

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 151
5429900

BETWEEN MARLENE CAMPBELL
 Applicant

A N D THE COMMISSIONER OF
 SALFORD SCHOOL
 Respondent

Member of Authority: M B Loftus

Representatives: Fiona McMillan, Counsel for Applicant
 Scott Wilson, Counsel for Respondent

Investigation meeting: 15 May 2014 at Dunedin and 26 to 30 May 2014 at
 Invercargill with additional information on 5 June 2014

Submissions Received: At the investigation meeting

Date of Determination: 25 September 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Marlene Campbell, claims she was unjustifiably dismissed from her position of Principal on 6 March 2014.

[2] She also has three separate claims of unjustified action causing disadvantage which have been raised at various times since July 2013. The first alleges Ms Campbell was disadvantaged by the way a complaint against her (the Stephenson complaint) was investigated. The second relates to her suspension in November 2013 and the third challenges the process used by School's Commissioner, Nicola Hornsey, to conduct the investigation which led to Ms Campbell's dismissal.

[3] The school accepts it dismissed Ms Campbell but claims the decision was justified. It denies the disadvantage claims have validity.

[4] It should be noted the School has been under various forms of management over the relevant period. It was initially managed by a Board of Trustees elected under the Education Act 1989. On 5 November 2012 a Limited Statutory Manager (LSM), Peter Macdonald, was appointed. An LSM has, as the name suggests, limited powers and operates in conjunction with the Board, which remains. On 7 November 2013 Ms Hornsey was appointed Commissioner. A Commissioner replaces a Board and exercises all the powers thereof (sections 78N and 78O of the Education Act).

Background

[5] Ms Campbell was appointed Principal of Salford School in 2006. She says her resolution of pre-existing issues made her unpopular with some staff.

[6] A regular Education Review Office (ERO) review occurred in 2012. Ms Campbell says she was told, on its second day, the ERO was also investigating complaints against her.

[7] The ERO did not, however, look into the alleged complaints but recommended further investigation. The Board appointed Mr Cleave Hay to conduct that investigation. His report, delivered in September 2012, identified issues of concern with Ms Campbell's management style and recommended the Board *place performance improvement strategies and measurements in place*. It also recommended they consider their ability to do so and whether they should obtain outside assistance by, for example, requesting an LSM.

[8] Correspondence followed with Ms Campbell portraying hers as an attempt to resolve any issues without further escalation or the involvement of lawyers. The School portrays her correspondence as a denial that concerns raised in the Hay report had any validity.

[9] In October the Board asked the Ministry of Education appoint a LSM. It did, Mr Macdonald.

[10] Ms Campbell contends Mr Macdonald decided to remove her almost immediately. Mr Macdonald denies the allegation. He says he interviewed all staff and Board members, both individually and in groups. He says while there was evidence of some support for Ms Campbell, he gained an impression the reports of

both the ERO and Mr Hay were accurate in portraying an overwhelming sense of low morale and a fear of Ms Campbell.

[11] On 6 December 2012 Mr Macdonald received the Stephenson complaint. It concerned the way Ms Campbell, accompanied by an external advisor (Mr Brian Richardson), treated Ms Stephenson on 31 May 2012. He investigated and concluded the complaint had validity. He then engaged external counsel to advise whether or not disciplinary action should follow but nothing came of that. Ms Campbell contends the investigation process, which continued for nearly seven months, was flawed as was its outcome. She challenged it via the first disadvantage grievance which was lodged on 16 July 2013. There was an unsuccessful mediation in September.

[12] On 12 December 2012 the Board and Ms Campbell met to discuss a range of issues and, in particular, the Board's view staff lacked confidence in Ms Campbell and her leadership. As Mr MacDonald concedes, he expressed a view the situation was unsustainable. The meeting was followed by various interactions between Ms Campbell, Mr Macdonald and the Board which she portrays as harassment and an undermining of her authority. The School denies the allegations and says it was simply trying to address its, and the staff's, concerns.

