that we can engage with you on any more than a superficial level. The Board does not have trust and confidence that it is provided with all relevant information or that your reporting of a situation, particularly a conflict situation, has not been distorted to portray yourself in good

> light. We believe that the governance and management relationship between both the Board and the principal and the LSM and the principal is no longer functional and this is an untenable situation.
>
> 31. There is now an irreconcilable breakdown in trust and confidence after a very long period of struggling to sustain and/or rebuild it.
>
> 32. The Board Chair and I now require to meet with you and your lawyer immediately to allow you a final opportunity to respond to the above concerns. We do not wish to continue a debate in writing as your last letter of 55 pages simply obfuscated the issues.

[176] Despite what might be seen in para 32 as Ms Anderson's prohibition upon Mr Edwards responding in writing to what was the LSM's lengthy, detailed, and formal letter, nevertheless his lawyer did so on his behalf on 15 April 2013. That correspondence was sent to Ms Anderson but was not seen by, or its contents otherwise known to, two other persons who met Mr Edwards with her on the following day, the Board Chair and the STA representative who managed the meeting and advised the LSM.

[177] In submissions Mr Harrison categorised the position in which his client was placed by those instructions not to respond in writing, as having to accept one of two unfair alternatives. The first was that if he did not accept, and wished to contest, the allegations and respond to them in writing as they had been made by Ms Anderson, then he ran the risk of both "obfuscating" the issue and not accepting responsibility for what the LSM had already concluded was his misconduct. If he was to provide written responses taking issue with the employer's conclusion, this would be a defiance of a direction and viewed negatively. The alternative was to leave the LSM's allegations unchallenged in writing, as had been the modus operandi of the parties until then, and to attempt to rely only on oral submissions or representations to the employer's representatives at an unrecorded meeting on 16 April 2013.

[178] The meeting of 16 April 2013 was an unusual event of its kind. There was no agenda, at least from the employer's point of view (whose meeting it was), apart from regarding it as an opportunity for Mr Edwards to persuade her from her conclusions that the LSM and the Board had lost trust and confidence in him. The employer's representatives, despite having control of the meeting on their terms, left it largely to Mr Edwards and his lawyer make the running.

[179] Despite the LSM's earlier intimation that she would record meetings between the two of them, no one appears to have created more than a very rudimentary contemporary note of what was said. The Court has been left to rely on the recollections of Ms Anderson, the Board Chairman Mr Hooson, and Mr and Mrs Edwards all of whom were present. There is, in the end, not much significant difference between the accounts of those persons as to what happened. Rather, the real controversy is the significance of what was or was not said in the context in which the meeting was convened.

[180] After a relatively short period of inconclusive discussion, including some long silences, the employer's representatives proposed that the meeting adjourn. Mr Edwards, his wife, and his lawyer returned to his office to await notification of what they expected to be the resumption of the meeting by the employer. This did not occur, however. The LSM's STA representative then acted as an envoy, initially inviting Mr Edwards's lawyer to consider an "exit package" and subsequently indicating, when this was not agreed to in principle, that Mr Edwards could expect to hear from the employer subsequently. The participants at the meeting did not meet again as Mr Edwards had expected.

[181] There was little discussion of Mr Edwards's lengthy "self-review assessment" of 15 April 2013 which was his response in writing that he provided to Ms Anderson on the day before the meeting. As already noted, neither Mr Hooson (Chair of the Board) nor Eric Woodward (STA representative) appeared to have read the document or, in the case of Mr Woodward, to have even known of its existence, and Ms Anderson did not respond to it much, if at all. One inference to be drawn from that is that it was seen by the LSM as another "obfuscation" of the issues against which she had warned.

A trespass notice

[182] Another event which both influenced the LSM in deciding that she did not have trust and confidence in Mr Edwards and which featured significantly in evidence, was whether Mr Edwards had prohibited two kaumatua from entering the school's grounds by issuing them with what are known colloquially as trespass

notices. Although people had said so to the LSM, she could not determine whether Mr Edwards had done so at the time of his dismissal in April 2013. What did weigh with her, however, were several more certain features of that saga. These included that Mr Edwards had been adamantly intent on prohibiting the two kaumatua from re-entering the school property; that he had taken substantial persuasion and, ultimately, a blunt direction from the Chairman of the Board not to do so; and that he failed to tell the Board, through its Chairman Mr Hooson, that he had also been counselled by Ministry of Education personnel not to do so only hours before Mr Hooson did likewise. These parts of the trespass notice question were not in dispute and contributed to the LSM's conclusion of a lack of trust and confidence in the plaintiff. In these circumstances, I will now set out the evidence and my conclusions about these events.

[183] Before Mr Edwards's appointment, the school's runanga kaumatua of elders from the 15 Ngapuhi hapu in the school's catchment area, had diminished in numbers and had lost its previous strength. When Mr Edwards was appointed he began to revive the runanga. At about the same time, however, Reverend Wimutu Te Whiu was appointed as interim acting head of the school's Maori Department. Reverend Te Whiu's full teacher registration had lapsed, although he had a limited registration enabling him to do so lawfully at the time, but there was significant antipathy towards him from many in the local Maori community. There was a perception that Rev Te Whiu's appointment had been at Mr Edwards's instigation alone, but the evidence establishes that the appointment was made regularly by the Board after a recommendation from a committee of three including Board and staff representatives as well as Mr Edwards.

[184] Nevertheless, community-school relations continued to deteriorate including between Rev Te Whiu and two of the remaining kaumatua on the runanga, Wiremu Wiremu (Bill Williams) and Hirini Henare. At a meeting on the school's marae in January 2011, tensions spilled over into threats of violence against Rev Te Whiu which were witnessed by Mr Edwards who became concerned for the safety of Rev Te Whiu and others at the college. Mr Edwards decided to deal with that situation by declaring Messrs Wiremu and Henare as trespassers if they returned to the college

premises (including the marae).[18] Mr Edwards prepared statutory trespass notices naming Messrs Wiremu and Henare but, after much unsuccessful persuasion of him not to serve these, initially from the Ministry of Education and subsequently from the Board, its Chair, Mr Hooson, eventually directed Mr Edwards not to proceed with the trespass notices. The plaintiff eventually acceded to that stern direction from the Board. The notices that Mr Edwards had prepared and signed, however, found their way into a trespass notice folder in the school's administrative office area where such notices which had been served, were kept. In these circumstances, the myth that Messrs Wiremu and Henare had been 'trespassed' from the school germinated and persisted within the school and wider community, and fuelled continuing resentment of Rev Te Whiu and Mr Edwards among some in the community.

[185] Those events involving Messrs Wiremu and Henare may or may not have contributed to the subsequent disestablishment of the runanga and Mr Edwards's attempt to set up what was known as a Maori Reference Group in respect of which Mr Edwards consulted Peter Tipene about who should be asked to represent the hapu. There was resentment that the hapu themselves were to be excluded from choosing their representatives and there followed division within the local Maori community including, at one point, what was said to have been a vote of no confidence in Mr Edwards's leadership.

[186] Although, therefore, Messrs Wiremu and Henare were not formally declared trespassers if they re-entered the school's grounds, there was a widespread, albeit erroneous, belief that trespass notices had been served on them. These events attracted an additional importance because they were emblematic of the dysfunctional relationships between the BOIC and some in its Maori community and the antipathy towards Rev Te Whiu.

[187] Another cultural issue, addressed by Mr Edwards as the new Principal, divided the school's staff. Very shortly after taking up office in 2010, Mr Edwards announced that karakia would be said at all morning staff briefings, full staff

---

[18] The school dealt similarly with a small but steady number of trouble-makers by prohibiting them from being on its premises at risk of arrest and prosecution if they did so again. It is probably not alone among secondary schools in doing so.

meetings, weekly whole school assemblies, and special assemblies at the beginning and end of each term. A number of the school's staff resented this directive and many local Maori considered it inappropriate for non-Ngapuhi occasions. Also resented was the absence of consultation by Mr Edwards and what was perceived to be the imposition of a cultural requirement by a Pakeha, including on significant numbers of Maori students and staff. Eventually, after complaints to the Board, karakia ceased to be said at staff meetings and weekly assemblies but did continue at the school's special end of term assemblies.

The defendant's submissions

[188] The defendant, through counsel, accepted its obligation in law to justify Mr Edwards's dismissal. It did so in two ways. First, counsel submitted that each of the four particular issues identified in the 18 April 2013 letter, and discussed in this judgment, constituted serious misconduct in his employment by the plaintiff for which dismissal could be justified. In addition, the defendant's case was that these particular serious misconducts, together with other relevant events and prognoses, meant that the LSM was justified in her conclusion that she and the Board had lost such trust and confidence in the Principal that his dismissal was justified for this reason also. Covering the second element of the s 103A test, the defendant's other broad ground of justification was that the LSM had acted as a fair and reasonable employer could have acted in all the circumstances in the process that led to dismissal. Counsel emphasised the unambiguity of Ms Anderson's written communications to Mr Edwards about her expectations of his principalship; her consideration of his responses to particular complaints and concerns; and, finally, the opportunities that were extended to him to meet with the LSM to dissuade her from her intended course of action and what the defendant says was Mr Edwards's failure to take up those opportunities other than minimally.

[189] The defendant's submissions then dealt in detail with issues and incidents supporting those two broad grounds of justification. I now address those submissions.

