IN THE EMPLOYMENT COURT
AUCKLAND

AC 1/07
ARC 65/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROSS MCKEAN Plaintiff
AND	THE BOARD OF TRUSTEES OF WAKAARANGA SCHOOL Defendant

Hearing: 23-27 and 30 May, 1-3 August, and 15 September 2005
(Heard at Auckland)

Appearances: Paul Pa'u, Counsel for Plaintiff
Christine Chilwell and Catherine Goode, Counsel for Defendant

Judgment: 26 January 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issues for decision on this challenge from the determination of the Employment Relations Authority finding Ross McKean to have been dismissed justifiably are:

- whether Mr McKean's employment was disadvantaged unjustifiably by his employer, the Board of Trustees of Wakaaranga School;
- whether Mr McKean was dismissed unjustifiably;
- if Mr McKean has a personal grievance or personal grievances, the remedies to which he is entitled.

[2] The Employment Relations Authority investigated Mr McKean's grievances over three days between April and December 2003 and then received submissions from the parties on dates in March, April and May 2004. It delivered its determination of Mr McKean's employment relationship problems on 3 August

2004. The Authority found in the school's favour and Mr McKean has challenged those conclusions by a hearing de novo that addressed the evidence in even more detail than at first instance.

The issues

[3] Because of the multiplicity of Mr McKean's dissatisfactions at the way in which he claims he was treated by his employer, it is important to record precisely what is in issue in this case. The following is summarised from the statement of claim and the hearing management memorandum filed by Mr McKean.

[4] First, the plaintiff says he was disadvantaged unjustifiably in his employment by the manner in which the defendant invoked the competency provisions in their employment agreement. Second, Mr McKean says he was disadvantaged unjustifiably in his employment and when on sick leave by his unilateral reallocation to another class at another level without advice or consultation. Next, Mr McKean says he was dismissed unjustifiably for purported reasons of incapacity that the defendant claimed precluded him from performing his work.

[5] Mr McKean claims remedies for all of these personal grievances including compensation under s123(1)(c)(i) of the Employment Relations Act 2000 for humiliation and loss of dignity in the sum of $50,000 for dismissal, similar compensation of $10,000 for unjustified disadvantage, remuneration lost as a result of his unjustified disadvantages and dismissal, and compensation for future wage losses.

Relevant contractual terms

[6] At all material times Mr McKean's employment was by an individual employment agreement with the Board of Trustees. This was a single page agreement that incorporated expressly both the terms and conditions set out in an attached position description and of the Primary Teachers Collective Employment Contract (Agreement) (2001-2003) *"… which, with all necessary modifications, are applicable to an individual employment agreement for teachers employed in Primary Schools"*. Expressly excluded, however, were *"… any clauses available only to NZEI Members who are party to the C.E.C."*. At no relevant time was Mr McKean a member of the union, the New Zealand Education Institute Inc (NZEI).

[7] Material parts of the collective agreement included its following provisions:

> ***2.1 Good Employer/Equal Employment Opportunities***
> *Attention is drawn to:*
> *(a) the State Sector Act 1988 Part VII(A) which outlines the responsibilities of the employer with regard to the operation of a personnel policy that complies with the principles of being a good employer and the equal employment opportunity responsibilities of the employer.*
>
> …
>
> ***PART 3 – Complaints/Discipline/Competency***
>
> ***3.1 General***
> *The following principles shall be used in addressing complaints against employees and matters of disciplinery (sic) and competence to ensure that such matters can in the interests of the parties be fully and fairly addressed. Many complaints will be able to be resolved by discussion between the principal and the employee concerned without the need to take the matter any further. Boards should, wherever appropriate, seek to resolve complaints in this manner in the first instance. Questions of competence, conduct and/or discipline should be handled in a manner which as far as possible protects the mana and dignity of the employee concerned. Employees may seek whanau, family, professional and/or NZEI support in relation to such matters.*
>
> …
>
> ***3.3 Discipline***
> *(a) The employee must be advised of the right to request representation at any stage.*
> *(b) The employee must be advised in writing of the specific matter(s) causing concern and be given a reasonable opportunity to provide an explanation. Before making a final decision, the employer may need to make further inquiries in order to be satisfied as to the facts of the specific matter(s) causing concern.*
> *(c) The employee must be advised of any corrective action required to amend their conduct and given a reasonable opportunity to do so.*
> *(d) The process and any disciplinary action are to be recorded, sighted and signed by the employee, and placed on their personal file.*
>
> …
>
> ***3.6 Competency***
> ***3.6.1*** *Where there are matters of competency which are causing concern in respect of any employee (for example failing to meet the beginning, fully registered, or Assistant and Deputy Principal professional standards, as appropriate), the Principal shall put in place appropriate assistance and personal guidance to assist that employee.*
> ***3.6.2*** *When this assistance and guidance has not remedied the situation, the following provisions should govern the action to be taken:*
> *(a) the employee must be advised in writing of the specific matter(s) causing concern and of the corrective action required, and the timeframe allowed. This timeframe should be determined by the principal and be relevant to the matters causing concern;*

(b) *the process and results of any evaluation are to be recorded in writing, sighted and signed by the employee;*

(c) *a copy of any report made by the principal to the employer or to the Teacher Registration Board shall be given to the employee;*

(d) *no action shall be taken on a report until the employee has had a reasonable time to comment (in writing or orally or both);*

(e) *if the above steps (a-d) fail to resolve the matter of concern, the employer may, where justified, dismiss the employee without the need to follow the provisions of 3.3 above.*

…

PART 10 – Employment Relationship Problems

…

Resolving an employment relationship problem

The employee and employer should first make a reasonable effort to discuss the problem and settle it by mutual agreement. (If it's a personal grievance, it must first be raised with the employer and within 90 days – Personal Grievances are explained further below.)

An employee (or employer) has the right to be represented at any stage.

…

As with other employment relationship problems, the parties should always try to resolve a personal grievance through discussion.

Either party can refer a personal grievance to the Employment Relations Service of the Department of Labour for mediation assistance, or to the Employment Relations Authority.

…

[8] Because the "*Competency*" provisions of clause 3.6 of the collective employment agreement are at the heart of Mr McKean's case and counsel could not identify any other case in which they had been interpreted and applied in proceedings such as this, it is appropriate to interpret them. First, the competency provisions must be interpreted and applied according to the general scheme of the agreement as a whole. That includes the contractual incorporation at clause 2.1 of the statutory obligation upon the Board as employer to operate a personnel policy that complies with the principles of being a good employer and the equal employment opportunity responsibilities of such an employer (Part 7A of the State Sector Act 1988). Not all matters of a teacher's competency are intended to be encompassed by the clause 3.6 procedure. That is because matters of competency must be ones which "*are causing concern*". Further, the examples of such competency matters (failing to meet the beginning, fully registered, or Assistant and Deputy Principle professional standards) are serious and objectively measurable elements of competency. So, where such competency issues that meet this standard come to notice, the first step in the

contractual process is for a principal to put in place appropriate assistance and personal guidance for the employee. The contractual emphasis is upon assisting and resolving such competency issues. The contract is silent about what, if any, advice of these preliminary steps should be given by the employer to the teacher.

