

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 25/08
File Number: 5090579

BETWEEN TREMAYNE CORNISH
Applicant

AND SCOTS COLLEGE INCORPORATED
Respondent

Member of Authority: G J Wood

Representatives: Stuart Dalzell for Applicant
Richard Harrison for Respondent

Investigation Meeting: 7 and 8 February 2008 at Wellington

Further Information: Received by 21 February 2008

Determination: 5 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Tremayne Cornish, claims that the respondent, Scots College Incorporated (Scots), unjustifiably dismissed and/or disadvantaged him in his employment and also claims penalties for breaches of good faith by Scots, all of which are denied. Reinstatement was withdrawn on the first morning of the investigation meeting.

[2] The issues in question have arisen after Scots made Mr Cornish's position of Deputy Principal Operations at the Prep School and the Director of Boarding at Gibb House (the DP/DB role) redundant and following the subsequent termination of his employment.

The Facts

[3] Mr Cornish was and remains universally respected as a resourceful, inspiring and hardworking teacher. After leaving South Africa 11 years ago, he worked at Scots, an independent preparatory and secondary boarding school in Seatoun, Wellington. Mr Cornish was Deputy Principal to Mr Peter Cassie, the Principal of the Prep School, and was also Director of Boarding, Gibb House. Mr Cornish stayed in accommodation at Gibb House on a full-board basis for himself and his family in a three bedroom house, at a nominal rental of \$100 per week. Mr Cornish's son also had a full boarding scholarship to Scots, which he expected to continue for another three years.

[4] At the beginning of 2007, Mr Graham Yule took up the position of Headmaster of all of Scots. Two immediate challenges faced Mr Yule. The first was the decision to implement the International Baccalaureate (IB) for future examinations, which would have curriculum and other repercussions right throughout the secondary and the prep school. The second was the expectation of some parents that Scots would now accommodate seven day boarding, rather than Monday to Friday boarding only.

[5] Mr Cornish was involved in the latter issue in that he had to assist Mr Yule in developing a crisis plan to deal with seven day boarding at short notice, which in the first instance involved students staying elsewhere over the weekend. Soon after, however, Mr Cornish formulated a proposal that allowed the boys to stay in Gibb House all weekend. This necessarily involved him and other boarding staff in additional work.

[6] Mr Cornish was already overworked in his existing role. While Mr Cornish, as a hard worker and committed educator, did not object to this, he was concerned that other staff were not pulling their weight in the boarding house, yet were given reduced teaching responsibilities upon their request. Of particular concern to him was Mr Cassie's insistence that Mr Cornish retain a home room class, when another teacher in the boarding house, who had a job of less seniority in the prep school, was not required to do so.

[7] While Mr Cassie had recently reduced Mr Cornish's admitted excessive workload by taking away a couple of periods when he had to supervise students, he was not prepared to allow Mr Cornish to relinquish the home room class because he felt that would distance him too much from the day-to-day life of students in the prep school.

[8] Mr Yule became aware of Mr Cornish's concerns. When he met with Mr Cornish in early February to get him to discuss them, Mr Yule questioned him as to whether his job as DP/DB was simply too big for one person. This issue is independently confirmed by an email sent by Mr Cornish to Mr Cassie on 22 February 2007, where Mr Cornish raises concerns about balancing his commitment in the Prep School as DP and a classroom teacher with those as Director of Boarding, together with his extramural commitments. He said that he was stressed and that the situation was too much to cope with. In particular, he noted that he found himself going to bed well after midnight every night and working all weekend just to stay ahead.

[9] Mr Yule and Mr Cornish had had another meeting, towards the end of February, where Mr Yule stated that he felt Mr Cornish's present role was too big for one person. Mr Yule again mentioned that he believed that Mr Cornish's position could evolve into two positions, particularly with the seven day boarding and the increasing roll at Scots.