[13] In June 2013, and while the above exchanges (both written and oral) continued, the Board conducted a staff survey. The Board says it was surprised and extremely disappointed with the results. While the survey showed some staff were happy with Ms Campbell, it also found a number were actively seeking alternate employment and there were clear signs of discontent. Ms Campbell contends the survey emphasised the negative and ignored many positive developments.

[14] Ms Campbell claims the Board used her grievance as an excuse to further exacerbate the situation by reconsidering the previous year's issues. She says this was another attempt to undermine her authority. The School denies the allegation. It says the formal investigation it commenced at that time was prompted by the survey which provided evidence problems remained and had to be addressed.

[15] The investigation was conducted by the Board's Chair and Geoff Bevan, a solicitor from a law firm engaged for both that purpose and to represent the school in the personal grievance.

[16] On 25 October the Board's Chair resigned. She says this was a result of what she heard during the investigation and the subsequent loss of any ability to deal with Ms Campbell objectively. Her resignation was followed by others and by the end of the month the entire Board had gone. That resulted in Ms Hornsey's appointment and Mr Macdonald's departure but it was a week before the change occurred.

[17] On 30 October 2013 Mr MacDonald received a letter (along with attachments) from Mr Bevan which, he says, gave him reason to believe concerns about Ms Campbell were widespread and serious. He says the content also raised concerns about the welfare of certain staff.

[18] He had also recently received Ms Campbell's performance appraisal which had been conducted by an external evaluator. Again Mr MacDonald had concerns about the content which further indicated staff were divided over Ms Campbell and her treatment of them.

[19] Another incident occurred at a staff meeting held on 31 October. Two members of the management team are said to have made comments supportive of Ms Campbell and which were construed as threatening those who may oppose her. Mr MacDonald discussed this with four of those present and their feedback further exacerbated his concerns about the staff's emotional safety.

[20] Having thought about the situation Mr Macdonald instructed the solicitors write to Ms Campbell's representatives which they did the following day, 1 November 2013. The letter, which is long and detailed, advises Mr MacDonald had formed a view Ms Campbell should be suspended while the investigation continued. It asked Ms Campbell comment before a final decision was made.

[21] The letter, which was sent at 4.09pm, tells Ms Campbell to leave work immediately. She was not to return the following Monday but attend a meeting, by telephone, at 8.30am to discuss the *proposed* suspension.

[22] Ms McMillan responded on Ms Campbell's behalf. She protested the timeframes were unreasonable especially given a 116 page attachment and the fact Ms Campbell had already left for an event in a remote location. She would not be contactable over the weekend and, it is alleged, Mr Macdonald knew that. Correspondence continued to flow over the weekend though Ms Campbell did not, as

a result of her absence, participate in the discussion. It culminated in the following being sent to staff at 6.11am on Monday:

I want to let you know that I have made a preliminary decision to suspend Marlene from her role as Principal, while the investigation continues. At the moment my decision is a preliminary one. I expect to be in a position to finalise the decision either later today or tomorrow, and will provide an update at that point. In the meantime Marlene will not be at work.

If the suspension continues then I also expect to make a brief statement to the school community and media either late today or tomorrow. If you are asked for comment before then, please simply advise that you are not able to discuss the matter, but you do expect the LSM to be making a statement either late today or tomorrow morning.

Thank you again for your hard work and support for the School.

[23] Discussions continued through the day and led to the School advising a deadline for feedback about suspension of 9.30am on Tuesday 5 November. Ms Campbell responded with a press release and Mr MacDonald publically confirmed the suspension around 11am on the 5th.

[24] On Wednesday 6 November 2013 Mr MacDonald became aware Ms Hornsey was to be appointed Commissioner.

