

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2015] NZEmpC 122  
EMPC 280/2014**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      MARLENE CAMPBELL  
   Plaintiff

AND                              THE COMMISSIONER OF SALFORD  
   SCHOOL  
   Defendant

Hearing:                      18 - 22 May and 28 May 2015  
   (heard at Invercargill)

Appearances:                R Harrison, counsel for the plaintiff  
   S Wilson and S Townsend, counsel for the defendant

Judgment:                    27 July 2015

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] Ms Marlene Campbell was the Principal of the Salford Elementary School (Salford or the school) in Invercargill from 2006 until March 2014. This judgment resolves her claims that she was unjustifiably suspended, and then unjustifiably dismissed.

[2] In 2012, serious concerns were expressed as to Ms Campbell's leadership by parents and staff to the Education Review Office (ERO). These concerns were summarised in ERO's eventual report on the school (the ERO report) and Mr Cleave

Hay was then retained by the Board of Trustees (the Board) to investigate them. Mr Hay's subsequent report disclosed serious concerns as to Ms Campbell's management style, prompting the Board to invite the Ministry of Education (the Ministry) to appoint a Limited Statutory Manager (LSM) under the Education Act 1989 (the Education Act) to assume its employment functions. This appointment was made. In due course, the LSM instituted a wide-ranging investigation. It was in the course of this investigation that Ms Campbell was suspended. As a result of the resignation of Board members, a Commissioner soon afterwards assumed governance responsibilities which brought the LSM's appointment to an end. A disciplinary process followed the investigation and resulted in a conclusion that over an extended period of time Ms Campbell's management and behaviour towards current and former staff members had been responsible for an unhealthy and harmful working environment at the school. The Commissioner decided Ms Campbell's actions and behaviours constituted serious misconduct, and that this warranted her dismissal which took effect in March 2014.

[3] Subsequently, the Employment Relations Authority (the Authority) held an investigation meeting and determined that the suspension was not justified, but that the dismissal was.<sup>1</sup> In respect of the established disadvantage grievance, the Commissioner was ordered to pay Ms Campbell the sum of \$5,000 as compensation for humiliation, loss of dignity and injury to feelings.

[4] Ms Campbell challenged the Authority's determination, electing a hearing *de novo*. Asserting that both the suspension and dismissal were unjustified, she sought reinstatement to her role as Principal of the school, along with significant financial remedies. The Commissioner opposed her claim for remedies and reinstatement, stating in response that appropriate steps had at all times been taken because Ms Campbell had acted improperly and then did not demonstrate insight as to the harmful culture she had created at the school.

[5] The challenge raises significant issues as to Ms Campbell's performance and conduct over a period exceeding six years. As a result, the Court has been required to consider a substantial quantity of information relating to Ms Campbell's

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<sup>1</sup> *Campbell v The Commissioner of Salford School* [2014] NZERA Christchurch 151.

interactions with pupils and their parents, staff, and Board members. All of that evidence has been carefully considered. Before summarising and analysing the issues which I must resolve, I describe the key events which gave rise to the employment relationship problems.

### **Chronology**

[6] Ms Campbell commenced employment as a first-time Principal at Salford in January 2006. Ms Michelle Poole, a former Chair of the Board, recalled that those appointing Ms Campbell realised she had comparatively little experience in school leadership and she had not been teaching for long. However, she was regarded as being innovative and insightful on educational practice. They were impressed by the fact that she wanted to empower students to learn and achieve by insisting on excellent practice.

[7] Prior to Ms Campbell's appointment there was discord amongst some staff; that discord was catalysed by the introduction of changes which Ms Campbell introduced following her appointment. This resulted in the Board appointing outside facilitators, who assisted in establishing more collegial relationships. Staff turnover was high throughout 2006 and 2007.

[8] On 30 June 2009, the ERO issued an evaluation for the school, which recorded good progress since Ms Campbell's appointment three and a half years previously. The report stated that the Principal's leadership was supported by staff who worked together in junior and senior teams to find more ways to help students learn and increase their levels of achievement; students received good quality education with high quality teaching practices being observed across the school. Assessment information was well analysed and used to help teachers make adjustments to their teaching practices. It was also noted that members of the Board had a good understanding of the school's programmes and practices, and of students' achievement levels. The ERO encouraged and supported the Principal and teachers to continue to build their knowledge and skills through regular professional learning and development. The report was generally positive.

[9] However, in 2012 it became evident that there were problems. In May of that year, Ms Campbell dealt with an employment issue concerning the Assistant Principal, Ms A,<sup>2</sup> who had commenced at the school in 2007. One of the issues related to Ms A's level of supervision provided to a junior teacher, Ms B, as well as the accuracy of the reports regarding this supervision. The process undertaken by Ms Campbell in responding to this issue resulted in Ms A deciding to step down to a teacher's position. This process was later the subject of a complaint by Ms B, it having entailed Ms Campbell and her legal representative interviewing Ms B during school swimming lessons.

[10] Some staff believed that Ms A was mistreated in this process, and that Ms Campbell was responsible for this. A rift developed and resulted in a group of staff ultimately approaching ERO and expressing their concerns regarding Ms Campbell's leadership.

[11] At the end of May 2012, the Board received a letter signed by eight parents about an incident that had occurred in a classroom a few days previously. They complained to the Board because they felt Ms Campbell was unapproachable. It was alleged that Ms Campbell had addressed students in an unacceptable manner. The letter advised the Board that parents were concerned their children would be targeted for reporting the incident and that this could further aggravate the situation. When the issue was referred to Ms Campbell, she noted that the words allegedly used had been taken out of context and misquoted, and that she had addressed the children in good humour. The Board was advised that Ms Campbell would take legal advice if they took the issue any further. The parents' complaint was dismissed by the Board.

[12] In June 2012, ERO officers visited the school for observation purposes. They alerted members of the Board and Ms Campbell to the fact that 11 anonymous complaints had been received; details of these were incorporated in a summary later made available to Ms Campbell and the Board. A variety of concerns were raised, including recruitment and retention issues due to apprehension generated by Ms Campbell; some complainants thought the working environment at the school was unsafe; reference was made to foul language, a culture of intimidation, as well

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<sup>2</sup> The names of staff members who did not give evidence have been anonymised.

as bullying by Ms Campbell. One complainant stated that most staff were too scared to stand up to Ms Campbell, and that she was particularly tough on beginning teachers. Ms Campbell responded to the visit of ERO officers by putting the school's insurers on notice of the lodging by her of a "potential" personal grievance against the Board, the grounds of which were not outlined in evidence. This step was apparently intended to discourage formal action by the Board in response to the complaints.

[13] The Board found these issues difficult to deal with, particularly as Ms Campbell had also engaged a lawyer to represent her. Ms Campbell had also obtained advice from an executive officer of NZE; she tabled an email from that officer which stated that a proposal under consideration by the Board that they institute an inquiry using an outside agency would be "very risky" for the Board. The NZEI representative said that genuine concerns should be dealt with via a proper complaints process and that complaints could only be properly investigated if there were sufficient details. If specific complaints were made, they could then be investigated in accordance with a complaints policy, and in accordance with normal employment law practice; the use of an external fact-finder could also be appropriate to inject objectivity and neutrality into the investigatory process. The later remarks as to process were prescient.

[14] In ERO's report of 22 August 2012, it was noted that prior to and during its review a number of past and present staff members and also some parents had expressed serious concerns regarding aspects of Ms Campbell's leadership. It was recorded that members of the Board had indicated that prior to the review, they were unaware of the extent of the dissatisfaction, and that the Board was now taking steps to investigate and address those issues.

[15] The ERO Report contained a recommendation to the Secretary for Education that she consider intervention under Part 7A of the Education Act so as to support the Board in investigating the concerns of staff and parents as to Ms Campbell's leadership. It was suggested that this would bring about improvements that would ensure the school had systems in place for effective governance and management, a safe environment for students and employees, and a robust self-review process.

[16] After taking legal advice, the Board asked Mr Hay to investigate the employment issues identified in the ERO Report. In mid September 2012, Mr Hay met with representatives of the Board, the Principal, a past staff member, three parents and 13 of 16 current staff members; in all a total of 19 interviews were held. He reported that there was high staff dissatisfaction and a tense workplace which was predominantly attributable to “the performance” of Ms Campbell. Reference was made to deliberate targeting of staff, inappropriate use of language, yelling at students and teaching staff, an atmosphere of fear, and concerns as to retribution and repercussions if complaints were laid.

[17] Mr Hay made a significant recommendation in his report in these terms:

[There are] certainly issues of workplace relationships and safety for the Board of Trustees to address. The weighting of the interviews would suggest that a very high percentage of Salford staff are unhappy in their work and feel unsafe in the present environment, predominantly due to the principal’s delivery and personal management ...

*As there have been no formal complaints and a reluctance to do so, the Board will need to address these matters through immediate and stringent performance improvement strategies. I therefore would recommend an amended performance agreement to address these with a specific review date (perhaps end of Term 2012, and again end of Term 1 2013) to ensure there has been satisfactory progress made. My recommendation would be measuring this progress through full staff and parental surveys against the Culture criteria in the Primary Principals’ Professionals Standards with an expected return of 80% satisfaction. I would also recommend some immediate professional development of the Principal with behavioural specialists as her Principal knowledge and attributes are not contested by the staff but her personality and delivery of personnel management.*

(Emphasis added)

[18] Later in Mr Hay’s report he concluded it was likely there had been serious misconduct issues, but that no person was willing to complain due to the atmosphere of fear in the workplace. He accordingly reiterated that performance improvement strategies and measures should be acted on urgently. When summarising his overall conclusions and recommendations, he stated that there was most certainly “industrial relations’ strife” which if left unattended by the Board would have a negative effect on student progress and achievement outcomes, staff turnover, health and safety implications and personal grievances. He considered that there was an atmosphere

where formal complaints were not being filed but were certainly warranted. As with the ERO report, the persons to whom he had spoken were not named.

[19] The Board met on 20 September 2012 to discuss the recommendations which had been received from Mr Hay. It resolved that it would approach the Ministry with a view to appointing a LSM to work with the Board on employment and complaint issues. The Board also decided at that meeting that the classroom complaint<sup>3</sup> should be reviewed because it had emerged the teacher who had witnessed the event was fearful of retribution by Ms Campbell.

[20] At a meeting held on 25 September 2012 when the ERO Report was presented to staff, Ms Campbell made a significant statement. She acknowledged that her leadership had led to the adverse comments made by ERO, but said that her leadership would also lead the school out of that position.

[21] The Chair of the Board, Ms Chris Cole, then wrote to Ms Campbell asking her to respond to the allegations made in both the ERO report and Mr Hay's report. On 1 October 2012, Ms Campbell's lawyer wrote to Ms Cole in response, suggesting that the various issues existed "only in the mind of a small group of malcontents". It was contended that there was probably not a school in the country which did not have parents or staff who believed their school should be run differently. Disciplinary action could not be taken against Ms Campbell without following a fair process, which should start with advising the employee of the factual allegations amounting to the alleged misconduct. Anonymous expressions of opinion were said to be worthless.

[22] Accompanying the letter was a memorandum from Ms Campbell herself who stated that without details it was not possible to respond other than in general terms. She said that she disagreed with the various findings made by Mr Hay as to alleged misconduct. She said the allegations that she was a bully and threatened staff, students and parents could not be substantiated. She referred to the preceding years where no personal grievances had been raised in relation to the school. Ms Campbell said there were good reasons for staff turnover unrelated to her

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<sup>3</sup> See para [11].

management. She emphasised that the ERO report was positive from a teaching and learning perspective. She believed that if particular new or improved strategies needed to be introduced she would be supportive of these, but on the basis that herself and the Board would be seeking to improve best practice and not because the allegations were true. She was happy to discuss this if needed.

[23] On 10 October 2012, Ms Campbell forwarded a memorandum to the Board suggesting processes for resolving concerns held by staff. This memorandum was presented to Ms Cole, and it is unclear whether it was passed on to the Board. Included in her recommendations was the establishing of a revised complaints procedure and the appointment of an independent complaints officer who could assess and advise on staff complaints if received. It was her contention that the Board needed to be proactive.

[24] At the same time, Ms Campbell's lawyer wrote to Ms Cole reinforcing the earlier comments which had been made, but also stating:

Mr Hay's suggestion of assistance with appropriate management techniques make sense, however his suggestion that this should be measured through 'full staff and parent surveys against the culture criteria in the Primary Principals professional standards with an expected return of 80% satisfaction does not. Mr Hay noted that the majority of those interviewed are currently highly dissatisfied. It is difficult to see how this high level of dissatisfaction can be turned around to an 80% satisfaction level in the shorter medium term. Clearly progress in this direction is required; ...

[25] Ms Campbell's performance appraisal for the year 2012 was finalised by an appraiser, Mr Rex Whiting, in a report dated 6 November 2012. Mr Whiting was required to measure Ms Campbell's performance against four areas of practice, one of which related to "Partnerships and Networks" criteria. He considered that the key objective of successfully implementing a vertical leadership structure at the school was not met, and the key objective of establishing a good working relationship with Ms Cole was only partially met.

[26] Relevant for present purposes are Mr Whiting's references to the reports which had been received in the course of the year, and his observation that these had a major impact on the Principal and Board. Mr Whiting suggested that the allegations in respect of leadership had been very unsettling. The Board's Chair was

recorded as stating that there was now an issue of trust between the Principal and Board which would have to be re-established.

[27] Mr Whiting also said that resolution of the difficulties was being handicapped by the time it was taking the Ministry to appoint an LSM. Until the details of such an appointment were known, it was difficult for the Board and Principal to move forward constructively.

[28] On 8 November 2012, the Secretary for Education appointed Mr Peter Macdonald as LSM of Salford. That appointment was made under s 78M of the Education Act which provides that from the date on which such an appointment takes effect, any functions, powers or duties of the Board specified in a notice of appointment vest in a LSM, and the Board must take into consideration advice given by a LSM on any matter in which he or she is obliged to give advice.<sup>4</sup>

[29] The Memorandum of Understanding (MoU) which appointed Mr Macdonald confirmed that he had been vested with the functions, powers and duties of the Board:

- in the management of health and safety of students and staff;
- as an employer (whether statutory or otherwise);
- and as to the establishing of procedures and processes for school-wide self-review and the investigation and resolution of complaints to the Board.

[30] On the topic of anticipated employment outcomes, the MoU described the specific actions that were required of the LSM with regard to the Principal. These included observations to:

- review the Board's employment management policies and to implement a robust and effective performance management system;

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<sup>4</sup> Education Act 1989, s 78M(4).

- manage the Principal’s performance, setting goals for improvement and monitoring progress to achieve these as recommended in an issues report;
- ensure that the Board’s employment responsibilities were met; and
- investigate the reasons for the current high level of staff turnover and to implement appropriate measures to address this issue.

[31] The MoU also required the LSM to keep the Board fully informed of progress against required outcomes. Whilst it was desirable for the LSM to consult with the Board on any proposed action relevant to the exercise of power, the LSM was not required to obtain the Board’s agreement before exercising the functions and powers vested in him.

[32] Mr Macdonald had a background in human resources and employment relations; he also had a close association with educational institutions having worked with schools as an employment advisor; and had been appointed on some nine occasions as a LSM. He considered such a role to be a difficult one that often attracted controversy since such appointments were invariably linked to suggestions of poor leadership and dysfunctional relationships. In his opinion, Salford was no exception.

[33] He also told the Court that Ms Campbell was by far the most difficult Principal with whom he had worked. He said that whilst he and Ms Campbell were able to work professionally and successfully on “nuts and bolts” issues concerning the school, when it came to considering or addressing issues relating to her leadership, performance or staff satisfaction she was uncooperative and it was impossible to talk to her. He said his experience was that she refused to engage or communicate and simply “turned off” whenever there was an attempt to converse on these issues.

[34] For her part, Ms Campbell believed that Mr Macdonald’s appointment only served to exacerbate the divisions in the school, and that it undermined her and the school’s management. She did not consider that she had a good working relationship

with Mr Macdonald, whose only interest appeared to be on securing her departure, rather than on focusing on reconciliation within the staffroom.

[35] Mr Macdonald was on leave from late November to early December 2012. During that period, an incident occurred which demonstrated significant unease amongst staff. Ms Campbell held staff interviews for four 2013 positions. Later, an allegation was made that three incumbent teachers had been offered permanent positions by Ms Campbell who had neglected to inform the Board's Appointments Committee. One of those offered a permanent role missed out on the position because it was in fact given to a relieving teacher. Staff were upset and distressed by these events. Two personal grievances were lodged. As Ms Campbell and Mr Macdonald were both away Ms Cole met with staff so as to understand what had occurred. She considered that the school was "disintegrating under no leadership and over boiling emotions that are erupting after a long period of repression". In her view, there was an absence of a senior management structure after Ms A had ceased to be the Assistant Principal, Ms Campbell was not making decisions and Salford had employed staff who were "young and fairly reactive".

[36] When Mr Macdonald commenced his role he interviewed staff and Board members, both individually and in groups, with a view to obtaining an impression of the school environment. This was an aspect of an initial scoping phase which he was required to undertake.

[37] On 12 December 2012, he met with Ms Campbell to provide feedback. He told her that staff had expressed concerns as to leadership. Mr Macdonald said that the decline in morale was such that with no plan in place stress on Board members, staff and Ms Campbell herself would increase. The situation was unsustainable. He wished to hold a meeting early in the New Year with members of the Board and Ms Campbell. He said she may wish to have her lawyer present. He considered that the school was "on the brink" and if it was not moved forward a Commissioner would need to be appointed in the following year. Ms Campbell responded to Mr Macdonald by confirming that she "was listening".

[38] In early 2013 Mr Macdonald investigated the complaint Ms B had lodged in early December 2012 regarding the way in which Ms Campbell and her lawyer had interviewed her in late May 2012 about Ms A's supervision of her. She said she was interrupted whilst teaching children swimming, interviewed inappropriately at the swimming pool in a manner that caused her to be very upset; and that later Ms Campbell had tried to make amends by attending her home with alcohol, stating that she was sorry for what had occurred. She said she had made no attempts to resolve the situation to this point for fear of retribution by Ms Campbell as well as staff members who supported Ms Campbell. She felt that her rights had not been acknowledged or adhered to, and that she had been intimidated, humiliated and misled.

[39] On 22 February 2013, Mr Macdonald recorded in a report he submitted to the Ministry that several complaints had been received and investigated, with two complaints not being upheld due to a lack of evidence. With regard to Ms B's complaint, Mr Macdonald advised that it had been upheld and he was considering what, if any, disciplinary process would be instituted. The evidence shows no further process was instigated, although it was not until more than four months later, on 8 July 2013, that Mr Macdonald advised Ms Campbell's lawyer to this effect. He said that by this time there were other substantial issues to which priority should be accorded.

[40] In his February report to the Ministry, Mr Macdonald also recorded he was "finalising the timeline, structure and content" of Ms Campbell's Performance Agreement. He said it would be conducted by the Chairperson of the Board and himself, with potential for an external review. He confirmed the process would be in accordance with Part 4 of the Primary Principals' Collective Agreement, and that it would commence in March 2013.

[41] Mr Macdonald further advised that a review and reorganisation of the Senior Leadership Team (SLT) was close to implementation. He was also about to commence an inquiry into the process that implemented the resignation of the previous Assistant Principal.

[42] Ms Campbell said that by about this stage she had concluded she was not supported by Mr Macdonald. However, in response to staff concerns, she realised she had to address aspects of her management style which she acknowledged could be direct. She was now refraining from swearing or making inappropriate comments or indulging in humour in the staff room, and was more vigilant as to the use of inappropriate language by others.

[43] Ms Campbell considered that the subject of her leadership was rarely raised with her by Mr Macdonald. She said there was no meeting where this was discussed, and no introduction of an action plan in that regard. She herself arranged for Dr Wendy Bamford, Principal of a Central Otago School, to provide advice and mentoring as to leadership, a role which was undertaken from approximately August 2012 to late October 2013. Ms Campbell also engaged Interlead which provided assistance on leadership and management issues.