[10] Given the early stage of the year the key issues for discussion, I conclude, were Mr Cornish's workload issues (particularly with the implementation of seven day boarding) and his concerns with what he saw as preferential treatment of other staff members in the boarding house. I therefore accept that Mr Yule and Mr Cassie's recollection of the order of meetings is more reliable than that of Mr Cornish's, particularly as their version is more consistent with Mr Cornish's own email about the concerns he was facing and his emailed request for a meeting with Mr Yule. Furthermore, while Mr Cornish has no problems with Mr Cassie whatsoever, Mr Cassie's evidence confirms that of Mr Yule rather than Mr Cornish. In this regard I note that Mr Cassie is as close to an independent witness as exists in this case on these disputed points.

[11] Mr Yule, in consultation with Mr Cassie, seems to have come very early to the view that the roles being asked of Mr Cornish were too big for one position. At the meeting, Mr Cornish was told that he would not be relieved of his home room responsibilities. Mr Cornish was very concerned because of the implications of the excessive workload which was already too great.

[12] Mr Yule also offered Mr Cornish some time off for him and his wife, which he accepted. During this time he would look at whether he would prefer to stay in the position of Director of Boarding or the position of Deputy Principal. It was implicit from this that Mr Yule believed a change was necessary.

[13] Mr Cornish returned from leave and informed Mr Yule that he was feeling reinvigorated and wanted to continue in his existing role without any split. Mr Yule disagreed, but allowed Mr Cornish the rest of term before he would make a decision. Mr Cornish quite properly indicated that he would like to be a principal at some point and he and Mr Yule surveyed potential vacancies in the *Education Gazette*. Mr Yule made the point that his opportunities for getting a principal's role would not be assisted by concentrating on boarding roles.

[14] Mr Cornish responded with his decision two days later, which was that his preferred position was the position of Director of Boarding. It is clear from Mr Cornish's email that he clearly had made a decision one way or other and as he has been consistent that he had to put his family and money considerations before his career, that decision can only have been Director of Boarding role. Therefore I accept that that must have been what he conveyed at that time to Mr Yule. Mr Cornish also stated that he did not want to remain in the prep school at that time because of his frustrations at the work ethic of a number of staff, as referred to above. Mr Yule counselled him against this preference, however, for professional development reasons and because he felt that the issues within the prep school could be resolved.

[15] On 6 April Mr Yule met again with Mr Cornish. Mr Yule again reiterated his view that one person could not do the DP and DB roles, particularly because of the implications of introducing the IB. It had become particularly clear that the amount of work required would be very substantial. Mr Cornish was furnished with a draft job description in relation to the two new suggested roles. Mr Cornish suggested that he could lose up to \$800 per fortnight as DP only and that if there was a performance management issue it could be dealt with under that process. Mr Yule made it clear that this was not a performance matter. He raised the following options for Mr Cornish to consider. These were that he either remain as the boarding school and simply be a teacher or shift accommodation and remain the Deputy Principal. Neither suggestion was acceptable to Mr Cornish, who did not want his position downgraded. In particular, Mr Cornish did not want to shift houses, because although the alternative accommodation had three bedrooms it contained markedly less space and was next door to one of the teachers whose work ethic Mr Cornish had problems with. It was also clear that the move in accommodation could have led to lesser benefits to Mr Cornish and his family such as internet, provision of all meals etc.

[16] After the meeting on 6 April Mr Yule approached Mr Giles Moiser, the Deputy Headmaster in the secondary school, about whether work could be found for Mr Cornish there. Mr Moiser reported that only approximately half a teaching load could be found for Mr Cornish in the secondary school and even that would be somewhat artificial. When Mr Yule relayed this back to Mr Cornish, the proposed job was unacceptable to him for the obvious reason that he would lose income if he did not have a full teaching workload.

[17] At a later meeting held with Mr Cassie and a support person for Mr Cornish also in attendance, Mr Cornish was clear that he could and would do the extra work in the boarding house and in relation to the IB. He said if there were problems with his performance this could be the subject of performance management. Mr Yule was told that Mr Cornish was not prepared to make a choice between his career and family and that he had good lawyers if the College decided to implement the proposal.