[25] Upon her arrival Ms Hornsey she reviewed the situation. After trading further correspondence and meeting with Ms Campbell she decided the suspension should continue. She decided the *potential effects on the emotional safety of current staff* outweighed any disadvantage to Ms Campbell as (a) the school could still function, (b) she had concluded Mr Bevan's preliminary report indicated potential serious misconduct and (c) the correspondence had given her an impression Ms Campbell had refused to meaningfully address the schools concerns.

[26] Ms Campbell challenged the suspension and sought interim reinstatement. She was unsuccessful (NZERA Christchurch 254, 11 December 2013).

[27] On 13 December Mr Bevan provided Ms Hornsey a draft report which, along with notes of interview responses, was forwarded to Ms Campbell for comment. Ms Campbell was told the draft raised serious concerns which could lead to disciplinary sanctions including dismissal. Ms Campbell was asked to comment and a

meeting was arranged for 20 December in Dunedin. It was attended by Ms Hornsey, Mr Bevan, Ms Campbell and her solicitor, Fiona McMillan.

[28] The meeting took some four hours and was followed by considerable correspondence in which Ms Campbell essentially denied any wrongdoing.

[29] The outcome was Mr Bevan's final report which was sent to Ms Hornsey on 4 February 2014. It is a lengthy document in which Mr Bevan concludes a number of the complaints were warranted. He finishes with:

[295] While her behaviour has improved significantly, Ms Campbell's inability to perceive or acknowledge her past behaviour leaves some current staff with real concerns as to whether this improvement has occurred for genuine reasons (as opposed to Ms Campbell feeling she had no other choice) and, most importantly whether that improvement is sustainable.

[296] I share those concerns, and find them to be entirely justified. In light of Ms Campbell's failure to demonstrate any insight into acknowledgment of what I have found to be serious, I have no confidence that her ongoing leadership or behaviour will be safe, or appropriate.

[30] Ms Hornsey considered the report and decided it warranted a disciplinary process. She advised Ms Campbell of this when she forwarded the report on 7 February 2014. She also advised:

... I have formed the preliminary view 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 working environment at Salford School and that this has caused significant harm to other Salford School employees...

Based on the contents of Mr Bevan's Report (which, subject to receiving your views, I accept), I have formed a preliminary view that your actions amount to serious misconduct and that it is not possible for me to have trust and confidence in you to appropriately and safely manage the staff of Salford School.

Accordingly, you should be aware that I consider that the alleged misconduct, if confirmed, is serious enough to warrant dismissal. ...

[31] A further meeting occurred on 14 February at which Ms Campbell gave her response though there was, in the interim, further written protest that Ms Campbell had done nothing that could amount to serious misconduct.

[32] Again the meeting took some four hours and it was followed by further correspondence in which Ms Campbell asserted her position. She also raised various concerns with the process and its conclusions. Ms Hornsey also made some further inquiries in response to points raised by Ms Campbell and the results were conveyed by letter on 23 February. That letter also advised Ms Hornsey retained her preliminary view Ms Campbell's conduct was serious and warranted a disciplinary response.

[33] Ms Hornsey offered to meet again but Ms Campbell chose to respond in writing. Ms Hornsey then considered the material before her in a process that took three days. She concluded Ms Campbell had behaved inappropriately and her conduct warranted dismissal.

[34] Ms Campbell chose not to meet and discuss the outcome and the decision to dismiss was conveyed by letter dated 6 March.

Determination

[35] As already said, Ms Campbell has four grievances; one of unjustified dismissal and three of unjustified action. Here I note there was six days of evidence and hundreds of pages of documents. While not referred to in any detail the parties can be assured these have been carefully perused and considered in reaching the following conclusions.

First disadvantage claim

[36] This relates to Mr MacDonald's investigation of the Stephenson complaint. Ms Campbell claims the complaint was historic and the investigation process predetermined and one which undermined her authority. There is an additional factor with a claim Ms Campbell was required to pay Mr Richardson's bill.

[37] I disagree the complaint was historic. While the event may have occurred in May 2012, the complaint was not made till December. It was only then it could be investigated and it was.