[44] Ms Campbell's appraiser, when summarising her professional involvement for 2013, confirmed that Ms Campbell kept herself professionally up-to-date and was heavily involved in a leadership role in education in Southland. This was exemplified by her directorship of Enrich ILT, a facility for enhanced education, her role as convenor of an education conference held in Invercargill and her monthly attendance at Invercargill Primary Principal's meetings.

[45] In early 2013, Ms Campbell organised and ran a teacher-only day. For the purposes of this or any other workshops, she was instructed by Mr Macdonald not to talk to staff about "the ERO issues". He said he wanted first to determine whether workshops were an appropriate way of addressing such issues.

[46] In February 2013, having been contacted by a former teacher, Mr Macdonald held two meetings with groups of teachers who had worked at Salford; speaking to 10 former teachers in total. He said that a similar story was told by all: they had left Salford as a direct result of being unable to accept the Principal's undermining and sometimes bullying management style. However, none were willing to lodge a complaint. Mr Macdonald said that by this time he was taking legal advice from the school's legal advisors as to options for addressing such issues as well as reporting to

the Ministry and the New Zealand School Trustees' Association (NZSTA, the organisation which supports Boards in the discharge of their responsibilities).

[47] In March/early April 2013, Mr Macdonald met with Ms Campbell on her own. This was not a planned meeting; he wanted to provide informal feedback. In the course of the conversation, Mr Macdonald said that it must be stressful for Ms Campbell to be a Principal with all that was going on. In evidence, he denied that he had wanted to discuss an exit proposal. This conversation did not result in an improvement in their relationship, or any understandings as to constructive steps which might be taken to address concerns.

[48] In May 2013, Mr Macdonald formed a committee to consider a proposal to restructure the SLT at the school so as to improve communication channels. Despite Ms Campbell's opposition to Ms A's reinstatement, she was reappointed as Assistant Principal. It is clear that the SLT then operated in a constructive fashion. Ms Campbell considered that there were several positive initiatives which the SLT was able to develop. One member of the SLT who gave evidence observed that Ms Campbell was "focused and positive" as a member of the SMT. Later comments made by staff about the establishing of the SMT were also positive.

[49] Early in 2013, Ms Campbell asked Mr Macdonald what arrangements were to pertain to her Performance Appraisal for that year. There was some delay in appointing an appraiser, but by March 2013 Mr Wayne Green had agreed to undertake the role. He commenced the necessary visits to the school for obtaining of feedback on 26 March 2013.

[50] Although the appraisal was not completed by Mr Green until 23 October 2013, the evidence is that in mid 2013 he met with Ms Campbell, Ms Cole and Mr Macdonald to advise as to the surveys of parents, teachers, students and Board of Trustees which he had undertaken by that time. Only eight teaching staff completed the survey. Mr Green expressed concern at the wide disparity of opinions amongst staff as to Ms Campbell's leadership. He said that the survey revealed serious issues that some teachers, parents and Board of Trustee members had with Ms Campbell's leadership, including a perception of a majority of teachers

that they were not being treated fairly; with some finding her confrontational and her manner frightening.

[51] Mr Macdonald was to be away for the month of June. Prior to his departure, he said he oversaw the initiation of a questionnaire survey of 16 staff, carried out by Ms Cole and the Deputy Chair of the Board, Ms Rowana Skelt. The information received was then collated on an anonymous basis. The responses included the following:

- a) First as to what had improved in the working environment since the 2012 ERO review. Two particular comments were made to the effect that the Principal was endeavouring to be more proactive, supportive, praising and fair; and that the SLT's structure was good, it being noted that there were good processes involved and more people to approach for communication purposes.
- b) As to what had not improved in the working environment since the 2012 ERO review, emphasis was placed on a lack of trust and respect in the Principal, a lack of professional working relationships between staff, and an absence of boundaries as to confidential communications.
- c) Under general, two particular comments were noted. Six staff were currently looking for alternative employment; and an observation was made that one staff member needed to leave, although she did not want to, because the working environment would not improve.

[52] Staff were also asked to rate the positives and negatives of the working environment according to a scale. These results suggested that the majority of staff held a higher level of satisfaction since the presentation of the ERO report. I shall discuss these later.

[53] Ms Campbell stated that on 15 July 2013 she met with Ms Cole and Mr Macdonald who advised her of the survey results. Mr Macdonald said they were all negative with staff wishing to leave the school because of Ms Campbell's

leadership. She said she was told the results were confidential and she was given only a verbal summary.

[54] At a Board meeting that evening the results were discussed. Mr Macdonald emphasised that in any organisation where trust and confidence was broken it was extraordinarily difficult to repair. It was his assessment that there were significant relationship issues within the school which were in urgent need of “investigation and resolution”.

[55] By August 2013, Ms Campbell had lodged a personal grievance regarding the outcome of the complaint which had been brought by Ms B.<sup>5</sup> Emails sent by Mr Macdonald to the Ministry at this time confirmed Mr Macdonald had discussed with his advising lawyer, Mr Geoff Bevan, whether the personal grievance raised the prospect of a “privately negotiated settlement”. If a privately negotiated settlement did not prove possible, mediation could be conducted to allow a discussion “on all relevant matters including the question of a negotiated exit”. There had also been discussion with Mr Bevan as to whether it could be argued that Ms Campbell was “incompatible”, in the context of a recent decision of the Employment Relations Authority in *Edwards v Anderson Limited Statutory Manager of Bay of Islands College* which Mr Macdonald considered was a mirror of the Salford situation.<sup>6</sup>

[56] The representative of the Ministry who was liaising with Mr Macdonald sought confirmation as to whether the Principals’ Performance Agreement had been completed. Mr Macdonald responded by stating he was about to meet with the external appraiser, in order to finalise the Principal’s objectives. To this point specific performance improvement strategies had not been introduced, notwithstanding Mr Hay’s recommendation to that effect in his September 2012 report.

[57] On 11 August 2013, Ms C completed an exit interview questionnaire following her resignation. She said she could no longer suffer the stress levels that

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<sup>5</sup> See para [38].

<sup>6</sup> *Edwards v Carol Anderson d Statutory Manager of Bay of Islands* [2013] NZERA Auckland 327; a successful challenge was subsequently brought: *Edwards v The Board of Trustees of the Bay of Islands College* [2015] NZEmpC 6.

had resulted from the way she had been treated by other staff at the school since the ERO report of 2012. This was because some staff perceived that she had an inappropriately close professional relationship with Ms Campbell as Principal. Whilst she felt supported by some colleagues, particularly three members of the SMT of which she was a member, she felt that issues had become unduly personalised amongst staff; they needed to be positive and move forward as a team. That said, she observed that Salford had “an amazing teaching community”.

[58] On 12 August 2013, a Restricted In-Committee Meeting of the Board was held; Ms Campbell was recorded as having been excused. Mr Macdonald reported that discussion between lawyers had not occurred as had been planned, and that a date for mediation had now been established for 17 September 2013. In a lengthy discussion, Mr Macdonald emphasised that the situation was not improving. Options included resolving issues amicably, or moving to a strict performance management process. He said that either Ms Campbell stayed and staff left, or Ms Campbell left and staff would remain. This statement was, Mr Macdonald explained in evidence, based on his assessment of the staff survey which had been carried out in June 2013. There was discussion as to “the merits of a change of principal”. Mr Macdonald said he would like to be able to come to an understanding so as to preserve Ms Campbell’s dignity. Then everyone could move on and he said this would be in both parties’ interests.

[59] On 28 August 2013, Mr Macdonald wrote to Ms Campbell. He emphasised the concerns revealed by the Board’s staff survey, and stated that he wished to send an email to current staff and a small number of former staff who had expressed concerns over the previous six to 18 months. The purpose of the email would be to request information as to any concerns held by staff. Any issues could then be discussed in the upcoming mediation, although he did not rule out some statements being used for formal processes thereafter. He said that the atmosphere and concerns at Salford had not improved to the degree needed. He wanted to clarify whether it was Ms Campbell’s behaviour which was the problem – if so requirements and systems would be put in place. He went on to say that if apparent concerns were trumped up or unfair to Ms Campbell, and/or there were problems in other areas, then he needed to know this. The status quo was not sustainable.

[60] At the same time Mr Macdonald directed Ms Campbell not to discuss the anticipated process or his email with any other person, other than her legal adviser. In particular she was not to discuss the process directly or indirectly with any person who might be a recipient of the proposed email to staff. Whilst he was offering her the opportunity of commenting on the draft email, he said he wanted to signal that he was likely to send it, simply because he could not see how the situation could be moved forward unless there was an understanding as to the large amount of negative feeling that clearly existed.

[61] On 30 August 2013, Ms Campbell's lawyer responded strongly contesting the proposed course of action saying it appeared to be one which was designed to cause Ms Campbell further unnecessary distress. The lawyer said the initiative seemed to be an attempt to obtain information against Ms Campbell, and to escalate matters prior to mediation in an attempt to establish grounds for her to either leave or be dismissed. In short, there was not agreement that the proposed email be sent.

[62] On 5 September 2013, Ms Campbell conducted mid-year staff appraisals, having first obtained Mr Macdonald's consent for doing so. A range of feedback topics were covered, including the extent of support individual staff members felt Ms Campbell was giving as Principal. Following each appraisal interview, a record was made of the interview, and each staff member and Ms Campbell countersigned it. Of the eight appraisals placed before the Court, most were positive about Ms Campbell in various respects, and of the restructured SLT. Mr Macdonald said that he did not recall seeing these at the time.

[63] On 6 September 2013, the lawyer advising Mr Macdonald, Mr Bevan, wrote to Ms Campbell's lawyer. The letter covered a range of topics, including the need to obtain "specific identifiable allegations from identifiable people", which to date did not exist. The letter went on to address whether there should now be a further independent investigation, stating that it was time to speak to staff "specifically and directly". The current concerns regarding Ms Campbell were recorded by Mr Bevan's letter in this way:

- a) The climate of unhappiness and fear that to some extent exists amongst a number of current staff, and the behaviour that has

allegedly caused this (identified allegations include yelling, deliberate targeting of one person, “mind games”, inappropriate “style of delivery”).

- b) Ms Campbell has not directly or constructively engaged with either the School or Mr Macdonald as her employer, with a view to honestly and openly addressing the issues. It appears this behaviour predates Mr Macdonald’s appointment.
- c) Further, Ms Campbell appears to have taken a confrontational approach to the ERO, Mr Hay and Mr Macdonald, and she has not demonstrated to the Board or Mr Macdonald sufficient (or any real) willingness to own her responsibility (or her potential responsibility) for the issues which have arisen. The school accepts that the degree of challenge by Ms Campbell to the ERO / Hay processes was understandable:
  - i) Ms Campbell is within her rights to challenge behaviour which is unfair;
  - ii) from a human point of view, the matters being raised are difficult, and there is inevitably going to be a degree of defensiveness; and
  - iii) the nature of the ERO and Hay investigations meant Ms Campbell was not given specific details of the complaints. In addition, Ms Campbell did not know the ERO were already aware of complaints about her when they came to the school.

However, the School is concerned that the degree and ongoing nature of her challenges (evidenced by [a recent email from her lawyer]) is both inappropriate, and a real and substantial barrier to resolving the issues.

[64] It was accordingly proposed that Mr Macdonald and Ms Cole would investigate these concerns, initially by obtaining statements from current staff members and a small number of parents and former staff members who had expressed concerns to the school. An outline of the intended process was given. Ms Campbell was told that she could not, in view of the allegations and her position, speak to staff about their concerns. It was explained that there was no intention to suspend Ms Campbell during the investigation, but if it was thought she was behaving in a manner which compromised the investigation, then that option might have to be considered. It was accepted that neither Mr Macdonald nor Ms Cole were “fully independent”, but it was not deemed appropriate to undertake yet another independent investigation because the employer needed to understand the issues.

[65] On 10 September 2013, Ms Campbell's lawyer responded, pointing out there were statutory and contractual processes designed to assist in resolving situations such as the present. It was pointed out that details of the alleged conduct and performance issues had been repeatedly sought and not given. It was indicated that Ms Campbell would welcome a properly conducted investigation by someone with the appropriate skills and no vested interest in the outcome. She would not welcome an investigation conducted in the same manner as had occurred with regard to Ms B's complaint regarding the interview during swimming class, which Mr Macdonald had dealt with. Nor was it appropriate for Ms Cole to be involved, given the Board's obligation to follow Mr Macdonald's advice on employment matters. Reference was made again to the provisions of the collective agreement which Ms Campbell's lawyer said clearly set out the requirements for investigating concerns relating to a principal's conduct or performance.

[66] On the same day Ms Cole and Mr Macdonald met members of the SLT for interviews each of which were, on average, 30 minutes in duration. A number of the comments emphasised that the SLT was operating as a team, establishing trust among teaching staff.

[67] That evening a Restricted In-Committee Meeting of the Board was held; again Ms Campbell was excused. The forthcoming mediation was discussed. Mr Macdonald noted that Ms Campbell had displayed a significant change in behaviour which had generated some doubt as to whether or not to proceed; however, there remained "great concern whether this behaviour change is sustainable". He said he genuinely believed it was time for a fresh start for both Ms Campbell and the school. The Board and LSM had been micro-managing "management responsibilities", which should not have been the case.

[68] Reference was made to the SLT meeting earlier that day. It was observed that staff had not come out of their shells unless they were talking about students. New staff were engaging at a different level when compared to staff employed prior to the ERO review. A lack of dialogue was said to be "obvious". It was then moved that the Board delegate authority to Ms Cole and Mr Macdonald to reach a settlement "within the bounds of the mediation meeting with Principal Marlene Campbell

within agreed parameters”. Later Mr Macdonald told a Board member this meant he and Ms Cole could negotiate an exit in mediation on “reasonably agreed terms”.

[69] Correspondence between the parties’ lawyers continued to be exchanged as to the proposed investigation. For Ms Campbell it was emphasised that Mr Macdonald should not be one of the investigators. Her lawyer said she did acknowledge the need for an independent investigation. The parties also exchanged correspondence as to the form of a letter which would be sent to staff advising them of the intended investigation.

[70] Mediation took place on 17 September 2013 against the background of the pending investigation. The parties’ issues were not resolved.

[71] On 18 September 2013, Ms Campbell’s lawyers proposed that as an alternative to a further investigation, the school should engage an educational expert to facilitate professional development including team building, assessment and analysis of issues and the discussion of ways of resolving the issues in practice at appropriate workshops. Such a process would not involve lawyers. This proposal was not accepted, and correspondence of a somewhat adversarial nature continued between the lawyers. That correspondence confirms that by 18 September 2013, Mr Macdonald had decided he would not be one of the investigators. Interviews would be conducted by Ms Cole, assisted by the school’s legal advisor, Mr Bevan. Staff were informed of the investigation on 27 September 2013; and former staff in early October 2013.

[72] As part of the investigation, interviews conducted by Ms Cole and Mr Bevan were held over three days, 21-23 October 2013, at a neutral venue. Ms Cole and Mr Bevan each recorded the comments that were made. They will be summarised shortly.

[73] On 23 October 2013, Mr Green’s appraisal report was finalised, details of which have already been discussed.<sup>7</sup>

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<sup>7</sup> At para [50].

[74] On 25 October 2013, Ms Cole wrote to Mr Macdonald advising of her resignation from the Board of Trustees as she felt she could no longer maintain her objectivity as Chair in her dealings with Ms Campbell. Her resignation was followed soon thereafter by the resignations of other Board members. These resignations were accepted in a Board meeting on 31 October 2013. Also carried was a resolution that the Board be disestablished and that the Ministry be requested to appoint a Commissioner as soon as possible in order to protect the future of the school.

[75] On 30 October 2013, the Southland Times published an article regarding events at Salford. It referred to the investigation, the interviewing of staff, and the resignation of Ms Cole as Board Chair. It went on to refer to Mr Macdonald's appointment as LSM, and commented that the school had cut its curriculum budget in order to meet the costs of that appointment.

[76] On the same day, Mr Bevan sent to Mr Macdonald a "confidential interim interview summary" and a "draft letter". The draft letter confirmed that 27 current or former staff had been interviewed, five of whom requested that all or most of what they had told Ms Cole and Mr Bevan be kept confidential from Ms Campbell. Mr Bevan said that of the current 16 staff, eight had expressed serious concerns about Ms Campbell, whilst five were positive. Of the 11 former staff spoken to eight expressed serious concerns. Of all those interviewed, Mr Bevan said that 44 per cent expressed more than minor concerns as to Ms Campbell's treatment of the Assistant Principal.

[77] In that letter, Mr Bevan commented that there was unanimous opinion from current staff that the environment had improved significantly in 2013 with particular mention being made of the success of the SMT, and that Ms Campbell's approach to staff and children had "improved significantly". The issue, however, was whether this improvement would continue. It was acknowledged that the investigation itself had led to some tension and suspicion between groups within the staff.

[78] Reference was made in the letter to concerns which had emerged regarding Ms Campbell's behaviour prior to the ERO Report of 2012. Mr Bevan described

these concerns as including serious and unacceptable treatment of staff, use of bad language, inappropriate treatment of children, unacceptable comments about parents, a culture of favouritism with certain staff while others were targeted or belittled, and a perception that Ms Campbell would use her influence to harm the future job prospects of departing staff, or use legal proceedings against staff who made complaints or with whom she was otherwise unhappy.

[79] Mr Bevan went on to state that there were now concerns as to the safety of staff if Ms Campbell were to be provided with a summary of the information which had been obtained. Consequently the release of information to Ms Campbell would need to be “managed” to minimise the potential for harm. He proposed that Ms A should be given leave to avoid Ms Campbell and Ms A being at the school together when Ms Campbell was provided with the information.

[80] The interim record of interviews which was attached to the letter was in spreadsheet form. It summarised comments which had been obtained from multiple interviewees collated into columns which included Ms Campbell’s comments about parents, staff, treatment of Ms A, swearing at staff, treatment of children and staff, current concerns, issues relating to Ms C, and general feedback including as to the investigation process.

[81] On 31 October 2013, Board members and Ms Campbell met staff to advise them of the developments occasioned by the dissolution of the Board. After Board members and Ms Campbell left the staff room, there was a robust discussion between staff. Those who had told the investigators there was an unsafe work environment were challenged by those who were supportive of Ms Campbell. Staff who had made negative comments about Ms Campbell felt intimidated and undermined when they were asked why they would make such comments when much work had been devoted that year to developing a trusting working relationship, particularly via the SLT.

[82] Subsequently, Ms A and other staff members contacted Mr Macdonald and expressed their concerns about this exchange. He was told that those who had criticised Ms Campbell understood they were being told by their colleagues they

were the primary reason for division within the school and they should stop causing trouble. Mr Macdonald concluded that the meeting had caused considerable upset for these staff members; he was concerned for their emotional safety in the workplace.

[83] This development was, Mr Macdonald said, a “tipping point” as to whether Ms Campbell should be suspended. It resulted in a letter being sent by Mr Bevan to Ms Campbell’s lawyers, late in the afternoon of Friday, 1 November 2013. It referred to the interview process, and attached a copy of the spreadsheet which summarised interviewees’ responses. It described concerns which were said to justify suspension. These are set out and discussed fully later in this decision. The letter went on to state that Mr Macdonald had concluded “on a preliminary basis that Ms Campbell should not be at work until the investigation concludes”. Ms Campbell was accordingly instructed:

- not communicate with any person other than her legal advisors and close family regarding the letter.
- to leave work immediately and not report to school on the following Monday; and
- to attend a meeting by telephone at 8.30 am on Monday, 4 November 2013 to discuss “the proposed suspension” so that Mr Macdonald could receive her views before making a final decision.

[84] In his letter, Mr Bevan stated that if it was not confirmed by later that day that Ms Campbell would attend the meeting proposed for 8.30 am on the following Monday, it would be assumed she would not do so and a statement would then be sent out to staff. Mr Bevan emphasised to Ms Campbell’s lawyer that concerns as to what had occurred since the investigation was announced, particularly over recent days, had led to the preliminary decision to suspend.

[85] Ms Campbell had left the school to attend a family reunion away from Invercargill in the course of the afternoon of Friday, 1 November 2013. She did not receive a copy of the letter sent to her lawyer until she returned on Sunday,

3 November 2013. However, the spreadsheet attached to the letter was not in a legible form and she could not read it at that stage.

[86] On Saturday, 2 November 2013, Mr Bevan sent to Ms Campbell's lawyer a draft statement which Mr Macdonald wished to provide to "the school community, including staff" on the following Monday morning. It stated Mr Macdonald had been persuaded to suspend Ms Campbell from her role as Principal while the investigation continued. Ms Campbell's lawyer responded by stating that the draft statement was entirely inappropriate; there had been no consultation as to a proposed suspension; and given that a Commissioner was to be appointed shortly following the resignation of Board members, it was also inappropriate for Mr Macdonald to suspend Ms Campbell as a "parting shot". Any question of suspension should be a matter for the Commissioner who would need to decide what should be done about the investigation. This exchange resulted in Mr Bevan modifying the proposed statement so that it referred to Mr Macdonald having made "a preliminary decision to suspend" Ms Campbell from her role as Principal while the investigation continued.

[87] In an email from Mr Bevan to Ms Campbell's lawyer on the Sunday evening, Ms Campbell was requested to provide feedback on the preliminary decision to suspend by 1.30 pm the following day since she had not had access over the weekend to the information which had been forwarded.

[88] At 6.11 am on Monday, 4 November 2013, the statement which had been sent to Ms Campbell's lawyer the previous day was sent to staff and members of the school community. It stated that a "preliminary decision" had been made to suspend Ms Campbell.

[89] On the same day, Ms Campbell's lawyer advised Mr Bevan again that the time which had been provided for response was unreasonable because Ms Campbell had not been given a genuine opportunity to provide a substantive response to the suspension proposal. It was asserted that no statement would have been sent to staff if there had been a genuine "preliminary" decision. Suspension in the circumstances was unfair; it had been prompted by members of the SLT placing pressure on staff,

not because of any step taken by Ms Campbell. She had been instructed not to discuss the investigation with anyone, and had not done so. She was unaware of the situation which had developed at the staff meeting, having not been present. She needed to be at work to facilitate the transition from LCM to commissioner. It was emphasised that any decision regarding suspension should be left to the incoming commissioner. If the suspension was not lifted promptly, Ms Campbell would be advised to raise a personal grievance.

[90] Having spoken to Mr Macdonald, Mr Bevan suggested to Ms Campbell's lawyer that there be an agreed announcement to the effect that Ms Campbell would stand aside from her position on a temporary basis whilst the investigation was completed. A response was sought by 9.30 am the following morning for a statement to be released soon thereafter. This proposal was not accepted.

[91] At 11.00 am on 5 November 2013, a public statement was issued by Mr Macdonald. It referred to the inevitable appointment of a commissioner in light of the resignation of Board members, and advised that the investigation would be continuing with a final report expected "in a few weeks." It further advised that on the basis of material given to him and his concerns about staff welfare in the current environment, he had suspended Ms Campbell as Principal. The same day, the Southland Times reported that Ms Campbell had herself released a statement the night before. She said that Mr Macdonald had been "looking for an excuse to get rid of me". It was reported that she had been suspended.

[92] On 7 November 2013, the appointment of Ms Nicola Hornsey as Commissioner of the school was published in the Gazette. She was an employment advisor with significant governance experience and a background as a lawyer which included practising employment law.

[93] On 15 November 2013, a meeting occurred between Ms Campbell and her lawyer (a partner from the firm for which Mr Bevan worked) on the one hand, and Ms Hornsey and her lawyer on the other. Ms Hornsey's lawyer stated that she was now in the course of reviewing the decision to suspend. Ms Campbell and her

lawyer gave detailed submissions to the effect that the suspension was not procedurally or substantively justified.

[94] On 26 November 2013, Ms Hornsey wrote to Ms Campbell with her decision regarding suspension. She stated that because the allegations of misconduct were serious and they suggested a pattern of behaviour which had continued over a long period, to allow her to return to her role would pose an unacceptable risk to the emotional safety of current staff, and potentially the integrity of the investigation which it was confirmed would continue with Mr Bevan as the sole investigator since Ms Cole had resigned as Board Chair.

[95] On 10 December 2013, the Authority heard an urgent application for reinstatement on the basis that Ms Campbell's suspension was unjustified. In its decision of the following day, the Authority declined to grant the order sought. The Authority determined that even if reinstatement was granted, it was highly unlikely that an appropriate programme could be put in place by the following day, the last day of the school year.<sup>8</sup> A key consideration was the Commissioner's undertaking that the investigation process could be completed before the commencement of the new school year.

[96] On 13 December 2013, Mr Bevan submitted a "draft report" to Ms Hornsey who in turn forwarded it to Ms Campbell's lawyer. In her covering letter, Ms Hornsey said that her review of the draft report confirmed her views as to suspension, and that the concerns raised were serious. She then said that depending on the outcome of the investigation, there may be grounds for disciplinary action up to and including immediate dismissal. An investigation meeting was proposed, the purpose of which would be to hear comments on the draft report.

[97] The draft report consisted of a summary timeline from 2006 to 2013, a description of 38 interviews which had by then been conducted. There was a summary of the circumstances of staff prior to the visit of ERO officials in 2012, all of whom were no longer employees at the school except for Ms A. Also included was a summary of information provided as to treatment of children (including

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<sup>8</sup> *Campbell v The Commissioner of Salford School* [2013] NZERA Christchurch 254.

swearing, yelling and other inappropriate interactions). The draft stated that current and former staff were genuinely fearful of the consequences of challenging Ms Campbell. Reference was also made to an inappropriate professional relationship with Ms C. With reference to the “post ERO” period, there was a collation of comments made by staff as to improvements. An outline of draft conclusions was also given, focusing on such issues as negative culture, a high turnover of staff, and a lack of insight.

[98] On 20 December 2013, a four-hour meeting was held, attended by Ms Campbell, her lawyer, Ms Hornsey and Mr Bevan. Detailed responses were given to the plethora of statements which had been summarised. It is evident that Ms Campbell was able to respond to some of the issues raised, but some allegations were simply denied, were described as inaccurate, or Ms Campbell said she was unable to recall the situation to which a particular interviewee had referred.

[99] Ms Campbell said that whilst she denied many of the statements which were put to her as allegations, she did accept that there were performance management issues she needed to address and that staff held negative perceptions of her style and approach. She said that it was for this reason she had taken steps to change her behaviour. Whilst she did not accept she had “bullied” or “targeted” individuals, she did accept her approach was experienced by some as confrontational; she acknowledged to Ms Hornsey that she could do better and said she was committed to doing so. She particularly denied allegations as to inappropriate treatment of children. She said that she had adopted strategies permitting a move away from a disciplinarian approach. She had been proactive in modifying her language, and was more careful in her interactions with staff. In summary, she acknowledged that modification of her management style was necessary as part of the resolution of the issues.

[100] For the purposes of finalising his report, Mr Bevan considered all the information he had obtained. On 20 January 2014, he wrote to Ms Campbell’s lawyer outlining particular areas of concern. These included a negative culture, Ms Campbell’s denial of that and her lack of insight on some issues. An additional

opportunity for further responses was provided. Access to Ms Campbell's school office would be provided to her so that she could obtain relevant documents.

[101] Debate concerning procedural issues continued between Mr Bevan on the one hand, and Ms Campbell's lawyer on the other. Included in those exchanges was a strong criticism from Ms Campbell's lawyer to the effect that Mr Bevan was conducting an investigation, and at the same time he and/or members of his firm were providing legal advice to Ms Hornsey. In his letter of 20 January 2014, Mr Bevan had confirmed he was acting both as investigator and as the school's legal advisor. As a result, on 28 January 2014 it was confirmed that Ms Hornsey would obtain legal advice from alternate lawyers. Further responses were given to the documentation which had been provided by Mr Bevan in December 2013, as a result of his interviews.

[102] On 4 February 2014, Mr Bevan forwarded his final report to Ms Hornsey. It was very comprehensive, running to some 58 pages, with an attached 22-page appendix which was an updated version of the "draft report" submitted to Ms Campbell in December 2013.<sup>9</sup> The report described the investigation process, including reference to information which had been provided on a confidential basis and not released to Ms Campbell. It included an assessment of the evidence obtained. In a section which described the difficulties and limitations of the investigative process it was acknowledged that the investigation had been "broad ranging". Assessments had been made about individuals' information on the basis of one interview only, taking into account comments made by others and in some instances documentary evidence where it was available. There was a specific acknowledgment that Mr Bevan had not had time to question all possible witnesses in detail about specific incidents which remained in dispute. In some instances he had therefore chosen not to make findings, giving the benefit of doubt to Ms Campbell and recognising that matters at stake were often matters of impression and perception. It was acknowledged that the making of findings on the basis of opinions was of concern, but opinions were nonetheless relevant. The fact that negative perceptions and fears were held was in itself a serious problem for Salford and for Ms Campbell. Mr Bevan also said that the widespread existence of opinions

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<sup>9</sup> See para [97].

provided some evidence that a problem actually existed; smoke, he said, is one of the telltale signs of fire.

[103] In assessing the evidence Mr Bevan summarised information relating first to what he described as the “early period” from 2006 to 2007; then the “middle period” from 2008 to 2010; this was followed by the “pre ERO period” which was 2011 to mid/late 2012, and finally the “post ERO period” from mid/late 2012 to the end of 2013. In the next section of the report Mr Bevan referred to information and conclusions he had reached as regards individuals who did not support Ms Campbell’s position and those who did. These will be discussed later.

[104] In the report, Mr Bevan concluded that until mid/late 2012 Ms Campbell had a habit of speaking to and disciplining certain children in a manner which was well outside what most staff members reasonably believe was appropriate or acceptable. It was concluded that inappropriate comments to children had been made, although as had been alleged, Mr Bevan found that Ms Campbell had not sworn at children during or after 2011. Whilst there had been a significant improvement since mid-2012 in regard to treatment of children, there was nonetheless, he found, a lack of insight as to the foregoing issues.

[105] Turning to the work environment and culture at the school, Mr Bevan determined there was a negative culture, and that Ms Campbell’s behaviour from about 2008/2009 was the primary cause. The culture of staff was accordingly polarised, and a number of teachers had been unacceptably treated by Ms Campbell. A small group of teachers may actually have been “targeted”, some four in number.

[106] The next topic which was dealt with was a failure to adhere to proper professional boundaries. Mr Bevan said this consisted of negative and inappropriate criticisms of staff, parents and children, until mid/late 2012; and it was concluded there was also a strong and pervasive belief amongst staff that the relationship between Ms Campbell and Ms C was unprofessional and harmful in the working environment, since they were perceived as working together against other staff.

[107] Finally, the report made findings regarding Ms Campbell herself. Mr Bevan referred to what he described as her “naturally forceful, colourful and reactive personality”, and that at times she was someone who “shoots from the hip”. She was capable of forming very positive views of individuals to the point where Mr Bevan questioned whether these were balanced. Equally she was capable of forming negative views about individuals. She was difficult to challenge or confront and she showed a lack of insight. There was an acknowledgment that Ms Campbell had moderated and improved negative impacts of her behaviour from mid/late 2012. Mr Bevan concluded that in 2013 Ms Campbell had worked professionally with a group of staff whom she knew had raised serious concerns about her with ERO, as well as Mr Hay, Mr Macdonald and the Board. He considered that she should have accepted significant responsibility for her behaviour when issues were flagged by ERO in 2012 and expanded upon in the Mr Hay’s report; however she had responded in a defensive way, and continued to do so. She remained unable to see or acknowledge the significant degree of unhappiness that existed amongst staff, for which she was primarily responsible. Thus there were current staff who had real concerns as to whether improvement had occurred for genuine reasons, a concern which Mr Bevan shared. He said he had no confidence that Ms Campbell’s ongoing leadership or behaviour would be safe or appropriate.

[108] Mr Bevan summarised his findings in this way:

27. It is clear to me that a number of current and former staff (mostly teachers) have been harmed by aspects of the environment at Salford during Ms Campbell’s tenure at the School. Salford has been a place where certain staff have been treated poorly, and where a wider group of staff have been at times very unhappy.
28. It is also clear that a significant number of teachers have resigned due, or substantially because of, problems within the Salford environment and that a number of current staff remain unhappy and uncertain about the current environment.
29. Identifying the causes of the negative aspects of the Salford working environment is not a straightforward exercise. Issues are not black and white, and causes are multi-faceted and complex. Opinions are subjective, memories are frail and opinions about Ms Campbell vary widely.
30. However, taking all I have heard into account, I have concluded that there can be no room for realistic doubt that Ms Campbell’s leadership, actions and style have been the primary cause of the

problems which existed at the School, and a key cause of the retention problems amongst teachers which I find exist in the School, and have done for some years.

31. Further, whilst there have been significant improvement from mid/late 2012, and particularly throughout 2013, I have no confidence in any ongoing safety of the workplace environment. Primarily this is because I do not believe Ms Campbell has any real acceptance or insight into her part in causing the unhappiness, difficulty and harm that many current and former staff have experienced. Nor in my view does she demonstrate any insight into how serious the problems have been, and remain. Accordingly, I believe there is serious risk that the current situation will not resolve and that previous unacceptable patterns of behaviour are likely to reoccur.

[109] On 7 February 2014, Ms Hornsey sent a copy of the report to Ms Campbell via her lawyer, stating that she had formed a preliminary view that over an extended period of time Ms Campbell's behaviour and management were largely responsible for the creation and maintenance of an unhealthy working environment. She said this had caused significant harm to other employees. Whilst her actions and the environment may have improved since the 2012 ERO report, her preliminary view was that she had shown little or no insight to the effects of her management and leadership style on staff, or on the school. She had also formed a preliminary view that Ms Campbell's actions amounted to serious misconduct and that it was not possible for her to have trust and confidence in Ms Campbell to appropriately and safely manage staff. She proposed a meeting on 14 February 2014 to provide an opportunity for Ms Campbell to respond to Mr Bevan's report. Ms Campbell would continue to be suspended, (subject to any representations made at the proposed meeting), and that position would continue until the conclusion of the disciplinary process.

[110] The disciplinary meeting on 14 February 2014 extended over four hours. Ms Campbell repeated her concerns as to lack of specificity in allegations which she said led to erroneous conclusions and expressed surprise as to why teachers would tell her one thing but tell the investigators another. She referred again to the circumstances of particular individuals who were referred to in Mr Bevan's report, including the disciplinary process involving Ms A and the wide discussions of that process thereafter by staff. Concern was raised as to the fact that significant reliance was being placed on "old actions", which did not justify discipline now. She had

wanted to talk to staff about accusations of fear, but had been stopped from doing so by Mr Macdonald. Ms Campbell went on to comment on the particular conclusions that had been reached regarding individuals, and the allegations relating to treatment of and swearing at children. She emphasised improvements which had been effected in the previous year, at least up until the time of her suspension. She disputed the finding made by Mr Bevan that changes were not sustainable. She concluded by saying that there was an improvement in communication and queried whether contrary assertions which were now being made were reasonable when staff had previously said in 2013 they were safe. There could be no risk in her returning to her role of Principal.

[111] Ms Campbell's responses led Ms Hornsey to consider that there were a number of matters that she should clarify by speaking to 12 individuals again. This she did, and wrote to Ms Campbell on 23 February 2014 summarising the feedback she had obtained. She said that having clarified some matters, she remained of the preliminary view that Ms Campbell had acted so as to create and maintain an emotionally unsafe working environment caused emotional harm to a number of staff and demonstrated behaviour which amounted to misconduct of such seriousness that disciplinary action up to and including dismissal was appropriate. A further opportunity was given to meet and discuss matters before she made a final decision, either by meeting or in writing. A detailed response from Ms Campbell as to all these points was conveyed via her lawyer on 27 February 2014.

[112] On 6 March 2014, Ms Hornsey wrote to Ms Campbell in these terms:

Dear Marlene,

Having considered all the representations made to me by you and your advisor at our meetings in November and December 2013 and February 2014, having reread all the material that has been presented to me by you and your advisor and reread all items of correspondence, the 2009 and 2012 ERO Reports, the 2012 ERO summary of material, the Hay Report, the Interim Reinstatement proceedings, the Bevan Report and the Salford School Board of Trustees material and also having clarified a number of matters that arose out of our meeting of the 14<sup>th</sup> of February 2014, I have concluded that over an extended period of time your actions in managing, and your behaviour towards, a number of current and former staff members have been largely responsible for the creation and maintenance of an unhealthy and unsafe working environment at Salford School and that this has caused significant harm to a number of current and former staff members.

I believe that a number of teachers who worked at Salford School became the focus of your harmful behaviours and that a number of others, including some current staff, worked in fear of doing something wrong that might result in them becoming subject to your negative attention. This has resulted in a number of teaching staff leaving the School, (many not telling you the true reasons for their departure) and a number of current staff genuinely fearing what would happen either to them or their colleagues if you returned. I believe that your actions towards some teachers went well beyond the boundaries of professional performance management and well beyond any justification of the pursuit of excellence.

I consider that your actions and behaviours constitute serious misconduct.

I have given serious thought to the disciplinary options available as a result of my finding that there has been serious misconduct and believe that dismissal is the only and proper response. This is not a decision that has been made lightly, but is one that reflects the gravity of the situation. The nature and extent of your actions over an extended period of time were extremely serious and the extent of the damage that you have caused to a number of former and current staff members is significant. As Principal you occupy the most senior role at Salford School and I must be able to have absolute trust and confidence that you will not conduct yourself in a way that could compromise that trust. Your actions and behaviours have seriously impacted upon our employment relationship to the point where I am not able to have trust and confidence in you as an employee.

The last day of your employment will be 6 March 2014.

...

## **Submissions**

[113] For the plaintiff it was submitted that:

- a) It was evident from Mr Hay's recommendations that there were no grounds at that time to take disciplinary action based on specific misconduct or serious misconduct incidents; there was however an urgent need to put in place a performance improvement strategy and measurements, establish clear and fair procedures, and employ deliberate strategies to rebuild trust throughout the school and its community.
- b) The investigation initiated by the LSM on 6 September 2013 was unreasonable. The processes recommended by Mr Hay had not been initiated; there were no reasonable grounds to later initiate an investigation given the passage of time since the ERO and Hay Reports,

and given also the progress which had been made in the intervening year.

- c) The suspension of 4 November 2013 was not undertaken in accordance with the relevant contractual provisions. It was neither substantively nor procedurally justified. It was also contended that the subsequent review by the Commissioner did not remedy the situation.
- d) The investigation undertaken by Mr Bevan and his subsequent report used to justify findings of serious misconduct and dismissal was unfair and unreasonable. Mr Bevan was neither impartial nor independent, and did not follow a fair process. The core issue, it was submitted, was one of substance. There was no proper assessment of any evidence that could support what were generalised statements and opinions made by some staff and former staff critical of Ms Campbell's management. In turn, Ms Campbell was unable to properly respond to non-specific claims.
- e) The Commissioner's disciplinary investigation initiated on 7 February 2014 relied primarily on Mr Bevan's report; this was a case where fruit of the poisonous tree was utilised.<sup>10</sup> Furthermore, the Commissioner did not remedy the situation by isolating specific issues in making findings of fact based on evidence. She did not identify those matters that could fairly and reasonably be described as serious misconduct.

[114] For the Commissioner it was submitted:

- a) The decision made by the LSM to suspend Ms Campbell was in the circumstances reasonable. Concerns raised by Mr Bevan's interim report were potentially very serious, and there was an issue regarding the appropriateness of Ms Campbell remaining in her role while the investigation was concluded. These concerns were exemplified by four

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<sup>10</sup> A reference to the doctrine which holds that evidence gathered with the assistance of illegally obtained information must be excluded from trial: *Silver Thorne Lumber Co v United States* (1920) 251 US 385.

staff members informing the LSM that there was, in effect, an atmosphere of intimidation and of attempts to undermine those expressing any concern about Ms Campbell. It was submitted that the suspension was procedurally justified in that Ms Campbell was given an opportunity to comment on the allegations and the proposed suspension; comments were made by Ms Campbell before the LSM made his final decision; a draft announcement was provided for comment; and the initial disclosure as to a proposed suspension was made only to staff who had a legitimate interest in knowing where matters stood. The LSM's efforts to agree on arrangements and announcements were pre-empted by Ms Campbell making a media statement herself on 4 November 2013.

- b) Any apparent unjustified disadvantage was in any event short lived, because the decision was reviewed in its entirety by the Commissioner within three weeks. She looked at the matter afresh, having offered an opportunity for feedback and submissions. The evidence suggested that the potential for damage was real, and the Commissioner had a duty to take all practicable steps to ensure that the school's employees were not harmed at work: s 6, Health and Safety in Employment Act 1992.
- c) By way of background to the investigation which the LSM instituted, the restructure of the SLT which he initiated improved communication; he put in place the Principals' Appraisal Process with Mr Green (which included performance objectives); he allowed the engagement of Interlead to provide assistance to Ms Campbell, and he arranged for staff surveys to be conducted (following receipt of the survey results Mr Green obtained). These raised serious concerns so that it was appropriate for the LSM to conclude that an investigation was necessary; this was accepted by Ms Campbell at the time.
- d) That investigation was appropriately conducted by Ms Cole and Mr Bevan, and following Ms Cole's resignation, Mr Bevan alone. The issue was not whether it was independent, but whether it was fair. Any

issues as to delegation under s 66 of the Education Act – an issue raised by counsel for Ms Campbell – were technical only.

- e) The findings made by Mr Bevan, after a three-month investigation involving interviews with 38 individuals, were balanced and open to him on a fair and reasonable assessment of the evidence. As to process, Ms Campbell was afforded a number of opportunities to respond to concerns raised by Mr Bevan, and she took those opportunities. Mr Bevan carefully considered comments and submissions, as well as documents which Ms Campbell provided. There was good reason for respecting the confidentiality which some interviewees sought, according to the provisions of s 4(1B) of the Employment Relations Act 2000 (the Act).
- f) The disciplinary process conducted by the Commissioner was also carried out in a fair and reasonable way, and there was substantive justification for the decision to dismiss. The Commissioner appropriately clarified a number of matters that arose from the disciplinary meeting by speaking directly with 12 individuals who had participated in Mr Bevan's investigation. An opportunity to provide feedback was then given. In the end, the Commissioner relied appropriately on the conclusions of Mr Bevan's report. No broader inquiry was required in the circumstances.
- g) The Commissioner's decision met the statutory test contained in s 103A of the Act, mindful of the potential effects on Ms Campbell's reputation and teaching career should disciplinary action be taken. The decision to dismiss was one open to a fair and reasonable employer, having particular regard to Ms Campbell's rejection of criticisms, and her undue defensiveness. The Commissioner consulted appropriately with Ms Campbell.

## **Issues**

[115] I propose to deal with the issues raised by the parties in the pleadings, evidence and submissions as follows:

- a) Relevant legal principles.
- b) The collective employment agreements.
- c) The circumstances giving rise to the investigation.
- d) Was the suspension justified?
- e) Was the dismissal justified?

## **Relevant legal principles**

[116] There are a number of considerations which have been discussed in many previous cases that are relevant to circumstances such as the present. Foremost amongst them are the statutory tests of justification set out in s 103A of the Act. It provides that the question of whether a dismissal or an action was justified must be determined on an objective basis by applying the test in subs (2) which provides:

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.

[117] The section goes on to provide for factors which the Authority or Court must consider namely:

### **103A Test of justification**

...

- (3) ...
  - (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.

[118] The Court may consider any other factors it thinks relevant. The Court must not determine a dismissal or an 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.<sup>11</sup>

[119] It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances, and how such an employer could have done it. In *Angus v Ports of Auckland Limited* it was emphasised 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 determine whether what the employer did, and how it was done, were steps which were open to a fair and reasonable employer.<sup>12</sup>

[120] Next, I turn to the cases which deal with dismissals of teachers where the professional consequences of a termination of employment can be very significant. In *Lewis v Howick College Board of Trustees* the Court said:<sup>13</sup>

[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

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<sup>11</sup> Employment Relations Act 2000, s 103A(5).

<sup>12</sup> *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [36]-[44].

<sup>13</sup> *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4, [2010] ERNZ 1. See also *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [15].

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.

[121] The Employment Court made another comment which is relevant for present purposes when it spoke of the “domination of lawyers, legal issues and of legalism at the expense of professional education input”.<sup>14</sup>

[122] Another factor which is relevant to dismissals for serious misconduct is the well established requirement that the more serious the allegation against an employee which it is said could justify dismissal, the higher the expected standard of proof. In *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Limited* the Labour Court said:<sup>15</sup>

... 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. This 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.<sup>16</sup>

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<sup>14</sup> *Lewis v Howick College Board of Trustees*, above n 13, at [122].

<sup>15</sup> *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZILR 82 (LC) at 4.

<sup>16</sup> This concept was more recently discussed by McGrath J for the majority in *Z v Dental Complaints Assessments Committee* [2009] 1 NZLR 1 (SC) at [98] and [102].

[123] This principle will require consideration when assessing the conclusion reached by the employer in the present case as to serious misconduct.

### **Relevant provisions of the collective employment agreements**

[124] It is necessary to have a good understanding of the contractual arrangements which the parties had chosen to enter into where specific provision has been made for topics such as performance, competence, discipline and suspension – all of which are relevant in this case. Careful scrutiny is required of relevant events to determine whether there has been compliance with the agreed arrangements.

[125] The issue of agreed performance processes was commented on by the full Court in *Lakeland Health Limited v Joseph* in this way:<sup>17</sup>

It is, of course, the right of employers to set standards and to decide that employment that is dependent on those standards being reached will not continue if they have not been reached after reasonable opportunities have been given for them to be reached, including any training that may be needed on the way. However, that proposition is subject to the conclusion that the standards have not been reached being itself reached objectively and following an adequately robust and rigorous process, and subject also to any provision in the contract as to the particular process that must be followed on the way to reaching such a decision.

[126] The Court has regarded this principle as being applicable also to dismissals in many instances: both in cases concerning principals, for example, *Edwards v Board of Trustees of Bay of Islands College*,<sup>18</sup> as well as in other workplaces, for example, *Clarke v Idea Services Limited*.<sup>19</sup>

[127] The relevant provisions which governed Ms Campbell's employment as Principal were contained in two collective agreements, the Primary Principals' Collective Agreement which applied from 29 November 2010 to 7 March 2013 (the first collective agreement), and the Primary Principals' Collective Agreement which applied from 8 March 2013 (the second collective agreement) onwards. It is necessary to analyse both.

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<sup>17</sup> *Lakeland Health Ltd v Joseph* [1997] ERNZ 425 at 448.

<sup>18</sup> *Edwards v Board of Trustees of Bay of Islands College*, above n 13, at [35].

<sup>19</sup> *Clark v Idea Services Ltd* [2013] NZEmpC 155 at [124].

### ***The first collective agreement***

[128] The first collective agreement provided that it would come into force on 29 November 2010, and would expire on 15 August 2012 except as provided for under s 53 of the Act. The effect of the section was to continue the term of the agreement after the specified expiry date whilst bargaining for a replacement collective agreement was conducted. Its provisions remained in effect until the second collective agreement took effect on 8 March 2013.

[129] Part 4 of the agreement dealt with performance review in this way:

#### **4.1 Performance Review**

- 4.1.1 Employers will review the performance of principals in carrying out the duties and responsibilities of their positions.
- 4.1.2 The employer shall prepare an annual performance agreement with each principal that details:
  - (a) the objectives of the principal's position including the relevant professional standards for that year; and
  - (b) the process and criteria by which the principal's performance is to be assessed for that year.
- 4.1.3 Every endeavour shall be made by the employer and the principal to arrive at a performance agreement that is acceptable to both of them. Where this has not been able to be achieved the views of the employer shall prevail. The principal may, however, in these circumstances attach such comments to the performance agreement as the employer considers appropriate.
- 4.1.4 The principal will co-operate with the employer during all stages of the performance review process and will provide the employer with such information as the employer may properly require to carry out any review of the principal's performance.

[130] As mentioned earlier, sch 2 of the collective agreement described professional standards for primary principals. One of the areas of practice was "Partnerships and Networks" which were to "strengthen communication and relationships to enhance student learning". Five professional standards were then described, one of which was to actively foster professional relationships with, and between colleagues.

[131] Part 8 of the agreement dealt with complaints, discipline and competency. Clause 8.1 described general principles which should be used in addressing

complaints, discipline and competence, to ensure that all matters could in the interests of all parties be fully and fairly addressed. It was emphasised that boards should, wherever appropriate, seek to resolve complaints by discussion between the employer and the principal without the need to take the matter any further. As far as possible such issues should be dealt with in a manner which would protect the mana and dignity of the principal concerned.

[132] Clause 8.6 dealt with competency issues in these terms:

### **8.6 Competency**

- 8.6.1 Where there are matters of competency which are causing concern in respect of a principal (for example failing to meet the appropriate professional standards), the Board shall:
- (a) Put in place appropriate assistance and personal guidance to assist the principal and;
  - (b) Follow the process outlined in clause 8.6.2 below, and for that purpose may seek such appropriate professional advice as may be required.
- 8.6.2 When this assistance and guidance<sup>20</sup> has not remedied the situation, 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 of the corrective action required, and the timeframe allowed. This timeframe should be determined by the Board and be relevant to the matter(s) causing concern;
  - (b) The process and results of any evaluation are to be recorded in writing, sighted and signed by the principal;
  - (c) A copy of any report made to the employer or to the New Zealand Teachers Council should be given to the principal;
  - (d) No action shall be taken on a report until the principal has had a reasonable time to comment (in writing or orally or both); if the above steps (a–d) fail to resolve the matter(s) of concern, the employer may, where justified, dismiss the principal without the need to follow the provisions of 8.3 above.

[133] Clause 8.3 described a process for discipline; since the disciplinary process did not arise during the currency of the first collective agreement, it is unnecessary to refer to it.

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<sup>20</sup> That is, as under cl 8.6.1(a).

## *The second collective agreement*

[134] As already mentioned, this collective agreement took effect on 8 March 2013. Part 4 dealt with professional leadership and annual performance review, in more elaborate terms from those which had applied previously. It stated:

### **4.1 Performance Agreement**

- 4.1.1 a. The Board shall put in place an annual performance agreement and carry out a review (appraisal) of the principal every year. Provided that, where a principal is newly appointed, it is expected that the Board and principal will put in place a performance agreement within two months of the appointment.
- b. The purposes of this process are to ensure the principal is aware of the Board's objectives, assist the principal's professional learning and development and improve/acknowledge performance (i.e. it is about both accountability and development).
- c. The performance agreement shall reflect the school's strategic and annual plans and the principal's job description and shall take into account the professional standards, the preceding year's review report where relevant and the New Zealand Teachers Council criteria for registration as a teacher.
- d. The performance agreement shall be in writing and a signed copy kept by both the Board and principal.
- 4.1.2 The performance agreement shall be developed in consultation with the principal and it shall detail:
- a. objectives for that year including relevant professional standards;
- b. a professional learning and development plan for the principal to identify strategies and support (including any agreed resourcing) to enable the principal to carry out his/her responsibilities, meet the objectives and improve professional knowledge and performance; and
- c. the process and criteria, as per 4.2 below, by which the principal's performance is to be reviewed for that year.
- 4.1.3 a. Every endeavour shall be made by the Board and principal to reach agreement on a performance agreement that is acceptable to both of them.
- b. Where this has not been achieved, the Board or the principal may seek professional advice to assist them.
- c. Where a performance agreement acceptable to both parties is not achieved, the decision of the Board in relation to the contents of the performance agreement for that year will be final. In such circumstances the principal shall have the right to attach written comments including any professional advice obtained under 4.1.3(b) above and/or noting any objectives that he/she considers unreasonable, to the performance

agreement which shall be considered during the review or other proceedings.

#### **4.2 Performance Review**

- 4.2.1 a. The Board will carry out the annual review of the principal's performance in accordance with the annual performance agreement.
- b. The review is in relation to the objectives in the performance agreement and to professional standards.

[135] Schedule 2 to the collective agreement described professional standards for primary principals and it included an area of practice relating to "Partnerships and Networks" which was in the same terms as applied for in the first collective agreement.

[136] The document went on to provide for issues arising in respect of the working relationship. So, where there was a problem in the working relationship between the Principal and the Board which was detrimental to the school that had not been formerly resolved, 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)".

[137] Part 8 of the second collective agreement dealt with the processes relating to complaints, discipline and competency. First there were general provisions, in cl 8.1, which were similar in effect to those which applied formerly under cl 8.1 of the first collective agreement. The provisions which followed were more elaborate than those of the first collective agreement relating to this topic.

[138] Clause 8.3 dealt with matters of competency which were causing concern, for example, a failure to meet the Primary Principals' Professional Standards. It stated:

#### **8.3 Competency**

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

- 8.3.2 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. This 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 in accordance with clause 8.6 or may, where justified, dismiss the principal in accordance with clause 8.6 or 8.7 and without the need to follow the provisions of 8.4 below; and
  - (g) a copy of any report given to the New Zealand Teachers Council shall be given to the principal.

[139] Next, cl 8.4 described the process for dealing with discipline in these terms:

#### **8.4 Discipline**

- 8.4.1 The following will apply where specific matter(s) are cause for concern.
- 8.4.2 The principal must be advised of the right to have representation at any stage.
- 8.4.3 The principal 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 Board may need to make further inquiries in order to be satisfied as to the facts of the specific matter(s) causing concern.
- 8.4.4 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.
- 8.4.5 The Board may also consider that the misconduct warrants dismissal with or without notice.
- 8.4.6 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.

8.4.7 A copy of any report in relation to this matter made to the Board or provided to the New Zealand Teachers Council shall be given to the principal.

[140] Although in these provisions there was a reference to “misconduct”, there was no definition of “serious misconduct” or description of potential examples of serious misconduct. But, as is well known, definition of the term is not always possible or necessary, because the issue is whether, as a matter of degree, there is conduct that deeply impairs or is destructive of the basic trust and confidence of the employment relationship.<sup>21</sup> Consistent with such an approach the Board could consider that “misconduct” *could* warrant dismissal with or without notice.<sup>22</sup> The collective agreement specifically provided for “instant dismissal” where there was a finding of “serious misconduct”, in cls 8.7 and 10.2.1.

[141] Clause 8.5 provided for suspension, where there was alleged misconduct that was sufficiently serious to warrant suspension. But a principal should first be given the option of making submissions unless there were extraordinary circumstances.

[142] In summary, both collective agreements drew a careful distinction between complaints, issues of competency, and specific matters justifying a disciplinary process and sanctions. Different processes were provided for competency issues on the one hand, and disciplinary issues on the other.

[143] Where appropriate help and guidance was provided to the principal and had not resolved a competency issue, the stipulated process required the principal to be given a reasonable opportunity to remedy the matters causing concern; only when the steps taken had failed to resolve the issue(s), would dismissal then be justified.

[144] Where there were specific matters of concern amounting to misconduct the disciplinary process could be initiated. There were a range of options open to the employer, including counselling and/or mentoring, a verbal or written warning that included advice of any corrective action required, and a final warning which included advice of any corrective action required. In a case of serious misconduct, a principal could be dismissed without notice.

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<sup>21</sup> *Northern Distribution Union v BP Oil* [1992] 3 ERNZ 483 (CA), at 487.

<sup>22</sup> Clause 8.4.5.

[145] It is these carefully prescribed arrangements that formed the legal framework within which the steps taken on behalf of the school must be assessed, having regard to the legal principles which I have also described.

### **The circumstances giving rise to the investigation**

[146] The two personal grievances which were raised by Ms Campbell focus first on the suspension, and then on the decision to dismiss her. However, in this case the preceding events require analysis, as it is these which provide the context within which the asserted personal grievances occurred and form an aspect of the relevant circumstances which must be considered under s 103A.

### ***The dynamics between Ms Campbell and Mr Macdonald***

[147] Before discussing those events, I summarise my findings as to the relevant characteristics of Ms Campbell on the one hand and Mr Macdonald on the other, since it is their actions and interactions which are critical to a proper understanding of the events which led to the investigation that Mr Macdonald initiated.

[148] Ms Campbell was passionately committed to obtaining positive results at Salford. In some respects, these objectives were achieved, but they came at a cost. The evidence establishes that Ms Campbell's strong views and at times single-minded determination to achieve her objectives precluded her from readily accepting criticisms. When confronted with the significant negative feedback of the ERO report in 2012, she immediately sought legal representation. She was entitled to do so but this was quickly noticed. It was assumed that her regular note-taking – for instance at Board meetings – was for legal purposes. Such actions did not enhance the rebuilding of trust and confidence between the Principal and the Board, as was necessary following the ERO report. In short, an adversarial approach to problem-solving developed. The Board soon instructed its own legal counsel to advise it in these circumstances; and Mr Macdonald, although an employment law advocate, obtained legal representation in his role as LSM following his appointment. This adversarial approach continued for more than 18 months. At times exchanges between lawyers dominated events and impeded a positive resolution of issues which at their heart arose from difficulties in relationships.

[149] Although it will be necessary later in this judgment to consider the extent of Ms Campbell's insight as to the extent of the relationship difficulties and her role in creating them, I find she did attempt to respond appropriately after the issuing of the ERO report in August 2012. I accept Ms Campbell made the statement she was credited as making to staff, to the effect that she had led the school into its problems, and would lead the school out of them. Her subsequent memorandum to the Board of 10 October 2012 was a genuine attempt on her part to put constructive processes in place, including a proper mechanism for dealing with staff complaints – although it is unclear whether the Chair to whom it was given placed it before the Board. At the same time her lawyer – no doubt on instructions – suggested to the Board that several of Mr Hay's recommendations, including those relating to her performance management, should be implemented.

[150] At this critical time, there was unfortunately a hiatus in the appointment process of the LSM. The Board requested the Ministry to make such an appointment on 20 September 2012, but it was not made until 8 November 2012. I infer that any new initiatives were being left for the LSM, and in the meantime the situation was in limbo.

[151] Following Mr Macdonald's appointment, it is clear that he and Ms Campbell did not engage constructively. Mr Macdonald was also strong-willed, and confidently articulated his views. He made it clear from the outset that he would sort out the numerous problems. He was recorded in Board minutes as being "blunt" as to his views on the way forward. He himself described his style as being "upfront", which is an accurate self-assessment.

[152] Ms Cole as Board Chair worked closely with both Ms Campbell and Mr Macdonald, and was well placed to observe the manner in which they undertook their responsibilities. Later, when providing information to Mr Bevan for the purposes of the investigation which he conducted, Ms Cole said this:

[Mr Bevan] asked why the relationship between [Mr Macdonald] and [Ms Campbell] did not work. [Ms Cole] said [she] felt that [Mr Macdonald] was not always balanced. For example after the staff survey [Ms Cole] felt that [Mr Macdonald] wanted to present the survey as showing that there was no change ... [Ms Cole] also said that [Mr Macdonald] could be blunt and

his manner could put people off. However [Ms Cole] said that [Ms Campbell] did not engage from the beginning therefore [Mr Macdonald] became frustrated. [Ms Cole] said that [Ms Campbell] was particularly bad when [Mr Macdonald] was in the room. [Ms Cole] referred to a meeting with the leadership team and said that the tone that [Ms Campbell] used when questioning [Mr Macdonald] was not “let’s try and work this out”. Instead the tone was confrontational. [Ms Cole] said that [Mr Macdonald] had to have the last word and correct her, which didn’t help.

[153] Given the circumstances in which Ms Cole provided this information to Mr Bevan, her observations can be relied on. They provide a logical explanation for the difficult dynamic between Ms Campbell and Mr Macdonald which I find existed from the outset. In my view these difficulties were catalysed by the fact that Ms Campbell intuitively resisted the challenge to her previous position of control, and on the other hand Mr Macdonald was determined that the balance of power would indeed alter.

### *Performance issues*

[154] A second relevant consideration on this issue relates to the terms of the MoU appointing Mr Macdonald as LSM. As already summarised, a specific task to which Mr Macdonald was to attend to was to manage the Principal’s performance.

[155] Turning to the specifics, Mr Hay in his report had given careful attention to performance issues. In his report which preceded the LSM appointment he advised that “immediate and stringent performance improvement strategies should be implemented”. As already noted this would be achieved by an amended performance agreement with specific review dates at the end of term four of 2012, and at the end of term one of 2013 to ensure satisfactory progress had been made. His recommendation was that progress would be managed through full staff and parental surveys against the culture criteria of the Primary Principals’ Professional Standards,<sup>23</sup> with an expected return of 80 per cent satisfaction. He also recommended immediate professional development of the Principal with behavioural specialists. Later in his report he stated that performance improvements strategies and measures should be acted on urgently. Ms Campbell through her lawyer stated in a letter of 10 October 2012 that these suggestions made sense; the only reservation

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<sup>23</sup> A reference to Sch 1 of the first collective agreement.

related to the 80 per cent satisfaction rate. The point which was made was that this target was unrealistic in the shorter to medium term given the history.

[156] Reference should be made also to the performance appraisal conducted by Mr Whiting for 2012, which on the evidence before the Court was finalised by him shortly before Mr Macdonald was appointed. As mentioned earlier, he found that the key objective of successfully implementing a vertical leadership structure at Salford was not met; and the establishing of a good working relationship with Ms Cole as Chairperson was only partially met, due to Ms Cole's recent appointment. Mr Macdonald said that he did not receive a previous performance appraisal until after Mr Green had been appointed in March 2013, and that he had not, to that point, known of its existence. It is unclear whether he was referring to the 2012 performance appraisal, or to an earlier appraisal. There is no evidence that he gave due consideration to this document. It referred to the significant events of 2012 and reinforced Mr Hay's observations.

[157] In any event, Mr Macdonald proceeded on the basis that he would first deal with the complaint and personal grievances that had been brought, and then, as he put it, "start afresh with a new appraisal that should lead to a performance agreement together with performance objectives for the 2014 year".

[158] The result was that stringent performance objectives were not set for late 2012 or 2013 in advance, notwithstanding the strong recommendation that had been made by Mr Hay. In his evidence Mr Macdonald made no reference at all to this particular aspect of Mr Hay's report, although he was clearly familiar with other aspects of it, particularly Mr Hay's view that it was likely there had been serious misconduct issues of which staff were reluctant to complain.

[159] It is surprising that Mr Macdonald did not pay heed to Mr Hay's recommendation since it featured so prominently in his report. There is no indication in the evidence that following his appointment Mr Macdonald raised such possibilities with Ms Campbell or her lawyer, or that he even considered it. That this did not occur is not explained by the difficulties in communication between Mr Macdonald and Ms Campbell; the collective agreement clearly provided that if

there was a dispute as to the content of the performance agreement, the views of the employer would prevail. Mr Hay's recommendation could have been implemented. In any event, as I have already mentioned, Ms Campbell did not oppose such a possibility.

[160] Also important was Mr Hay's recommendation that immediate professional development with behavioural specialists should be considered. Again there is no evidence that this recommendation was addressed. Ms Campbell herself sought external assistance from Dr Bamford and from Interlink, but those were unilateral initiatives not undertaken in the context of defined performance objectives established by the LSM.

[161] I note that Mr Hay did not advance his recommendations on the basis that there were alternatives – either an investigation of complaints or the imposition of stringent performance objectives. He said there was an urgent need for the imposition of these.

#### *Subsequent measures*

[162] The restructuring of the SMT as an aid to the improvement of communication was a positive initiative. Although Ms Campbell objected to the inclusion of Ms A, once its composition was settled it operated effectively and was generally seen as a constructive development.

[163] Mr Green was appointed to undertake the 2013 appraisal of Ms Campbell's performance, but only according to the defined standards appended to the second collective agreement.

[164] The surveys conducted by Mr Green in his role as appraiser, and then by the Chair and Deputy Chair of the Board raised concerns that despite improvements in some areas of Ms Campbell's practice, some staff continued to be concerned by her leadership. In the case of the Board survey, it was recorded that six staff were currently looking for alternative employment.

[165] Ms Campbell said that on 15 July 2013 when the survey conducted by Board members was to be placed before the Board, she was shown a draft of the summary of responses given by individuals prior to the meeting. However, Ms Campbell says she was not shown the results of 10 questions staff members were asked, where interviewees were to assign on a numerical scale the degree of satisfaction with their working environment. On the version of the report which was presented to Board members, the following appeared:

Staff [were] asked the following:

10 indicates a high level of satisfaction in the working environment, 0 no confidence in the working environment.

1. Using the above scale indicate where you consider you would place yourself in relation to how you were experiencing the working environment when ERO came last year (prior to any implementation of change).
2. On the same scale indicate how you currently experience the working environment. 10 would indicate feeling 100% comfortable and safe in your workplace.

Movement	Number
Decrease in satisfaction	2
No change in level of satisfaction	3
Minor increase in satisfaction (1-4)	5
Higher increase in satisfaction (5+)	4
Two staff not at school when ERO came	2
TOTAL	16

[166] It was this survey that Ms Cole commented on when providing information to Mr Bevan, as described earlier.<sup>24</sup> It was Ms Cole's view that Mr Macdonald had wanted to present the survey as showing that there was "no change", and that this was an example of him not being "balanced" in his approach to issues such as this. Ms Cole meant that there were in fact positive improvements, as noted by many staff when giving responses for the survey. The survey results were not necessarily as bleak as Mr Macdonald took them to be.

[167] That is not to say that there were not genuine and significant reservations as to Ms Campbell's leadership; but the question is whether the survey responses were assessed in a fair and reasonable way. Mr Macdonald focused on the issue as to

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<sup>24</sup> Para [152].

retention of staff. That issue, however, had to be considered against the fact that despite not being subject to particular objectives over and above those set out as Professional Standards for Primary Principals in the second collective agreement, Ms Campbell was making an effort to effect improvements in her management of staff.

[168] The surveys were undertaken at a time when those changes were in the process of becoming evident, although some staff were understandably concerned as to whether the changes were genuine and whether Ms Campbell could be relied on to maintain them. She was not given a chance to do so.

[169] In the face of the survey results, Mr Macdonald considered that significant relationship issues remained within Salford, and that there was “an urgent need for investigation and resolution”. The tenor of his remarks to the Board at the meeting held on 15 July 2013 – in the presence of Ms Campbell – could not have been mistaken. He was sceptical that trust and respect could ever be rebuilt. By this time he had determined that it would be preferable for Ms Campbell to depart. Soon after he discussed with Mr Bevan whether an argument could be advanced that Ms Campbell was “incompatible”, and that this might represent a ground for dismissal. Mr Bevan provided a memorandum to him advising that dismissal on such a ground would be open to challenge.

[170] At the Board meeting of 12 August 2013, Mr Macdonald reiterated his view that as staff were unhappy the situation required fundamental change. He said one option was to resolve issues amicably, by which it was meant that an agreement would be reached for Ms Campbell to go, thereby encouraging staff to stay. The other option was to engage in a strict performance management process, but that could lead to staff departing. Mediation was about to take place, and it is clear that Mr Macdonald’s preference was to negotiate Ms Campbell’s exit.

[171] It was at this point that the situation became even more adversarial than had been the case previously. For her part Ms Campbell had lodged a personal grievance with regard to the way in which Ms B’s complaint had been dealt with. In

February 2013, Mr Macdonald upheld the complaint, although it was not until early July that he confirmed a disciplinary process would not be undertaken.

[172] For his part, Mr Macdonald, in his email of 28 August 2013 to Ms Campbell proposed to obtain statements that could be discussed at mediation, which was to take place on 17 September 2013; although he also said he did not rule out the possibility of these being used in other formal processes. That possibility was firmly rejected. As a result Mr Bevan wrote to Ms Campbell's lawyer on 6 September 2013 stating that an investigation would be initiated. Mr Macdonald said this was because the results of the survey conducted by the Board meant there was such an accumulation of concerns that formal action was necessary. He wanted to be in a position of advancing an investigation if mediation did not otherwise resolve matters. I find the timing of the announcement of that investigation was deliberate so as to place pressure on Ms Campbell at the upcoming mediation. It did nothing to enhance positive relationships with Ms Campbell.

[173] Ms Campbell conducted mid-year staff appraisals – without objection from Mr Macdonald – on 5 September 2013. There is no evidence that Mr Macdonald considered their responses, some of which were positive. A further indication of positive feedback was obtained from one-on-one interviews between Mr Macdonald and Ms Cole, and members of the SLT on 10 September 2013. These confirmed that communication with and between staff members had improved, and that trust was being rebuilt.

[174] Notwithstanding the positive responses, that evening at a Board meeting the forthcoming mediation was discussed, with Mr Macdonald reiterating his belief that it was time for a “fresh start” for both Ms Campbell and Salford. It was recorded that Ms Campbell was working cooperatively with the Board, although it was said this had most obviously occurred in the immediate past, and there was a concern as to whether the improvements would be ongoing.

[175] The evidence suggests that no agreements emerged from the mediation process, and consequently the investigation of which notice had been given on 6 September 2013 was progressed.

[176] In summary, there is no evidence that any consideration was given by Mr Macdonald to the important recommendation made by Mr Hay to introduce immediate stringent performance measures in late 2012. No explanation has been provided as to why this recommendation was not considered and implemented.

[177] Mr Macdonald chose a different path which focused on conduct matters and by mid 2012 it was his opinion that it would be desirable for Ms Campbell to depart, notwithstanding the fact that there was a consensus that there were distinct signs of improvement in Ms Campbell's leadership in the third quarter of 2013.

[178] Mr Macdonald told the Court that this was necessary to establish whether the concerns raised in the ERO documents and report, and the Hay report had substance, or whether the concerns expressed in those documents were wholly or largely exaggerated. He went on to say that if they were exaggerated, then he intended to take steps which would likely be non-disciplinary to address ongoing issues and to build trust and collegiality. Strict performance management could be implemented, he said, after an investigation had been conducted. In the absence of any logical reason for not managing Ms Campbell's performance in the manner recommended by Mr Hay, I conclude that the alternative path chosen by Mr Macdonald which culminated in his decision to institute a wide-ranging investigation was because he believed it would reveal evidence that would support a serious misconduct finding.

[179] It was submitted for the defendant that the decision to initiate an investigation was accepted by Ms Campbell at the time through her lawyer. Such statements were made after Mr Macdonald had made it clear that he would be taking action. The acceptance of that reality by Ms Campbell's lawyer after those events was hardly surprising. Open resistance to the investigation would have made her position even more difficult than it already was.

## **Was the suspension justified?**

### ***Substantive issues***

[180] The trigger for the suspension was created by the events of an informal meeting of staff on 31 October 2013. Mr Macdonald received phone calls following

the meeting from four staff members. In his subsequent file note he noted that the Deputy Principal, Mr Tucker, had been present, but had played no part in the meeting. Without speaking to Mr Tucker to check the information with which he had been provided or his views as to the emotional safety of staff, Mr Macdonald said he decided staff were at risk and that he needed to act. He authorised Mr Bevan to send the letter of 1 November 2013 which raised the prospect of suspension.

[181] The first alleged personal grievance relates to the substantive and procedural justification for the steps that were then taken.

[182] The starting point must be the provisions of the second collective agreement. Clause 8.5 provided:

**8.5 Suspension**

- (a) If the alleged conduct is deemed sufficiently serious a principal may be either suspended with or without pay or transferred temporarily to other duties.
- (b) The Board shall not, unless there are exceptional circumstances, suspend the principal without first allowing the principal a reasonable opportunity to make submissions to the Board about the alleged misconduct and the appropriateness of suspension in all of the circumstances. The Board shall take into account any submissions made by the principal before determining the matter of suspension.
- (c) The Board shall use its best endeavours to ensure that the period of suspension is kept to the minimum possible time consistent with ensuring that the allegations of misconduct are properly investigated and that the principal is treated fairly at all times.

...

[183] I deal first with the submission made for Ms Campbell that suspension was only available in circumstances where a disciplinary process has been commenced. Support for that view is provided by the fact that there was a clear and self-contained description in cl 8.3 of the second collective agreement of the competency process. Then followed the provisions as to discipline in cl 8.4, and as to suspension in cl 8.5. I find that the reference to “misconduct” in cl 8.5 is the “misconduct” which is the subject of disciplinary process in cl 8.4. The term is not used when describing the process of competency in cl 8.3.

[184] Applying these provisions to the letter sent by Mr Bevan to Ms Campbell's lawyer on 1 November 2013, was the "alleged misconduct" which needed to be specifically identified sufficiently serious to justify suspension?

[185] Mr Bevan's letter stated the grounds were:

...

- (a) The nature, seriousness and number of concern expressed:
  - i. Of the current staff (16 interviewed) **50%** expressed serious concerns about Ms Campbell. 31% did so on an open basis and 19% on a confidential basis. **31%** were positive about Ms Campbell and the remaining 19% expressed what we would term as "some" or "minor" concerns (which, on their own, would likely have been relatively inconsequential).
  - ii. Of the former staff spoken to (11 interviewed) **73%** expressed serious concerns about Ms Campbell. 45% did so on an open basis, and 27% on a confidential basis.
  - iii. Of all current and former staff interviewed, **44%** expressed more than minor concern about Ms Campbell's treatment of the Assistant Principal (26% doing so openly, and 19% on a confidential basis).
- (b) The current state of the workplace, and the safety of staff, while this investigation continues. In particular, the LSM has concerns about:
  - i. The already divided work place (particularly the division between the bulk of the SLT and staff who have raised concerns).
  - ii. Recent reports and calls the LSM has received from a number of staff over the last 36 hours. Some have expressed concern about their safety and vulnerability, and have made allegations that they are facing pressure from members of the senior leadership team about statements they have made to the investigation (including pressure during meetings held over the last couple of days). This is of grave concern. The situation has been affected by the resignation of the various Board members over the last few days.
  - iii. Ms Campbell's potential reaction to the information in the attached summary, and the possibility of a detrimental effect on staff. The LSM is particularly conscious of allegations that various current and former staff have made about the way in which [Ms A] has been treated, and the effect this alleged treatment has had on her over time. Although untested, these allegations are widespread. If they are true, the LSM is concerned about the potential effects to [Ms A] during the next few weeks.

- iv. Comments made to the investigators by [Ms A], including the allegation that:
  - 1. Ms Campbell has apparently told [Ms A] she intends to take the ex teacher(s) involved in making allegations against her to teacher's council; and
  - 2. Ms Campbell has expressed her belief on more than one occasion that there is one current staff member and one former staff member who is stirring up trouble. [Ms A] asks if that comment is intended to "put fear" into her?
- v. The investigators' (my and [Ms Coles']) observations of the stress and pressure that current staff who have raised concerns are under ([Ms A] in particular, but also others).

[186] The first ground referred only to numerical issues. The letter gave percentages as to persons who had expressed "serious concerns". It did not describe what conduct would amount to a "serious concern", and did not, at this point, describe any specific serious concerns.

[187] The second ground related to the current state of the workplace and the safety of staff while the investigation continued, and relied on five factors:

- a) There was a concern that the workplace was already divided between the bulk of SLT members, and staff who had raised concerns. Whilst the information which had been received by Mr Bevan in interviews suggested there was a divided workplace, the letter did not provide any analysis as to why, and to that point did not specify what examples of alleged misconduct may have caused that division.
- b) Reference was made to "recent reports and calls" which Mr Macdonald had received from staff in the previous 36 hours. It was said this was of grave concern, and was a situation affected by the resignation of Board members in the previous few days. Significantly, Ms Campbell had not been present in the part of the meeting when some staff felt humiliated by statements made by others. There was no evidence that Ms Campbell had misconducted herself. Rather, staff were reacting to a complex situation which had developed following the commencement of the investigation, the subsequent resignation of the Board, and the fact that a Commissioner would now be appointed.

- c) Finally, it is convenient to refer to the remaining three paragraphs. The first of these implied that Ms Campbell would react adversely to the information contained in a summary attached to the letter. Reference was made to unspecified allegations that current and former staff had made as to the way Ms A had been treated and the effect this had on her over time. The next paragraph referred to comments made by Ms A herself, including a statement that Ms Campbell had told Ms A she intended to take ex teachers who made allegations to the New Zealand Teachers Council, and that Ms Campbell had told her on more than one occasion there was one current staff member and one former staff member who were stirring up trouble, which made Ms A wonder if she was one of those persons. And the final paragraph stated that Ms Cole and Mr Bevan had observed that current staff were under stress and pressure. It is to be inferred that Ms Campbell was implicated, although no specifics were given as to the causes of such stress and pressure.

[188] From the foregoing, the most specific allegation to which reference was made at this stage related to the way Ms A had been treated. The letter itself provided no examples of actual misconduct on the part of Ms Campbell, nor did the attached summary. The spreadsheet which was subsequently provided (but not in a form which could be read until 5 November 2013) recorded general observations which had been made about Ms A. They were made by both former and current staff, with particular mention being made as to the way in which she had relinquished her role as Assistant Principal in early 2012. Ms A herself had told Mr Bevan that she had been “targeted”, and that Ms C had been allowed to undermine her, with specific reference being made to the period 2008 to 2010. She said that she often felt “shutdown”, but no details were provided. Against that were her positive comments relating to the SMT structure, which she said had made a “huge difference”. She felt supported by others on the SMT; although she said she still did not feel safe.

[189] In short, the only specific allegation concerned events which had occurred up to 18 months previously. Since that time Ms Campbell’s leadership had been subject

to significant scrutiny, with general agreement that she had altered her behaviour and improvements had been effected, particularly by the mechanism of the SLT.

[190] Ms Campbell had been aware of these concerns since the ERO report of 2012, and she had worked constructively with Ms A since. No examples of subsequent alleged misconduct were given, although Ms A obviously and naturally felt apprehensive. By this time Ms C had resigned so there was no prospect of any further undermining of Ms A by her. Mr Bevan told her in an interview that her circumstances could be managed for instance by placing her on paid leave; and he told the Court that he had considered this issue with Mr Macdonald, which would “give the situation some time”. This possibility was not mentioned in the letter of 1 November 2013. No explanation was given as to why it was not explored with Ms Campbell. It was an obvious mechanism which a fair and reasonable employer could have undertaken in order to deal with what was perceived as being a key concern.

[191] As regards the assertion that Ms Campbell would react adversely once presented with the detail of the allegations emanating from the interviews conducted by Ms Cole and Mr Bevan, I consider that a fair and reasonable employer could not have concluded that this was a ground for suspension unless there was reliable evidence to support such a concern. Mr Macdonald’s email of 28 August 2013 and Mr Bevan’s letter of 6 September 2013 had instructed Ms Campbell not to talk to any person about the staff concerns or the investigation. Mr Bevan had said that although there were suspension provisions in the second collective agreement, there was no intention to utilise them during the investigation. This was subject to the caveat that if Ms Campbell behaved in a manner which compromised the investigation, then the option might have to be considered. There was no evidence that Ms Campbell had spoken inappropriately to any person regarding statements they would or did make to the investigators.

[192] There is no doubt that the Salford environment had become very challenging. There was a wide-ranging investigation that involved all staff. The resignation of the Board meant that the appointment of a Commissioner was awaited. There was now media interest in the situation at Salford. Inevitably parents of students were

concerned. What the school needed in these difficult circumstances was strong leadership. By this time, Ms Campbell was disempowered as Principal, and there was no governance person who could provide such leadership other than Mr Macdonald, whose appointment was about to cease. The hiatus in leadership was compounded by the fact that Mr Macdonald was at this crucial period in Christchurch; he did not make himself available at the school in Invercargill. What was required was cool and calm leadership from the LSM whilst the appointment of the Commissioner was awaited. Effective in-person communication, for example, with staff, with Ms Campbell, and with parents, was necessary at this time and was not provided.

[193] I conclude suspension was not a step that a fair and reasonable employer could have undertaken. It was not substantively justified on the grounds that were described in the letter which proposed it.

### ***Procedural issues***

[194] I now turn to the opportunity which was given to Ms Campbell to make submissions. The second collective agreement stated that the Principal must be provided with a reasonable opportunity to make submissions about the alleged misconduct and the appropriateness of suspension, unless there were exceptional circumstances. Those submissions had to be taken into account before the matter of suspension was determined.

[195] This provision is consistent with the requirements of s 103A of the Act, and previous authorities. Reference to two previous decisions of this Court will suffice as to how a fair and reasonable employer can decide whether suspension is justified. In *Graham v Airways Corporation New Zealand Limited* Chief Judge Colgan stated:<sup>25</sup>

[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an

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<sup>25</sup> *Graham v Airways Corporation New Zealand Ltd* [2005] ERNZ 587.

opportunity to persuade the employer not to do so. The passage from *Tawhiwhirangi* set out at para 90 of this judgment confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately a test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others it may not.

[196] In *B & D Doors Limited v Hamilton*, Judge Couch subsequently held that it would “only be in very few cases that a decision to suspend would be justifiable without the employee having had an informed opportunity to be heard before the decision is made.”<sup>26</sup> I respectfully agree with the propositions referred to in these judgments.

[197] I have already referred to the events following the sending of Mr Bevan's letter of 1 November 2013, which raised the prospect of suspension. In summary, that letter was emailed to Ms Campbell's lawyer at 4.09 pm on Friday, 1 November 2013; in it Ms Campbell was instructed to leave work immediately and not to report on the following Monday but to attend a meeting at 8.30 am to discuss her suspension.

[198] There then followed various exchanges between lawyers over the weekend, during which it was made clear that Ms Campbell was unavailable because she was attending a family event where there was no reception that would enable her to access emails. It was proposed that a statement would be made by Mr Macdonald on the Monday morning. The statement which was ultimately provided to staff at 6.11 am on Monday, 4 November 2013 advised that Mr Macdonald had made a “preliminary decision” to suspend Ms Campbell while the investigation continued.

[199] By that time, neither Ms Campbell nor her lawyer had been able to peruse attachments which had been forwarded amounting to some 116 pages. According to contemporaneous correspondence, it was not until 4.25 pm on Tuesday, 5 November 2013 that a complete and legible copy of the spreadsheet of interviews and summaries was able to be considered (except for certain confidential material to

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<sup>26</sup> *B & D Doors Ltd v Hamilton* (2007) 5 NZELR 69 at [80].

which I refer below). The view was advanced for Mr Macdonald that Ms Campbell had previously been able to consider the letter of 1 November 2013 and a one-page overview of the interviews. It was contended that these documents contained the reasons for the preliminary decision to suspend and that this was sufficient for consultation purposes.

[200] Eventually, Mr Bevan was instructed to extend time for a response from 9.30 am on Monday, 4 November 2013, to only 1.30 pm. It was not possible – nor reasonable – for Ms Campbell to respond substantively within this timeframe. Although a letter taking strong objection to the process was able to be sent on Ms Campbell’s behalf by the 1.30 pm deadline, at that stage Ms Campbell and her lawyer were unable to access the spreadsheet of comments from interviewees.

[201] At 6.14 pm on the same day, Mr Bevan was instructed by Mr Macdonald to propose an agreement that Ms Campbell stand aside as Principal on a temporary basis. However, if this was not agreed to by 9.30 am the following morning when an agreed statement could be issued, then Mr Macdonald’s decision to suspend would take effect. Mr Macdonald would release his own statement at 10.00 am. Despite Ms Campbell’s lawyer sending a strong objection by email at 9.23 am on Tuesday, 5 November 2013 – which apparently was not received until 9.58 am – the public statement was issued by Mr Macdonald shortly before 11.00 am confirming that members of the Board had stepped down, a Commissioner would inevitably be appointed, this would be a positive step for Salford, the investigation would continue and he had been persuaded to suspend Ms Campbell from her role as Principal while the investigation continued.

[202] It was submitted for the defendant that Ms Campbell was in fact given an adequate opportunity to comment on the allegations and on the proposed suspension. Counsel argued that this was achieved by inviting a response to the possibility of suspension by the letter of 1 November 2013, by taking into account such comments as were thereafter made, by the provision of a draft announcement for comment, and by the fact that the “initial disclosure about a proposed suspension” was only made to staff who had a legitimate interest in knowing where matters stood.

[203] I do not accept this submission. The provision of the statement to staff early on Monday, 4 November 2013 was unfair when it was originally intended Ms Campbell would have the opportunity of considering the relevant material over a weekend, but for reasons beyond her control was unable to. Even when Mr Macdonald was apprised of that fact, no equivalent period was provided for the purposes of a response.

[204] Consequently, the communication early on the Monday morning to the effect that Mr Macdonald had made a “preliminary decision” was not a step which a fair and reasonable employer could have taken. The second collective agreement did not provide for the implementing of a preliminary decision to suspend; the only option Mr Macdonald had was to suspend, provided the criteria of the collective agreement were met. To announce that a “preliminary” decision to suspend had been made, and to direct Ms Campbell not to attend the school meant she had been suspended.

[205] The notice of confirmation of the decision to suspend given later that day was a further step which a fair and reasonable employer could not have taken. As a matter of process Ms Campbell had still not been able to access all the material she needed to consider, and she still had not been given adequate time within which to do so.

[206] The decision to suspend, as notified late on Monday, 4 November 2013 was, I find, motivated by the wish to issue a statement the next morning. That was a very significant step, since a publicised decision that Ms Campbell had been suspended would impact on her reputation and standing, and potentially on her registration with the New Zealand Teachers Council. The circumstances were not exceptional or urgent. They could have been managed in an orderly way. There was an obvious option open to Mr Macdonald, which was to make himself available in Invercargill so that a fair process which considered the range of options that were open could be undertaken. Having regard to Mr Macdonald’s clearly held views (which had been articulated over a period of months to the Board) to the effect that Ms Campbell should go there is an irresistible inference that he took the opportunity to remove her from the workplace.

### *Review of suspension decision by the Commissioner*

[207] It is submitted for the defendant that any unjustified disadvantage resulting from the suspension was “short-lived”. It was asserted that the decision to suspend was reviewed in its entirety by Ms Hornsey, the Commissioner, within three weeks. It was argued that Ms Hornsey looked at matters with a fresh pair of eyes, which included the convening of a meeting on 15 November 2013 to hear submissions as to whether the suspension should remain in place. She also reviewed a range of material which included correspondence between lawyers from 30 August 2013 up to the date of her appointment as well as the non-confidential spreadsheet summary of interviews in the interim report provided to Ms Campbell on 1 November 2013 and her appraisal for that year. She also considered the summary of 11 complaints prepared by ERO in 2012, the ERO report itself, the Hay report and Ms Campbell’s 2012 appraisal.

[208] At the meeting Ms Hornsey held with Ms Campbell, along with their respective legal advisors, on 15 November 2013, the key points which were covered related to the improvement of staff relationships which had occurred that year and the number of staff who had expressed concerns about the investigation. Ms Campbell’s lawyer also advanced criticisms as to the way in which the original decision to suspend had been made.

[209] Although a limited opportunity was given to Ms Campbell to step down voluntarily during the course of the investigation, it was otherwise Ms Hornsey’s determination that a return to her role of Principal would pose an unacceptable risk to the emotional safety of current staff, and potentially to the integrity of the ongoing investigation process.

[210] The decision was expressed in broad terms. I find that it amounted to a ratification of the grounds that had originally been advanced in support of suspension in Mr Bevan’s letter of 1 November 2013.

[211] The issues which existed when suspension was first considered remained. Many of the concerns expressed in the material which Ms Hornsey reviewed were not particularised; comments made by interviewees focused in the main on events

that had occurred a number of years previously. Improvements had been effected that year.

[212] As I have found, any particular issues relating to Ms A could be managed for the balance of the school year. The continuation of suspension was obviously potentially harmful to Ms Campbell's professional reputation. The review undertaken by Ms Hornsey meant that the suspension would continue. It did not cure the substantive and procedural defects which arose at the outset of the suspension process.

[213] There were no fresh grounds for concluding that suspension was justified. While Ms Hornsey was concerned as to the high level of stress amongst staff that was primarily caused by the investigation process itself. There is no evidence that Ms Campbell had done anything to foster the fears of staff.

[214] By the time of the review which Ms Hornsey undertook, the harm had been done. The original decision to suspend was unjustified; the procedural and substantive flaws could not and were not cured by the review process. As this Court has observed, a breach of contract can be put right before it has caused any damage: *Rankin v Attorney-General*.<sup>27</sup> That was not the situation here. Whilst there was an opportunity for Ms Hornsey to ameliorate the impact of the suspension, that did not occur, although it must be acknowledged that she was in an unenviable position by having to deal with a complex situation which was not of her making.

[215] I have already referred to the subsequent application that was made for an interim order of reinstatement. The Authority declined that application, mainly because it was made so late in the school year that an order of reinstatement could not realistically be implemented for that year, and the Authority had been assured that the investigation would be concluded prior to the commencement of the following school year. I place no reliance, therefore, on the conclusion reached by the Authority that interim reinstatement was not appropriate.

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<sup>27</sup> *Rankin v Attorney-General* [2001] ERNZ 476 (EmpC) at [132].

[216] Finally, with regard to the first personal grievance, I note that Ms Campbell's claim for unjustified disadvantage by suspension did not assert that the suspension was substantively unfair because the investigation should never have been set up having regard to the events which preceded it, and as discussed earlier in this decision.<sup>28</sup> Since the personal grievance was not put on that basis, those matters are not relevant to the first personal grievance, although as will become evident shortly they are relevant to the second personal grievance.

[217] The unjustified disadvantage grievance is established.

### **Was the dismissal justified?**

[218] Whether Ms Campbell's dismissal was justified is the subject of the second personal grievance. I have already considered the events that preceded the decision to conduct a formal investigation in early September 2013. Now I consider the process which was followed initially by Ms Cole and Mr Bevan, and then Mr Bevan alone which resulted in his report. I shall then analyse the disciplinary process conducted by Ms Hornsey, and her ultimate decision to dismiss Ms Campbell.

#### ***Mr Bevan's role***

[219] It was acknowledged from the outset that the investigation would not be carried out by any person or persons who were independent from the school. However, prior to the investigation Mr Bevan had acted as Mr Macdonald's legal advisor engaging in regular correspondence on behalf of the LSM with Ms Campbell's lawyer, and attending mediation as Mr Macdonald's representative. The provision of advice continued during the investigation. For instance, he raised with Mr Macdonald the possibility that Ms Campbell be suspended, as discussed earlier. During the suspension process he corresponded with Ms Campbell's lawyer as counsel.

[220] Although Mr Bevan explained to the Court that as far as he was concerned, his focus during the investigation was to get to the truth, it was in my view difficult for him to do so given that he had and continued to be involved as Mr Macdonald's

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<sup>28</sup> At paras [145]-[179].

legal advisor. Mr Macdonald himself said that he did not agree that Mr Bevan was “wearing two hats”, but acknowledged that if this had been the case he would have been compromised.

[221] The evidence clearly establishes that Mr Bevan occupied dual roles. This was unfortunate and foreseeably avoidable. As Mr Macdonald’s counsel, it was his function to advocate and represent Mr Macdonald’s particular interests and views. As investigator, he had a different role; it was to conduct a fair process and reach conclusions uninfluenced by any external obligations. Whilst Mr Bevan is adamant that he was not compromised and that he maintained a conscientious approach to his conduct of the investigation, there was nonetheless a distinct appearance of bias (in the legal sense); and it was unfair that Ms Campbell was obliged to participate in a comprehensive investigation that suffered from this flaw.

[222] It is unclear why this difficulty arose. Mr Bevan informed the Court that his costs in undertaking the investigation were between \$25,000 and \$35,000; from this it can be inferred that the decision that he was so heavily involved did not arise from fiscal considerations. It was suggested that since Mr Macdonald held the Boards’ functions of employer, he needed to have a good understanding as to what had occurred previously. But that was not a reason for Mr Macdonald to decide that his own legal advisor should play a key part in the investigation.

[223] Counsel for the Commissioner submitted that the mere fact that an investigation was carried out by an employer’s representative did not render it unfair, having regard to the dicta in *New Zealand Tramways etc IUOW v Auckland Regional Council* where Judge Travis stated:<sup>29</sup>

As representatives of the respondent they could not be described as independent, but there was no evidence which suggested they were anything but impartial. There was no evidence that they had made their minds up in advance and therefore did not give the grievant a proper opportunity to be heard and have his defence considered. The mere fact that the person making the decision is an officer of the employer empowered to deal with the issue does not of itself automatically make the decision biased and thereby deny the employee of the opportunity of a fair hearing. To hold otherwise would effectively prevent employers themselves deciding whether there are grounds for a dismissal.

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<sup>29</sup> *New Zealand Tramways etc IUOW v Auckland Regional Council* [1992] 2 ERNZ 883 at p 891.

[224] I respectfully agree with this dicta which related to an employee conducting an investigation. That employee was not also giving legal advice. The problem in the present case related to the fact that the person who was appointed to take a significant role in the investigation already held and continued to hold significant responsibilities as legal advisor to the LSM.

[225] As I have explained, that was unfair. I shall return to this topic when considering the disciplinary process.

*Terms of reference*

[226] Mr Bevan's report commenced by discussing the "focus" of the investigation. He referred to the correspondence that he had conducted with Ms Campbell's lawyer which he said had resulted in a narrowing of the scope of the investigation. Originally, there had been a reference to concerns such as the climate of unhappiness and fear that existed amongst some current staff, that Ms Campbell had not directly and constructively engaged with either the school or Mr Macdonald with a view to honestly and openly addressing issues, and that Ms Campbell had appeared to have taken a confrontational approach to the ERO, Mr Hay and Mr Macdonald. When more detail was sought as to what would be investigated, Mr Bevan referred to the broad conclusions contained in the 2012 ERO report and its summary of 11 complaints, the Hay report and information emanating from the June 2013 staff survey. All of these documents raised concerns of a general nature.

[227] Intended interviewees were told that an opportunity would be provided for them to speak "about the working environment at Salford school, and about [Ms] Campbell's leadership and behaviour". In a subsequent email to Ms Campbell's lawyer it was explained that information relating to the concerns would be elicited by asking interviewees to:

- Describe the working environment at Salford – what had been good and was there anything that was not good.

- Describe the interviewees' experience of Ms Campbell's leadership – what had been good, and whether there was anything that had not been good.
- Whether the environment at Salford was conducive to raising concerns, if the interviewee had any. It was also explained that if staff raised any issues, specific questions would be asked to establish the details.

[228] These statements were the context for Mr Bevan's statement at the commencement of his report that the investigation "focused on the working environment at Salford school and on Ms Campbell's professional leadership in particular".

[229] This sole term of reference could hardly have been more general. An analysis of the report and the associated summary of interviews confirms that the investigation covered events which exceeded six years, from 2006 to 2013. The questions which were asked were open-ended so that interviewees were free to speak in a general way. As the report itself acknowledged, one of its limitations was the broad ranging nature of the investigation which received information from a very large number of people who were only interviewed briefly.

[230] Despite this limitation, Mr Bevan told the Court he was aware that his report may be relied on for potential serious misconduct.

[231] If that was to be the case, any particular allegations that might have emerged would need to be specifically referred to in order to comply with the requirements of the second collective agreement: the disciplinary process would apply if there were "specific matter(s)" of concern. The terms of reference did not refer to the possibility of such refinement taking place during the investigative process, or at the inception of any subsequent disciplinary process. In fact, as it emerges later in this decision, it did not take place at all. That the single term of reference was so wide ranging contributed to these difficulties.

### *Delegation to Mr Bevan*

[232] It was submitted for Ms Campbell that there was not a valid delegation by Mr Macdonald of his power to investigate, under s 66 of the Education Act which requires a “resolution and written notice” to be provided where a Board delegates any of the functions or powers of the Board. Mr Macdonald held the power to conduct an employment related investigation. Initially he intended that the investigation would be conducted by himself and Ms Cole, but following objection he determined that it would be conducted by Ms Cole assisted by Mr Bevan. It is at that point, that counsel submitted, an issue of delegation under s 66 arose. Mr Macdonald confirmed in evidence that his instructions to Mr Bevan regarding the investigation were given orally; indeed he said that he provided relevant information as to his concerns to Mr Bevan who was given the authority to draft the appropriate correspondence as to the investigation, which he did. Mr Macdonald then approved relevant correspondence once it was drafted.

[233] Counsel for the defendant submitted that there was no misapprehension or misunderstanding as to what was happening. But if there was a breach of the statutory provision, it was a “minor defect in form” which did not give rise to any substantial wrong or miscarriage of justice. Reliance was placed on a finding made by the High Court in a judicial review decision, *X v Bovey and others*.<sup>30</sup> In that instance it was held that there was in fact a valid delegation under the section, but alternatively if there was a defect in the delegation requirements, it was one of form only. Since there had been no misapprehension and no substantial wrong had occurred the Court held this would not have been a ground for granting relief.

[234] Counsel for the plaintiff in this case submitted in response that the failure to meet the requirements of the section was more than minor. It was argued that if there had been compliance with s 66, the terms of reference would have been the subject of greater attention, and particular acts of misconduct would at that point have been identified and included in the resolution of delegation. I do not accept this submission. It was plain that Mr Macdonald held the view that a wide ranging investigation was required. He left the description of the scope of the investigation, however, to Mr Bevan. I find that had the issue of formal delegation arisen, it is likely Mr Macdonald would have required Mr Bevan to prepare the relevant

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<sup>30</sup> *X v Bovey* [2014] NZHC 1103 at [49].

documentation. It is probable that any resolution and notice would have been expressed in the terms used in Mr Bevan's correspondence. There is no evidence to suggest that the focus would have become more specific at the outset of the investigation if this particular requirement had been considered. The failure to attend to the resolution and notice under s 66 was unfortunate, but it was not this technical oversight which caused unfairness. That was created by the other factors which are analysed in this decision. Accordingly, I consider this particular breach was a defect in process that falls within the ambit of s 103A(5) of the Act, in that the defects were minor and did not lead to the employee being treated unfairly.

### *The process of the investigation*

[235] In his report, Mr Bevan referred to various limitations in the investigation. He acknowledged that one of these was the investigation's broad-ranging nature which covered the impressions and perceptions of a substantial number of people in respect of a significant period of time. Further, he made assessments of many individuals and reached conclusions as to their opinions on the basis of one 40-minute interview with each interviewee.

[236] Mr Bevan said he did not have time to question all possible witnesses in detail about specific incidents which remained in dispute, so that on some matters he concluded he could not make findings. But this limitation was more fundamental. It also affected those matters where Mr Bevan did make findings which were adverse to Ms Campbell.

[237] In relation to the question of whether there had been past serious problems, Mr Bevan, in giving evidence to the Court, said that although there were conflicts of evidence between many interviewees on the one hand and Ms Campbell on the other, re-interviewing and obtaining further information on particular issues would have elongated the investigation process and led to further disruption; but a key consideration was cost. Mr Bevan placed considerable weight on his view that it would not have been cost-effective to do so. Consequently, where there were simply denials from Ms Campbell he did not revert to those who had been critical of her in any systematic way. He said that if he had probed on any one issue, then he would have had to have done so for all others. There is no evidence that he discussed this

problem with either the LSM or the Commissioner, or for that matter Ms Campbell's lawyer.

[238] I have already commented on the fact that the terms of reference were general in nature. This factor was raised on numerous occasions by Ms Campbell's lawyer during the investigation process. Although some incidents which were alluded to by interviewees were accompanied by brief details, most were not. Reference to the spreadsheet which Mr Bevan developed confirms that the information provided in each interview consisted mainly of overarching opinions and impressions held about Ms Campbell. Where examples of incidents were provided they were given in a shorthand way with little supporting detail if any as to time and place.

[239] Mr Bevan's consideration of the circumstances of three individuals illustrates this problem; it was found that in their cases harm was caused; and these conclusions supported the ultimate finding there had been mistreatment of staff which was an aspect of the polarisation of the workplace, the creation of a climate of fear and a harmful work environment.

[240] The first individual whose circumstances I consider is Ms D. Mr Bevan concluded that in the period 2008 to 2010 during a performance management process, Ms D was treated in an unacceptable manner so that she was seriously and unacceptably harmed. That harm did not arise from reasonable and justified management of her performance issues; rather Mr Bevan considered that she was exposed to a negative, unprofessional and unacceptable culture which included being yelled at and spoken to in an improper way, being exposed to unacceptable treatment of children and of other staff. In support of this conclusion Mr Bevan relied on recollections provided by Ms D herself, and by five others.

[241] By way of example, Ms D said that she was placed under "extreme pressure", the problem was "the way I was talked to"; and that "support was negative". Apparently because of time constraints, no information as to context, or specific examples of incidents which occurred in the performance management process was obtained from Ms D. So there was no specificity as to the nature of any pressure, the language used that created extreme pressure or which created unrealistic

expectations in a particular context, or how or why support was negative. Nor did other interviewees who spoke about Ms D's circumstances provide examples of Ms Campbell's behaviour that gave rise to their perceptions as to how Ms D was treated. It was also the case that apparent treatment which was described by other staff was not described by Ms D herself; she was not asked to confirm whether events referred to by others had occurred.

[242] During the four-hour meeting held on 20 December 2013 when responding to the various statements made by the 38 interviewees, Ms Campbell commented on the various assertions as best she could, stating that she was unable to verify or recall particular incidents.

[243] It was concluded that unacceptable treatment of children, including swearing at them, had affected Ms D. Later in the report it concluded that swearing had not occurred "during or after 2011"; and Mr Bevan declined to make a finding that it occurred before then. That later conclusion amounted in effect to a rejection of what Ms D had said on the topic, from which it must be inferred she was regarding as having exaggerated her recollections. It is unclear why her account on some issues were accepted, but not on others.

[244] Mr Bevan found that Ms D did have significant performance issues. It was appropriate, he considered, for Ms Campbell to be concerned about whether Ms D would meet her registration requirements and it was appropriate for her to be clear about this with Ms D. It was the way she did so that was considered inappropriate.

[245] Mr Bevan said that he was took an "in the round" approach, and that his findings regarding Ms Campbell's interactions with Ms D were to be taken as a whole. He proceeded on the basis that Ms D was a "really credible witness"; that her evidence was consistent with what he heard from other staff regarding Ms Campbell; he said he formed a favourable view of her reliability. He said that by contrast Ms Campbell's denials were not reliable. However, I find that he relied in the main on expressed conclusions that were bereft of supporting details.

[246] The second individual whose circumstances I refer to is Ms A. She was a current staff member whose employment commenced in 2007. Mr Bevan considered there were sharp divisions between Ms Campbell and Ms A in regard to appropriate standards as to how junior teachers should be managed, and more generally how staff should be treated. He found that Ms Campbell had formed genuine views about Ms A's performance, and that some and possibly most of those performance concerns had merit. He went on to conclude however that Ms A had been treated unacceptably over a lengthy period of time by Ms Campbell in that she had been marginalised and allowed her to be undermined by Ms Campbell's colleague, Ms C. He found that Ms A had been harmed by Ms Campbell's treatment.

[247] Ms Campbell in her responses to Ms A's statements denied some of the particular assertions which were made such as "yelling" and "targeting" but she emphasised the performance history and said that Ms A had misled and lied to her.

[248] In evidence Mr Bevan accepted that Ms A's circumstances could have justified a more detailed inquiry – as had been the case in respect of Ms D – particularly as to the extent of harm which they had each briefly referred to when being interviewed. Mr Bevan said he felt comfortable making the strong findings he did because the treatment to which they had referred was corroborated by observations reported by others, and similar treatment which others had experienced themselves. Given those factors, Mr Bevan concluded that further interviews were not necessary, particularly when factors of delay, disruption and cost were considered. Because he was conducting a broad brush approach, as he described it, he declined to consider documents relating to Ms A's concerns when she provided them.

[249] The third individual whose circumstances I refer to is Ms E. Mr Bevan found she had been a high-achieving student on placement who subsequently became a beginning teacher in 2011. He concluded that "at some point" in 2011 she "encountered the negative aspects of the Salford culture and Ms Campbell's behaviour in particular". This had, he said, a damaging effect on her "probably due to her particular personal circumstances, personality and vulnerabilities".

[250] In the “draft report” which was prepared by Mr Bevan and which was therefore the focus of the response given by Ms Campbell at the meeting on 20 December 2013, there was a heading “Ms E”. Then followed a summary of information provided by others, but not by Ms E herself.

[251] Ms Campbell addressed those comments in response. She explained the context as far as it was possible with regard to what the individuals had said, and in one instance denied what had been asserted by a third party.

[252] Mr Bevan relied on the comments of one of those third parties, Ms Tegan Smithies, to conclude that Ms E had been damaged by unprofessional feedback. Ms Smithies expanded her concerns when giving evidence to the Court. As a result, Ms Campbell was able to provide information as to the context when she gave her evidence. She said that Ms E’s performance issues related to the accuracy of achievement data which had to be compiled in a stressful situation. Put in context, the manner in which feedback was given by Ms Campbell was a performance issue rather than a conduct issue. Because the information providing that context was not available at the time of the investigation, Ms Campbell was unable to respond adequately.

[253] I turn from examples of findings relating to the mistreatment of staff, to those findings relating to the intimidation of children. In some of those instances, there were specific allegations to which Ms Campbell could and did respond. In those cases Mr Bevan concluded that allegations of swearing at children were not established. Other specific inappropriate statements were alleged and Ms Campbell responded to those which led to a finding that they were “reasonably minor contributors”. However, other comments on this topic made by staff lacked detail but were found to be “substantially accurate”, simply because such concerns were expressed by a “large number of interviewees”. What was said, and by whom, was not explained.

[254] It is plain that there was a complex history which covered a period of years over which there had obviously been a huge number of interactions. The particular examples touched on in the relatively brief interviews were not sufficiently

supported by details of context. Mr Bevan accepted that he took a broad overview of many issues and that was undoubtedly the case.

[255] The question to which I will return later however is whether the investigation was fair and reasonable if the findings Mr Bevan made were to be relied on for serious misconduct purposes.

***Did the concerns relate to performance or conduct?***

[256] Mr Bevan acknowledged that the matters covered in Mr Bevan's report were a combination of performance and conduct issues. Issues which related to the way in which certain staff members were performance managed, the way they were spoken to, whether there were breaches of professional boundaries, the yelling and intimidating of children and were all said to be examples of performance issues. Mr Bevan believed that some concerns raised both performance and conduct issues – for instance allowing a polarised culture to develop. He said that other concerns were solely conduct issues, such as swearing and the belittling or marginalising of staff in a humiliating way. Ms Hornsey gave a similar acknowledgment.

[257] The broad nature of the terms of reference meant that there was no reference to the distinction under the second collective agreement between performance and conduct matters. As I found earlier, there were different processes relating to each. Where there was a failure to meet professional standards, then the collective agreement required the employer to put in place appropriate individual assistance and guidance, and to seek appropriate professional advice; where that did not remedy the situation then a competency process was to be undertaken. If that process did not resolve the matters of concern, dismissal could follow. By contrast, the disciplinary process applied where there were specific matters which were cause for concern. In short, the second collective agreement provided obviously different processes for their resolution.

[258] This distinction was not identified in the terms of reference; nor was it in the report itself. It is an issue to which I shall return to when considering the disciplinary process that followed the investigation.

### *Confidential information*

[259] The investigators accepted information from some interviewees on the basis that it would remain confidential. Two persons requested that their feedback be entirely confidential; two asked that some aspects of their feedback be confidential. Two further interviewees had some concerns about providing information so that they were given the opportunity of reviewing a transcript of their interview for the purposes of removing or amending the summary of their information.

[260] Ultimately, Mr Bevan recorded that one current and two former staff members who kept their feedback entirely confidential had serious concerns about Ms Campbell; and that in respect of certain of his findings he could not avoid taking into account the experience disclosed by a former staff member who wanted his information kept confidential. He also acknowledged that in reaching a decision about Ms Campbell's treatment of staff and students he had been unable to avoid being influenced by certain views expressed by a current staff member of a confidential nature. Additionally he received written information from Ms A, which he told her he would not consider because of the "broad brush" approach being adopted. The receipt of this information was not disclosed.

[261] In cross-examination, Mr Bevan acknowledged that three of the persons whose information was kept confidential were very critical of Ms Campbell. One of these, Ms F, spoke extensively about her criticisms. Two more, Mr G and Ms H were "scared out of their minds in a way that was remarkable", although this did not strike him as particularly rational. There was also a fear of defamation and of other subtle pressures being applied. The report referred to the fact these persons were "seriously unhappy with Ms Campbell", but their reasons for this were not disclosed. In respect of current staff members who asked that aspects of their feedback be kept confidential, Mr Bevan said in cross-examination he could not avoid being influenced by that person's views. In his report, Mr Bevan stated that this approach was justified because others whose views were disclosed held the same concerns.

[262] Section 4(1A) (c) of the Act provides that an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of an employee's employment must provide access to relevant information, and provide

an opportunity to comment on it before the decision is made. It was submitted for the defendant that under s 4(1B) of the Act in its then form, the employer did not need to provide access to confidential information if there was a good reason to maintain it. Section 4(1C) included as an example of “good reason” the protection of privacy of natural persons. In *Vice-Chancellor of Massey University v Wrigley*, a full Court referred to these provisions and stated:<sup>31</sup>

If confidentiality of any particular relevant information is to be maintained, there must be sufficiently good reason to do so. In any particular case, whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and those of maintaining confidentiality. How serious those effects are likely to be and how likely they are to occur, will be important. Equally, the employer must consider means of reducing possible adverse effects and restrict access to information only to the extent necessary to reduce the adverse effects of sharing that information to a level which no longer constitutes a sufficiently good reason to maintain confidentiality of the remaining information.

[263] The duty of good faith required the employer to provide real opportunity to comment. This was in effect a natural justice obligation.<sup>32</sup> The investigators needed to consider whether former and current staff had advanced sufficiently good reasons for maintaining confidentiality, given the competing natural justice requirement.

[264] Given the significance of the matters under review, including a potential for a disciplinary process on grounds of serious misconduct that could lead to a dismissal, this was an occasion where in my view the natural justice principle of disclosure had to prevail. A fair and reasonable employer in such a circumstance could not be satisfied that there were sufficiently good reasons to withhold the information.

[265] If there were concerns as to disclosure on the part of interviewees they should not have been asked to provide information to the investigators. If that was not acceptable to interviewees then either the information should have been received and disclosed, or the opportunity to give it should have occurred in a separate confidential process outside the investigation.

[266] In my view this was a significant procedural flaw since Mr Bevan relied on this information in part in his report. It is not sufficient to argue that the confidential

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<sup>31</sup> *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [81].

<sup>32</sup> *Vice-Chancellor of Massey University v Wrigley*, above n 30, at [54].

opinions were consistent with other opinions which were able to be disclosed. That is because Ms Campbell did not have the opportunity of considering the basis of the opinions made by the individuals who sought confidentiality.

### ***Conclusions as to investigation***

[267] Drawing the multiple threads together, the investigation was beset with a range of problems. It was instituted by Mr Macdonald whose own view was that Ms Campbell should go. Mr Bevan undertook a dual role which created an appearance of bias. If the conclusions of the report were to be a foundation of an allegation of serious misconduct, the terms of reference were too broad. Details of specific concerns, to use the language of the second collective agreement, were required. Performance concerns could not be aggregated with conduct concerns. Confidential information would not in these circumstances be relied on.

[268] But the most significant problem was not to implement Mr Hay's recommendation as to the urgent implementation of stringent performance objectives, and as well to delay any investigation to the time when improvements were being effected.

[269] Mr Bevan agreed the investigation process was very divisive. In evidence he acknowledged that the situation had been "absolutely salvageable as at August 2012", and that the investigation "ripped the scab off" old wounds, thus rejuvenating previous concerns. Delay in instituting such an investigation was potentially unfair and unreasonable if it was to result in a decision to initiate a disciplinary process.

### **The disciplinary process**

[270] As with the process of suspension, Ms Hornsey faced a difficult situation when deciding whether a disciplinary process should be instituted. There is no evidence that any of the factors I have just alluded to were considered, as I shall now discuss. But I must first consider the procedural requirements of the second collective agreement with regard to the undertaking of a disciplinary process.

***Should the matter have been resolved informally?***

[271] The disciplinary clause, cl 8.1, referred to the initiation of discussions with a principal to resolve concerns in an informal manner. That requirement arises following receipt of a complaint or after concerns have been raised. It was to occur prior to the commencement of a disciplinary or competency process, unless the nature of the complaint or concern is such that it would be inappropriate.

[272] By the time Ms Hornsey received Mr Bevan's report and considered the possibility of undertaking a disciplinary process, she had met Ms Campbell on several occasions, including at the four-hour meeting with Mr Bevan when Ms Campbell provided a response to Mr Bevan's "draft report" on 20 December 2013. Ms Hornsey considered in light of the issues, as she understood them at the time, that it would be inappropriate to resolve matters informally.

[273] In my view, the procedural and substantive issues were very complex, with each party now relying on legal advice. The issues were not susceptible to informal resolution. Accordingly, I do not consider that there was noncompliance with the provisions of cl 8.1.

***Notice of serious misconduct allegations***

[274] As previously mentioned, cl 8.4 of the second collective agreement stated that advice was to be given to the Principal in writing of the specific matter or matters causing concern, so that there was a reasonable opportunity to provide an explanation.

[275] Notice of the disciplinary process was given by Ms Hornsey in her letter of 7 February 2014, the contents of which were earlier summarised. She referred to Mr Bevan's report, then expressed her preliminary views that:

- a) Over an extended period of time Ms Campbell's actions in managing, and her behaviour towards, a number of current and former staff members had been largely responsible for the creation and maintenance of an unhealthy working environment.

- b) This had caused significant harm to employees.
- c) Whilst Ms Campbell's actions and the environment had improved since the 2012 ERO report, she had little or no insight into the effect of her management and leadership style.
- d) Ms Hornsey was greatly concerned by Mr Bevan's conclusion he would have no confidence that her ongoing leadership or behaviour would be safe or appropriate. She went on to say that it was her preliminary view that these actions amounted to serious misconduct which was sufficiently serious as to warrant dismissal.

[276] The letter of 7 February 2014 did not identify specific acts of misconduct save for an assertion that Ms Campbell had created an "unhealthy working environment". No particular allegations were relied on as to how this had occurred. Furthermore, the letter referred only to alleged mistreatment of staff. No reference was made to mistreatment of children by yelling which Ms Hornsey told the Court she also considered. Although Mr Bevan's report was attached, it too lacked specifics as already discussed. There was no attempt to refine particular allegations.

[277] In my view, there was not compliance with the requirements of the second collective agreement in cl 8.4.3.

***Further enquiries***

[278] Clause 8.4.3 of the second collective agreement also referred to the fact that before making the final decision, further enquiries may need to be conducted in order to be satisfied as to the facts of the specific matters causing concern.

[279] A lengthy disciplinary meeting was conducted on 14 February 2014. Again the point was made that there was the lack of specificity regarding dates and times, and that an absence of specifics had led to erroneous conclusions.

[280] In the event, Ms Hornsey decided that there were matters that had been raised which required clarification and/or follow-up. She said she would accordingly speak with individuals interviewed during the course of Mr Bevan's investigation.

[281] The decision to do so was appropriate having regard to the obligations not only of cl 8.4.3, but also s 103A(3)(a) of the Act which in summary required a sufficient investigation.

[282] Ms Hornsey subsequently spoke to 12 persons, at least three of which were interviewed by phone rather than in person; this included Ms A whose circumstances had been the subject of considerable comment and analysis. Ms Hornsey subsequently summarised the information provided in her letter of 23 February 2014. It is clear from that letter and from her evidence to the Court, that she did not seek specifics of particular incidents which had given rise to the comments, opinions and impressions provided by interviewees.

[283] In the formal response which then followed, Ms Campbell's lawyer yet again repeated the concerns as to a lack of specific allegations and details. He asked which allegations were sufficiently serious as to justify dismissal. The background was that Ms Hornsey had said at the meeting on 14 February 2014 that "all of the findings in the Bevan report amounted to serious misconduct". It was argued that this could not be correct because there was a mixture of conduct and performance issues.

[284] The comprehensive cross-examination of Ms Hornsey with regard to her assessment of the circumstances relating to Ms D, Ms A and Ms E confirmed that Ms Hornsey did not seek particulars of conduct which gave rise to the opinions and perceptions expressed by those persons to the investigators, or by others about them. Similarly, with regard to allegations of using inappropriate language with regard to children, and yelling at them, no specifics were sought from any of the persons to whom Ms Hornsey spoke.

[285] In the end Ms Hornsey accepted the conclusions which Mr Bevan had reached relating not only as to the way in which current and former staff members had been treated, as referred to in her letter of 7 February 2014, but also taking into account conclusions reached as to inappropriate treatment of children and use of unsuitable language.

[286] Although Ms Hornsey acknowledged that the behaviours of concern had not continued following the ERO and Hay reports, she considered the manifestations of Ms Campbell's earlier conduct remained because she had not acknowledged she was responsible for her actions.

[287] In short, there was no attempt to focus on and investigate for disciplinary purposes particular aspects of Ms Campbell's conduct which it was believed gave rise to serious misconduct. Nor was it acknowledged in the disciplinary phase that the process to date had not provided a proper opportunity for Ms Campbell to respond to the opinions which had been given without specifics; or that Mr Bevan had adopted what he described as a broad brush approach.

***Mix of performance and conduct issues***

[288] A yet further issue which was not identified at the disciplinary stage was the mix of performance issues on the one hand, and conduct issues on the other. As explained earlier, performance and conduct issues were supposed to be dealt with differently.

[289] Where an employer and an employee have agreed on prescriptive arrangements for managing their employment relationship, an employee is entitled to expect adherence to those arrangements. In my view, a fair and reasonable employer could have treated many of the circumstances which were described in Mr Bevan's report as performance issues capable of being dealt with if necessary under the competence provisions, and could not have combined them with conduct issues so as to reach a conclusion that dismissal was justified.<sup>33</sup>

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<sup>33</sup> *Clark v Idea Services Ltd*, above n 19, at [124]; leave to appeal this decision was declined by the Court of Appeal in *Idea Services Ltd v Clark* [2014] NZCA 97, (2014) 11 NZELR 619.

[290] Ms Hornsey said that she had regard to the ERO report of 2012, and Mr Hay's report. No consideration was given to the fact that a strong recommendation had been made for stringent performance measures to be introduced in late 2012, and that this had not occurred, but that an alternative process focusing on conduct had been preferred a year later just as positive improvements became evident.

***The confidential material***

[291] Ms Hornsey was not provided with the confidential comments that had been made by some interviewees, as described earlier.

[292] This did not resolve that particular difficulty, however, because I have found that Mr Bevan's conclusions were influenced by confidential information to which Ms Campbell had not had an opportunity to respond; and Ms Hornsey relied on Mr Bevan's opinions when reaching her own conclusions. The unfairness occasioned by the use of confidential information in the investigation remained relevant at the disciplinary stage. It was not identified as a problem. A fair and reasonable employer could not rely on conclusions influenced by such information.

***Conflict of interest issue***

[293] I indicated earlier that Mr Bevan's dual role gave rise to a *perception* of bias, in the legal sense. I do not consider there was *actual* bias on his part. Furthermore I am satisfied that at the disciplinary stage, Ms Hornsey's decision to re-interview some individuals who had already been spoken to overcame the perception issues.

***The dismissal decision***

[294] I conclude that the ultimate finding of serious misconduct and the consequential decision to dismiss Ms Campbell was not justified; there are four reasons for this conclusion.

[295] First, specific matters were not identified, which meant Ms Campbell was not given a reasonable opportunity to respond to the employer's concerns. This was important having regard to the potential consequences of adverse conclusions on Ms Campbell's reputation and teaching career. The context of the circumstances of the investigation were not considered adequately, including the failure to impose stringent performance objectives when this should have occurred in late 2012.

[296] Secondly, the issue as to the delay in instituting the investigation was not considered. It is well established that delay of this kind may amount to a significant breach of the duty of trust and confidence inherent in an employment relationship.<sup>34</sup>

[297] Thirdly, some of Mr Bevan's conclusions were influenced by confidential information; these were included in the totality of his findings which Ms Hornsey adopted to conclude there was serious misconduct.

[298] Finally, there was the important distinction between performance and conduct issues which was not identified and considered.

[299] Many of these issues were raised for Ms Campbell prior to the final decision to terminate Ms Campbell's employment. I must conclude that the decision to dismiss by relying on an investigative and a disciplinary process that suffered from these flaws meant dismissal was not a step which a fair and reasonable employer could have taken. The test for justification in s 103A of the Act is not met.

[300] That is not to say that there were not significant concerns which required attention, particularly relating to Ms Campbell's performance. I have concluded only that the steps taken by the employer leading to dismissal on the grounds of serious misconduct were not those which a fair and reasonable employer could take.

[301] Ms Campbell's dismissal grievance is accordingly established.

## **Remedies**

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<sup>34</sup> *Canterbury Clerical Workers IUOW v Marshall Cordner & Co* [1983] ACJ 869, 871; *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920, 928.

### ***Reinstatement***

[302] An important aspect of Ms Campbell's claim is her application for reinstatement. Her counsel submits that she needs to be reinstated so as to place her career back on track; that she is committed to education and has a significant contribution to make; that she has received positive feedback as is evident from the information provided by Mr Green to Ms Cole and Mr Bevan in the investigation; that she has taken criticisms on board and changed her style; and that there have been changes at the school so that there is now a different dynamic and no impediment to her return to her previous role. Ms Campbell when giving evidence emphasised that for the purposes of reinstatement she would agree to performance management and a restorative process as part of any advice and guidance procedure, and as an aspect of her performance agreement. She said she is confident from previous experience, particularly during 2013, that she and her colleagues at the school would be able to work collaboratively, and she would see it as her responsibility to ensure this occurs.

[303] That application is opposed by the Commissioner. Essentially, it is submitted that the history is such that it would be impracticable and unreasonable to reinstate her. Counsel argues there would be a risk of recurring problems because there has been no acknowledgment by Ms Campbell of the negative impacts of her behaviour on others; that internal divisions amongst some staff remain; that the Commissioner believes she could not establish a healthy working relationship with Ms Campbell given what has transpired; and that the potential effect on third parties if reinstatement were to occur also suggests such a possibility. It is contended that polarised attitudes continue to exist, as is evidenced by, among other things, public social media comments which have attacked staff and former Board members.

[304] Section 125(2) of the Act requires the Authority, and thus on a challenge the Court, to be satisfied that reinstatement of an unjustifiably dismissed employee is both reasonable and practicable.

[305] Turning to legal principles, in *New Zealand Education Institute v Board of Trustees of Auckland Normal Intermediate School* the Court of Appeal confirmed that the main principles to be applied when determining practicability are:<sup>35</sup>

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with regard to the past but also and in particular the future.
- Practicability involves considering whether the employment relationship can be successfully re-imposed on the parties.
- The Court may consider matters that were outside the reasons for a dismissal when assessing whether the employment relationship can be re-imposed. A broad approach is to be taken.

[306] In 2011, reinstatement ceased to be the primary remedy under the Act. Further, the test of “reasonableness” was added as an aspect of the test. As to this requirement the full Court in *Angus v Ports of Auckland Limited* stated:<sup>36</sup>

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had 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.

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<sup>35</sup> *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416 - 417.

<sup>36</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

...

[68] ... 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.

[307] Starting with Ms Campbell's position, she emphasised in her evidence that she is committed to her calling in education, about which she is passionate. She acknowledges she would need to be subject to a performance agreement as well as advice and guidance procedures that would address her performance issues. She says she wishes to demonstrate her ability to change at Salford. The effect of her evidence is that she wishes to build on the positive steps which she had taken by way of response to issues identified in the ERO and Hay reports, but which were thwarted by her suspension and then dismissal.

[308] Whilst her intentions are entirely understandable, they must be balanced against other realities which the Court has to consider in assessing the broad equities of the parties' respective positions.

[309] There are still polarised views at the school about Ms Campbell's leadership. I accept Ms Hornsey's evidence that an internal division remains amongst some staff at Salford. Two current staff members have advised that they would have to look for employment elsewhere should Ms Campbell return. Ms F is also on record stating that she believes her position would be untenable were Ms Campbell to return, so that she would have to leave. I find there is a potential for further disruption of employment arrangements for staff.

[310] Ms Hornsey also gave evidence as to a divide which she says exist amongst the wider school community. I also accept her evidence that a number of parents and community members have contacted her to express their views, which are also polarised.

[311] By contrast, one existing staff member who was appointed to the Deputy Principal position in December 2013 advised the Court that she considered

reinstatement would be beneficial to Salford. That is because she says there are staff and many within the school community who would welcome her return.

[312] The divergence of views described by the Commissioner on the one hand, and the Deputy Principal on the other, serves to reinforce the dichotomy of opinions held on this topic. It is obvious that strong views are held both ways on Ms Campbell's ability to lead Salford out of its longstanding and significant difficulties. I consider that there is accordingly a potential for the continuation of difficult working relationships. I do not consider that as a matter of practicality good working relationships could readily be established with staff and others. This factor militates strongly against the making of an order.

[313] Reference has also been made to cyber-bullying. Examples of blogs which were critical of staff who were perceived as having opposed Ms Campbell were placed before the Court. Although Ms Campbell knows one individual who is responsible for these, there is no evidence that she has promoted them. But they are a yet further indication of the controversy that continues to surround Ms Campbell's role at Salford.

[314] The school continues to be subject to the governance of a Commissioner. Ms Hornsey says that were Ms Campbell to be reinstated, she herself would not continue in that role, having regard to the difficult interactions which occurred during the disciplinary process, and the necessity of having to participate subsequently in litigation opposing Ms Campbell's claims. The effect of what she was saying is that these processes have inevitably been bruising, and have negatively affected any potential professional employment relationship. Were Ms Campbell to be reinstated and were Ms Hornsey to resign as Commissioner, it is probable that a replacement would be appointed by the Ministry. It would be that person's responsibility to engage with Ms Campbell to stipulate particular objectives for the purposes of her performance agreement, and to identify and establish other advice and guidance initiatives which would apply to her as Principal of Salford. Having regard to the protracted and difficult history of this matter, the potential for disagreement in settling such objectives could not be ruled out which would not enhance the prospect of trust and confidence being restored readily.

[315] I observe that there is no evidence to suggest that Ms Campbell is the only person who is capable of leading the school successfully, or why it is that she is the person who should do so. In the absence of such evidence or reasons, I infer that the Commissioner, or in due course the Board, has the option of employing a person who is free from the performance issues which Ms Campbell acknowledged. No practical reason is given which dictates that Ms Campbell must be reinstated.

[316] I also consider that as far as the school is concerned a decision not to reinstate is more likely to result in an earlier return of governance to a Board of Trustees. A state of normality is more likely to be achieved earlier if there are not ongoing issue as to the performance of the Principal.

[317] I have been referred to several previous authorities relating to teachers and/or principals, where reinstatement was not considered appropriate.<sup>37</sup> A decision to which counsel did not refer reached the opposite conclusion. In *Hobday v Timaru Girls High School Board of Trustees*, Judge Palmer ordered reinstatement of a principal, holding that when the teaching staff absorbed and evaluated the judgment they would understand why an internal conflict had existed; he found that any problems in that instance were not insurmountable.<sup>38</sup>

[318] By contrast, I do not consider that in this case there is a prospect of such reconciliation occurring readily at Salford. I must have regard to the significant history of dysfunctional relationships.

[319] Whilst I have found that the processes which led to a conclusion of serious misconduct justifying dismissal were not those which a fair and reasonable employer could undertake, that does not mean that there were not significant problems which required very careful management. Those problems remain and I do not consider it reasonable to make an order of reinstatement which would require an ongoing process for their resolution.

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<sup>37</sup> *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*, above n 34; and *Lewis v Howick College Board of Trustee*, above n 13.

<sup>38</sup> *Hobday v Timaru Girls' High School Board of Trustees* [1994] 1 ERNZ 724.

[320] In my view, it is inherently unlikely that Salford is the only educational institution where Ms Campbell might choose to advance her career in education, applying her undoubted experience and skills constructively.

[321] The Court was told that there are issues arising from the events reviewed in this decision, which have yet to be considered by the New Zealand Teachers Council. I record that I have no detailed evidence as to those matters; nor was it argued that such issues are potentially an impediment to reinstatement. I have accordingly placed them to one side.

[322] I am not satisfied that it would be practical or reasonable to order Ms Campbell's reinstatement. The application to do so is declined.

***Loss of income***

[323] Ms Campbell claims reimbursement of remuneration lost since dismissal on 6 March 2014.

[324] The circumstances relating to Ms Campbell's post-dismissal employment were covered briefly in evidence. She was without work for 10 months; she said it took a while to obtain confidence to commence applying for jobs. She stated that she made 14 applications for a range of jobs, but she was not accepted for any. Her view was that this was unsurprising given the circumstances and publicity which surrounded her dismissal. Eventually she was able to obtain work in an institution that is separate to the Ministry's school system, which she started on 22 January 2015, occupying a relieving position for a person who was on maternity leave. She retained this role as at the date of the hearing.

[325] Although Ms Campbell was dismissed on 6 March 2014, two months' salary was paid in lieu of notice. Accordingly, Ms Campbell's claim runs from the expiry of the two-month period until the date when she assumed her current role.

[326] Counsel agreed that the Court should make the necessary findings as to the period for which remuneration should be awarded, and as to mitigation and

contribution; it is anticipated that the parties can then complete the relevant calculations.

[327] I deal first with the issue of the period for which remuneration should be awarded. Section 128 of the Act provides that where an employee has a personal grievance, and the employee has lost remuneration as a result, the Court must order the employer to pay the employee the lesser of a sum equal to that loss of remuneration or to three months' ordinary time remuneration.

[328] For the purposes of that claim I must first consider the question of adequacy of proof of loss, since it is submitted for the defendant that insufficient information has been provided.<sup>39</sup>

[329] I have summarised above the evidence which Ms Campbell gave in this regard, and it was confirmed by her partner's testimony. It was not suggested to either of them that the information which had been provided was unreliable. I find that although more detail would have been desirable, there is sufficient information which allows me to conclude that in the difficult circumstances Ms Campbell faced, which included significant regional publicity, it would indeed have been challenging to obtain alternative employment following her dismissal. I accept her unchallenged evidence that she made multiple applications for work, unsuccessfully, eventually only obtaining employment earlier this year.

[330] I am satisfied that she has established that she had lost remuneration as a result of the personal grievance, and that she has made reasonable attempts to mitigate that loss. Accordingly, I am satisfied that Ms Campbell should be reimbursed for three months' ordinary time remuneration, less the post-dismissal sum that was referred to in the letter of dismissal of 6 March 2014.

[331] Section 128(3) of the Act provides a discretion to order compensation for lost remuneration over and above the three-month period. As the Court of Appeal found in *Sam's Fukuyama Food Services Limited v Zhang*, moderation is required in fixing

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<sup>39</sup> An example of the Court's consideration of this issue is found in *Alan v Transpacific Industries Group Ltd* [2009] NZEmpC 38; (2009) 6 NZELR 530 at [78].

awards for lost remuneration and any such award “must have regard to the individual circumstances of the particular case.”<sup>40</sup> The Court went on to state that it is necessary to have regard to any relevant counterfactual analysis in making allowance for contingencies that might, but for the unjustifiable dismissal have resulted in the termination of the claimant’s employment.<sup>41</sup>

[332] It was submitted for the defendant that the particular contingency which the Court needs to take into account is the possibility that a competency process may have led to dismissal, given a lack of insight as to Ms Campbell’s role in the precipitating circumstances. The counterfactual must assume a date when such a process would have been implemented, and then an assessment as to whether dismissal might have followed. Ideally, as I have indicated on several occasions in this decision, stringent performance objectives should have been introduced in late 2012. If, for the purposes of this analysis, improvements were not achieved, a subsequent competency process under cl 8.3 of the second collective agreement could have then been considered. It would have been accompanied by appropriate individual assistance and guidance to assist Ms Campbell, as implemented by the employer. The formal competency process described in cl 8.3.2 would have been instituted only if that assistance and guidance had not remedied the situation.<sup>42</sup> In my view it is possible that those processes would have resulted in a positive outcome, noting that Mr Bevan was of the view following his investigation that the situation was capable of being remedied as at August 2012. Accordingly, I do not consider that dismissal would have occurred as a result of a competency process within the period which ran from the date when remuneration ceased to the date when alternative employment was obtained. I find that Ms Campbell is entitled to full reimbursement for this period.

### ***Contribution***

[333] The findings I have made with regard to loss of income are, however, subject to contribution considerations, to which I now turn. Section 124 of the Act provides:

#### **124 Remedy required if contributing behaviour by employee**

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<sup>40</sup> *Sam’s Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [36].

<sup>41</sup> At [37].

<sup>42</sup> See [138].

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—

- (c) Consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (d) If those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[334] Counsel for the defendant submitted that a “substantial reduction” was warranted. Reference was made to the *NZEI* case where an award of compensation was reduced by 75 per cent to reflect the significant degree to which the Deputy Principal contributed to the plight in which the grievant had found himself.<sup>43</sup> It was submitted for the defendant that Ms Campbell was responsible for serious and longstanding problems in working relationships at Salford, so that a similar conclusion was warranted.

[335] Section 124 requires me first to consider the extent to which Ms Campbell’s actions contributed towards the situation that gave rise to the personal grievance, that is, the unjustified dismissal.

[336] In undertaking this assessment I take into account the fact that the application for reinstatement has been declined.

[337] Next, I find that Ms Campbell’s conduct was a significant factor in the circumstances which were the subject of the investigation, disciplinary process and then the dismissal which I have found to be unjustified. Following the ERO and Hay reports, Ms Campbell acknowledged her role in the criticisms which were being advanced. At the time she accepted that her leadership had contributed to the difficulties which arose, and it was her point that she would need to provide appropriate leadership to deal with them. She recognised that there was an issue of swearing, and modified her language accordingly, although an issue remained as to the extent to which she required other staff to do likewise.

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<sup>43</sup> *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*, above n 35.

[338] At the hearing, Ms Campbell agreed there were performance issues. On the basis of the acknowledgments confirmed by Ms Campbell in her evidence, I find that her actions contributed to the situation which led to the processes I have reviewed. Those processes were, however, significantly flawed.

[339] Standing back, I consider a just reduction for contributory purposes is 30 per cent.

[340] Counsel are to reach agreement, if possible, as to the effect of the foregoing findings. Leave is reserved to return to Court for its assistance if agreement does not prove possible.

***Compensation for humiliation, loss of dignity and injury to feelings***

[341] In her statement of claim, Ms Campbell sought total compensation for humiliation, loss of dignity and injury to feelings in the sum of \$50,000, for her two personal grievances. However, they need to be assessed separately.

[342] The first such assessment relates to the unjustified action grievance, which arises from the suspension.

[343] Evidence as to this has been provided by Ms Campbell and her partner. The information they provided indicates significant stress and distress arising from a very public suspension which occurred in circumstances that were unfair and unreasonable.

[344] I do not accept the submission made by the defendant that there is insufficient detail for a proper assessment to be undertaken. The evidence provided is compelling and satisfies me that it is appropriate to make an award for such compensation.

[345] In *Hall v Dionex Pty Limited*, Judge Inglis stated:

Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect it might otherwise be expected to have increased them. They further note that while in *NCR(NZ) Corp Ltd v Blowes* the Court of

Appeal attempted to set an “upper limit” on compensatory awards of \$27,000, consistent with inflation from the award of \$20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be \$33,000. By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between \$3,000 and \$20,000 with the average award before taking contribution into account being \$9,687.50.<sup>44</sup>

[346] For this particular aspect of the matter, I consider a fair award of compensation is \$12,000, subject to any contributory factors.

[347] Turning to the consequences of the dismissal, they too have been significant, and for similar reasons. It is unsurprising that the dismissal had a profound impact on Ms Campbell, given the long and difficult investigatory and disciplinary processes, and the inevitable stigma associated with a finding of serious misconduct against her as a professional occupying a role which interfaces with the community in a public way.

[348] I am satisfied that a further significant award is justified in these circumstances, which I fix in the sum of \$20,000, subject to issues of contribution.

[349] The compensatory awards made in respect of each personal grievance should be reduced by the same percentage as I applied earlier under s 124 and for the same reasons.

[350] In the result, the total compensatory award is \$22,400.

## **Conclusion**

[351] The decision to suspend Ms Campbell was not a conclusion which a fair and reasonable employer could have reached in all the circumstances. Her disadvantage grievance is accordingly established.

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<sup>44</sup> Kathryn Beck and Hamish Kynaston, “Remedies – we’ve been thinking...” (paper presented to New Zealand Law Society 10<sup>th</sup> Employment Law Conference, October 2014) at 457-458, citing *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [40]-[42], and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA), cited in *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [87].

[352] The decision to dismiss Ms Campbell was not a conclusion which a fair and reasonable employer could have reached in all the circumstances. Her dismissal grievance is accordingly established.

[353] The Commissioner is to pay Ms Campbell lost wages as described in paras [330] and [332] above. The parties are invited to agree quantum. If that does not prove possible, leave is reserved to bring that issue back to the Court for resolution. Such an application should be filed and served within 28 days of the date of this judgment. The sum so calculated or assessed will be reduced by 30 per cent.

[354] The Commissioner is to pay Ms Campbell compensation for humiliation, loss of dignity and injury to feelings in the sum of \$22,400.

### **Costs**

[355] Ms Campbell has succeeded in her challenge, and she is entitled to costs. If agreement cannot be reached, any application for costs, supported by evidence, is to be filed within 28 days of the date of this judgment; any response and evidence is to be filed and served 28 days thereafter.

B A Corkill  
Judge

Judgment signed at 2.40 pm on 27 July 2015

## **ADDENDUM**

**29 July 2015**

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The Court's judgment was issued to the parties only on 28 July 2015. It was at that point subject to a non-publication order, so as to provide the parties with an opportunity to make any necessary submissions as to anonymity of names of persons who were referred to in the judgment. Since counsel have now advised that no such submissions are necessary, the order of non-publication has been discharged.