[18] Mr Yule determined that matters had gone far enough on an informal path without any resolution. He therefore took professional advice and decided to implement a formal restructuring proposal, subject to a consultation process.

[19] On 1 May, Mr Yule provided Mr Cornish with a proposal to disestablish his position and replace it with two positions, a full time Director of Boarding and a full time Deputy Principal in the prep school. Mr Yule met with Mr Cornish and his support person on 9 May. Mr Cornish gave his views on the proposal, which were that he could continue to do both jobs to his usual high standard. Mr Cornish also provided written submissions in support of this proposal, which also provided for an additional position in the prep school to help plan for the IB programme and other curriculum issues.

[20] Mr Yule considered this feedback and decided to implement his original proposal, except for some adjustments to the draft position description. Mr Yule's decision was based on all the matters referred to above, such as the increased roll, the change to the IB system and the significant impact that would have on staff and students, and the move to seven day boarding. He determined that Mr Cornish's position was at significant variance from the either of the new positions and therefore reconfirmation could not apply. He then stated:

As is my policy for all new, full time positions, the vacancies will be advertised internally and externally and filled through the merit-based appointment process. You will need to apply for the position(s) in which you have an interest.

[21] This was explained to Mr Cornish at a meeting on 18 May. Mr Cornish was concerned that this decision was immediately relayed to all staff, which confirmed in his mind that the consultative process was a sham. He told Mr Yule and others that he wanted to consult with a lawyer, address the Board and bring the matter to the attention of the Department of Labour and others.

[22] Mr Cornish then sought information held by the school about the restructuring process, but was denied notes of the meeting of 9 May taken by Ms Karen Martyn, Scots's HR adviser, for reasons which are simply not acceptable. This is a minor issue, however, which cannot vitiate any justification for dismissal.

[23] From the date of closing of applications on 11 June, lawyers became involved. Mr Dalzell raised a personal grievance on behalf of Mr Cornish on the basis that his position could not be surplus to requirements because a Deputy Principal and a Director of Boarding were both still required and that there should have been further consultation. Mediation was sought.

[24] While advertisements for the positions were open from 21 May, Mr Cornish did not initially apply, on the basis that he believed that to do so would be tacit approval of the restructuring and the new positions, and that he was entitled to stay in his existing position. Be that as it may, Mr Harrison replied to the grievance letter asking Mr Cornish to apply for the positions on a without prejudice basis. Mr Dalzell confirmed that Mr Cornish would like to be considered for both roles.

[25] Over the period since the positions were advertised and at least until the end of the third term, there was a great deal of consternation in the school and in the boarding house in particular. These events are irrelevant to the claims before the Authority and I do not refer to them again except to say they were symptoms of how life was extremely difficult for Mr Yule, Mr Cassie, Mr Cornish, other members of staff, students and the school as a whole over that period.

[26] The Director of Boarding interviews were held on 22 June. On 26 June interviews were held for the Deputy Principal position. Mr Cornish was interviewed for both positions. I accept that Mr Yule, at the end of the interview for Deputy Principal with Mr Cornish, asked him which position most excited him and that there

was reference as well as to which was more challenging. Mr Cornish answered that he found the Deputy Principal more challenging for career reasons. I accept that Mr Cornish was giving Scots the answer he thought it wanted and in any event that could not have been taken by Scots as a preference for the Deputy Principal position, particularly as Mr Cornish had previously expressed a preference for the Director of Boarding position.

[27] In any event, Scots decided that there was a better candidate than Mr Cornish for the Director of Boarding position, but that Mr Cornish was the best candidate for the Deputy Principal's position.

[28] When Mr Cornish was advised that he would be offered the Deputy Principal position but not the Director of Boarding, he said he was interested in it, but only because he felt he had no choice given he was not successful in his application for Director of Boarding, and because he wanted to see what happened in mediation, which was to take place on 2 July.

[29] Mr Yule provided Mr Cornish with a draft employment agreement after he had been requested to do so. It should not have been necessary for him to ask for one. Quite rightly, Mr Cornish was concerned about the fact that the employment agreement provided for a probationary period of six months, despite the fact that he had been working for Scots for many years. While Mr Yule states that that was simply a standard form document and that it could have been discussed, such an agreement should not have been offered to a longstanding staff member such as Mr Cornish.

[30] Of particular concern to Mr Cornish was, however, the loss of boarding accommodation and the other benefits which arose for him and his family from being the Director of Boarding, which equated to approximately \$15,000-20,000 per year.

[31] In advance of the mediation, Mr Harrison wrote to Mr Dalzell about the Deputy Principal role, which Mr Cornish said he would respond to after taking advice. The position was to remain open for discussion at mediation.

[32] The mediation was held on 2 July but was unsuccessful. On 3 July Mr Harrison wrote to Mr Dalzell stating that Scots intended to continue the mediation process in good faith. He then stated:

However, in the interests of clarity I wish to record that the offer of employment to Mr Cornish as set out in Mr Yule's 27 June 2007 letter is now subject to ongoing without prejudice discussions. Accordingly the terms of offer are no longer capable of acceptance by the signing of the 27 June 2007 letter of offer as earlier advised by Mr Yule. This offer is therefore withdrawn so as to avoid any misunderstanding and I will write separately to you on a without prejudice basis.

[33] No doubt there was another letter, but because it was without prejudice, and, as with the discussions at mediation, the Authority is unable to know what was said.

[34] On 16 July, Mr Harrison wrote again to Mr Dalzell stating the following:

I record the College's disappointment that we have been unable to reach agreement on the terms under which Mr Cornish would accept the Deputy Principal – Operations position. It is necessary for the College to now proceed with following up other candidates and in order to avoid any misunderstanding, the offer of the Deputy Principal position of the Preparatory School is withdrawn. The College will make contact with other candidates who were short listed for the position in order to complete the appointment process. Mr Cornish's employment with Scots College is therefore to terminate by way of redundancy on 28 September.

[35] Mr Harrison then wrote about the expectations of both parties during the transition process. He informed Mr Dalzell that the College wished to meet with Mr Cornish in order to discuss alternative employment, including reasonable out-placement assistance.

[36] One of the teachers who Mr Cornish had had problems with earlier in the year was subsequently appointed to the Deputy Principal's position.

[37] Subsequently, a meeting was held on 23 July about future options for Mr Cornish, which was followed up by Mr Yule by discussions with other staff. Mr Yule considered that Mr Cornish's suggestion that he remain on as Deputy Principal in the prep school until the end of the year would not be feasible because of the importance and pressing implementation of the IB. Furthermore, there were no full time positions in the prep school and even if there were, the College could not afford to maintain Mr Cornish's salary and benefits, and in particular his accommodation benefits. Sabbatical leave was ruled out because other staff had already taken sabbatical leave that year and because Mr Cornish did not have a future with the College.

[38] Mr Cornish was later informed that his position would cease on 28 September and that he would be paid redundancy and holiday pay at that time. This is exactly what happened, despite further discussions between the parties' representatives.

[39] Mr Cornish soon gained another boarding position, albeit that it was overseas and did not commence until term 1 2008. Mr Cornish was able to obtain this position with the support of Mr Cassie.

[40] Mr Cornish has returned from Australia to have the Authority determine the matter, as it had not been resolved in mediation or by discussions between the parties during the course of the Authority's investigation.

The Law

[41] Subsequent to the 2004 amendments to the Act, which made significant changes to parties' good faith obligations and the law on justification for dismissal and actions to an employee's disadvantage, the law on redundancy was reassessed in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825. At para.[67] it was held:

I do not consider that the recent statutory changes were intended to revisit longstanding principles about substantive justification for redundancy exemplified by judgments such as Hale. The words and phrases of s.103A echo the statements of Cooke P and Richardson J in Hale as set out in paras.[40] and [41]. Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s.103A, to return to the position espoused by the Courts in cases such as and following Hale. So long as an employer acts genuinely and not out of ulterior motives, the business decision to make positions or employees redundant is for employers to make and not for the Authority or the Court, even under s.103A.

[42] In *GN Hale & Son Ltd v. Wellington Caretakers etc IUOW* [1990] 2 NZLR 1079 Cooke P held, at p.1084:

... an employer is entitled to make its business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him. ...

...A reasonable employer cannot be expected to surrender the right to organise its own business. Fairness, however, may well require the employer to consult with the Union and any workers whose dismissal is contemplated before taking a final decision on how a planned cost saving is to be implemented. Constructive alternatives may emerge as

a result. For example, the possibility of part time employment of the workers, or engagement on contract, may warrant exploration. This is a field where probably hard and fast rules cannot be evolved.

[43] That case was followed by *Aoraki Corporation Ltd v. McGavin* [1998] 1 ERNZ 601. At 618 the Court of Appeal found:

Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of business. Where it is decided as a matter of commercial judgment that there are too many employees in a particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

[44] The issue was assessed in more detail in *NZ Fasteners Stainless Ltd v. Thwaites* [2000] 1 ERNZ 739 (CA). In that case, the majority judgment, issued by Gault J, noted that the issue on challenge was that the Employment Court found that there was no true redundancy because there was another new position which Mr Thwaites should have been offered, rather than because his position had not truly become surplus to New Zealand Fasteners Stainless' requirements. It concluded that in the Employment Court, the major issue in relation to the genuineness of the redundancy was over whether the new position was *suitable* for Mr Thwaites. The Court of Appeal held, at para.[22], that:

Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgment for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer, acting reasonably and in good faith, could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate the absence of genuineness in the determination. Where there is a genuine redundancy that will justify termination of the employment of the person's position. In the course of the employer's consideration of the position and in carrying out the dismissal, the obligation of good faith and fair treatment applies. Any failure to discharge that obligation that itself is unjustifiable may result in remedies appropriate to the breach.

...The genuineness of the redundancy of one position once established cannot be negated by a failure to offer a different position. ...

...

In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustifiable dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and the work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment.

[45] In *Coutts Cars Ltd v. Baguley* [2001] ERNZ 660, the Court of Appeal upheld the applicability of the judgments in *Aoraki* and *Thwaites* in general terms. As highlighted above, these cases continue to provide guidance on the applicable principles after the judgment in *Simpsons Farms*.

[46] *Simpsons Farms*, of course, should not be read as supporting *Thwaites* without account being taken of the s.104 amendments, such as the statement by Gault J in *Thwaites* that a decision may not be impeached if it was one that the employer, acting reasonably and in good faith, could have reached. The appropriate assessment under s.103A is, of course, whether the decision was one that a fair and reasonable employer would have made in all the circumstances at the time the decision was made.

[47] *Simpsons Farms* also deals with the issue of consultation. Key points here are that consultation involves an employer making a statement on a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done. An employer is quite entitled to have a working plan already in mind, but must keep an open mind and be ready to change and even start anew. Consultation is, however, less than negotiation and the assent of the person consulted is not necessary for any actions taken that follow proper consultation.

[48] The issues in *Simpsons Farm* were not entirely dissimilar to those here. In *Simpsons Farms*, the employer intended to have a manager appointed to run three farms, of which Mr Aberhart was already manager of one only. Rather than consult Mr Aberhart about this, it was essentially presented to him as a *fait accompli*. The new management position was to be advertised and Mr Aberhart was denied the opportunity, as soon as he asked, to be trialled in the new position. Mr Aberhart believed that the new position was in effect his own position and elected not to apply for it. He was subsequently made redundant. In determining the issues in the case, it was held at para.[68]:

It follows ... that once a decision had been made to disestablish the Te Akau farm manager position and Mr Aberhart had not applied for or of course had been successful in obtaining the new managerial position, it was fair and reasonable that he be dismissed on notice as he was.

It is the other statutory consideration under s.103A (how the employer acted) and whether a fair and reasonable employer would have so acted in all the circumstances at the time of dismissal or disadvantage action in employment, that provides difficulties for SFL in this case.

For reasons earlier set out, consultation with Mr Aberhart was necessary before SFL made its restructuring decisions. As part of consultation, Ms Green's reasonable proposal made on behalf of Mr Aberhart that he be trialled in the proposed new position to gauge his suitability for it, was rejected immediately, out of hand, and without any consideration by Mr Simpson. It is not to say, of course, that SFL was bound to have agreed to this proposal. It was, as I have already found, a reasonable suggestion warranting consideration in all the circumstances.

[49] It is thus clear that the Court in *Simpsons Farms* did not require the employer there to offer its staff member redeployment or even to offer him the opportunity to trial the new position. Furthermore, the employer was allowed to advertise the new position even although the applicant worker may have been suitable for it.

[50] In *van Etten v. Board of Trustees of John Paul College* (unreported, Travis J, AC20/00, 3 April 2000) the issue of advertising new positions in the education sector was discussed. Judge Travis held at p.22:

Mr Harrison also referred to the statutory obligations on the defendant to appoint the Directorship positions on merit (s.77G State Sector Act 1988) and the requirement to notify the vacancies in a manner sufficient to enable suitably qualified persons to apply for the position (s.77H State Sector Act). I accept his submission that these provisions do not allow a Board of Trustees to offer new positions to existing staff and that there must be notification of vacancies and an appointment process. ... [The positions] accordingly had to be advertised in accordance with the statutory requirements.

[51] Similarly, in *Principal of Auckland College of Education v. Hagg* [1997] ERNZ 116 (CA), it was held at p.125 that:

The object of ss.76G and H [which apply throughout the State-funded education sector] ... is to ensure that such appointments are made openly and on merit. The requirements cannot be waived by employer or employee. They cannot contract out. They cannot by arrangement convert a term contract into a permanent contract without going through that statutory process of advertising, assessment and selection from the applicants for the person best suited to a permanent position. The public interest as expressed in those provisions precludes that. There are two public interests involved. One is the interest of the public at large in securing and ensuring an open system of appointment

on merit to a major part of the public sector, the education service. The other is the interest of other potential applicants who might have applied when the term appointment was advertised had it been offered as a permanent appointment, or who might have envisaged applying for any appointment available on expiry of the term appointment. And unlike private sector employers, the College was also subject to standard public sector accountabilities for the discharge of its functions.

Determination

[52] While it is clear that Mr Cornish was doing the bulk of the work of the two positions later advertised in his existing position, there is no doubt that the College had good reasons to effectively split the position into two. First, Mr Cornish was already stretched by his very substantial workload. Second, there was the prospective switch to the IB and the work associated with that change. Third, there was the move to seven day boarding and the increasing student roll, including boarders. While Mr Cornish claims that he should have been allowed to remain on, it is clear that it was open to Scots as a fair and reasonable employer to conclude otherwise, for the reasons given directly above, so as to run the College as effectively as possible in Mr Yule's view. Even Mr Moiser, who was active as Mr Cornish's support person throughout and who disagreed with Mr Yule's decision because he felt that staff members should be looked after before outsiders (an admirable proposition that may often bring long term benefits), accepted that it was open to Scots to draw the conclusions it did that two new positions were required to replace Mr Cornish's position. For all these reasons it is clear that it was justifiable for Scots to replace Mr Cornish's position with two new positions.

[53] The next issue, therefore, is whether Mr Cornish should have been offered one of the other positions as of right. *Thwaites*, which remains binding on the Authority for the reasons given above, makes it clear that Scots was not so required. Furthermore, even were that not the case, I accept that Mr Yule's practice of advertising all new positions was a reasonable one in the circumstances, because Scots operates in the education sector, albeit that it is one of the 2% or so of New Zealand schools not covered by the State Sector Act. It was reasonable for Mr Yule, on behalf of Scots, to apply the same principles applicable to the vast majority of schools who are required by law to advertise new positions (as per *Hagg*). It was therefore appropriate for Mr Yule to advertise the two new positions.

[54] Mr Cornish's situation can also be assessed by analogy to a reverse situation, by considering whether Scots could have required Mr Cornish to accept either one of the two new positions. Clearly it could not do so if Mr Cornish was of a mind instead to demand redundancy, as with either of the new positions he would have lost some of his previous responsibilities. Given that I do not accept that Scots acted with any ulterior or irrelevant motives, I determine that its actions in replacing Mr Cornish's position with two new positions were therefore what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[55] I now turn to whether or not how the employer acted was what a fair and reasonable employer would have done. I am satisfied that genuine consultation was held and that Scots was genuine in its offer of the Deputy Principal position to Mr Cornish. Even if there had been any error in Mr Yule's initial approaches to Mr Cornish, I conclude that they were later remedied by the formal consultation that took place in May.

[56] The next issue relates to the withdrawal of the offer of the Deputy Principal's position. I am satisfied that it was inextricably linked with the grievance that Mr Cornish had raised and that the College was therefore effectively insisting that the Deputy Principal position be considered in the light of Mr Cornish's grievance. The duty of good faith in s.4 of the Employment Relations Act 2000 covers bargaining for an individual employment agreement or variation thereto, and negotiating over the Deputy Principal's position was clearly such bargaining. It was unfair on Mr Cornish to effectively require his personal grievance to be linked with him accepting the DP position or not and vice-versa. To deny Mr Cornish the opportunity to take up the Deputy Principal position until the personal grievance was addressed in private (when no doubt it was hoped by all parties that it could be resolved) clearly put pressure on him to resolve his personal grievance and in this regard it was a breach of good faith which affected the bargaining for the Deputy Principal's position. A fair and reasonable employer would not act in a way that is contrary to good faith and so therefore the College is not only susceptible to a penalty but to compensation to Mr Cornish for not acting as a fair and reasonable employer would during the course of the disestablishment of his position and his subsequent redundancy. It was thus reasonable for Mr Cornish to understand, as he did, that he would only be able to take up the DP role if he compromised his legal rights to try and keep his current job and/or pursue a personal grievance over the way he had been treated. He was entitled to

believe that his continued employment with Scots College was at risk if his personal grievance was not resolved. I have no doubt that this was one of many events that deeply upset Mr Cornish. He is entitled to compensation (see, for a more extreme example, *Burns v. Attorney General* [2002] 2 ERNZ 292). Although his employment was affected to his disadvantage, such compensation must be limited to the loss, which in this case was the opportunity to take up the Deputy Principal role, but also to leave with dignity.

[57] I conclude, however, that there was no prospect of Mr Cornish accepting the Deputy Principal role as offered, effectively because the salary was so significantly less, and as it was remuneration that was a major factor driving Mr Cornish to try and retain his existing job or take the position of Director of Boarding.

[58] I have only briefly referred to the great turmoil that Scots went through prior to Mr Cornish leaving, but I am satisfied that in terms of ensuring that Mr Cornish had a dignified exit, there were no significant breaches by Scots to Mr Cornish. Similarly, I conclude that alternatives to redundancy were adequately explored.

[59] I note also that it was inappropriate for Scots to require a probation period of Mr Cornish if he were to accept the Deputy Principal position, but I accept that this was a matter capable of resolution by discussion between the parties. I therefore determine that it is not a sufficiently serious issue to warrant a finding that how Scots acted over the course of this redundancy process was not what a fair and reasonable employer would have done overall.

[60] Compensation must therefore be limited to the unfair way that Mr Cornish was treated, taking into account the fact that the result would most likely have been no different. Compensation of \$2,500 is appropriate in these circumstances. Given that Mr Cornish is to be compensated for this breach of good faith, there is no need to apply a penalty.

[61] I therefore conclude that, while Mr Cornish was justifiably dismissed, his employment was affected to his disadvantage by an unjustifiable action of Scots, namely apparently linking his ability to accept the Deputy Principal's role offered to him with consideration of his personal grievance. The respondent, Scots College Inc, is therefore ordered to pay \$2,500 compensation under s.123(1)(c)(i) to the applicant, Mr Tremayne Cornish.

Costs

[62] Costs are reserved.

G J Wood
Member of the Employment Relations Authority