[38] In investigating the complaint Mr MacDonald was required to put his concerns and findings to Ms Campbell, allow an opportunity to respond and consider those responses. The evidence is, having made appropriate enquiries, he did.

[39] The real complaint appears to be that Mr MacDonald's decision to uphold the complaint was predetermined. There is no evidence of this other than Ms Campbell's seizing upon an accusation of Mr Richardson's that Mr MacDonald was *bent*, along with her understanding of the reasons why Mr Richardson held that view. The accusation was made toward the end of a meeting between the three.

[40] As Mr Wilson submitted it is not surprising Mr Richardson was defensive at the meeting. He, in fact, conducted the bulk of the interview which gave rise to the complaint and it was his idea to conduct it in an environment which Ms Stephenson considered inappropriate.

[41] In any event a claim of unjustified action requires two things. A disadvantage which emanates from an unjustifiable action or decision. It is difficult to see the disadvantage. While Mr MacDonald concluded the complaint had validity he chose to take no action. Indeed Mr MacDonald received three complaints about Ms Campbell around this time and not one resulted in disciplinary action.

[42] Given the evidence I cannot help but conclude Ms Campbell was becoming increasingly defensive given the ERO report and evidence staff were now more willing to challenge her behaviour and complain about it.

[43] As to the allegation Ms Campbell was required to pay Mr Richardson's fee, I find no evidence to support the claim.

[44] Finally there is the claim Ms Campbell's authority was being undermined. This has two possible sources. The first was Mr MacDonald's decision to investigate the Stephenson complaint. The second, which Ms Campbell referred to at some length and which was concurrent with the decision in respect to the Stephenson complaint was a restructure. I have already concluded Mr MacDonald was justified in investigating the complaint – indeed he was duty bound to do so. With regard to the restructure I note Ms Campbell participated in the process that led to that decision and now concedes it was the correct decision and the new structure had a positive effect on the school. Again that begs the question of where the disadvantage might lie.

[45] For the above reasons I conclude Ms Campbell has not been disadvantaged in respect to the issues raised under this grievance, let alone unjustifiably. It is dismissed.

Second disadvantage grievance

[46] This is a challenge against the suspension with Ms Campbell asserting there was no substantive justification for it and the process by which it was implemented was not one a fair and reasonable employer would have used.

[47] This is a claim which has some validity. While Mr Bevan's initial reporting raised the spectre of serious issues which had to be addressed questions arise over the timing of the suspension and the process by which it was implemented.

[48] It is well established the requirements of s.103A apply to a decision to suspend. In other words suspension must be preceded by advice it is being contemplated along with an opportunity to argue against the proposal.

[49] The evidence does not support a conclusion that occurred here. Notwithstanding the use of words such as *proposed* and *preliminary* in correspondence relating to the suspension it is clear from answers Mr MacDonald gave at the investigation the decision had effectively been made. For example, and when asked whether there were alternates to suspension, he commented there may have been if he thought only one staff member was under threat but there were a multiplicity of dissatisfied staff who he thought Ms Campbell might target. He said it was not practical to put that number of staff on leave to protect them when he could suspend one - Ms Campbell. Similarly the notice to staff was written and issued prior to the deadline for response. While it talks of a preliminary decision it also says Ms Campbell was, in the interim, away from work. That is a suspension.

[50] Given the evidence I have to conclude Mr MacDonald wanted Ms Campbell out of the workplace. Notwithstanding his initial approach and decision not to take disciplinary action against Ms Campbell when the chance first arose, there is considerable evidence his attitude toward her changed and he came to the view she should be removed from the school. For example he is recorded as saying at a Board meeting *This is very much a Win/lose theory – Marlene stays / staff goes. Marlene goes / staff stays.*

[51] For two reasons it is difficult not avoid a conclusion he grabbed his chance when the fetter of the Board no longer remained. It is apparent there had been problems for some considerable time yet it had not been necessary to remove Ms Campbell to protect others and other than receipt of Mr Bevan's initial

observations, there is no evidence anything had suddenly changed. To the contrary, and while he had no expectation the change would be permanent, Mr MacDonald accepts Ms Campbell had ameliorated her behaviour toward others. In such circumstances, and having waited for so long surely another day or two to allow Ms Campbell a proper opportunity to respond to the suspension proposal was reasonable. It did not however occur.