[190] In para 7 of her dismissal letter of 18 April 2013, Ms Anderson said that Mr Edwards's lawyer's letter of 15 April 2013 expressed his view that the problems in their employment relationship were due to the LSM. Put as baldly as that, it is not a fair analysis of the content of that letter. Whilst Mr Edwards, through his lawyer, did assert that there were difficulties between the two and that these in some instances had been caused, and in others exacerbated, by the LSM, the letter also accepted Mr Edwards's responsibility for many of those matters of concern to the LSM. There was, therefore, a risk of unfair treatment of the plaintiff by the LSM from her recorded assessment of an important part of Mr Edwards's penultimate opportunity to respond to his proposed dismissal, his lawyer's letter to her of 15 April 2013.

[191] I deal next with the defendant's argument that it was fair for the LSM to have decreed on 27 March 2013 that another written response to Ms Anderson's advice or direction to Mr Edwards would not be appropriate and would be regarded as further obfuscation of the issues. Ms Beck submitted that this was an entirely reasonable stance for Ms Anderson who wanted to hear from Mr Edwards in person and required him to meet with her on 16 April 2013 for that purpose. Counsel said that this did not preclude Mr Edwards from preparing a written response (as he did) and speaking to it at the meeting. That is so, but the employer's clear message to Mr Edwards had been that there should not be a response in writing, albeit to serious allegations that had been put to him in writing. Further, the plaintiff was led to believe in no uncertain terms that to do so (what the LSM called obfuscation) would count against him. Combined with the failure of at least two of the employer's three advisers or representatives at that meeting to consider that written material, this gives the impression that the plaintiff's response of 15 April 2013 was, if not ignored, then taken into account insufficiently before the decision to dismiss was confirmed.

[192] I also infer from both the content of the 27 March 2013 letter to Mr Edwards and from Mr Woodward's inquiries of Mr Edwards's lawyer during the period of the adjournment of the 16 April 2013 meeting, that the decision to confirm dismissal was made at the point immediately after the proposal of a "settlement package" was declined by Mr Edwards during the adjournment of the meeting. The offer of a "settlement package" was his last chance to avoid dismissal, and then only by resignation. I conclude that the following period of two days before the letter

confirming dismissal was written, was used for the composition of that letter and the stated reasons for dismissal, rather than for an objective consideration of Mr Edwards's response of 15 April 2013 to the letter of 27 March 2013. The employer's decision to dismiss was made, at the latest, on 16 April 2013.

[193] The defendant submitted that Mr Edwards's written response of 15 April 2013 to Ms Anderson's letter of 27 March 2013 did not cover all of her concerns and that Mr Edwards, together with his lawyer, failed to address those other issues at the meeting on the following day. In particular, those issues were the LSM's allegations about the NCEA and staff survey data and, at least sufficiently, the allegations about his dealings with PM. If that was so, however, I consider that it was incumbent on the LSM, as employer with control of the process, to have advised Mr Edwards of the perceived insufficiency of his responses other than simply inquiring, as the employer's representatives did, and more than once after several long periods of silence at that meeting, whether Mr Edwards had anything further to add.

[194] It does not absolve the employer of this responsibility, in these circumstances, as Ms Beck submitted, that Mr Edwards had a "strong personality" and that he was accompanied at the meeting by an experienced employment lawyer. Nor was it, in my assessment, a failure to act in good faith by Mr Edwards that he did not raise immediately any issue or concern about the conduct of the meeting or ask to have the opportunity to address issues which the employer considered (but did not tell him) that he had not addressed sufficiently. The meeting of 16 April 2013 was an important event in which the employer set the agenda, had control of the process, and had already expressed strong views about the outcome. It was incumbent on the LSM to be proactive, responsive, and communicative where she perceived Mr Edwards to be at a disadvantage by not addressing the issues she wished him to and which were crucial to her confirmation of the dismissal indication.

[195] Addressing the plaintiff's case about non-compliance with the collective agreement, Ms Beck submitted that although Mr Edwards was subject to an assistance and guidance programme under cl 6.2.1 of the agreement at the time of his dismissal, this did not preclude dismissal for serious misconduct during the currency of that programme. I do not disagree with the general proposition that if an event

amounting to serious misconduct by the employee arose during the course of an assistance and guidance programme, that would not preclude the employer from acting on this, even including dismissing the employee by reason of such serious misconduct. But that was not the position here. The events concerning the NCEA and staff survey data reporting were known to Ms Anderson long before the guidance and assistance programme was put in place by her in January 2013 with effect from 4 February of that year. So, too, were Mr Edwards's explanations about those two events, as were the LSM's conclusions about them.

[196] It was not open to the LSM, as a fair and reasonable employer, to have embarked upon an assistance and guidance programme to deal with Mr Edwards's shortcomings (including about those events) in that knowledge, but to then dismiss him in reliance on those events treated as serious misconduct whilst he was still the subject of that programme. A fair and reasonable employer could not have dismissed the plaintiff justifiably for those behaviours only weeks into a programme designed to deal with them and other concerns.

[197] The other two (post-January 2013) conclusions of serious misconduct (about the 21 March 2013 meeting and Mr Edwards's dealings with PM) occurred after the commencement of the programme. Therefore, if one or both of them amounted to serious misconduct justifying dismissal, the continuation of the assistance and guidance programme would not have precluded their consideration by the LSM as issues of serious misconduct in the circumstances.

[198] The assistance and guidance programme under cl 6.2.1 of the collective agreement was put in place generally to address the LSM's dissatisfactions with Mr Edwards's performance of his role as principal. It was only fair, in these circumstances, that the assistance and guidance programme gave Mr Edwards an opportunity to be assisted and guided to avoid problematic issues in the future and to benefit from the programme. In the circumstances, that opportunity was not given when, in late March 2013, less than two months after it started, Ms Anderson announced her loss of trust and confidence in him based, in part, upon incidents which had arisen in the previous year and for which he was being given assistance and guidance.

[199] I do not accept, as Ms Beck submitted, that cl 6.5.1 of the collective agreement enabled the employer in the circumstances to dismiss Mr Edwards by applying the principles and processes of any one of cls 6.1, 6.2 or 6.3, under the latter of which the LSM purported to act.

[200] Addressing the requirements of cl 6.1 of the collective agreement concerning the initiation of informal discussions with a view to informal resolution before commencing a disciplinary process, Ms Beck submitted that it was inappropriate for the LSM to do so in all the circumstances. Those circumstances were said by counsel to have been "the survey data … the NCEA data, honesty and a possible intention to mislead". I note, however, that the evidence suggests that Ms Anderson had concluded more than that Mr Edwards had a "possible intention to mislead": her conclusion was that he did intentionally mislead or deceive or attempted to mislead or deceive the LSM and others in relation to both the data issues.

[201] Ms Beck submitted that Ms Anderson complied with cl 6.1 of the collective agreement in relation to the PM complaint when she attempted to have an informal discussion with Mr Edwards on 21 March 2013, although that broke down. In these circumstances, counsel submitted, it was then inappropriate to initiate further informal discussions with the plaintiff on that issue.

[202] I agree with that submission. On 21 March 2013, Ms Anderson did attempt to engage Mr Edwards in informal discussions about PM's complaint, albeit unannounced. The breakdown in those discussions on that day made any further informality inappropriate. The LSM was then entitled to treat the resolution of this issue formally, as she did. That does, however, require an analysis of the fairness and reasonableness of that formal process and whether dismissal in reliance upon it was justified. I do so subsequently in this judgment.

[203] Addressing the requirements of Part 4 (professional leadership and annual review process) of the collective agreement, Ms Beck pointed to the parties' performance agreement under cl 4.1. Under cl 4.2.1, the employer was required to carry out an annual review of the Principal's performance in accordance with the performance agreement. Under sub-cl 4.2.2, the Board was to retain responsibility

for that review but was entitled to delegate management of the process to Board members (which it did not do). It was also entitled to engage an external reviewer as the LSM did in the case of Mr Edwards whose 2012 external reviewer was Gail Thompson. I agree with the defendant also that as a result of the appointment of the LSM, responsibility for the review was then held by Ms Anderson and that she did not delegate entirely the management of that process despite the assistance of an external reviewer having been engaged.

[204] The reviewer's report was provided by the plaintiff to Ms Anderson in early 2013. Ms Thompson's review provided "information to the Board of Trustees [in this case the LSM] so that they are able to determine if the Principal is providing effective leadership and meets the expected outcomes as documented for secondary school Principals." I accept that, in accordance with cl 4.2.5(a) of the collective agreement and a protocol known as the Managing Principal Appraisal (Performance Review) – Good Practice Framework, Ms Anderson prepared a draft report on 13 March 2013 based on the appraisal and provided this to Mr Edwards for his comment. Mr Edwards was also advised of his right to provide a written response to accompany the final appraisal when he was to report to the Board on 25 March 2013 pursuant to cl 4.2.5(b) of the collective agreement.

[205] Mr Edwards's negative and challenging response to the LSM's adaptation of the Thompson review, which took issue with Ms Anderson preparing her own report and seeking the removal of her comments, was not justified. He was able to provide a list of the points in the draft report with which he took issue, and Ms Anderson amended her draft after consideration of those before preparing a final report which was itself provided to Mr Edwards before its presentation to the Board meeting. Ms Anderson's report was provided to the Board (in committee). In spite of being invited to do so, Mr Edwards did not provide a written response to the final report or take up the invitation to speak to the appraisal at the Board meeting: instead, he walked out of the Board meeting. Mr Edwards has no valid complaint about his annual assessments or about the ways in which the LSM and the Board dealt with these.