[9] At the relevant time (that is before the enactment of the 2004 amendments to the Employment Relations Act 2000), the then legislative regime governed the question of statutorily implied terms in this regard. Section 4 required the employer and employee to deal with each other in good faith and, without limiting that duty, not to mislead or deceive the other or to act in a way that was likely to mislead or deceive. Given the potential consequences of the competency provisions of the collective agreement (discussed subsequently), I am satisfied that the s4 obligation of good faith applied to the employer's implementation of clause 3.6.1. That is notwithstanding that the parties to the collective employment agreement did not provide expressly for such advice under clause 3.6.1 but did so for the following steps under clause 3.6.2. That is for two reasons. First, the implementation of appropriate assistance and personal guidance under clause 3.6.1 was *"any matter arising under or in relation to a collective agreement while the agreement is in force"*: s4(4)(b). Although Mr McKean's was an individual agreement, it consisted overwhelmingly of the relevant collective agreement so the question relates to the collective agreement. However, even if that section might not apply, s4(5) makes it clear that the matters specified in subs (4) are examples of the circumstances in which the duty of good faith was to apply and did not limit the circumstances in which they would apply.

[10] Where a principal has concluded that there are concerns of such significance regarding competency that the provisions of clause 3.6 may be triggered, statutory obligations of good faith, as well as the implied contractual obligations of trust, confidence and fair dealing between the parties, require notification by the employer to the affected employee of the putting in place of appropriate assistance and personal guidance measures under clause 3.6.1.

[11] It is implicit that the appropriate assistance and personal guidance that is put in place by a principal to assist a teacher should be of a nature and duration to both allow real improvement and for a fair assessment of whether improvement has occurred. It is also implicit that such processes do not take place in secret, that is

that the employee is aware of them and therefore able to participate meaningfully in them.

[12] If, following the clause 3.6.1 process as just defined, a principal concludes that this has not remedied the situation, clause 3.6.2 that is more detailed then comes into operation. Express obligations of advice to the employee of such a significant conclusion are mandated by 3.6.2(a). This requires that an employee must be advised in writing of the specific matters causing concern, of the corrective action required and the timeframe allowed for this as determined by the principal. Next, the express provisions require that the process and results of this formal evaluation are to be recorded in writing, sighted and signed by the employee. If the principal makes a report to the Board of Trustees or to the (now) New Zealand Teachers Council, a copy of such report must be given to the employee. Where there is such a report, no action can be taken on it until the employee has had a reasonable time to comment upon the report in writing or orally or both. Clause 3.6.2 provides that only if the foregoing formal steps fail to resolve the principal's concern about the teacher's competency, the Board of Trustees may, *"where justified"*, dismiss the employee without the need to follow the provisions of clause 3.3 of the collective agreement relating to discipline and set out above.

[13] It was common ground that Part 10A of the Education Act 1989 now imposes strict requirements of mandatory reporting of teachers involved in competency procedures. Section 139AK requires a Board to report its dismissal of a teacher for any reason immediately to the Teachers Council. More particularly, s139AK(2) provides:

> *An employer must immediately report to the Teachers Council when a teacher resigns from a teaching position if, within the 12 months preceding the resignation, the employer has advised the teacher that it was dissatisfied with, or intended to investigate, any aspect of the conduct of the teacher, or the teacher's competence.*

[14] Section 139AN (mandatory reporting of failure to reach required level of competence) now obliges Boards of Trustees to report immediately to the Teachers Council if they are satisfied that, despite undertaking competency procedures with the teacher, that teacher has not reached the required level of competence. Although sections 139AN and 139AZC came into force on 1 September 2004 after the events

in this case had concluded, they nevertheless reinforce the serious consequences of decisions about teacher competency.

[15] Complaints of teacher competence issues made to the Teachers Council may result in professional sanctions including imposition of conditions on the teacher's practising certificate or even an order that the teacher's registration be cancelled: see s139AZC

[16] So the formal professional consequences of the commencement of the competency procedures under the collective agreement mean that commensurately high standards of procedural fairness by Boards of Trustees as employers towards teachers as their employees are not only appropriate but necessary and affect the interpretation of the relevant provisions of the collective agreement.

Background facts

[17] Primary school teaching was Mr McKean's second vocation after work in real estate and property development. He began full-time employment as a teacher at Wakaaranga (Primary) School in January 1999 immediately after completing his teacher training. As a *"beginning teacher"* for the first two years in 1999 and 2000, Mr McKean was assigned to year 3 classes. At the end of that certification period he had completed his teacher training.

[18] Wakaaranga is a large primary school with a roll of approximately 700 students and an appropriate management structure for an institution of that size. Mr McKean was part of the junior school and of a syndicate led by a senior teacher. Overall responsibility for the junior school rested with the associate principal, Beverly Boyle. The principal, the professional leader and chief executive officer of the school, is Brent Jenkin. In his first year at Wakaaranga in 1999, Mrs Boyle was Mr McKean's tutor teacher. In 2000, his second year, responsibility for Mr McKean's support and supervision passed to his syndicate leader, Gael Anderson. Because by mid-2000 there were personality problems between Mrs Anderson and Mr McKean, supervisory responsibilities were resumed by Mrs Boyle.

[19] The first two years of Mr McKean's employment at Wakaaranga School as a *"beginning teacher"* were unremarkable in the sense that he received the usual assistance and guidance from more experienced teachers and, with satisfactory assessments of his performance, was promoted on the salary scale. At the beginning

of his third year of teaching, 2001, Mr McKean became a fully certificated teacher. As such, the levels of guidance and assistance from senior colleagues reduced accordingly although Mr McKean was still subject to the usual requirements of planning and assessment of all teachers and at Wakaaranga School in particular.

[20] Despite having some reservations, the school, through its principal on advice from Mrs Boyle, certified that Mr McKean met the professional standards for a fully registered teacher as from the end of 2000.

[21] In 2001 Mr McKean changed from teaching year 3 pupils to a year 2 position and another senior teacher, Yvonne McDonald, became his syndicate leader and supervisor. Mrs McDonald completed appraisals of Mr McKean's performance, making a number of specific recommendations for the improvement of his classroom management and teaching practice. She expressed to Mrs Boyle her concern that Mr McKean was not meeting the professional standards of a fully registered teacher and, as a consequence, a process was put in place by Mrs Boyle involving the assistant principal's regular confirmation that expected standards were being met. In about March 2001 the school also received the first complaint from a parent alleging classroom disorganisation and uncertainty of educational programmes.

[22] By the end of 2001, following several further routine appraisals of Mr McKean's teaching practice by Mrs McDonald, Mrs Boyle concluded that there were more than the usual areas for improvement by the plaintiff that might have been expected of a teacher in his circumstances. Following a meeting with Mr McKean to deal with these concerns, it was made clear to him that he was required to make significant changes himself and that he could not henceforth expect the level of professional input by his syndicate leader as he had received in 2001. Mrs Boyle recommended a review of Mr McKean's teaching performance be undertaken in the first term of the 2002 school year by an independent agent. The principal Mr Jenkin considered, however, that an independent review was not then warranted and in January 2002 Mrs Boyle signed off compliance with Mr McKean's job description although noting that not all teaching techniques or classroom management standards had been met.

[23] During the early months of the 2002 school year, Mr McKean's teaching became of escalating concern to his professional supervisory colleagues. He was

subjected to increasingly close scrutiny in his classroom as well as to increasingly negative performance assessments. He considered (but without articulating his concern to the school) that he was being unjustifiably harassed, more particularly by the school's assistant principal, Mrs Boyle, who was responsible for his performance. Further corrective assistance was provided to Mr McKean by Mrs Boyle and Mrs McDonald in February 2002 including observations of his classroom teaching and suggestions for improvement. On 20 May 2002 Mrs McDonald conducted a further routine assessment of Mr McKean's teaching and again noted several areas requiring improvement.

[24] On 21 May there was an event that brought matters to a head between the parties. It is unnecessary to determine precisely what happened in the absence of agreement because the case does not turn on these events. Mrs Boyle made another classroom visit and observed Mr McKean chewing what she believed to be gum but what transpired to be a lozenge. Mrs Boyle remonstrated sharply with Mr McKean and he reacted angrily. Mrs Boyle directed Mr McKean to meet with her after school and they did so in the presence of the principal.

[25] In addition to the gum chewing allegation, Mrs Boyle referred to a number of other alleged infringements of the school's policies such as Mr McKean allowing his cell phone to ring during class time. He provided explanations for these complaints and then the principal Mr Jenkin raised issues of the syndicate leader's concern about Mr McKean's performance during the term. The plaintiff was unprepared for this topic and distressed by what appeared to him to be the elevation to matters of concern of unremarkable teacher training issues. The meeting ended inconclusively.

[26] Mr McKean was absent due to illness from the following day, 22 May, until 27 May. However, he immediately contacted his solicitors who sent a letter to the school two days following the incident, 23 May, challenging in a forthright and legalistic way, the propriety of the school's dealings with the plaintiff. Mr McKean's solicitors' letter complained that he had been subjected to harassment and intimidation by his employer for a long period of time and was extremely concerned with what he termed "*this unfair and unreasonable treatment*". The details of this alleged treatment were not provided and indeed the previous day's events at the meeting with the principal and assistant principal were not referred to. Mr McKean's solicitors' letter made formal request for a full copy of the plaintiff's

personnel file including all appraisals, notes and documents, and copies of the school's policies and procedures including in particular those on appraisal, *"good employer responsibilities"* and discipline.

[27] One consequence of Mr McKean's confrontational response to his employer's concerns was that the employer promptly involved a representative of the School Trustees Association, Wayne Parkinson, who played a significant role in advising the school over the following year.

[28] Because of repeated errors by the school in addressing correspondence to both Mr McKean personally and his solicitors, dealing with these issues was delayed and the position was not helped by Mr McKean's absences (with medical certificate support) for health reasons. These matters were brought by the principal to the attention of the Board of Trustees as Mr McKean's employer and in particular its chairperson, Gillian Price, who thereafter also played a leading role in dealings between Mr McKean (principally through solicitors) and the school.

[29] Among much correspondence that reflects a very legalistic and defensive response to the school's concerns by Mr McKean, the principal Mr Jenkin wrote to the plaintiff asking him to attend a meeting on 28 May and confirming: *"At this meeting we will be discussing matters relating to competency.* Mr McKean was encouraged to seek legal advice and representation and was told that the school's adviser from the Trustees Association would attend the meeting. The school intended by this correspondence to trigger the operation of clause 3.6.1 of the collective agreement that was applicable to Mr McKean's circumstances. That advice was reinforced in a letter of the same date, 24 May, from the Board's chairperson to Mr McKean's solicitors advising:

> *There have been on-going issues relating to performance. This is documented and will form part of the material requested by you.*

[30] The letter confirmed the proposed meeting on 28 May and its purpose being *"… to continue the process of addressing performance issues relating to Mr McKean"*.

[31] By about 30 May the school had sent documents relating to competency issues from Mr McKean's personnel file to his solicitors together with a copy of its annual appraisal documents as had been requested.

[32] Mr McKean, through his solicitors, considered that insufficient material had been supplied by the school in response to his request and sought a postponement of the first meeting that had been rescheduled to 7 June. The school agreed to do so with the meeting to take place on 14 June. On 10 June the principal Mr Jenkin faxed the plaintiff's solicitors a two page document detailing specific concerns, another page giving details of proposed support and the timeframe for this, and copies of records known as Mr McKean's student tracking book. These documents were said to outline the school's competency concerns that it proposed to discuss with Mr McKean on the morning of 14 June. The documents then sent were said to have been a summary collated from documents already sent to the solicitors and the copies of pages from the student tracking book were said to illustrate some of the concerns about competency. The principal's advice was that he would demonstrate these particular concerns by showing a comparison with the same pages of peers' records. As already noted, a draft guidance and support programme was also sent to Mr McKean's solicitors several working days before the proposed meeting.

[33] Although the school took the view that these were all documents for discussion, Mr McKean's attitude was that the school's professed concerns were, even if not without any foundation as he contended, then altogether too general in nature, providing no examples or documentary evidence to support the concerns listed. He complained that these concerns had never been raised with him previously and certainly that he had no inkling that the competency provisions of the collective agreement might be in issue. Accordingly, his solicitors wrote again to the school on 11 June complaining about a lack of detail of the performance concerns and that they had not been raised with the plaintiff before this point. The solicitors asserted that if the school's concerns had been held genuinely, they would have expected appropriate professional development by the employer to have dealt with them.

[34] The school responded by letter on the following day, 12 June. It confirmed again that it had concerns about Mr McKean's teaching performance. It said that its purpose in having the meeting two days later was to formally advise Mr McKean that pursuant to clause 3.6.1 of the collective agreement, the principal would be putting in place appropriate assistance and professional guidance for the plaintiff. The letter confirmed that if that did not remedy the situation, Mr McKean would be subject to the processes described under clause 3.6.2 of the agreement. The school

advised clearly that it wished to consult with Mr McKean about its draft programme suggestions following which it would confirm the process by letter.

[35] The intended meeting took place on 14 June but did not focus completely, as the defendant intended, upon Mr McKean's teaching performance and a process for assisting and guiding him towards improvement. Mr McKean was defensive and reticent. His solicitor criticised, sometimes trenchantly and bluntly, the employer's representatives accusing them of ulterior motives. While the school wished to address professional educational issues, Mr McKean's solicitor focussed on the legal process that he believed the school was even then undertaking with a view to ending Mr McKean's employment. He claimed that the plaintiff had no knowledge of the issues about which the school was concerned, that Mr McKean had lost trust and confidence in his employer and that he had been by that stage *"stitched up"*.

[36] The school pointed out that Mr McKean's claims of innocence of knowledge about any performance concerns before 21 May were not easily reconciled with his solicitors' statement on 23 May that the plaintiff had been harassed and intimidated for some time. Mr McKean, through his solicitor, who spoke on his behalf at the meeting, asserted that neither the principal nor the associate principal were appropriate to assess his performance but, at the suggestion of Mr Parkinson of the School Trustees Association, it was agreed that an independent person would undertake the roles of guidance and assistance and of appraisal during and at the end of the support and guidance period. It was agreed that the parties would suggest suitable persons within the following week.

[37] Mr McKean's solicitors, with whom correspondence was exchanged at his insistence, neither nominated an appropriate independent person nor even responded to the school's communications about this. Accordingly, on 4 July, the school wrote to Mr McKean confirming that the competency process would begin at the start of the forthcoming third term. The school advised Mr McKean that it had appointed an experienced former principal and teacher, Pat Riley, to take the assistance and personal guidance role, and that it was proposed that Mrs Riley would report to the principal at the end of term 3 indicating whether the matters of competency causing the Board concern had been remedied. The Board sought a further meeting with Mr McKean on 16 July to further explain to him the matters of competency causing it concern and the assistance and personal guidance to be put in place with the plaintiff

having an opportunity to comment on these proposals. The Board's letter to Mr McKean of 4 July warned expressly that if its matters of concern were not addressed it would proceed in accordance with clause 3.6.2 of the collective agreement and if this process failed to resolve matters of concern, Mr McKean might face dismissal. The school urged Mr McKean to take professional advice and reiterated his right of representation at any stage.

[38] Mr McKean's response came on 9 July in the form of the raising of a personal grievance (unjustified disadvantage) in relation to the school's commencement of the competency process. This was based on an allegation by Mr McKean that there had not been any ongoing genuine concerns about his performance, that no such concerns had been documented properly, and that he had not been kept fully informed of any concerns that his employer had.

[39] Progress with this personal grievance was delayed over the question of mediation. Mr McKean having made a number of serious allegations of breaches of good faith and unjustifiable action by the school, insisted on these matters going to independent mediation as soon as possible. The school, while not opposing mediation, pointed out the parties' contractual obligations to attempt to resolve these problems themselves and considered that, despite difficulties to that time, this was still possible by further meetings. Mr McKean rejected this approach and both insisted on mediation and, through his solicitors, criticised the school for not mediating. Further time passed by while these issues were argued over in correspondence.

[40] Mr McKean, through his solicitors, objected to this assistance and guidance being provided by his current supervisors in the school and in these circumstances it acceded to having an experienced external person arranged to undertake these functions under clause 3.6.1. Mr McKean was invited to provide input into the identity of an appropriate person but, I find consistent with his rejection of any question of concern with his performance, he and his solicitors failed after a reasonable period to make any response to the suggestion of his input. In these circumstances the defendant reasonably settled on an experienced former teacher and principal but who had no connection with either Mr McKean or Wakaaranga School, Mrs Riley.

[41] Because Mr McKean had taken sick leave on 22 May and remained on this for some time, it was not until 18 July 2002 that he was able to meet Mrs Riley at the school when, after some discussion between the two, Mrs Riley observed Mr McKean's classroom teaching. Mrs Riley's approach to her task was to assess Mr McKean with a clean slate. To this end she asked not to be shown any of the school's documented assessments of his performance. Mrs Riley obtained Mr McKean's agreement to her observation of his classroom teaching and to her intention to prepare a draft report that would be discussed with him.

[42] At the conclusion of Mrs Riley's classroom observation that took place over about three hours on 31 July 2002, she had a brief discussion with Mr McKean including asking for clarification about his planning and his participation in his team's plan. Mrs Riley arranged to meet with Mr McKean on the following Monday morning to discuss her draft report with him to satisfy herself that it would be fair and accurate.

[43] It appears, however, that Mr McKean was absent on jury duty for the whole of the week at the beginning of which Mrs Riley had arranged to meet him. Nevertheless, that meeting took place on the following week and in going through Mrs Riley's draft report, she and Mr McKean discussed her suggestions for improvement. It was agreed between them that Mrs Riley would return in about a month to carry out a further observation although this did not happen because, by then, Mr McKean was absent on long-term sick leave. Mrs Riley eventually provided a copy of her report to the principal. It identified what she described as four major areas of concern indicating that Mr McKean's teaching practice was unsatisfactory for children of the age and stage of his pupils. She concluded that Mr McKean was not meeting the standards for an experienced teacher, the next step on the promotion scale, and indeed was not meeting the standards for a fully registered teacher as he then was. These concerns were very similar to those that had been reached by the school's own supervisory staff earlier in the year and which prompted its commencement of the competency review under the collective agreement.

[44] There was some confusion between Mrs Riley and the school about her role. She understood that she was to be an independent reviewer of Mr McKean's performance but not to give him guidance and support. Mr Jenkin, on the other hand, who had made the school's arrangements with Mrs Riley, contemplated that

she would fulfil both roles. As it transpired and as far as the competency process went, I conclude that she did act as an appraiser and, in some respects, also gave Mr McKean guidance and advice.

[45] In the event, Mrs Riley did not return for a further observation of Mr McKean's teaching because he was absent on sick leave on a number of dates during August and then, from 4 September, continuously on sick leave. In these circumstances Mrs Riley provided her report to the school noting, from her first observations of the school's records of Mr McKean's performance that she had not previously considered, that there were remarkable similarities between her assessments and those of the school's supervisory staff.

[46] By early 2003, Mr McKean had exhausted his sick leave entitlements so that he was thereafter on unpaid leave. He requested the Board of Trustees to consider paying him ex gratia for that period but it declined on reasonable grounds relating to its budgetary constraints and the uncertainty of a prospective date of his return to teaching.

[47] Towards the end of 2002 a decision was made by the school's management team to assign Mr McKean to a year 4 class for the following school year, 2003. This was a change of class level from those previously taught by Mr McKean but not a substantial change. The school's decision to do so was unremarkable except perhaps it did not consult him about its intended claim to his teaching level and did not advise him of this before the commencement of the school year. Although there is usually no obligation to consult, good educational practice includes such consultation and, certainly by any account, advice to an affected teacher is provided as soon as possible. In Mr McKean's circumstances of long-term sick leave, however, the school elected not to bring this change to his notice. Other relevant considerations applied by the school included its assessment that Mr McKean did not enjoy good collegial relationships with the leaders of the two syndicates within which he had taught until then and that a number of parents had become dissatisfied with the disruptions to their children's learning by his frequent absences in the latter part of 2002. There was a suitable reliever available who preferred to teach at the year 4 level in case Mr McKean did not return to work at the beginning of 2003 and suitable relieving teachers were scarce.

[48] In late January 2003 Mr McKean's solicitors wrote to the school's solicitors saying that there was no change in Mr McKean's prognosis and that he would not be at work when the school reopened on 28 January 2003. A medical certificate to support this was supplied. This indicated Mr McKean was suffering from moderately severe reactive anxiety symptoms preventing him from working "*in his current employment position*". The certificate referred to Mr McKean's "*… awareness of an 'unsafe' work environment …[and that he would] … be unlikely to return to the school in the foreseeable future*".

[49] The school's view was that the competency process that was then in limbo would have to be continued if and when he returned but that process and its operation appeared to the school to be what was referred to as the unsafe working environment.

[50] At the Board of Trustees meeting in February 2003 when Mr McKean's situation was discussed as usually occurred at these monthly meetings at that time, the following was recorded:

> *BOT members feel that the complainant* [sic] *returning is NOT an option and this view has been strongly expressed to our solicitor.*

[51] Mediation of Mr McKean's grievances was attempted on two occasions in March 2003 although this did not resolve the issues between the parties. The relief teacher covering Mr McKean's class for the first term of 2003 was not available in the following term meaning further disruption to the school if Mr McKean did not return by then.

[52] The school was becoming increasingly concerned about the prospects for Mr McKean's return. Accordingly, on 3 April, its solicitors wrote to his setting out the position that the school faced and asking for a firm indication of his date of return and an assurance that his medical condition was such that the school might expect no repetition of his frequent absences as in 2002. Those assurances were sought preferably in a letter from his medical practitioner and the school stated that if these advices were not received within about a week, by 11 April 2003, and that Mr McKean would be able to return to work at the beginning of the following term, it would have to give serious consideration as to whether, and if so for how long, it was able to continue holding his job open.

[53] No response was received to these requests by 11 April but by 15 April Mr McKean's solicitors advised that following discussions with his medical practitioner, Mr McKean was then concerned about the effects of the changes to his teaching level from year 2 to year 4 and that he would be required to return to a "*stressful competency process*". The solicitors advised that a specialist psychiatric opinion had been sought to provide *"a very accurate view of Ross's prognosis"* and that this specialist report was expected to be available by about 22 April.

[54] The school's solicitors again wrote to Mr McKean's on 17 April, reiterating that it was not possible for Mr McKean to return to teach year 2 pupils and pointing out that the Board of Trustees' next meeting would be on 30 April. The solicitors advised that it would then consider whether to dismiss Mr McKean on the grounds of incapacity, taking into account all the information that might be submitted to it on his behalf. Mr McKean was asked to provide the school with any doctor's letters and submissions by 28 April. This letter was followed up with another from the school to Mr McKean's solicitors on 28 April setting out its reasons for changing his teaching to year 4.

[55] On the following day, 29 April, Mr McKean's solicitors sent the school two letters. The first raised a personal grievance in relation to the teaching level change and the second contained a report from Mr McKean's general practitioner dated 29 April advising that he would not then be seen by the psychiatrist until 10 May but that in the meantime he was not able medically to return to work within the same school environment "*due to feeling unsafe and stressed at this prospect*".

[56] Although arrangements were by then in place for further temporary cover for Mr McKean's class and this was likely to continue until the end of the second term, these arrangements were less than satisfactory (including different teachers taking different classes at different times of the day) and it was not known whether they or any substitute arrangements could be made for the third term.

[57] In these circumstances the Board of Trustees stayed its hand at its April meeting but on 7 May its solicitors again advised Mr McKean that the question of his future employment would be considered at the Board's next meeting on 20 May and reiterated its request for copies of the psychiatric report and any submissions by Monday 19 May.

[58] The specialist psychiatrist's report, although dated 13 May 2003, was not apparently received by the plaintiff's solicitors and therefore passed on to the school's solicitors until earlier on the day of the Board's May meeting, 20 May. It did not express any explicit prognosis or any indication of when Mr McKean might return to work. The relevant advice of the psychiatrist is contained in the following two paragraphs:

> *Mr McKean is has exhibited acute stress related symptoms secondary to his previous work environment. From the history gained by me, and from my interview with Mr McKean, I do not believe that he has suffered from a Major Depressive Episode. It appears that his anxiety symptoms have abated now that he is away from this work environment*
>
> *It is Mr McKean's belief that he can now function as a teacher to the level that he has previously functioned if he was able to work in a different school environment than Wakaaranga School. In my opinion exposing him to that environment is likely to be met with further problems of increased anxiety and inability to function at his previous work potential.*

[59] The Board's solicitors, to whom Mr McKean faxed the report in the early afternoon of 20 May, responded pointing out the inaccuracy of the report's apparent assumption that Mr McKean *"is no longer required at this school"* and asking what steps the plaintiff proposed to take in light of the advice that he had now received. The solicitors' letter noted that *"the board has no assurance that the acute stress symptoms apparently diagnosed will not recur if he returns to school"*.

[60] At 5.36 pm that evening Mr McKean's solicitors responded by fax to the Board's solicitors indicating that they had not had an opportunity to discuss the employer's request with the plaintiff, that Mr McKean was distressed because he believed the school had made it abundantly clear that he was not welcome back there, that it was the Board that needed to assure Mr McKean rather than he the Board, and that the solicitors would obtain further instructions. Because of the time at which it was sent because it was not marked as urgent, the fax was not received by the solicitor handling these matters for the Board until the following morning. It was not, therefore, seen by the Board that evening and its contents were not made known to the Board.

[61] At the Board of Trustees' meeting on 20 May the chairperson, Mrs Price, referred to the relevant contents of the psychiatric report but did not distribute copies of it to other Board members. The principal, Mr Jenkin, outlined a chronology of events and, in particular, described how the school had been dealing with Mr

McKean' absences. Mr Jenkin then absented himself from the meeting while the Board decided whether to continue Mr McKean's employment. Its members concluded that the psychiatrist's report indicated that Mr McKean could not return to the school in good health. There was no indication when he might do so. Surprised that Mr McKean had not elected to resign in these circumstances, the Board considered that it had no alternative but to terminate his employment and resolved to do so.

[62] The minutes of the Board of Trustees' meeting held on the evening of 20 May disclosed that it met "in committee" between 8.35 pm and 8.54 pm to discuss the matter of Mr McKean's employment. The minutes noted:

> *The Board discussed the ongoing difficulties caused by Mr McKean's absence. Since Mr McKean was on leave on 4th September, there has been considerable disruption to his classes and his absence has caused considerable stress and inconvenience to other staff members. We have been unable to find a long term reliever for Mr McKean's class for term two of this year.*
>
> *The Board also considered the advice from the Board's solicitor and the letter from Mr McKean's psychiatrist. The Board does not accept the comments made in that report about the school's responsibility for Mr McKean's health, but considers that, given the views stated by Mr McKean, there could be continuing serious concerns for his health if he returned to teach at Wakaaranga School.*
>
> *Mr McKean has given no date for his return. In all circumstances the Board cannot continue to hold his position open.*
>
> *The Board decided to dismiss Mr McKean on the grounds of incapacity. The dismissal will take place after the expiry of two months' calendar notice under clause 2.8 of the Collective Employment Agreement.*
>
> *The Board noted that it is required by law to inform the Teachers council of the dismissal.*

[63] Mr McKean was dismissed with effect from 22 July 2003, on two months' notice for the following reasons recorded in the Board's letter to him of 22 May 2003:

> *… the board met on the 20 May 2003, to consider whether it could continue to hold your position open in light of your long absence since 4th September 2002.*
>
> *The Board considered the disruption to your classes and the inconvenience and stress to other staff members caused by this long absence. We also took into account that despite a number of requests you have not provided us with*

any assurance that you will be fit to return in the near future. In fact, the letter from your psychiatrist, received 20 May 2003, advised that:

- *You had exhibited acute stress related symptoms secondary to your employment with us*

- *You believed that you can function as a teacher to the level at which you had previously functioned at a different school, but not at our school;*

- *Exposure to the environment at Wakaaranga is likely to be met with further problems of increased anxiety and inability to function at your previous work potential.*

Taking all these factors into account, the Board decided to dismiss you on the grounds of incapacity. …

Unjustified disadvantage to employment?

[64] I am not satisfied that the defendant's allocation to a level 4 teaching position for the 2003 school year disadvantaged the plaintiff in his employment. Mr McKean was qualified to teach at this level and it was a recognised expectation among teachers generally that they might be called upon to teach classes at different levels from year to year. Although such a change may have provided Mr McKean with some challenges as it would have for any teacher in his circumstances, that is not the same as disadvantaging a teacher in his employment.

[65] Nor does it convert from a reasonably expected contingency of primary teaching to a disadvantage in employment that Mr McKean was then facing performance and competency issues. Irrespective of his teaching level for the forthcoming year, these issues would have had to have been addressed by the school. Primary school teachers are trained to teach at all levels in such schools. It is a common expectation, and therefore unremarkable, that teachers will, for a variety of reasons, be allocated to different class levels at different times. So Mr McKean's claim to have been unjustifiably disadvantaged by his reallocation of teaching level for the 2003 year fails because this was not a disadvantage in employment.

[66] Even if, nevertheless, this reallocation had amounted to a disadvantage, I am not satisfied that the school's action in doing so was unjustified. Although in many cases teachers are consulted about a school's intention to allocate them to different teaching levels and can expect reasonably to have sufficient notice of such reallocation to prepare for it, Mr McKean's circumstances were unusual. He had

been absent from the school for a considerable period on sick leave. There was an understandable level of dissatisfaction with the consequences of that exhibited by both his colleagues and by the parents of affected children. Additional responsibilities fell inevitably on Mr McKean's teaching colleagues and parents of affected children were entitled to expect consistent teaching. The school had to balance the interests of those staff and parents, its own resources and the need for further prospective long-term relief in the absence of any reliable prognosis of Mr McKean's return to the classroom.

[67] In addition to his absence for reasons of ill-health, matters between employee and employer were otherwise strained to the extent that the school was expected to communicate with Mr McKean through his solicitor. The defendant cannot be more than mildly criticised in all the circumstances for not either consulting with Mr McKean about its proposal to change his class level or really even for failing to advise him of this before the beginning of the 2003 school year although that may have been a prudent course.

[68] This first claim of unjustified disadvantage in employment fails.

[69] The next alleged unjustified disadvantage relates to the school's implementation of the competency procedures. This process, although commenced, did not get far because Mr McKean's indisposition and absence from work for a long period meant necessarily that the school was unable to assess his competency following the steps set out in the collective agreement.

[70] Although I accept that the implementation of the competency procedures disadvantaged Mr McKean in his employment in the sense that a process was implemented that may have resulted in his dismissal, I am not satisfied that in all the circumstances of the case the employer's actions can be said to have been unjustified. That is not, however, to say that the defendant acted impeccably in the steps that it took to investigate and assess Mr McKean's competency as a teacher. But the Court's concern is substantial fairness and reasonableness rather than minute or pedantic scrutiny and expectation of precise contractual compliance.

[71] Before the incidents of 21 May 2002 that, from Mr McKean's point of view, precipitated the events that led to his dismissal, the plaintiff's supervisors and the school's principal had concerns about his performance as a teacher. It is fair to

describe these performance concerns as being ones about Mr McKean's competency. The plaintiff, contrary to his general performance in the first two years of teaching, was failing to meet expected teaching standards although apparently motivated to do so.

[72] The trigger factors under clause 3.6.1 of the collective agreement existed at that time. That in turn allowed, indeed perhaps required, the principal to put in place appropriate assistance and personal guidance to assist Mr McKean. The plaintiff was advised in writing that this was the position in the school's first letter to the plaintiff's solicitors dated 24 May 2002 sent in response to Mr McKean's allegations of long-running harassment and intimidation and requesting a copy of his personal file that had been sent to the school on the previous day. Although I consider it probably did so, it is unnecessary to determine whether the school brought up competency issues with Mr McKean during the meeting on the afternoon of 21 May 2003 as it asserts but he denies. That is because, within two days, Mr McKean's solicitors wrote to the school complaining of *"harassment and intimidation … for a prolonged period of time"*. The solicitors asked for a fully copy of Mr McKean's personnel file including all appraisals, notes and documents, and a copy of the school's policies and procedures including those on appraisals. I am satisfied that this request related not only to the events of the early afternoon of 21 May that precipitated the meeting between Mr McKean, Mr Jenkin and Mrs Boyle later that afternoon, but the long-running concerns and criticisms that the school had about Mr McKean's performance.

[73] The Board of Trustees' letter in reply dated 24 May 2002 included advice to Mr McKean's solicitor:

> *There have been on-going issues relating to performance. This is documented and will form part of the material requested by you.*

[74] The school's letter also sought a meeting with Mr McKean on 28 May *"to continue the process of addressing performance issues relating to Mr McKean"*. I am satisfied from these exchanges of correspondence both that the school had, by that time, concern about matters of Mr McKean's competency and that he was made aware of these concerns. The first contractual test under clause 3.6.1 of the collective agreement having been established, it was then incumbent on the school's

principal to put in place appropriate assistance and personal guidance to assist Mr McKean.

[75] I conclude, regretfully but nevertheless surely, that the school's professional educational objectives were not assisted by the aggressively legalistic approaches and responses of Mr McKean's solicitors from their first involvement with the school in mid-May 2002. It is tempting to speculate that if a professional educational response and attitude had met the school's attempts at compliance with the competency provisions, matters may have turned out differently in the end for Mr McKean. But he was not a member of the relevant teachers' professional body, the NZEI, and what might have happened in different circumstances cannot determine the questions before the Court. The justification for the employer's actions must be determined in the light of the parties' actual dealings.

[76] At Mr McKean's solicitors' request, the defendant wrote to him by letter of 10 June 2002 setting out a list of its concerns although this was very general and did not include any particulars or examples. But I am satisfied that the information so provided to Mr McKean met the school's contractual obligations to establish a dialogue to enable the principal to put in place the appropriate assistance and personal guidance contemplated by clause 3.6.1.

[77] Because of Mr McKean's prolonged absences through illness, the school's recourse to clause 3.6 of the collective agreement (competency) went no further than the first steps to put in place appropriate assistance and personal guidance under clause 3.6.1. I find that the defendant was justified in going to those lengths and generally in the manner it did so. It had genuine concerns about his teaching competency and expressed these repeatedly to Mr McKean as was appropriate. It is simply not possible, however, to determine any further questions about Mr McKean's competency and indeed it would be inappropriate to do so. So I reject the plaintiff's claim that the school's commencement of the contractual competency provisions disadvantaged him unjustifiably in his employment.

Unjustified dismissal for incapacity?

[78] The first point to be made is that if the incapacity (illness) suffered by Mr McKean that precluded his return to work in his position was caused or contributed to, unlawfully, by his employer's wrongful acts or omissions, it would not be open to

the defendant to say that it dismissed him justifiably because he was incapable of resuming work as a teacher. It is unclear whether this was Mr McKean's argument in the case. If it was, I would find it unsupportable on the evidence.

[79] There is little doubt that Mr McKean was affected adversely, in both psychological and physical senses, by the events at work and not only from the events that immediately precipitated his first sick leave in May 2002 but also building up to these. I am satisfied that there was nothing extraordinary or certainly unlawful about the way in which the defendant went about addressing validly held performance concerns that Mr McKean says led to his lengthy periods of sick leave. Although not continuous, at least in the initial stages, these absences lasted from mid-May 2002 until July 2003. Mr McKean well and truly exhausted his sick leave entitlements and for most of the time was on unpaid sick leave. The Board of Trustees refused his request to be paid for his sick leave. Its reasons for doing so were justifiable. Mr McKean's prolonged absences were not only very disruptive to his pupils and staff colleagues but the school had to engage and pay for relieving teachers to cover those periods of absence. The Board made a decision that it should not add to those costs by paying Mr McKean's salary for a potentially long period without any certainty of a date of return to work. Mr McKean had no entitlement in law to insist upon such a payment and indeed he acknowledged that he was restricted to trying to prevail upon the Board to grant him an indulgence.

[80] By April 2003 the defendant was entitled to certainty about Mr McKean's situation and, in particular, both when he was going to return to work and the prognosis for his health upon doing so. It signalled these requirements to Mr McKean's solicitors and they acted on them accordingly.

[81] Mr McKean had, through his general practitioner, sought and obtained specialist advice from a psychiatrist. This was for the purpose of ascertaining this information sought by the Board and Mr McKean's solicitors forwarded the psychiatrist's written report to the school to enable this to be considered at the Board's monthly meeting in May 2003. That was almost to the day exactly one year since Mr McKean had first taken relevant sick leave and this had been continuous for a period of about 8½ months since September 2002.

[82] The content of the psychiatrist's report was crucial. It addressed specifically Mr McKean's fitness to return to work. It noted that the plaintiff *"remains distressed about his experience at Wakaaranga School"*. It recorded Mr McKean's advice to the specialist that if expected to return to that school he would find the environment hostile and that due to his lack of trust, considered that his stress would return. Mr McKean was reported to remain enthusiastic about teaching and believed he could function to previous levels in any other school environment. Mr McKean's specialist found no evidence of delusions or hallucinations or depression or other mood disorder but concluded that Mr McKean had acute stress related symptoms related to his work environment.

[83] The psychiatrist's report was dated 13 May 2003 and was sent, apparently by post, to the plaintiff's solicitors. They in turn sent it on by facsimile to the defendant's solicitors on the late morning of 20 May 2003 without meaningful comment. The defendant's solicitors wrote back to the plaintiff's solicitors later on the same day taking issue with the accuracy of one statement Mr McKean was reported to have made to the psychiatrist that he was no longer required at the school. Its solicitors refuted this and referred to what were, by then, its numerous requests to Mr McKean. After summarising the findings of the report, the Board's solicitors asked Mr McKean's to advise urgently what steps the plaintiff proposed to take in the light of the report's conclusions. The Board's solicitors reminded Mr McKean's that the Board was due to meet that evening to consider his position and that it would be bound to consider its obligations to him and to itself in the interests of the employee's health and noted, on the basis of the information contained in the report, that it could have no assurance that the acute stress symptoms diagnosed would not recur if Mr McKean returned to teach at the school.

[84] The psychiatric report was sent on to the school for consideration by the Board at that evening's meeting. Mr McKean's solicitors replied by a letter to the Board's solicitors faxed at 5.36 pm that evening, noting that they had not had an opportunity to discuss the solicitors' request with Mr McKean. The solicitors re-asserted his claim that the school had made it abundantly clear to him that he would not be welcome back and although wishing to return to teach at Wakaaranga, the school Board were *"quite clearly not prepared to allow that to happen"*. The plaintiff's solicitors stated that it was the school that needed to give Mr McKean assurances

rather than the other way round and that the plaintiff's conclusion about the school's attitude was *"perfectly reasonable"*. The plaintiff's solicitors' letter did not refer to the Board's meeting that evening that would discuss the question of Mr McKean's continued employment.

[85] I have concluded that the defendant was justified substantively in dismissing Mr McKean for what it described as "*incapacity*". After almost a year of sick leave, the most recent and largest proportion of which was continuous, the Board faced existing and potential problems for students, other staff members and the school. It was entitled to some certainty about when Mr McKean would be able to return to work and the circumstances of such a return. It had alerted his solicitors to the need for this information and they had responded by providing a psychiatrist's report. Although this did not address when Mr McKean might return to work, it was significant in that it assessed that if he did so, he would be likely to suffer a relapse of the ill-health from which he had suffered for much of the past year. The school was entitled to assess that such a return would be likely to be temporary and, in reality, no return to work at all. In all of these circumstances the defendant was justified substantively in terminating Mr McKean's employment on notice as it did.

[86] As to the fairness of the process by which the dismissal was effected, although there was evidence of several minor elements of unfairness to Mr McKean, overall the defendant's conduct of this dismissal was not so unfair that it should thereby be categorised as unjustified.

[87] I do not accept the plaintiff's case that "*incapacity*" was used by the defendant as a convenient excuse to dismiss the plaintiff when the real reason was dissatisfaction with his performance or misconduct or a severe personality conflict. In many cases, and this is no exception, issues of employee performance, employee misconduct, and capacity or ability arise contemporaneously. That does not mean, however, either that the incapacity or inability was a result of the manner in which the employer dealt with the other issues, or that an employer dismissed for reasons that were not stated truthfully. If an employee is unable to return to work or provide a positive prognosis for return, an employer cannot be expected to continue the employment relationship to enable other dissatisfactions to be dealt with on their merits at some indefinite future time. The facts of a particular case will govern whether fair and reasonable treatment has been accorded to an incapable employee.

There needs to be a balancing of the interests of the employee and the employer in this exercise and this in turn requires a proper investigation of the circumstances of the employee.

[88] Mr McKean alleged that the decision to dismiss him was not approached by the Board of Trustees with open minds. In particular, the records of the Board's deliberations show that by February 2003 members had decided that Mr McKean's return to the school was *"not an option"*. Mr Pa'u argued this indicated a *"closed mind"* about his return to school and that the Board thereafter misled Mr McKean by pretending to consider his position while all the time it had determined that he should not return to work. While I agree that this revealing minute does tend to illustrate both exasperation with Mr McKean and a determination that this should not recur in future, the Board, guided by advice, nevertheless kept his position open for several months afterwards. It allowed the plaintiff to establish his good health that was essential to a return to work and only dismissed him when he could not do so. It dismissed him for that reason. That was not a decision in which personal animosity overrode objective judgment. The psychiatric report's contents made termination of employment inevitable, especially as Mr McKean did not resign as he might have done.

[89] Next, the plaintiff says that the Board should have obtained further clarification from the psychiatrist before dismissing Mr McKean on reliance on the specialist's report when it showed that the central issue of when he might return to work was inconclusive. Shortly before the Board's meeting on 20 May 2003 its own solicitors had asked for clarification of this issue but the Board did not wait for the plaintiff to provide this. Further, Mr Pa'u submitted that it was a procedural failing that the Board had no adviser present at the meeting at which it determined to dismiss Mr McKean. I do not agree. The Board was entitled to act without an adviser but must be judged by the quality of its own decision-making as it has been. Because of legal professional privilege, I simply do not know what advice the Board received leading up to the dismissal. Again, its actions are to be judged on the quality of its decision-making, not the quality or nature of legal advice it received.

[90] Next, the plaintiff complains that information that was conveyed from his solicitors to the defendant's was not passed on by the Board's two individual recipients of it, the principal and the chairperson, to other members of the defendant

who decided to dismiss the plaintiff on 20 May 2003. In all the circumstances I do not consider it unfair that the report's relevant contents were summarised for Board members by its chairperson. The report was available for consideration if this had been requested. The outcome would not have been different if copies had been distributed.

[91] In all the circumstances the plaintiff says that the Board ought to have postponed any decision about his future at this meeting on the evening of 20 May 2003 and have sought and obtained further information before acting on the psychiatric report. Again I disagree. The school had postponed once already its consideration of the issue to accommodate Mr McKean and he supplied his psychiatrist's report to the Board for its consideration and had not requested to be heard at the Board's meeting on 20 May. Reasonably interpreted, the report stated that Mr McKean could not both return to work and recover and maintain good health in the foreseeable future. The Board was then entitled to rely upon this information and to bring Mr McKean's employment to an end for the reasons it did.

[92] Mr McKean alleges that the school's principal Mr Jenkin and the chairperson of the Board of Trustees Mrs Price were prejudiced against Mr McKean by the time the decision was made to dismiss him. They were aware that the associate principal Mrs Boyle had indicated that she would seriously consider resignation if Mr McKean returned to the school and they had received complaints from other staff and parents although these had not been referred to Mr McKean. That is so, but the defendant did not dismiss on those grounds, rather on the basis of pertinent information supplied to it by the plaintiff himself. Some Board members and others may have been relieved that other sound grounds existed to end what they considered an otherwise dysfunctional employment relationship. However, that does not cause an otherwise justifiable dismissal to have been unjustified.

[93] Next, the plaintiff says that the principal Mr Jenkin should not have been present with the Board of Trustees for any discussion about Mr McKean's continued employment, not merely when the Board made its decision and for which period Mr Jenkin deliberately absented himself from its presence. I disagree. Mr Jenkin was a member of the Board *ex officio* and its professional adviser. He was the person best placed to advise other members of all the relevant implications of the plaintiff's

situation and his absence contended for by Mr Pa'u would have deprived the Board of valuable relevant information.

[94] Mr McKean says it was wrong of the chairperson of the Board of Trustees to have withheld the psychiatric report from other Board members and not to have made available to all members the Board's own solicitors' letter referring to that. I have already concluded otherwise.

[95] For the foregoing reasons, I agree with the Employment Relations Authority that Mr McKean's personal grievances fail and must be dismissed. Any application for costs by the defendant should be filed by memorandum within one month if this issue cannot be resolved directly between counsel, with Mr McKean having a further month to reply.

GL Colgan
Chief Judge

Judgment signed at 4.45 pm on Friday 26 January 2007