[52] For the above reasons I conclude Ms Campbell has a personal grievance in that she was unjustifiably suspended.

Third disadvantage grievance

[53] The third claim relates to the process adopted by Ms Hornsey but it is difficult to ascertain exactly what underpins some of these issues as the applicant did not specifically address this cause of action in submissions.

[54] In the statement of problem five possible failures are identified. They are:

- a. A claim *The Commissioner failed to address the serious procedural flaws in the investigation initiated by the LSM but continued to conduct the investigation along the same lines;*
- b. A decision to withhold information;
- c. A view Ms Hornsey ignored evidence that supported Ms Campbell's position;
- d. A failure to complete the investigation within a reasonable time; and
- e. A deliberate or reckless approach aimed at making the process as expensive and stressful as possible for Ms Campbell.

[55] The first claim I take no further. It does nothing more than repeat the assertion upon which Ms Campbell relies for her claim the dismissal was unjustified. It shall be considered with the dismissal claim.

[56] The withheld information was discussed in correspondence between the parties in December 2013. The School's position is the material was evaluative (as defined by the Privacy Act 1993) but, in any event, it played no material part in the

decision to dismiss as Ms Hornsey never had access to it. The evidence supports both assertions.

[57] The third complaint is similar to the first and is essentially part of the consideration of whether or not the decision to dismiss was justified.

[58] The fourth complaint has its foundation in the fact that during the interim reinstatement hearing Ms Hornsey indicated she would complete the investigation process before the new school year commenced. She did not.

[59] Again I conclude the claim lacks validity. Ms Hornsey's assertion she initially thought she could complete the investigation in the stated timeframe remained undisturbed under questioning. That she did not do so is attributable to the fact she had to await Mr Bevan's report which was not forthcoming until early February. There is then the fact this is a complex matter with considerable documentation and Ms Campbell's career was potentially at stake. It deserved careful consideration and it is ironic Ms Hornsey is now being criticised for approaching it accordingly. Lastly Ms Campbell had the option of pursuing the issue at the time (see [2013] NZERA Christchurch 254 at paragraph [57]). She chose not to.

[60] Finally there is the issue of cost. There was no evidence specific to this claim, nor submission in respect to it. The employer is not only entitled to raise its concerns, it is obliged to do so and allow Ms Campbell an opportunity to address them. It was her choice to use a lawyer to respond but, in any event, a reading of the correspondence would suggest most of the issues which led to protracted exchanges between the parties representatives seem to have been initiated by Ms Campbell.

[61] For the above reasons these claims, as a separate cause of action, are dismissed.

Unjustified dismissal

[62] Ms Campbell argues the decision to dismiss lacked both substantive and procedural justification. The claim, and the way it was pursued, misses one key point. That is that I am not charged with deciding whether or not Ms Campbell actually acted as alleged. I am charged with deciding whether the employer could reasonably have concluded dismissal was justified on the basis of a proper investigation.

[63] Ms Hornsey decided to dismiss having concluded that:

... over an extended period of time [Ms Campbell's] actions in managing, and [her] 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

[64] She concluded there was little chance Ms Campbell could sufficiently ameliorate her behaviour given the period over which problems had continued and the responses Ms Campbell gave during the investigation process. To Ms Hornsey these indicated Ms Campbell was incapable of understanding the schools concerns and was therefore be incapable of addressing them.

[65] A reading of the various reports clearly supports the schools contention there was cause for concern. It was bound, given the nature of the issues being raised, to investigate further. It did. It engaged its solicitor to investigate and Mr Bevan's evidence would support a conclusion his efforts were thorough.