[206] As to the issue of the staff survey data, Ms Beck submitted that Mr Edwards's response of 19 December 2013 to Ms Anderson's raising of this issue on 5 December 2013, did not explain his errors other than by saying that the document that he had provided to her was a draft. Ms Beck emphasised that Ms Anderson was not satisfied with that explanation and wrote to Mr Edwards again on 4 March 2013 confirming her dissatisfaction with his response and identifying her main concern. This was that the document was "completely inaccurate and bore no connection with the two sets of data he was preparing". Ms Beck emphasised that in the absence of any response to this communication, Ms Anderson wrote again to Mr Edwards on 27 March 2013 advising him that the continued absence of any explanation would be grounds for concluding that the Board did not have trust and confidence in him.

[207] As already described, Mr Edwards then responded on the following day, 28 March 2013, providing his explanation although this was not accepted by Ms Anderson who had undertaken her own inquiries as she described in her letter of 11 April 2013. In that letter she said that the provision of false data was not an innocent mistake but was done deliberately by Mr Edwards to create a more favourable impression of himself. She said that, in these circumstances, she could not have trust and confidence in him but would wait until the scheduled meeting on 16 April 2013 before reaching a final conclusion. Ms Beck emphasised that in these circumstances it was significant that the plaintiff, assisted by his lawyer, did not address these concerns or respond at all to the issue, even at that last meeting. As already noted, however, these were adamant conclusions in 2012/13 from which Ms Anderson twice retreated upon further informed consideration.

[208] Ms Anderson's reasons for concluding that Mr Edwards had presented deliberately false staff survey data were as follows. She considered, but rejected, Mr Edwards's explanation, as he described it, of reading from the wrong tables in the course of "flipping back and forth" between different years' results. She concluded that a comparison of all relevant tables for the 2012 year with the previous year (2011) showed that the figures included by the plaintiff could not have been achieved mistakenly. Ms Anderson said that she provided these "workings" of her thinking to Mr Edwards in the letter of 11 April 2013. Ms Beck submitted that it had only become clear to Ms Anderson during the course of the hearings of these proceedings

in the Authority, and then subsequently in the Court, that Mr Edwards may have been referring also to 2010 figures, not just the tables for 2011. He had before him the 2010 and 2011 figures, not simply the last year's, when analysing the 2012 data. It was this belated acknowledgment of the presence of the 2010 data as well as the 2011 figures, that lead Ms Anderson to retreat from her earlier adamant conclusion of deliberate misleading by Mr Edwards.

[209] Next, the LSM's case was that if Mr Edwards's error had been a genuine mistake, she would have expected a mixture of both more positive and less positive results. However, her analysis of the results showed them to be almost invariably more favourable (17 out of 22) for the 2012 year. Accordingly, Ms Anderson said that her conclusion at the time was that Mr Edwards deliberately presented misleading survey data for the purpose of portraying himself in a more favourable light. This conclusion too must be in doubt in view of the LSM's concessions made to the Authority's investigation and at the hearing of the challenge in this Court.

[210] Next, Ms Anderson's case was that she rejected Mr Edwards's assertion that the document that she was shown in late October 2012 was a "draft". That was because it was not so labelled, it was not presented as such, and that Mr Edwards did not ever indicate at the time that it was a draft document. Further, the defendant pointed to subsequently obtained evidence about the creation of the document on 9 October 2012 rather than, as she said Mr Edwards claimed, on 29 October 2012 and as a draft for Ms Anderson. She relied on the fact that Mr Edwards sent the 9 October 2012 document to his lawyer on that date so that, in her conclusion, it could not still have been a draft on 29 October 2012. She also concluded that it was unlikely, on that later date, to have been a "sample of data" on which he had been working when Ms Anderson called on him in his office on 29 October 2012.

[211] Ms Beck submitted that it was disingenuous for Mr Edwards to continue to assert that the document was a draft and that it was reasonable for Ms Anderson to regard it as a final document when it was handed to her on 29 October 2012, and when she subsequently considered Mr Edwards's explanations for the errors contained in it.

[212] The defendant's case was that this was not a trivial matter, that human error could not excuse what had occurred, and that a principal, as the conduit of information to a school's board, must present accurate information consistent with the relationship of high trust and confidence between principal and board. Ms Beck submitted that, as the Board's most senior employee, it was unacceptable for Mr Edwards to attempt to mislead it, particularly as the information presented was, in part, an assessment by Mr Edwards of his own performance and because the information would also be provided to the Ministry of Education as part of his self-review report.

[213] Ms Beck acknowledged that Ms Anderson had conceded in evidence that she was now prepared to accept that the plaintiff may have made a genuine error, although she submitted that this was based on information provided to her after the dismissal and so cannot affect the justification for it.

[214] In addition to acknowledging that Mr Edwards had three and not two years' data, the LSM's concession extended also to Mr Edwards's case that he had used data provided by her (in a different format) to undertake the comparison, rather than the reformatted data which had been provided by his office assistant. His explanation was that, in flipping from one year to the next (across differently formatted data for 2010/11 and 2012), he had used the data from the wrong year.

[215] Ms Beck submitted that this provided a classic example of the consequences of Mr Edwards's failure to clear up matters at the final meeting held for this purpose on 16 April 2013. Counsel submitted that his explanation of using differently formatted data and flipping from year to year could have been put forward on 16 April 2013 but that he did not do so. That was despite being aware of the seriousness of the situation, of Ms Anderson's concerns, and the possible consequences to him. Put simply, the defendant submitted that if the plaintiff had a response to make, especially on a matter where his honesty and integrity were at stake, he could and should have put that explanation forward but chose not to do so.

[216] Ms Beck submitted that, under the s 103A test, the Court must have regard to the circumstances at the time the dismissal occurred and, therefore, justification

should be based on the information that was available to Ms Anderson at the time and not information that has come to light subsequently. I have already determined,[19] however, that those circumstances must include also what a fair and reasonable employer ought to have known had proper inquiries or investigations been made.

[217] Counsel submitted that the LSM followed a fair and reasonable process. She submitted that at the end of this the LSM was entitled to conclude fairly that there had been presentation of false or misleading information which amounted to serious misconduct, striking at the heart of the good faith relationship between the parties and justifying dismissal.

'Mobbing'?

[218] I referred briefly to this issue at [16]. I now set out academic definitions of it and analyse its application to the facts of this case. It is an increasingly reported phenomenon whereby individuals gather others to participate in "continuous, malevolent action to harm, control or force another person out of the workplace."[20] The International Labour Organisation has described it in the following way:

> **Ganging up or mobbing** - A growing problem in Australia, Austria, Denmark, Germany, Sweden, the United Kingdom and the United States, it involves ganging up on or mobbing a targeted employee and subjecting that person to psychological harassment. Mobbing includes such behaviour as making continuous negative remarks about a person or criticizing them constantly; isolating a person by leaving them without social contacts; gossiping or spreading false information. In Sweden, it is estimated that mobbing is a factor in 10 to 15 percent of suicides.[21]

[219] Although alluded to in evidence, I am not satisfied that any concerted effort by anyone other than the employer caused Mr Edwards's dismissal. Because of the novelty of this phenomenon and what may be a lingering suspicion by Mr Edwards that it was factor in his dismissal, I will elaborate on that finding briefly.

---

[19] At [27].
[20] Duncan Chappell and Vittorio Di Martino, *Violence at Work*, (3rd ed, ILO, Geneva, 2006) at 22.
[21] ILO "Work-Related Violence and its Integration into Existing Surveys" (19th International Conference of Labour Statisticians Geneva October 2013) at 8.

[220] There is no suggestion that, as LSM and the plaintiff's employer, Ms Anderson allowed herself to be influenced improperly by anyone (school staff members, Board members, or in the community) in her consideration of complaints against Mr Edwards and of the consequences of these. Indeed, such evidence as there is on the topic indicates that Ms Anderson was both conscious of the potential for concerted improper influence and correctly rejected it on the occasion when it arguably arose.[22]

[221] The greatest potential for concerted improper influence came in the form of the approximately one-third of the school's staff which was consistently opposed to Mr Edwards, many of his changes that would affect them, and his general management of them. Several of those staff members gave evidence although most did not. Of those who gave evidence, one resigned in frustration at his treatment by the plaintiff but there was no suggestion that this staff member, whether alone or in concert with others, attempted to bring improper pressure on either the Board or the LSM to remove the Principal. Another senior staff member who complained about the Principal agreed to attempt to resolve their differences in mediation, participated with the Principal in this, and there was an improvement in that relationship. In this case, also, there was no suggestion of improper influence being brought to bear on the LSM by this staff member, whether alone or in concert with others.

[222] The third event which may have been indicative of this phenomenon of 'mobbing' was what I have referred to as the PM complaint. Although I have concluded that the LSM could not reasonably have accepted PM's complaint about his treatment by Mr Edwards at face value and in the extreme terms in which it was expressed, there is no evidence that PM's complaint was groundless, malicious, or made with a view to seeking Mr Edwards's removal as Principal. Nor was there any suggestion or evidence that PM's complaint was made in concert with other staff.

[223] For the reasons just described, therefore, this is not a case of so-called 'mobbing', that is the concerted exercise of improper pressure for the removal from employment of a particular employee.

[22] When staff member PM asserted that he would not return to work while Mr Edwards remained as Principal.

Decision of challenge

[224] I will determine the questions of justification for each of the four specific conclusions of serious misconduct said to have supported the dismissal before turning to the broader ground of justification, the defendant's loss of trust and confidence in the plaintiff.

[225] Before doing so, it is appropriate to re-state the two questions upon which the case will turn. Could a fair and reasonable LSM have dismissed the plaintiff in all the circumstances when she did so? Could a fair and reasonable LSM have gone about dismissing the plaintiff as she did go about doing so in all the circumstances at the time of the dismissal?

Justification for staff survey data serious misconduct ground

[226] The first serious misconduct ground for dismissal was the staff survey data issue. The LSM's assessment at the time was that Mr Edwards was not only attempting to place erroneous material before the Board and the school's community which falsely portrayed him in a favourable light, but that he did so deliberately, knowing that the data was false. However, Ms Anderson conceded albeit belatedly but very fairly and with the benefit of reconsideration, that Mr Edwards's innocent explanation may have been acceptable or perhaps correct. Even without that concession, I conclude that a fair and reasonable employer in those circumstances at the time could not have concluded fairly that Mr Edwards misled or deceived others deliberately, with the intention of misleading or deceiving the LSM, the Board, and the community.

[227] The LSM's ground for concluding malevolent intent on the part of Mr Edwards was, substantially, his ready acceptance of error when this possibility was drawn to his attention by Ms Anderson. That was not a conclusion which was reasonably open to her, or at least the only conclusion at which I find she nevertheless arrived. It was an action that was equally, if not more, open to other, and more innocent, interpretations. In addition, Ms Anderson's assumption about Mr

Edwards's intention and her reasons for it, were never put to him squarely with an opportunity for him to dissuade her from them.

[228] The plaintiff's case is that Ms Anderson could not have concluded reasonably either that Mr Edwards intended to mislead or deceive the Board or, in particular, that he hoped to do so in circumstances where Ms Anderson would not check his figures in the course of a busy meeting. The plaintiff said that it was also unfairly misleading of Ms Anderson, even at a relatively late stage of this matter, to have indicated that Mr Edwards's conduct might have warranted a warning but subsequently elevated that to serious misconduct for intentionally fabricating data to mislead the Board, serious misconduct for which he was dismissed.

[229] Finally, the plaintiff said that the weakness and uncertainty of Ms Anderson's conclusions is illustrated by her repeated reconsiderations and withdrawals of important parts of these allegations against Mr Edwards in the Authority and this Court.

[230] There was no evidence either that Mr Edwards had deliberately fabricated the data, believing that Ms Anderson would not notice in the course of a busy meeting, or that the LSM's explanation for a sinister motive was ever investigated any further than its assertion as a conclusion by Ms Anderson.

[231] Ms Anderson's initial response to Mr Edwards's draft self-assessment document (including the corrected comparative survey data) was not critical of him and no mention was made of it in her 19 November 2012 email to Mr Edwards. At the Board's December 2012 meeting (where Ms Anderson was present), there was no mention of the previous inaccuracy or otherwise of the information in Mr Edwards's report which was accepted by the Board.

[232] When Mr Edwards's error was categorised by Ms Anderson in March 2013 as being one of "fabricating the data", she indicated (in her email of 22 March 2013) that these actions would be deserving of a written warning. On 27 March 2013, and despite her concerns having been kept by her from the Board, Ms Anderson advised

Mr Edwards that "[t]he Board cannot have trust and confidence in you" in relation to these events, and that they constituted serious misconduct.

[233] Even at best for the defendant, Ms Anderson's ambivalent reconsiderations of her initial conclusion of inaccuracy and dishonesty by Mr Edwards, undermine the defendant's conclusion of serious misconduct justifying dismissal. On the evidence heard and seen by me, I have concluded that a fair and reasonable employer, in all of the circumstances that then prevailed, could not have concluded, as Ms Anderson did, that Mr Edwards deliberately sought to mislead or deceive her, the Board, and the school's community about those survey data. There is, however, also a serious question about the propriety of the way in which the LSM went about reaching those conclusions.

[234] In this regard, the plaintiff relied on cl 6.1 of the collective agreement. This requires expressly that there be initial informal discussion of issues or concerns about a principal that a board (or, in this case, the LSM) may have. It provides relevantly:

> Where issues or concerns arise the board shall initiate informal discussions with the principal in an attempt to resolve the matter in an informal manner. This applies following receipt of a complaint and/or concern(s) being raised. This occurs prior to formally commencing a disciplinary or competency process, unless the nature of the complaint or concern(s) is such that this would be inappropriate;

[235] In relation to the survey data allegations, the defendant acknowledged that Ms Anderson did not initiate informal discussions with Mr Edwards about her concerns, in an attempt to resolve that matter in an informal way. It said, however, that the nature of the concern was such that it was inappropriate to raise it informally with Mr Edwards and attempt to resolve it in an informal way. The plaintiff said, however, that the nature of this (and other concerns and complaints) made them entirely appropriate subjects of informal discussion with a view to informal resolution, and that there were mechanisms in place for just such a process. These were either the regular meetings between the LSM and the Principal, or there could have been others arranged, with external assistance if the matter might not have been appropriate for informal discussion between the LSM and the Principal directly, given the LSM's role as complainant and decision maker in this regard. The plaintiff

pointed out that he had offered expressly to discuss these matters with Ms Anderson and the office assistant or for the former to meet independently with the latter to ascertain how the error may have been made by him.

[236] As to whether Ms Anderson decided that Mr Edwards intentionally attempted to present fabricated data to the Board, the plaintiff submitted that Ms Anderson could not reasonably have reached the conclusion as she did. The plaintiff submitted that it tells against Ms Anderson's conclusion of intentional deceit that Mr Edwards raised the subject initially at his own initiative, that he gave the full document (he says, and I accept, in draft) to Ms Anderson for comment, and only then after having received her comments and having altered the document, presented it to the Board. The plaintiff submitted that it defies logic that his errors could have been elevated to deliberate misleading or deception in this way when there was, in reality, nothing to hide or "to slip past" the Board. Ms Anderson had the raw data (mistakenly applied by Mr Edwards) which was also available to the Board. The erroneous document does not itself present a positive picture of the sort that might have been expected if this had been the devious plan Ms Anderson concluded it was. Finally, he said that even Mr Edwards's mistaken comparison focused on issues that were unsatisfactory and needed to be improved on: in other words, that the data presented to the LSM were not universally laudatory of Mr Edwards's management.

[237] It follows that a fair and reasonable employer, in the circumstances of the LSM at that time, could not fairly have concluded that an error in what was in form, if not name, a draft document given to her spontaneously, was done with the deliberate intention of misleading her or others. On that analysis, the event was not only not serious misconduct, but was not misconduct. It could not, therefore, have constituted a ground for dismissal. This ground fails both tests under s 103A of the Act.

Justification for the NCEA data issue serious misconduct ground

[238] Next is the NCEA data event, the second of the four specific factors relied on by the LSM in dismissing the plaintiff. She concluded that Mr Edwards knowingly used inaccurate data about NCEA success rates to promote himself to the LSM, the

Board and the community, thereby attempting to mislead or deceive them deliberately.

[239] The context in which +verifiability arises in this case is as follows. Mr Edwards intended to advise the Board (and thereby to make known to the school's community publicly) that its students' NCEA results for the 2011-2012 academic years were "the best ever". Although "ever" could only have meant since 2004, the LSM (Ms Anderson), took serious issue with the accuracy of the comparative elements of Mr Edwards's intended claim. This was significant because, had the claim been made as he intended it to be, it would have been attributable in substantial part to Mr Edwards's principalship of the school and impressive proof of the fulfilment of his avowed aim of improving students' academic results and standards.

[240] Ms Anderson's assertion was that this "best ever" proclamation would have been a false claim for two reasons. These were that it was simply not possible to compare accurately the 2011-2012 figures with earlier years, but also that in fact some of those earlier years produced better results than 2011-2012. Ms Anderson's concern was that had she not made this discovery herself and both drawn it to Mr Edwards's attention and prohibited him from so reporting, an inaccurate account of these significant events would have been given by the school's professional leader to its Board and its community. Ms Anderson emphasised the need for absolute accuracy of such information presented by the school's professional leader to a largely amateur Board which relied on the Principal for the correctness of complex, technical, but also important information about the school.

[241] Mr Edwards's response, in supporting his assessment of the superiority of the 2011-2012 results, was that the comparative analysis was valid but, also importantly, that Ms Anderson could not assert its inaccuracy. He said that was because the NZQA website's figures for earlier years were unverifiable by reference to the school's own database (KAMAR) statistics.

[242] In a strict or technical sense, the school's early NCEA results data on the NZQA website were unverifiable. That was in the sense that they were not able to be corroborated from the school's own KAMAR program, because those data had

been lost. That, however, begs the question of the necessity for, or even the desirability of, corroboration of such historical data.

[243] I conclude that whilst Mr Edwards may have been technically and linguistically correct that the NZQA website NCEA figures were “unverifiable”, this is a description without any real effect. The plaintiff’s excuse in this regard was spurious. That is because, it is safe to assume on the evidence, the statistics originally assembled on the school’s KAMAR database were transmitted to, and replicated accurately on, the NZQA’s website. Combined with that, I accept the defendant’s case that, given the so-called “official” status of the school’s NCEA results on the NZQA database, at least after a short period following their publication, ‘verification’ against KAMAR or similar school databases of those results is not a process which is undertaken in practice or would be productive if it were.

[244] It follows that Mr Edwards’s claim about verifiability was a rhetorical non sequitur. The evidence, particularly of the school’s Principal’s Nominee, Mr Smyth, persuades me that the fundamental differences inherent in the NCEA regimes, operating before and during Mr Edwards’s principalship at the school, mean that valid comparisons could not be drawn, one way or the other between results for those periods. Mr Edwards was wrong and, importantly for the purpose of this case, Ms Anderson was right in concluding that Mr Edwards was wrong on this one issue about the NCEA data. His explanations only compounded his initial error and, although intended to defeat the LSM’s argument, also confounded his own original assertion.

[245] However, there remains the important question whether that error by Mr Edwards meant that he attempted deliberately to mislead or deceive the LSM, the Board, and potentially the school’s community about that issue. Ms Anderson assessed that Mr Edwards did so. She concluded that this intentional or deliberate misleading or deception constituted serious misconduct, and that this, in turn, justified Mr Edwards’s summary dismissal.

[246] I have concluded that it was open to the LSM, as a fair and reasonable employer, to have decided as she did that Mr Edwards attempted to mislead or

deceive her, if not by his original claim of "best ever" results but, rather, subsequently after he was asked to justify that assertion. Faced with the LSM saying to him, in effect, 'prove it', Mr Edwards responded by asserting that the LSM could not prove that he was wrong or that she may have been right that earlier results were indeed better than those achieved on Mr Edwards's watch. By asserting that the LSM's conclusions were "unverifiable", Mr Edwards must logically thereby have conceded that his assertions were also unverifiable. Yet he persisted in making them when he ought reasonably to have known that the sets of data were incomparable. In this regard, the LSM was entitled to conclude that Mr Edwards had sought to mislead her about the accuracy of his claims.

[247] Ms Anderson decided that Mr Edwards's conduct in relation to the NCEA results data was serious misconduct. That was because in her view he deliberately provided her with false information to make it appear that his principalship had been more favourable for students than had been the case.

[248] In relation to Mr Edwards's claims of unverifiability, I am satisfied that the LSM's was a conclusion that a reasonable employer in those circumstances could have reached and that this could have amounted to serious misconduct by a school principal. Mr Edwards prevaricated when these matters were put to him for explanation by Ms Anderson. To use her word, although in another context, he obfuscated by attempting to excuse or explain his error in an unconvincing manner instead of confessing to it, acknowledging it, and committing himself not to overplay his hand again in circumstances where honesty and transparency were needed. The NCEA data use issue could have amounted and, in my assessment, did amount to serious misconduct.

[249] Although the NCEA results issue was serious misconduct, it was, however, unfair that this was relied on by the LSM to dismiss Mr Edwards. That unfairness arose because, in light of the NCEA data events and her conclusions about them, the LSM nevertheless elected to put in place an assistance and guidance programme with a mentor with a view to correcting a number of Mr Edwards's inadequacies. These included, specifically, the LSM's justified concern that he should present accurate and well-founded information about himself and the school to her, the

Board, and its community. A fair and reasonable employer, in those circumstances, could not, without more, have then elected to treat that same incompetence as misconduct grounds for a disciplinary dismissal.

[250] There is another reason for dismissal on this ground having been unjustified. It is also notable from Ms Anderson's letter to Mr Edwards of 4 March 2013 that, having expressed her disagreement with the plaintiff's assertions, the LSM warned him against "any repetition" of the claim that the NCEA results were the best ever. Paragraph 19 of the LSM's email left open the possibility of Mr Edwards verifying his claim to Ms Anderson. In the absence of such verification, it was the repetition of the claim which the LSM said "will result in disciplinary action". It is necessarily implicit in this advice that the repetition of the claim could only have been its broader or public repetition, that is repetition otherwise than by Mr Edwards to Ms Anderson herself.

[251] As he was entitled to do (even if erroneously) following the LSM's letter of 4 March 2013, Mr Edwards stuck to his guns and tried to persuade Ms Anderson of the accuracy of his claims. That was as she had left it open to him to do without repercussion: he was only instructed not to do so any more publicly. But the evidence is that this is as far as Mr Edwards went, that is he did not repeat his claims to the Board or otherwise publicly. This seen, Mr Edwards was dismissed in significant part for doing something he was permitted to do, even if foolishly and groundlessly.

[252] So it follows that the LSM's conclusion of serious misconduct by Mr Edwards can only have related to his continued attempts to persuade Ms Anderson herself of the accuracy of that statement, actions which were not only not the subject of her 4 March 2013 warning, but which indeed she had left open to him expressly. In those circumstances, a fair and reasonable employer could not have concluded that the plaintiff's continued assertion to the LSM of the accuracy of his data was the serious misconduct against which he had been warned.

Justification for 21 March 2013 meeting events serious misconduct ground

[253] Dealing first with the "how" (the second test) under s 103A, I conclude that the LSM was not entitled in law to act as she did in relation to the events of, and arising out of, the 21 March 2013 meeting between her and Mr Edwards. This was, by any account, a fraught meeting that deteriorated in stressful circumstances and which was brought to a premature end. None of that much is surprising. Mr Edwards was under considerable stress as a result of the LSM's increasing micro-management of him and her increasingly critical scrutiny of his job performance. Although he was not unaware of the subject matter of the discussion initiated by the LSM at that meeting (the PM complaint), Mr Edwards was not prepared to deal with it informally as the LSM sought and was entitled to do. He complained that he was not being treated fairly and said that PM's complaint about how the plaintiff had treated PM, resembled how Mr Edwards felt that the LSM was treating him and his family.

[254] The LSM did not appreciate Mr Edwards's personal criticism of her. She responded by describing to him, in what he considered were uncomplimentary terms, what she saw as his intimidating appearance. Mr Edwards took this to be a more general criticism of him. At whosever instigation the meeting ended is not important but the fact that it did end when it did was both sensible and a credit to the participants.

[255] There is an important and fundamental procedural flaw in how the LSM dealt with the 21 March meeting. It was wrong in the circumstances that Ms Anderson made her perception of Mr Edwards's conduct at that meeting the subject matter, in effect of, a complaint of misconduct made by herself, to be decided by herself.

[256] The defendant accepted that Ms Anderson dealt with what was, in effect, her own complaint to herself about Mr Edwards's conduct. She did so by raising her concerns in her letter of 27 March 2013 following an email exchange about those with the plaintiff on 25 March 2013. Ms Beck submitted, however, that the LSM provided Mr Edwards with an opportunity to respond to her allegations and concerns when they met on 16 April 2013. However, that does not address the absence of an

objective and unbiased consideration of what were serious allegations against Mr Edwards and which, having been categorised as serious misconduct by Ms Anderson, formed grounds for his dismissal by her.

[257] These events, and Mr Edwards's account of them, were a separate issue which Ms Anderson concluded amounted to serious misconduct justifying summary dismissal. However, she alone was the complainant bringing a serious allegation about conduct to which there was no independent witness but about which it was clear she and Mr Edwards disagreed fundamentally from the outset. He had asserted that he remained "calm and gentle" and that it was Ms Anderson who became upset, causing him, not her, to suggest that the meeting terminate.

[258] The plaintiff submitted that in the circumstances of the events at that meeting, and what the LSM described as Mr Edwards's "distorted and unreal" account of what had happened being classed as serious misconduct warranting summary dismissal, a reasonable employer could not have adopted the strategy that Ms Anderson did for investigating and dealing with these events. I agree.

[259] Nor was it fair when, in her own investigation of that complaint, she alone treated Mr Edwards's account of what had happened, with which she disagreed, as compounding his original misconduct on 21 March 2013 and constituted these events as further serious misconduct.

[260] As Ms Anderson accepted in cross-examination, she was aware of her ability to seek an independent investigation into those events and that this could have been arranged at little or no significant additional cost or delay. There was no need for the LSM to have acted as complainant, prosecutor, and judge in relation to the events of 21 March 2013 and their aftermath, and it was unreasonable that she did so. A fair and reasonable employer, in those circumstances at the time, could not have done as the LSM did.

[261] Irrespective of whose account of the meeting was correct, it was not fair for these events to have been elevated to complaints of serious misconduct by Mr Edwards which were determined against him by Ms Anderson. In statutory terms,

this ground for dismissal fails the test in s 103A(3)(a). The LSM did not "sufficiently investigate [these] allegations against the employee before dismissing" him. Alternatively, under s 103A(3)(c), the LSM did not give Mr Edwards "a reasonable opportunity to respond to the employer's concerns" in the sense that Ms Anderson could not be said to have been seen to have given an objective and unbiased consideration to her own complaint about Mr Edwards's conduct. Alternatively, under s 103A(3)(d), the LSM could not be seen to have "genuinely considered the employee's explanation … in relation to [these] allegations against the employee before dismissing" him. A genuine consideration would necessarily have to be an objective and unbiased consideration of Mr Edwards's account which contradicted Ms Anderson's own complaint to be determined by herself.

[262] In these circumstances, the events of, and subsequently relating to, the 21 March 2013 meeting do not meet the "how" (fair process) test in s 103A, and it was not, therefore, justifiable for them to have been determined as serious misconduct.

Justification for PM complaint serious misconduct ground

[263] The next of the four specific grounds of misconduct justifying dismissal is the manner in which Mr Edwards dealt with the PM complaint. Ms Anderson accepted that, on its own, this would not have constituted misconduct or serious misconduct warranting dismissal. She also accepted that Mr Edwards responded correctly to a number of the elements of PM's complaint. These included that it was based on a timetable that was created in good faith by another senior manager at the school as a result of PM's own apparent request to teach particular music classes for which he was not formally qualified. The LSM concluded that Mr Edwards acted properly in refusing PM's proposed solution because that would have breached another junior teacher's workload limits. Rather, it was the Principal's manner towards PM and the alleged consequence of those dealings with the teacher that caused the LSM to take this incident into account in deciding to dismiss the plaintiff.

[264] The plaintiff says that cl 6.1.1 of the collective agreement was not applied to that situation by Ms Anderson, that is that there was no informal attempt to obtain an informal resolution of the situation. It must be noted, however, that PM had then

refused to meet again with Mr Edwards under any circumstances. In these circumstances, I accept that it was inappropriate to try to achieve an informal resolution of PM's complaint in an informal manner.

[265] There are two important aspects of this complaint that affect the justification for dismissal in reliance on it. The first was what I conclude was the LSM's insufficiently critical acceptance of PM's account of his dealings with Mr Edwards and the effect that this had on him. The LSM ought to have had more regard to the more independent version of the other teacher who witnessed those exchanges and whose account of them was markedly less critical of Mr Edwards than PM's rhetorical analysis of what happened. Whilst the LSM may have been entitled to conclude that Mr Edwards responded peremptorily and unsympathetically towards PM, she could not have concluded reasonably that PM's complaint of egregious disrespect to himself was such that it should form a contributory ground for his dismissal. Mr Edwards was correct, on the evidence heard by me, that there was probably only one feasible solution to PM's and the school's predicament which had arisen as a result of a misunderstanding by the timetabler, and that this solution, although not ideal, was proposed and decided upon by Mr Edwards.

[266] The LSM responded, appropriately, to PM's rhetorical ultimatum that he would not return to work at the school while Mr Edwards remained as Principal, by telling PM that this was not how the matter would be dealt with. However, this statement by PM should have caused a more careful inquiry by Ms Anderson about the motivation for, and accuracy of, PM's complaint. That, in turn, would have brought about a greater reliance by the LSM on Ms Higgins's more moderate and independent account of the interchange between the plaintiff and PM which was more favourable to the plaintiff than PM's.

[267] Although Ms Anderson was not obliged to inform Mr Edwards immediately of PM's complaint in circumstances where PM did not wish to pursue it formally on 1 March 2013, that situation changed when the complaint was lodged formally on 13 March 2013. In those circumstances, it was incumbent on the LSM to disclose to Mr Edwards PM's first complaint letter of 1 March 2013 and records of her other relevant inquiries which she conducted, rather than only selectively as she did, by

including some of the points from some of these inquiries in her correspondence to Mr Edwards.

[268] At about the same time, albeit separately but illustrating the same elements of unfairness to the plaintiff, was the fact that the LSM had sought and obtained information about Mr Edwards's past career but which neither the fact of seeking that information nor the content of it, was disclosed to him. This information included about why an LSM had been appointed at his previous school. This was information that was relevant to the decision to dismiss the plaintiff in that it contributed to the LSM's conclusion that the plaintiff's management problems were unrectifiable. The fact of these inquiries and the information that they elicited should have been provided to Mr Edwards for his response before the decision to dismiss was taken, but they were not.

[269] Although the defendant's case is now that the information that the LSM obtained, but did not disclose to the plaintiff, did not form any part of the decision to dismiss him, realistically I do not accept that it can be so neatly and dismissively categorised. The issue about why his previous schools had been under limited statutory management did constitute relevant considerations by the LSM in her overall assessment of her lack of trust and confidence in Mr Edwards which was a ground for dismissal. So too were the LSM's enquiries of other senior staff made in the days immediately before the plaintiff's dismissal, but which were not disclosed to him for response.

[270] I agree with counsel for the plaintiff, Mr Harrison, that this failure to provide relevant information to Mr Edwards risked making it appear that Ms Anderson was not acting as an objective assessor of relevant facts but was herself compiling information to support a claim of serious misconduct against Mr Edwards that she herself was to decide. Whilst it was unobjectionable that Ms Anderson was the recipient of PM's complaint and investigated it by speaking with the complainant as well as others who could assist with its resolution, it was incumbent on the LSM to have disclosed fully and fairly to Mr Edwards what she had done in his otherwise perilous employment circumstances. That is especially so because at least some of the earlier incidents referred to by Ms Anderson and relied upon by her as

categorising Mr Edwards's interactions with PM as being a breach of lawful and reasonable instructions, were controversial.

[271] One example of this undisclosed information related to an incident in September 2012 about an interaction with another staff member, to which Ms Anderson referred in her assessment of the PM incident. This had been in relation to comments made by Mr Edwards to a staff member in a staff meeting that were said to have been direct and abrupt, but for which Mr Edwards had apologised. That apology had concluded the matter and there was no warning or disciplinary outcome. Another example of the history on which the LSM drew was the letter of complaint from a deputy principal. This was also referred to by Ms Anderson in relation to the PM complaint, but it had resulted in both parties attending mediation and resolving their differences without the need for an investigation or conclusion by the LSM. There was, in that instance as well, no investigation and decision reached as to the rights and wrongs of what had transpired. It was therefore not open fairly to Ms Anderson to rely to the plaintiff's disadvantage upon those previous events in classifying Mr Edwards's behaviour towards PM as misconduct because it was in breach of specific instructions previously given.

[272] It follows that, even if Mr Edwards's dealings with PM may have been insensitive and peremptory and may even have constituted a misconduct, they could not reasonably have warranted his dismissal, even as a contributing factor.

Disciplinary consequences of performance issues

[273] Was the defendant entitled to impose the disciplinary consequence of dismissal for serious misconduct in respect of issues that the LSM had already begun to deal with under the collective agreement as ones of performance and competency?

[274] The collective agreement cannot be read to preclude an employer acting upon any complaint or report of misconduct or serious misconduct which arises during the currency of an assistance and guidance programme for a principal, and doing so under the disciplinary provisions of the collective agreement. However, that is not the case where, as here, the employer has elected to address its pre-4 February 2013

concerns by the implementation of a support and guidance programme in respect of those matters for which the programme was put in place.

[275] It follows that a fair and reasonable employer, in the circumstances of the LSM in this case, could not have treated, as matters of misconduct or serious misconduct and thereby as matters of discipline, those performance-related events which came to her notice before the imposition of the support and guidance programme in late January 2013. Those prior matters included the staff survey data and NCEA results allegations. They did not include, potentially, the alleged misconducts by Mr Edwards at and arising out of the 21 March 2013 meeting and the complaint by PM which arose after the implementation of the programme. So the focus of justification for dismissal must, in these circumstances, be on those two post-February 2013 grounds.

[276] I have concluded that the events of, and following, the 21 March 2013 meeting between Ms Anderson and Mr Edwards would not have constituted justifiable grounds for dismissal. Nor, too, especially given the procedural unfairness in the process of investigating the PM allegations and the flawed conclusion about the seriousness of those events, could those events have constituted justifiable grounds for dismissal. In these circumstances, Mr Edwards's dismissal for misconduct and/or serious misconduct, in reliance on both pre and post-4 February 2013 events, has not warranted a justifiable dismissal at the time it was effected.

Justification for general loss of trust and confidence dismissal ground

[277] Finally, there is the overall loss of trust and confidence ground for dismissal. Because the LSM was not entitled to rely on the specific instances of what she contended were serious misconducts which I have concluded were not available to her, these cannot, in turn, constitute grounds for her loss of trust and confidence (and that of the Board) in Mr Edwards.[23] The NCEA verifiability events could properly have contributed to such a conclusion by the defendant although, on its own, that

[23] See, for example, *Clark* v *Idea Services Limited* [2013] NZEmpC 155, (2013) 11 NZELR 206 at [129].

was an insufficient or temporary loss of trust and confidence as to not warrant the plaintiff's dismissal, at least when the guidance and assistance programme to deal with them and other issues was still unconcluded.

[278] That brings me to the effect on this ground of dismissal of the assistance and guidance programme which the LSM put in place with effect from 4 February 2013, the aim of which was to eliminate and to prevent a recurrence of those issues on which she claimed subsequently to have lost her trust and confidence in Mr Edwards. If, in late January 2013 when the LSM directed Mr Edwards to participate in that programme, there was an insufficient loss of trust and confidence in him to have warranted his dismissal, then it is difficult for the defendant to argue that this pre-January 2013 situation could subsequently justify his dismissal. I infer that the LSM had considered that any loss of trust and confidence that she had in the plaintiff then, was able to be resurrected by the assistance and guidance programme that she directed he undergo. Coupled with this, the LSM ought reasonably to have given the performance improvement programme a fair opportunity to be completed by the plaintiff before she dismissed him on grounds including those for which the programme had been implemented.

[279] Finally, there is also the catch-all ground of loss of trust and confidence. It is necessary to apply the same analysis of the non-duplication of the disciplinary and competency procedures under the collective agreement to the LSM's conclusion generally that this had been irretrievably lost so justifying the plaintiff's dismissal. Many of the events and circumstances, which the LSM concluded had brought about her and the Board's loss of trust and confidence in Mr Edwards, arose before late January 2013. Some, but not all, of those were what were later constituted as grounds for Mr Edwards's dismissal. As with the case of those allegations affecting NCEA and staff survey data, the LSM nevertheless elected (appropriately in my assessment) to deal with her other dissatisfactions with Mr Edwards to that point, by imposing on him an assistance and guidance programme with effect from early February 2013. Absent any subsequent events which may have amounted to misconduct or serious misconduct by Mr Edwards justifying his dismissal (of which I have concluded there was none), the support and guidance programme should have been given a fair chance to resolve the LSM's dissatisfactions with Mr Edwards.

Had that occurred, but the programme been unsuccessful, the collective agreement provided the LSM with a pathway to potential dismissal.

[280] Such indications of progress with the assistance and guidance programmes as emerged between 4 February and 16 April 2013 tended to be positive, although Mr Edwards was a long way from being out of the woods with respect to improving his inter-personal and school management skills and attributes. The LSM did acknowledge such positive developments as had been allowed to flow from the support and guidance programme including, albeit briefly, from Mr Smith's mentorship of Mr Edwards. It is simply not possible to predict what would have occurred if the support and guidance programme had run its fair course and Mr Edwards had not been dismissed on 18 April 2013 as he was. But if the assistance and guidance programme, properly conducted and concluded, had not produced objectively verifiable improvements in Mr Edwards, the collective agreement then contemplated a competency investigation by the employer which could have led to Mr Edwards's dismissal.

[281] Indeed, the plaintiff had, through his lawyer, indicated to the LSM that if the support and guidance programme could not achieve the necessary change for the employer, Mr Edwards would then "consider his position". By this I understood him to mean that if he was confronted by an assessment, not only by the LSM but endorsed by the independent mentor under the assistance and guidance programme, that he remained unsuited to be the school's Principal, he may well have accepted the inevitability of the ending of that relationship and resigned gracefully. There would have been significant perceived and real distinctions between a resignation tendered at the plaintiff's own initiative, and a dismissal for incompetence. There would also have been real differences as between two types of dismissal, one for incompetence and another for serious misconduct for intentionally misleading or deceiving his employer. So it cannot be said that the end result would have been the same as it was, even if Mr Edwards had not improved his performance sufficiently as a result of the assistance and guidance programme.

[282] In these circumstances, I have concluded that, as a fair and reasonable employer, the LSM could not have relied upon a generalised loss of trust and confidence in Mr Edwards to support his dismissal on 18 April 2013.

Consequence of partial support of conclusions of misconduct

[283] By this heading I mean that of the four grounds of misconduct or serious misconduct relied on by the defendant, only one (NCEA data verification) now survives scrutiny intact, albeit in modest form, and another (the PM complaint) can, at most, have been categorised as non-serious misconduct. Can it now be said that dismissal of Mr Edwards in mid-April 2013 was one of the sanctions open to the LSM from a range of potential consequences in all the circumstances?

[284] Did Mr Edwards's attempt to portray the school's 2011 and 2012 NCEA results as the best ever at the school and his disingenuous persistent excuse for doing so, together with his dismissive treatment of a complainant staff member, justify his dismissal under the s 103A test?

[285] In the circumstances, I am not satisfied that a fair and reasonable LSM could not have both gone about investigating and determining the existence of serious misconduct, and could not have dismissed the plaintiff as and when she did. The procedural flaws and shortcomings of that process are not saved by s 103A(5) of the Act, and there were insufficient substantive grounds available to the LSM to justify the plaintiff's dismissal. The same reasoning applies to the LSM's conclusion of loss of trust and confidence in Mr Edwards. His dismissal does not meet the Act's s 103A tests and was unjustified.

Remedies for unjustified dismissal

Reinstatement?

[286] I decline to direct Mr Edwards's reinstatement to the position of Principal of the school for the following reasons.

[287] Section 125(2) of the Act requires the Court to be satisfied that the reinstatement of an unjustifiably dismissed employee will be both reasonable and practicable. Practicability of reinstatement has long been the test for this remedy. Reasonableness has been added as a distinct test since 2011. There is a long line of case law interpreting and applying the practicability test including from the Court of Appeal.[24] There is very little authoritative case law on the meaning of reasonableness as an additional test, although the full Court in *Angus* provided some guidance to the Authority and the Court as follows. At [61] and following, the Court noted:[25]

> [61] Reinstatement is now no longer the primary remedy for unjustified disadvantage in, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if it is sought.
>
> [62] Not only must the Authority and the Court be satisfied that the remedy of reinstatement is practicable in any particular case, but they must also now be satisfied that it is reasonable to make such an order. Parliament has clearly intended that there be factors which are additional to those of practicability as the Employment Court and the Court of Appeal have interpreted that notion.
>
> [63] It is only necessary to refer to the most recent case in which the Court of Appeal examined practicability of reinstatement, *Lewis v Howick College Board of Trustees*. The Court of Appeal upheld the reinstatement test applied by this Court at first instance, which reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* (*NZEI*) which had, in turn, affirmed the test applied by the Labour Court in first instance in that case. The Employment Court in *NZEI* said:
>
>> Whether … it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the

---

[24] *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2], citing. *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416.

[25] *Angus*, above n 10 at [61]-[68].

> potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[64] In *Lewis* the Court of Appeal added:

> [6] … The test for practicability requires an evaluative assessment by the decisionmaker and the factors to be considered have been clearly identified by this Court in the *NZEI* case. We see no basis on the wording of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to the issue of reinstatement is preferable.
>
> [7] There is no dispute between the parties that the onus of proof of lack of practicability rests with the employer. …

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[68] As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[288] The plaintiff could and should not have been dismissed as, when, and for the reasons that he was. There had been, nevertheless, a series of dysfunctional relationships between the Principal and others, including a significant number of the school's staff, the school's Board of Trustees, and parts of the school's community. In my assessment, reinstating Mr Edwards would create a real risk of reversion to at least some of that dysfuntionality and, thereby, a reversion to some of the difficulties experienced by the school and its pupils and staff between 2010 and 2013. The evidence establishes that the school has moved to a significantly more functional state since Mr Edwards's departure. There would be a risk of the school having further limited statutory management or other statutory intervention if the plaintiff were to be reinstated. That would not be in the interests of the school or its pupils.

[289] Although the effluxion of time can, in some cases, count against the reasonableness and practicability of reinstatement, and the defendant may have benefited from that period of almost two years since Mr Edwards's dismissal, it cannot rely significantly upon that consideration. Since immediately after his dismissal, Mr Edwards has unequivocally sought his reinstatement. Knowing of that remedy on his challenge, the school nevertheless resolved to appoint a permanent replacement as principal. In addition, following the investigation meeting in the Authority, the (then former) LSM, Ms Anderson, departed New Zealand for more than a short time in circumstances in which I was told that she was both unable and unwilling to return to give evidence, and that she would not be able to give evidence from a distance. Given Ms Anderson's pivotal role in Mr Edwards's employment and dismissal, the Court had no choice but to schedule its hearing of the plaintiff's challenge after Ms Anderson's return to New Zealand from an absence of several months. The delay in hearing Mr Edwards's challenge, in these circumstances, was not attributable to him and should and would not have counted against him if he might otherwise have been entitled to reinstatement.

[290] Despite what must be acknowledged as Mr Edwards's strengths as a teacher and an educational leader, it seems, with the benefit of hindsight, that he was not well suited for appointment as Principal of BOIC. Mr Edwards's managerial philosophy and, particularly, his people-management style, meant that although he had supporters and admirers, he also alienated significant sections of those people

with whom he had to work harmoniously, the school's staff, its Board, and sections of the Maori community in which the school has a special place. Having observed Mr Edwards giving lengthy evidence including being subjected to probing cross-examination and other questioning, I agree with counsel for the defendant that the plaintiff only agreed to do things that others recommended and directed him to do, but with which he disagreed, because of an obligation of obedience. He did not do so out of a broader acceptance of his own fallibility and acknowledgement of expectations in education of consultation, consensus, and collegiality. A repetition of those relationship difficulties would be a real possibility if Mr Edwards were to be reinstated as Principal of the school, and that would not be reasonable.

[291] As to practicability, I do not consider that good working relationships could be re-established with the whole of the school's staff, its Board, and all of its diverse communities of the school.

[292] Finally, and tellingly, Mr Edwards's own witness, Rev Te Whiu, conceded that the plaintiff's reinstatement would not be in BOIC's broad interests and the community's. That was a disarmingly frank concession from someone who was a supporter of Mr Edwards and whose role at the school Mr Edwards supported and promoted. For the foregoing reasons, I decline to direct Mr Edwards's reinstatement as Principal of BOIC.

Reimbursement of lost income?

[293] Mr Edwards claims reimbursement for income lost by him as a result of his unjustified dismissal. Section 128(2) of the Act requires the Court to make such an order being the lesser of three months' ordinary time remuneration, or the amount of the plaintiff's loss. Any award above the minimum is both discretionary and subject to loss mitigation obligations of the dismissed employee.

[294] I am satisfied that Mr Edwards met his remuneration loss mitigation obligations following his dismissal. As well as pursuing realistic opportunities for employment in education in Northland where he is resident, he also made attempts, within reason, to use his other strengths or qualifications, including a heavy transport

driver's licence, but to no avail. Those attempts made by him to obtain other work had necessarily to take into account his application for reinstatement which was a genuine application although it has not now been fulfilled. It follows, in these circumstances, that the minimum compensation for remuneration lost is three months' ordinary time income, together with any other monetary benefits attaching to the position of Principal at the school. In this regard, for example, Mr Edwards lived in a house provided by the Ministry of Education at a less than market rental. Although he was permitted to remain in that house for some months after his dismissal, that was then at a market rental. The plaintiff may, therefore, have incurred some loss of benefit in that regard and there may also have been losses of superannuation or similar entitlements following his dismissal.

[295] There was no evidence called by the plaintiff about the actual sums lost and so I propose to leave it to the parties to attempt to calculate these by agreement but reserve leave to Mr Edwards to apply further to fix those sums if agreement cannot be reached.

[296] The next question is whether the Court should exercise its discretion to direct reimbursement of lost income beyond that three month minimum. In determining this question, it is important to note that Mr Edwards was paid two months' salary in lieu of notice of his dismissal which took effect on 19 April 2013, so the question now becomes whether he should be compensated for remuneration lost after that period of five months following the date of his dismissal.

[297] Mr Edwards is in his early 60s and I infer that his principalship of the school was probably going to be his last permanent position before retirement from that role in education. As well as I am able to, I must also take into account the probability of how long he would have continued as Principal of the school had he not been dismissed unjustifiably. Even if there had not been the ongoing issues of his poor inter-personal relationships with staff, the Board and the community, and other performance problems contingencies that are common to all school principals in his situation must be taken into account in this exercise.[26]

---

[26] *Zhang v Sam's Fukuyama Food Services Ltd* [2011] NZCA 608, [2011] ERNZ 482 at [26].

[298] If the defendant had continued and completed Mr Edwards's assistance and guidance programme that the LSM began but concluded prematurely, the plaintiff may have gained sufficient self-awareness and commitment to change a number of his management strategies so that he may have continued as Principal as BOIC for a number of years. There is, however, a substantial possibility that competency proceedings would have been instituted by the LSM or the Board even if Mr Edwards had not, as his lawyer said he would, considered a dignified retirement in the light of an unsuccessful assistance and guidance programme. So it follows that this not insignificant possibility of cessation of principalship, whether by lawful dismissal or resignation, must reduce his claim to long-term remuneration compensation.

[299] I consider that the line between probability and improbability of continued employment in the position of Principal of the school would have sat at about 18 months after his dismissal in mid-April 2013. So, without taking into account s 124 of the Act, which I must, Mr Edwards would have been entitled to compensation for lost remuneration and benefits in an amount equivalent to a further 16 months (including the minimum required period of three months).

Section 124 considerations

[300] As just mentioned, s 124 of the Act (Remedies reduced if contributing behaviour by employee) must be applied in all cases such as this. It provides:

> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[301] In applying s 124 as the Court must, I take into account my refusal of Mr Edwards's reinstatement. As to the extent to which his actions contributed towards the situation that gave rise to his unjustified dismissal, I consider that the remedy of compensation for lost remuneration must also be reduced. Mr Edwards's responsibility for the difficulties in which he found himself that this judgment

details, and which brought about his dismissal, was more than insignificant. It must, therefore, sound an appropriate reduction of those remedies. This is not an exact science but, rather, a matter of fact, degree, and impression. I consider that a just reduction to meet the requirements of s 124 in relation to compensation for lost remuneration is one of 25%. The calculation of Mr Edwards's compensation for lost remuneration and other financial benefits is to include, as its temporal element, 12 months, being 75% of the 16 months as assessed above. So, applying s 124, Mr Edwards is entitled to compensation representing 12 months of lost remuneration and employment associated benefits.

Compensation for non-pecuniary losses

[302] This arises under s 123(1)(c)(i) of the Act. The defendant acknowledges, realistically, that if Mr Edwards is found to have been dismissed unjustifiably, he did suffer at least some of those consequences for which the legislation says that he may be compensated. The defendant emphasised, however, that it took fair and reasonable steps to minimise those consequences to Mr Edwards and any exacerbation of them was not attributable to it. I accept that the defendant and the LSM sought to minimise such losses and other consequences of dismissal. The dismissal was handled by the LSM as sensitively as it could reasonably have been in all the circumstances. Mr Edwards was given an opportunity to leave the school before there was any public announcement of his dismissal. Strategies were put in place to make an appropriate public announcement in terms that were sensitive to Mr Edwards's plight. His dismissal cannot have been unexpected to him, given the numerous signals from the LSM that he was at very real risk of dismissal and the offers made on behalf of the LSM to avoid a dismissal by an agreed resignation on terms held out by the LSM but rejected by Mr Edwards.

[303] That said, it is hardly surprising that dismissal as a school principal for serious misconduct, including dishonesty, has embarrassed and humiliated Mr Edwards significantly. His wife, who also gave evidence, cannot be compensated, either directly or through Mr Edwards, for those similar consequences she and others in their family have suffered. However, the plaintiff's distress and humiliation arising from his experiencing the impact of his dismissal on his wife, in particular, is

a foreseeable and compensable consequence of his dismissal from an esteemed position in his small community for reasons of dishonesty.[27]

[304] Again in this regard, assessment of a monetary sum to compensate for those consequences is not an exact science: rather, it is a matter of impression and relativity. But for the application of s 124, I would have awarded Mr Edwards compensation under s 123(1)(c)(i) of the Act in the sum of $22,000. The same 25% reduction to that sum under s 124 as I have made in respect of remuneration loss compensation, must reduce that award, however, to $16,500. Mr Edwards is awarded that sum in compensation under s 123(1)(c)(i) of the Act.

Costs

[305] Both counsel asked that these be reserved and I will do so. Any application for costs should be filed and served by memorandum by Friday 27 February 2015 with the respondent to any such application having the period of 21 days to respond likewise.

Comment

[306] This case illustrates a phenomenon that the Employment Court is seeing increasingly in dismissal cases. Having conducted an investigation, an employer then sets out, in a comprehensive letter, the employer's findings arising from that investigation, and the employer's conclusion that the appropriate sanction or outcome is or will be dismissal. The employer, nevertheless, invites the employee to a further meeting, in effect to allow the employee an opportunity to dissuade the employer from the course of action it has indicated it is going to, is likely to, or may well take. On its face, such a 'last chance' opportunity may be seen to be fair to the employee, especially where that has been preceded by a comprehensive and inclusive inquiry process with warnings of potential consequences.

---

[27] *Mega Wreckers Ltd v Taafuli* [2014] NZEmpC 234 at [15], citing *Harawira v Presbyterian Support Services* [1994] 2 ERNZ 281 (EmpC) at 289.

[307] However, the natural reaction of many employees in such circumstances, particularly after a lengthy, complex, and difficult investigation by the employer, will be to shrug his or her proverbial shoulders and say: "What's the point? The employer's mind's already been made up and, especially following an investigation in which I have participated, there is really nothing more I can say that will change the employer's mind. The die is already cast." This is a natural human reaction despite the apparent implication from such an approach that there is yet time to change the employer's intention.

[308] Another difficulty arises where there may be matters referred to in the employer's pre-conclusory advice, as I have set out above, which the employee wishes to have the employer take into account and which may or may not have been raised previously. Even if, as in this case, that information is given to the employer before the final meeting, there is a natural view on the part of the employee that it is going to be very difficult, if not impossible, to persuade the employer to retreat from the decision to dismiss that has already been indicated.

[309] In legal terms, this approach to investigations, conclusions, and dismissals, runs the risk of breaching s 103A of the Act and, in particular, the minimum requirement under subs (3)(d) that an employer, in these circumstances, must genuinely consider the employee's explanation (if any) in relation to the allegations against the employee before dismissing the employee. That phrase ("before dismissing the employee") means before *deciding*[28] to dismiss the employee. It is a long and well-established expectation of employers in these circumstances that they should remain open-minded and objective at all stages during the investigations and inquiries that they carry out into alleged misconduct before reaching decisions about whether that occurred, the nature of the misconduct, and the consequences of it.

[310] Doing what the LSM did in this case went further than properly advising Mr Edwards that he was at risk of the loss of his employment if the employer's inquiries established serious misconduct or a loss of trust and confidence in him. The LSM's advice in her letters to Mr Edwards of 27 March and 11 April 2013 included statements at significant conclusory points of those letters such as:

---

[28] My emphasis.

> Despite your acknowledged contributions to school development, I and the Board have concluded that it is no longer possible for you to manage the staff and to lead the school. (LSM's letter to plaintiff 27 March 2013)
>
> …
>
> There is now an irreconcilable breakdown in trust and confidence after a very long period of struggling to sustain and/or rebuild it. (LSM's letter to plaintiff 27 March 2013)
>
> …
>
> Our current view, subject to your right of response, is that the employment relationship now needs to come to an end. (LSM's letter to plaintiff 27 March 2013)
>
> …
>
> The constant re-appearance of this kind of behaviour despite advice and instructions that it is to be avoided would suggest that there is little value in continuing with support programmes. If you do not actually believe [that] there is any problem in the way you respond in these situations (as your two written responses on this matter indicate) it is unreasonable for the Board to hope for sustainable progress in your management of staff. (Letter LSM to plaintiff 11 April 2013)

[311] Some of these conclusions expressed by the LSM indicated very arguably her view (as employer) that Mr Edwards should either resign or he would be dismissed. Taken collectively, they corroborate Mr Edwards's view that, even despite his lawyer's letter of 15 April 2013, there was little that he could say or do at the meeting on 16 April 2013 that would change a clearly signalled outcome.

[312] It is good employment practice for an employer to indicate the potential or possible consequences of its investigation into serious misconduct and even, at that stage, findings about what occurred and whether that constitutes misconduct or serious misconduct. However, to then express, as clearly as the employer did in this case, what the consequences of that will be, at the same time as allowing for a further meeting between the parties, and the implicit opportunity to dissuade the employer from that outcome, risks a finding of pre-determination by the employer and, potentially, the dismissal being held to be unjustified.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Tuesday 3 February 2015