[66] There is then Ms Hornsey's evidence which would, on the face of it, support a conclusion the process was conducted in a manner which complies with the requirements of s.103A. Ms Campbell was constantly advised of the schools concerns via copies of the reports and several long meetings. She was given an opportunity to have her say and took it. Given Mr Hornsey's undisturbed evidence I conclude the responses were carefully considered.

[67] I say *on the face of it* as Mr Campbell disagrees. Her prime contention is the school consistently failed to provide adequate details of its concerns. In this respect it become obvious she had an expectation that, for example, every utterance with which staff took issue had to be reported verbatim along with a date and time of the occurrence. That was a reoccurring theme throughout her evidence. I disagree. The concerns were about a pattern of behaviour and that was, in my view, made abundantly clear. Ms Campbell, by concentrating on minutia, missed the point and that became a source of further frustration. To the school she appeared unwilling to address the issues and that was again reflected in her evidence and the way it was presented in the Authority. I conclude she should have been well aware of the schools concerns.

[68] Ms Campbell raises other allegations in respect to the investigation. She says Mr Bevan selected interviewees on the basis it was likely they would support the desired outcome (Ms Campbell's removal). The evidence does not support that allegation. Mr Bevan sought to interview all current staff though some refused to participate. He ultimately interviewed a wide range of people including a number who Ms Campbell identified and who supported her. That said I had to note when some of those gave evidence to the Authority there were concessions of deficiency in Ms Campbell's behaviour.

[69] There are further allegations such an assertion the school ignored or rejected evidence that failed to support its desired outcome and made negative assumptions about what some might say. Again the evidence does not support these assertions.

[70] There is also an allegation the school ignored responses and required Ms Campbell to respond anew every time. Again the claim is not supported by the evidence and it neglects to recognise there were two investigation processes.

[71] There is one final allegation that requires consideration and that is the school failed to take account of current situation. This is a reference to Ms Campbell's claim she had considered her behaviour and made every endeavour to ensure she gave no cause for complaint after receipt of the ERO and Hay reports. The school accepts there was an improvement but it is wrong to say it was not considered. It was referred to in the Bevan report but reasons were given as to why the improvement may not be sustainable.

[72] Similar views were expressed in Ms Hornsey's letter of 7 February 2014. Ms Campbell was put on notice about the schools views in this respect and was given an opportunity to respond. The evidence is she did and her views were considered.

[73] Having reviewed the considerable evidence I conclude the school has discharged the onus it carries and convinced me the decision to dismiss was one it could fairly and reasonably have reached in the circumstances. Accordingly Ms Campbell's claim she was unjustifiably dismissed fails.

[74] Ms Campbell has been successful with her claim she was unjustifiably suspended. The rest of her claims are dismissed. The success does, however, raise the question of remedies. With respect to the successful cause of action she sought \$25,000 under s.123(1)(c)(i).

[75] While it is clear Ms Campbell feels extremely aggrieved she did not give evidence which reflected her claims and attribute hurt to each of the cause of action. It is therefore difficult to attribute her more general evidence about the hurt she suffered to this or one of her unsuccessful causes of action. That said, the pain caused by the suspension was canvassed in affidavits provided for the interim reinstatement and apparent at that hearing. Having considered the evidence I conclude \$5,000 to be appropriate.

[76] That conclusion means I must, in accordance with s.124 decide whether or not Ms Campbell contributed to the situation. While there is plentiful evidence of potential wrongdoing on her part, little or none influenced the failures which led to the successful cause of action. The answer is therefore no.

Conclusion and Orders

[77] For the above reasons I conclude Ms Campbell has a personal grievance as she was unjustifiably disadvantaged in her employment.

[78] As a result the respondent, The commissioner of Salford School, is ordered to pay Ms Campbell the sum of \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[79] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority