Employment Court of New Zealand

Fox v Hereworth School Trust Board [2015] NZEmpC 206 (25 November 2015)

Last Updated: 1 December 2015

IN THE EMPLOYMENT COURT WELLINGTON

[2015] NZEmpC 206

WRC 5/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EMMA YUEN SEE FOX Plaintiff
AND	HEREWORTH SCHOOL TRUST BOARD Defendant

Hearing:	15, 16, 17, 18 and 19 September, and 19 and 20 November 2014 (Heard at Hastings)
Appearances:	P Churchman QC and D Traylor, counsel for plaintiff S Webster and L Blomfield, counsel for defendant
Judgment:	25 November 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

A. **The defendant acted in breach of its s 4 Employment Relations Act 2000 obligations towards the plaintiff.**
B. **The defendant did not disadvantage the plaintiff unjustifiably in her employment by giving her a formal employment warning.**

C The defendant dismissed the plaintiff unjustifiably.

D The plaintiff is entitled to compensation for lost remuneration of

$78,934.

E The plaintiff is entitled to compensation under s 123(1)(c)(i) of the

Employment Relations Act 2000 in the sum of $6,666.

F. **The Employment Relations Authority's costs order against the plaintiff is set aside.**

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G. **Costs in the Employment Relations Authority and in the Court are reserved.**

REASONS

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Background

Introduction

[1] This case is a challenge by hearing de novo to the rejection by the Employment Relations Authority (the Authority) of Emma Fox's personal grievances.1 Mrs Fox's case in the Authority, and now on this challenge, is that she was disadvantaged unjustifiably in her employment as a teacher at Hereworth School and, subsequently, dismissed unjustifiably. The remedies sought by Mrs Fox for these personal grievances include declarations:

- that the Hereworth School Trust Board (the Board) acted in bad faith towards her;
- that an employment warning issued to her on 19 November 2009 was an unjustified disadvantageous action; and

• that she was dismissed unjustifiably.

[2] Monetary remedies claimed encompass lost remuneration, compensation for humiliation, loss of dignity and injury to feelings of $20,000, and costs in both the Authority and the Court.

[3] Getting this case to a hearing has been a long and difficult process. It had tentative fixtures in mid-October 2013 and August 2014 but the late emergence of a number of disputed document disclosure issues meant that these fixtures had to be abandoned. The Court has issued six substantial interlocutory judgments, as well as numerous Minutes, so that it can be safely said that this is now a more comprehensive case than was presented to, and determined by, the Authority at first instance. Because of a significant underestimate by counsel of the hearing time required, the case had to be adjourned after five days in September 2014. Due to the

unavailability of counsel and the Court, it could not be resumed until mid-November

1 *Fox v Hereworth School Trust Board* [2013] NZERA Auckland 45.

2014. I regret the subsequent delay that has ensued in issuing this judgment. As will be seen, it is a multi-faceted case.

The applicable statutory tests of justification

[4] Because Mrs Fox's personal grievances relate to events which took place before 1 April 2011, the original s 103A of the Employment Relations Act 2000 (the Act) governs issues of justification on which her case will turn. These tests have been changed with subsequent effect. In this case however, the Court must determine on an objective basis, in respect of each of the unjustified disadvantage and unjustified dismissal grievances, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal and/or the action took place.

[5] The leading judgment on the interpretation and application of this version of s 103A is the judgment of the full Court in *Air New Zealand Limited v V.*2 I propose to follow and apply the principles set out there.

[6] Although the subsequently legislated tests contained in the current s 103A(3) are not applicable to this case, they nevertheless represent a convenient summary of some of the longstanding minimum procedural fairness requirements formulated by the courts. So too does subs (4) of the current s 103A represent the previous (and in this case still applicable) judge-made law that there is no limited set of expressly defined fair process requirements. In the same way, the current subs (5) also expresses previous judicial interpretation of s 103A that process defects, which are minor and do not result in the employee being treated unfairly, will not cause an otherwise justified disadvantage or dismissal to be an unjustified one.

[7] The applicable s 103A test requires the Court to judge the employer's actions against the objective standard of a fair and reasonable employer. That is not what the Court considers those standards should have been had the Court been in the employer's position. Rather, it is what the Court concludes a fair and reasonable

employer in the circumstances of the actual employer would have decided, and how

2 *Air New Zealand Ltd v V* [2009] ERNZ 185.

such an employer would have made those decisions. The applicable s 103A test encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also covers an inquiry into the employer's ultimate decision in the light of that finding. The Court is required to review objectively all relevant conduct of the employer leading up to, and including, the decision to dismiss. The same test applies to justification in disadvantage grievances.

The pleadings

[8] The pleadings determine the issues for decision. They comprise the plaintiff's second amended statement of claim filed on 17 January 2014 and the defendant's statement of defence to the plaintiff's second amended statement of claim filed on 3 February 2014.

[9] First, the plaintiff asserts that what the defendant claimed to be its independent investigation of her complaints by Abraham Consultants Limited (ACL), a company engaged by the defendant, was flawed in that it was incomplete, not independent and reached erroneous conclusions. As the defendant's agent, ACL is said to have failed to interview key persons such as the plaintiff herself, other relevant staff, and parents of students. It is claimed that ACL did not gather or consider appropriate information including the defendant's policies, and it failed to provide the plaintiff with copies of the information relied on by ACL.

[10] Next, the plaintiff says that she was disadvantaged unjustifiably by an unwarranted threat in a letter sent to her by the defendant's agent on 29 September

2009.

[11] The plaintiff says that the defendant's breaches included a failure to act in good faith by misleading and deceiving her as to the independence of the Board's agent. Mrs Fox says that the defendant thereby breached its obligation to act in good faith including by making the threat contained in its representative's letter of 29

September 2009.

[12] The plaintiff then asserts that an employment warning issued to her on 19

November 2009 disadvantaged her unjustifiably in her employment. This was because there was no substantive basis on which to issue the warning; the plaintiff was not afforded natural justice; she was given insufficient notice of this intended disciplinary action; and she had no opportunity to provide the defendant, as decision maker, with any explanation or information regarding that matter.

[13] Next, in respect of a significant disciplinary meeting held on 18 December

2009, the plaintiff claims that she was not afforded natural justice and had no reasonable opportunity to provide explanations to the Board as decision-maker. This is a further alleged unjustified disadvantage.

[14] The plaintiff says that there were insufficient grounds to warrant her dismissal including that the defendant did not conduct its own investigations into several of the allegations against her and relied on incomplete and erroneous reports by its agent. In particular, the plaintiff says that the defendant failed to provide her with all statements taken from staff and other information relied on such as the defendant's policies, to allow her a proper opportunity to comment on these before the decision to dismiss was made. The plaintiff says that a fair and reasonable employer would not have dismissed her as the Board did in all of the circumstances.

[15] The plaintiff says that she was not dismissed lawfully by her employer, the Board. She says that what purported to be her dismissal

was not decided by the trustees after consideration of her case by them, but was the purported exercise of a non-delegated power to a subcommittee of the Board.

[16] Remedies claimed by the plaintiff include lost remuneration and loss of future earnings from the date that she would probably have returned to work from parental leave, as well as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the sum of $20,000, and costs in both the Authority and this Court.

[17] The defendant denies all of the plaintiff's allegations of wrongful conduct and the consequences of these. It also advances affirmative defences in the event

that the Court finds that the plaintiff was disadvantaged or dismissed unjustifiably. It says that any remedies must, in these circumstances, be reduced for culpable contributory conduct pursuant to s 124 of the Act, reflecting the plaintiff 's refusal to engage with her employer; her demeanour which was not conducive to resolution of the employment relationship problem identified by it; her language which was destructive of the relationship of trust and confidence between the parties; and her apparent connection, through supply of information, to the authors of what are known to the parties as the critical and destructive "aromabadlaughs" emails, which breached her obligations of good faith and further eroded the relationship of trust and confidence between the parties. The defendant says that the foregoing conduct amounted to a breach of the plaintiff's obligations of good faith and fair dealing and her obligation to "engage willingly and without equivocation" in matters touching on the employment relationship. It says that not only did it not treat Mrs Fox in bad faith, but that she dealt with it in bad faith.

Scope of proceedings

[18] The hearing was, and this judgment is, confined to the question of justification for the alleged disadvantages to Mrs Fox of the acts or omissions of the Board leading up to her dismissal, and the justification for that dismissal. The merits of the plaintiff's claims about the school's educational standards and methods are not for decision by this Court. Their existence only forms the background to or context within which the events that the Court must determine, occurred.

[19] This Court is not competent to decide the merits of the professional education issues raised by Mrs Fox with the school's headmaster, Ross Scrymgeour, and subsequently with the Board. Rather, the employment relationship issue, which was generated by those professional concerns, is how they were dealt with as between employer and employee. This judgment has been prepared on the foregoing basis.

[20] So, too, are the merits of the plaintiff's dissatisfactions with the Department of Labour's (now the Ministry of Business, Innovation and Employment's) Mediation Service including, in particular, the Department's investigations into complaints to it by Mrs Fox, especially those dealt with after her dismissal. The only

relevance to this decision of Mrs Fox's concerns about the Department relates to her refusal to engage in mediation in Napier arranged by it in November 2009 before her dismissal.

The employment agreement

[21] Mrs Fox was a registered teacher who commenced employment at Hereworth School, an Anglican Church private preparatory primary school for boys in Havelock North, at the beginning of the 2008 school year. Her terms and conditions of employment were set by an individual employment agreement entered into by the parties on 13 February 2008.

[22] Among the parties' contractual obligations, the Board was required to be a "good employer" in its dealings with the plaintiff and to accept "its responsibilities to be fair and reasonable at all times". Also under cl 3, Mrs Fox was required to promote and foster the special aims, objects and character of the school, to faithfully discharge her duties, and to observe and comply with all instructions and requirements in relation to those as directed by the headmaster and the Board. Mrs Fox was obliged to observe all regulations and policies of the school and was prohibited from engaging in conduct which might harm the good name of the school.

[23] Clause 7 ("Termination") allowed for Mrs Fox's "instant dismissal" for

serious misconduct where that was justifiable.

[24] Clause 12 required that any communication by Mrs Fox with the Board would be through the headmaster unless the latter refused or omitted to forward such communication to the Board, or that it was about the headmaster. In such cases Mrs Fox was required to forward any communication in writing to the chairman of the Board who, after consultation with the whole Board, could elect to forward a copy to the headmaster.

[25] Clause 15.1 provided that any personal grievances or disputes should, in the first instance, be brought to the Board's attention to enable an early resolution of these between the parties. This was to be done in writing to the Board detailing the nature of any claim, the facts giving rise to it, and the remedies sought. Clause 15.2

provided that upon receipt of such a letter from Mrs Fox, the Board would convene a meeting with her within seven days at which the parties were entitled to be represented. The purpose of such a meeting was to allow Mrs Fox and the Board the opportunity to resolve matters at the earliest possible opportunity in an informal and practical manner. Clause 15.3 provided that if the parties were unable to resolve matters in this way, their employment relationship problem resolution, which was said to be appended to the individual agreement, would apply.

[26] The employment agreement was deficient in that it did not contain the statutorily required mechanism for resolving employment

relationship problems between the parties. Although the school's template form of individual employment agreement did include such a mechanism, for some unknown reason Mrs Fox's did not. The case must, nevertheless, be decided on Mrs Fox's form of individual employment agreement signed by the parties.

[27] The foregoing is a summary of the particularly pertinent provisions of the agreement.

The Employment Relations Authority's determination

[28] This was issued on 8 February 2013 following an investigation meeting held over three days in early September 2012. The plaintiff was then represented by her husband, Dr Stephen Fox. Because the plaintiff has elected to challenge that determination by hearing de novo, it is unnecessary to say much about the Authority's determination. What can be said, however, is that a different case has been put forward in this Court in several respects reflecting, no doubt, the plaintiff's representation now by senior counsel. There were also fewer witnesses (by number but not evidential volume) who gave evidence in this Court. Another difference is the significantly greater amount of disclosed documentation than was available to the Authority. Those significant changes were allowed by a challenge (appeal) by hearing de novo under s 179 of the Act.

[29] Summarised, the Authority concluded that although some of the defendant's actions and conduct in relation to Mrs Fox warranted criticism, even trenchant criticism, overall dismissal was what a fair and reasonable employer would have

done in all the circumstances at the relevant time and that this was done in a manner that a fair and reasonable employer would have done.

[30] In a subsequent determination issued on 2 May 2013,3 the Authority determined the Board's application for a penalty to be imposed on Mrs Fox for obstructing and delaying the Authority's investigation and questions of costs arising out of its earlier substantive determination. The Authority dismissed the application for a penalty under s 134A and because there is no challenge to that rejection of its claim by the Board, nothing further needs to be said about it now. As to costs, the Authority awarded the amount of $21,000 to the Board. That costs decision has also been challenged by the plaintiff and so will form one of the issues for decision in this case.

[31] As already noted, the Court has, however, heard a very different case to that which was determined by the Authority. A number of witnesses who gave evidence to the Authority (principally parents of pupils) did not do so in this Court. Most remarkably, I was told that one of the central actors in the events leading to Mrs Fox's dismissal, Douglas Abraham, did not give evidence to the Authority. So significant was Mr Abraham's role in these events and such was the Authority Member's severe criticism of the misdescription by the school of Mr Abraham's role, that his omission as a witness in the Authority's investigation is surprising.

[32] As remarkable, also, was the absence, as a witness in this Court, of Simon Beamish. Mr Beamish was the then Chairman of the defendant Board and was central to the making of decisions affecting Mrs Fox. Mr Beamish was apparently available to be called as a witness but was not. The Court is left, however, with significant correspondence by and to him which must, therefore, speak for itself and from the contents of which inferences can be drawn about Mr Beamish's actions.

[33] Finally, it is remarkable also that it has only been for the first time, in preparation for the hearing in this Court, that the identity of the school's staff

member who conducted an observation of Mrs Fox's home at the request of the

3 *Fox v Hereworth School Trust Board* [2013] NZERA Auckland 159.

school, has been revealed. Counsel told me that the school successfully resisted disclosing this person's identity during the Authority's investigation meeting.

[34] Another significant change has been that the plaintiff is now represented by solicitors and, at the hearing, by senior counsel. Previously, Mrs Fox's agent was her husband, Dr Stephen Fox; both Mrs and Dr Fox participated in the Authority's investigation meeting by video conference call or Skype from Western Australia where they then lived. At the Court's hearing, Mrs Fox gave evidence in the courtroom while Dr Fox gave evidence by video conference links with Western Australia.

The facts

Summary

[35] The plaintiff was originally a physiotherapist but retrained as a school teacher before immigrating to New Zealand with her husband, a hospital doctor. Mrs Fox became provisionally registered as a New Zealand teacher and was appointed to a position with the defendant at the start of the 2008 academic year.

[36] Hereworth is a small private Anglican boys' preparatory school located in Havelock North. It has a role of about 150 pupils (boarders and day pupils) and a staff of about 20. It derives its income predominantly from fees charged and also from an endowment foundation. Its financial assets are its land, buildings and associated equipment. The school strives to break even financially. The Board is constituted by seven members who are nominated informally and appointed to represent the school's communities. The headmaster, who is not a member of the Board but works very closely with it, was at material times Mr Scrymgeour.

[37] Everyone who encountered Mrs Fox as a teacher (the school's Board and management, her colleagues, and her pupils' parents) spoke or reported highly of her talents and commitment to her profession and to her students. Mrs Fox's first 18 months or so as a junior teacher in the defendant's junior school passed not only without complaint but with plaudits.

[38] By July 2009 Mrs Fox was expecting her first child and had been granted 12 months' parental leave from the beginning of August. Her employment agreement provided that her entitlements were those set out in the relevant legislation so that, for the first few months of her parental leave she would receive an allowance from the state but would be unpaid for the balance of her 12 months' agreed leave.

[39] The events with which this case is concerned began in the last fortnight of Mrs Fox's time at the school and continued until her summary dismissal for serious misconduct on 12 January 2010 while she was still on leave.

[40] In mid-2009 differences of opinion had emerged between Mrs Fox and other teaching staff at Hereworth about reports to parents. These differences were not able to be resolved collegially as between professional educators. On 19 July 2009 the plaintiff met with Mr Scrymgeour to discuss her concerns about the junior syndicate's consistency of assessment, grading and marking of pupils' work. On 20

July 2009 she sent an email to all teaching staff of the school about the benchmarking of student assessments. Mrs Fox elaborated on her concerns in writing to Mr Scrymgeour on 29 July 2009. This email was also copied by Mrs Fox to all teaching staff.

[41] At a meeting between the plaintiff and Mr Scrymgeour on 22 July 2009 the plaintiff then raised with him her concerns about certain aspects of the conduct of her supervisor and deputy headmaster, Shirley Cameron.

[42] On 28 July 2009 Mr Scrymgeour requested a meeting with the plaintiff to discuss issues which had arisen from earlier emails between her and Mrs Cameron. Although the plaintiff and Mr Scrymgeour agreed originally to this meeting taking place at 4.15 pm on 29 July 2009, and that it would be attended by the headmaster, the plaintiff and Mrs Cameron, later that night the plaintiff confirmed that she would not attend the meeting, saying that the issues did not need to be resolved before she went on parental leave, and that she preferred to deal with those matters after the birth of her child. That was apparently accepted by Mr Scrymgeour and appears reasonable in all the circumstances then prevailing.

[43] On the following day, 29 July 2009, the plaintiff changed her mind and emailed the headmaster, saying that she then considered that those issues needed to be dealt with before she went on parental leave. That did not occur, however, before the plaintiff commenced her period of parental leave. There can be no criticism of the defendant that the meeting did not take place in these circumstances.

[44] This caused the headmaster to write to Mrs Fox by email on 31 July 2009, advising her that the school would conduct a formal investigation into the issues she had raised. Mr Scrymgeour advised Mrs Fox that this investigation would be conducted by an "independent consultant" but he neither advised her of this person's identity nor when and how that investigation would take place.

[45] On 31 July 2009 Mrs Fox began her period of parental leave before the birth of her child so that, while she remained interested in and concerned about goings-on at the school, she was not actively engaged in teaching and the other activities of a working teacher. She was absent from the school on statutory and contractually agreed leave. Her teaching duties were assumed by another or others.

[46] On 11 September 2009 Mr Scrymgeour again advised Mrs Fox that he had engaged what he described as "an independent consultant" to investigate the issues she had raised. Although Mr Scrymgeour identified the consultant by name, he did not disclose to Mrs Fox that the consultant, Mr Abraham, was also a member (and the Vice-Chairman) of the defendant Trust Board. The consultant operated a business (Abraham Consultants Limited or ACL) which, in addition to providing "business management solutions" to clients, also undertook debt collections, the preparation of employment agreements, evictions, and repossessions. The headmaster engaged Mr Abraham and ACL to investigate the issues concerning Mrs Fox's complaints that Mr Scrymgeour identified to the consultancy.

[47] Mrs Fox says that at the time of Mr Abraham's/ACL's appointment as independent investigator and Mr Scrymgeour's advice to her of that event, she was not aware that Mr Abraham was either the Deputy Chairman of the defendant or indeed a member of the Board. The defendant says, however, that this is so unlikely to have been so, that Mrs Fox should not be believed. That is a conflict which must

be resolved because Mr Abraham's treatment of Mrs Fox in that role, and otherwise

leading to her dismissal, is in issue in the case.

[48] The defendant is not a board of trustees of a State school, the members of which are elected periodically and publicly or may otherwise be well known publicly. For example, the staff members of State schools have an opportunity to elect a representative member of a board of trustees. In these circumstances, teachers at State schools would likely be in a better position to know of the membership of their employing boards. In this case, however, the Board is not a publicly elected body, and does not include a staff representative. Its membership is largely enduring rather than changeable periodically and publicly. I find Mrs Fox's evidence more probable that she did not recognise Mr Abraham or know that he was a Board member, at least at the time of Mr Scrymgeour's advice to her about the identity of the Board's independent consultant.

[49] That Mr Abraham may have been amongst a group to whom Mrs Fox was introduced when she began teaching at Hereworth, does not persuade me that she must have recognised his name by that information alone when Mr Scrymgeour first identified Mr Abraham to her. A combination of the headmaster's advice of the consultant's independence of the school or the Board, and the absence of any reference to him being a Board member, affirms Mrs Fox's account that she did not recognise his name or role at the school. The reference to Mr Abraham being "independent" would, if anything, have discouraged any association in Mrs Fox's mind between him and the Board.

[50] On 11 September 2009 the plaintiff emailed Mr Scrymgeour seeking a meeting with him about her concerns. He responded, telling the plaintiff that the school was looking into her allegations and that he would get back to her when he had received a report.

[51] On the following day, 12 September 2009, the plaintiff emailed Mr Scrymgeour, saying that she had not received an apology for the school's treatment of her and that she would be "escalating the issue".

[52] On 26 September 2009 Mr Abraham wrote a detailed letter to the plaintiff summarising her complaints against other staff and, unexpectedly to Mrs Fox, theirs against her and asking her to attend a meeting on 8 October 2009 to discuss all matters.

[53] On 28 September 2009, upon receiving Mr Abraham's s 26 September 2009 letter, the plaintiff wrote to Mr Abraham challenging his authority to act on behalf of the Board.

[54] On 29 September 2009 Mr Abraham wrote to the plaintiff confirming his authority to act on the Board's behalf and, among other things, warning the plaintiff not to publicise the issues between the parties and of the consequences of doing so. His advice about this founded one of Mrs Fox's complaints of unjustified disadvantage, and I will return to that later. The manner in which Mr Abraham delivered this warning to Mrs Fox will be the subject of later elaboration as it was a significant bone of contention for her.

[55] Mr Abraham undertook his investigation of Mrs Fox's complaints by reading correspondence and interviewing a number of staff members. Mr Abraham did not, however, interview or otherwise communicate with, either Mrs Fox or any parents of pupils whose dissatisfactions had sparked Mrs Fox's concerns originally. Mr Abraham reported his conclusions to the defendant by letter dated 26 September

2009 and then sought information from Mrs Fox before a meeting which he advised would be held with her. The purpose of this meeting was not stated by Mr Abraham. His letter to Mrs Fox dated 29 September 2009 identified that ACL was the Board's duly authorised representative in the matter.

[56] Mr Abraham's investigation and report went beyond Mrs Fox's complaints made to the headmaster as she expected it would have done from Mr Scrymgeour's communications to her. As a result of speaking with school staff and looking at correspondence, Mr Abraham apprehended misconduct by Mrs Fox herself and his investigations and report focused on this.

[57] On 12 October 2009, after receiving Mr Abraham's report, the Board

Chairman, Mr Beamish, requested the plaintiff's attendance at a meeting on 16

October 2009 but the plaintiff declined that invitation because the period of notice was too short.

[58] On 16 October 2009 a letter was sent to the plaintiff suggesting a meeting during the following week but her response was to say that a number of conditions had to be fulfilled by the Board before she would agree to meet. The Board was unprepared to meet those conditions.

[59] On 29 October 2009 the plaintiff's husband, Dr Fox, emailed Mr Beamish and all Board members, declining on the plaintiff 's behalf to attend mediation as had then been proposed by the Board.

[60] On 4 November 2009 the plaintiff emailed the Board's Deputy Chair, Tom Hamilton, in an attempt to arrange a meeting with him. This was initially agreed to be at 3 pm on 5 November 2009 at the plaintiff's home but the plaintiff shortly thereafter asked that five Board members attend the forthcoming meeting and suggested that it be postponed to an evening later that week or early in the following week. This meeting did not eventuate, despite initially being a hopeful glimmer of light on the horizon.

[61] On 5 November 2009 the plaintiff wrote to the Board advising that she did not have a personal grievance and would not attend mediation as had again been proposed by it.

[62] On 17 November 2009 the Board, now represented by its solicitor, Mr Webster, asked the plaintiff to attend a meeting but she declined to do so unless an apology was first tendered to her for Mr Abraham's conduct in his warning of 29

September 2009 to her.

[63] During October and early November 2009 there were a number of unsatisfactory communications between the plaintiff (increasingly written by her husband and representative, Dr Fox) and the Board and its solicitor, Mr Webster.

Mrs Fox challenged Mr Abraham's authority to represent the Board. Although there were discussions about potential meetings between her and one or more Board members, these did not eventuate, in part because of Mrs Fox's insistence on a withdrawal and apology by Mr Abraham and the Board for his initial threat to her that if she publicised the dispute with the school, it would be at her "peril".

[64] There was also an incident in which it appears that parents of a child, meeting with a teacher at the school, removed surreptitiously some progress records. When this was noted, it was suspected that the parents may have taken these to Mrs Fox's residence and another member of the staff was dispatched to observe whether the parents' car was at Mrs Fox's home. This observation came to Mrs Fox's notice subsequently and she assumed that she and her home had been put under broader surveillance. With the school declining to confirm the identity of the person or persons responsible for the surveillance, her position became more suspicious and entrenched. The possibility of meetings, discussions, and a resolution with the Board ebbed away. There were other incidents and exchanges of correspondence at this time in and after which the parties' relationship deteriorated.

[65] On 17 November 2009 the Board (by its lawyer Mr Webster) wrote to Mrs Fox proposing a meeting between the parties on Thursday 19 November 2009 at 7.30 pm at the school. Mr Webster proposed that the meeting would deal with the parties' employment related issues but left open the opportunity for Mrs Fox to address the Board or individual members of it on the subject of her concerns

about the school's educational standards. Mr Webster's letter also addressed the Board's response to a number of Mrs Fox's previous complaints including about the impartiality of the Mediation Service and Mr Abraham's warning to her that if she discussed the parties' disputes, she would do so at her peril. Mr Webster noted in this regard:

Rather than assisting with the resolution of disputes it [publicity] has the tendency to divide otherwise cohesive staff. ... We are unable to work out why you should have difficulty with the way in which that has been expressed.

[66] On the same or following day (18 November 2009) Mrs Fox responded to Mr Webster. The plaintiff asserted that any meeting between her and the Board could not include Messrs Beamish or Scrymgeour because she had complained separately

to other bodies about their conduct. Mrs Fox indicated her preparedness to meet with a number of other Board members (including Jock Mackintosh, Andrew Thomas, Stuart Signal, Tom Hamilton, and Chris Skerman). Mrs Fox indicated that she wished to discuss, primarily, the issues that she had raised about the school's educational standards but was agreeable to discussing subsequently what she described as "the conduct of senior management and the Board in the handling of this matter".

[67] Mrs Fox did not agree with Mr Webster's innocent interpretation of what Mr Abraham had meant when he wrote to her: "If you elect to discuss these matters externally, you do so at your own peril". Mrs Fox sought either an apology from the Board for this statement or what she described as a disavowal by the Board of it, either condition being satisfied before any meeting could take place. She continued to take issue with the partiality of Messrs Beamish and Abraham as Board members and requested a copy of the Hereworth School Trust Board deed or other documentation relevant to its powers. Mrs Fox concluded by reiterating her preparedness, on the foregoing conditions, to engage with the five Board members against whom she did not make allegations of impropriety.

[68] By letter dated 18 November 2009 Mr Webster responded directly to Mrs Fox. This letter recorded the Board's unpreparedness to accept the terms upon which she would meet with it. The letter continued: "As a directive from the Board your attendance is required at a meeting tomorrow evening". The time and address of that meeting was set out as was the identification of those who would be attending on behalf of the Board, Mr Webster himself, Mr Beamish as Chair, Messrs Hamilton and Mackintosh as Board members, and Mr Scrymgeour as the headmaster. Mrs Fox was invited to bring an advocate to the meeting. Its purpose was said to be "... to discuss, clarify and attempt to resolve the employment relationship problem arising out of the issues set out in the letter from Abraham Consultants Limited dated 26

September 2009". Mr Webster's letter included provision, in the latter part of the meeting, for Mrs Fox to address the Board's representatives "on any other matter that you may wish to bring to the Board's attention". Mr Webster's letter concluded:

Please note that failure to follow a reasonable directive of the Board could amount to misconduct and may consequently lead to disciplinary action.

Please immediately acknowledge receipt of this letter and confirm whether or not you will attend the meeting as requested.

You are strongly encouraged by the Board to seek employment advice.

[69] Mrs Fox's response was by an email sent to Mr Webster on the same day.

She advised:

We do not consider this a "**reasonable** directive" from the Board. Failure to apologise or disavow prior threat is unacceptable. (Please see Summary Offences Act 1981 – section 21 – intimidation).

As you have now failed to apologise or disavow the Board from this prior threat, on multiple occasions, we will be actioning this further.

[70] Mr Webster's response was equally as prompt, a letter sent to Mrs Fox by email the same day, 18 November 2009. This recorded that "... you are refusing to follow a reasonable directive from your employer". Mr Webster left open the opportunity for Mrs Fox to attend the meeting on the following day but sought her confirmation by 12 noon on 19 November 2009 that she would do so, failing which the meeting would be vacated and "the Board will again consider its position in light of your refusal to attend". The letter confirmed that this was a "directive" to attend because the Board did "not wish to lose the opportunity to meet with you given your intended absence from Hawkes Bay". Mr Webster again advised Mrs Fox to take advice "from a competent and suitably qualified employment advocate in the interim".

[71] Mrs Fox's email response late on 18 November 2009 was short and to the

point:

Again, we do not agree this is a reasonable directive.

I would suggest you focus your energies on advising your client on the proper course of action and their competency in the handling of this matter so far.

[72] There was yet further correspondence from Mr Webster in reply. By a letter sent by email to Mrs Fox on 19 November 2009, Mr Webster confirmed that the proposed meeting had been vacated and advised that: "Wilfully disobeying a reasonable directive from your employer constitutes misconduct." The Board did

not accept the validity or reasonableness of Mrs Fox's reasons for refusing to meet with the Board. Mr Webster's letter continued:

This letter is to be taken as a **formal written warning** that your refusal to attend the scheduled meeting amounts to misconduct and that you are required at all times to follow a reasonable directive from your employer.

This warning will remain on your record of **six months** from the date of this letter.

Any further misconduct (whether or not it relates to wilful failure to follow a reasonable directive or not) may lead to a disciplinary process where, in the circumstances, a fair and reasonable employer may be entitled to terminate your employment.

[73] Mrs Fox's response was by email to Mr Webster (but, as with most of her emails on this matter, copied to individual Board members) sent in the early afternoon of 19 November 2009. This letter included:

We have asked you now at least four times to provide us with documentation establishing that you have the Board's authority to act as their representative (see Employment Relations Act 2000; Section 236(3)). You have either not sought this authority from the Board or have for whatever reasons refused to provide us with a copy. You should know the last correspondence we had from a Board member was an email, from Tom Hamilton on 4 November, in which your firm's name is not mentioned.

In effect, you have provided us with a formal written warning from a firm that is not my employer!

You should be well aware that process is everything.

[74] Mr Webster responded, also on 19 November 2009. His letter stated that notwithstanding the plaintiff's refusal to meet and the formal written warning which had been issued, the Board considered it had an obligation to attempt to resolve the employment relationship issues which it had identified. Mr Webster noted Mrs Fox's intention shortly to be absent from Hawke's Bay. She was invited to advise when she was due to return and a range of dates when she would be available to meet with representatives of the Board. Mr Webster's letter concluded: "In default of a response from you, a further meeting time will be fixed and you will be invited to attend on that date."

[75] Dealing with the question of representation of the Board which Mrs Fox had challenged, Mr Webster wrote a second letter to the plaintiff later on 19 November

2009. His advice was that the Board's solicitors had been authorised to represent it from 3 November 2009 and this representation was confirmed by written terms of engagement that were required under the New Zealand Law Society's Rules of Professional Conduct and Client Care. Mr Webster added:

... More often than not the formal terms of engagement are signalled well after the commencement of work simply because the urgency of the job at hand takes precedence over the administrative requirements of the formal engagement. ...

All correspondence sent to you has been approved in accordance with Board procedure, including two items of correspondence sent to you before 10

November. They do not require formal ratification. The terms of engagement acknowledgement sent as an attachment with our last letter was not received

into our office until this morning and was therefore not available to send to you before that time.

Nothing in your latest email invalidates the communication exchange commencing from our first communication with you on 6 November. In particular, the formal written warning contained in the first of our 19

November letters, was approved before it was sent to you today. You now have proof of our authority to act.

[76] Mrs Fox's response to Mr Webster's third letter to her on 19 November 2009 was sent by email to him later that day. It continued to take issue with the lawyers' representation of the Board. It said:

Can we point out to you that the date on the authorisation is the 10

November. You corresponded with us **twice before** that date. Also we have had to ask you at least five times for this documentation. All previous

correspondence between us is redundant due to this omission by yourself.

Thank you for confirming that Mr Beamish was the sole Board member who gave you this authority.

[77] Shortly after this flurry of correspondence between the parties, an anonymous critical email (one of a series referred to elsewhere in this judgment) under the name "aromabadlaughs" was sent to parents of pupils at the school. The email dated 20

November 2009 was passed on to the Board which, on the same day, had Mr Webster write to Mrs Fox asking her to "confirm by return email whether or not you had any association with the drafting of that email or its distribution". Mr Webster advised Mrs Fox that if she did not respond by 8.30 am on Monday 23 November 2009, "... we will assume that you had some involvement in either the drafting or the distribution of it". Mr Webster advised Mrs Fox that the Board's presumption was

based on the apparent use of similar technology by the senders of the anonymous emails and Mrs Fox's previous emails, and the

apparent identity of the subject matters raised by Mrs Fox in her various emails to the Board's solicitors, members of the Board and the school's management. Mr Webster's letter concluded with a renewed plea for a response to his second letter of 19 November 2009 about Mrs Fox's availability to attend a meeting with the Board.

[78] The plaintiff responded to Mr Webster's letters about his firm's authority to act for the Board by email sent on 22 November 2009. Mrs Fox's email posed a number of further questions about the timing of the Board's authority to Mr Webster's firm, Sainsbury Logan & Williams, challenging the defendant's compliance with s 236(3) of the Act which relates to representation authority generally in employment matters under the legislation. Subsection (3) requires any person purporting to represent any employer to establish that person's authority for that representation. Mr Webster's previous advice had related to the lawyers' authority to represent the Board as solicitors, but not under s 236. Mrs Fox's letter continued to address her dissatisfactions with the Board's failure or refusal to apologise for what she described as "the explicit threat in Abraham Consultants Ltd

(ACL) letter dated 29th of September 2009". Mrs Fox continued:

It is now clear that the Board is unanimous in validating and approving ACL's "independent investigation" and subsequent threat. Even if an apology or disavowment was issued now, it would not be sufficient. We have asked HSTB [Hereworth School Trust Board] to apologise or disavow the threat at least a dozen times, it is clear that they wish to perpetuate the intimidation. Any serious law enforcement body will tell you it [is] the written threat that they take most seriously as they are the threats that are most likely enacted.

[79] Mrs Fox referred to communications that she said she had had with Police National Headquarters about escalating this issue under s 21 of the Summary Offences Act 1981 and that "We will now be making a complaint against the HSTB/ACL in regards to the explicit threat".

[80] Mrs Fox denied that she had any role in the drafting or distribution of the

"aromabadlaughs" email.

[81] Mrs Fox concluded by suggesting that the school:

... agree to save HSTB ... further expense by not prolonging this discourse". It would be prudent to await the outcome of the independent investigations of the Teaching Council and the Diocesan Board of Trustees (+/- the charities commission) before we proceed.

[82] Mrs Fox advised the Board:

Due to the threat we will be staying with friends during our last week in the

bay. So unreasonable demands like "If you do not respond to this e-mail by

8.30am Monday 23 November" will not be taken seriously.

[83] On Monday 23 November 2009 a further anonymous "aromabadlaughs" email was sent to some parents of pupils at the school. This referred to the background to Mrs Fox's dispute with the school but from an angle that was very critical of the defendant.

[84] The plethora of emailed letters between Mr Webster and Mrs Fox continued. Later on 23 November 2009 Mr Webster wrote in reply to the plaintiff 's email sent earlier that day about the lawyers' authority to represent the Board. In essence Mr Webster said that he had established his authority to represent the Board by providing Mrs Fox with a copy of the Board's terms of engagement of his firm, Sainsbury Logan & Williams. Mr Webster asserted that it was competent for the Board to have confirmed subsequently its former oral instructions to its lawyers as its representative and that the subsequent formality of doing so did not invalidate the original retainer. Next, Mr Webster noted that although his previous question to Mrs Fox had been whether she had any "association" with the drafting of the "aromabadlaughs" email or its distribution, her response had been that she had no "role" in its drafting or distribution. Mr Webster sought Mrs Fox's confirmation that she had no "association" to the extent that this may have been broader than having any "role" in the email.

[85] Mr Webster also referred to the second "aromabadlaughs" email sent earlier that morning and its reference to a formal warning having been given to an anonymous teacher but who Mr Webster alleged could only have been the plaintiff. Mr Webster inquired how, if this was so, what he described as "confidential information about your employment status" came to the knowledge of the author of the email. Mr Webster repeated his request for advice by return email whether Mrs

Fox had any "association" with the drafting or distribution of the second email. The

email concluded:

Nothing in your latest email convinces the Board not to meet with you as requested in our 19 November letter. Please confirm your availability to attend a meeting with the Board's representatives. In the absence of a response, the Board may resolve to set a date and direct that you attend.

[86] By email dated 27 November 2009 the school's executive assistant asked Mrs Fox whether she had at her home a number of school records in hard copy, which were needed by the school for the conclusion of reports. Mrs Fox's response by email on the same day did not confirm whether or not she had the records but, rather, suggested that inquiries should be directed to the school's senior management whom she said were ultimately responsible for assessment and data generated.

[87] Another “aromabadlaughs” email arrived in some parents’ email inboxes on 2

December 2009. It continued to criticise the school’s position on the dispute with Mrs Fox including by alleging that Mr Abraham had an obvious conflict of interest in his roles as the diocesan representative on, and vice-chairman of, the Board, and as an independent consultant who was investigating the plaintiff’s complaints. It alleged that Mr Abraham’s 29 September 2009 letter was designed to intimidate and frighten the plaintiff. It recorded that in the view of the writer, all Board members were responsible for Mr Abraham’s actions by not having denied them or disassociated themselves from them. It alleged that all Board members individually had refused to apologise for those actions which it described as “threatening ... bullying ... [and] shameful”. The anonymous email called on all Board members to resign immediately. The writer of the email asserted that the issue between the plaintiff and the Board was not an employment relations issue but, rather, one of educational standards. It alleged that the school’s senior management and Board did not want to talk publicly with parents about the issues because they were “highly revealing of their characters and incompetence”.

[88] There was a further similar “aromabadlaughs” email distributed to some parents on 5 December 2009.

[89] The Board met on the evening of Monday 7 December 2009. In addition to the trustees (Messrs Beamish, Mackintosh, Thomas, Signal, Hamilton and Abraham), the headmaster (Mr Scrymgeour) was also in attendance. Under the heading “Emma Fox”, the Board resolved a number of matters about the contents of responses to communications from others and noted:

Simon initiated discussion around the role of a smaller group to continue dialogue and to meet when necessary with Stuart Webster and the [Foxes]. This group to be able to act on behalf of the Board on such matters. Simon, Jock and Tom to represent and to communicate progress back to the Board.

[90] On 9 December 2009 Mr Webster circulated amongst Board members a copy of a letter to Mrs Fox, a draft of which had been discussed at the previous meeting. Contributors to the content of that letter included Messrs Beamish and Abraham. Referring to the letter having been sent, Mr Webster advised Board members: “I have tracked the email so that I can tell that it’s been delivered and read by Emma. I [will] let you know if and how she responds.” Mr Webster’s covering email to the plaintiff, which attached the letter, invited her to consider it and asked her to “[k]indly acknowledge receipt of this email and confirm to me whether or not you

will be attending the disciplinary meeting scheduled for next Friday 18th December

2009.”

[91] Mr Webster’s letter of 9 December 2009 sent to Mrs Fox on behalf of the Board was lengthy and dealt with a number of issues. The following quotations from it will deal with those that were relied on by the Board in dismissing Mrs Fox. After formally ‘inviting’ the plaintiff “to attend a disciplinary meeting” which was proposed for Friday 18 December 2009 at 12 noon, Mr Webster spelled out the subject matter of the meeting as being the Board’s “concerns” and “to consider any response that you might have”. Mr Webster acknowledged that Mrs Fox was away from Hawke’s Bay and that “[a]ttempts to ascertain when you were due to return have been met with silence”.

[92] Elaborating on the Board’s concerns, Mr Webster stated:

The issues that concern the Board are likely to go to the core of the employment relationship between you and the Board. They are not issues that can be overlooked or postponed. One of the main reasons for the timing of the meeting is the recent series of email communications from

“Concerned Hereworth Parents” which has escalated and heightened the

need for resolution.

[93] Mr Webster’s letter referred to the Board’s awareness of the complaints made formally by Mrs and Dr Fox to the New Zealand Teachers Council, the Charities Commission, the Registrar of Incorporated Societies, the Privacy Commissioner, the New Zealand Police and the Bishop of Waiapu. The letter recorded that Mrs Fox had declined to participate in mediation and to meet members of the Board because she had imposed her own (and, in the opinion of the Board, unreasonable) conditions requiring a written apology and excluding certain members of the Board “in deference to others”. The letter continued:

The meeting scheduled for Friday 18 December will be attended by the following representatives of the Board: Simon Beamish (Chairman), Ross Scrymgeour (Headmaster), Jock Macintosh (Board Member), and Stuart Webster (Legal Representative).

[94] The Board offered to pay for the air fares of Mrs and Dr Fox and any incidental costs related to her attendance.

[95] Mr Webster outlined more particularly the matters which the Board wished to discuss with Mrs Fox. These included:

- The matters set out in the letter from Abraham Consultants Limited dated 26 September 2009

• Your failure to follow a reasonable directive of the Board

• Your potential involvement with the “Concerned Hereworth

Parents” emails

- An allegation that you have attempted to obtain information relating to Hereworth to which you are not entitled

• Your failure to return school records when requested to do so.

[96] Each of those topics was then further expanded upon in a full and fair way. Included, as part of the detail about Mrs Fox's alleged failure to follow a reasonable directive, was the following:

The request to attend the proposed meeting (details of which are set out in this letter) constitute a reasonable directive of the Board and your attendance is expected (notwithstanding your temporary absence from Hawkes Bay).

[97] I note that this appears to confuse Mrs Fox's alleged disobedience of a

previous directive to attend a meeting whilst she was still living in Hawke's Bay, and

the Board's request (termed an "invitation" and not a direction) to attend the proposed meeting on 18 December 2009. In those circumstances, although it is not clear from Mr Webster's letter, the reference to "your failure to follow a reasonable directive of the Board" can only logically refer to the earlier meeting at a time when the plaintiff was still living in Hawke's Bay.

[98] Apparently for the first time, Mr Webster's letter of 9 December 2009 raised a further allegation and gave details about "seeking to obtain information to which you are not entitled". It said:

It has come to the attention of the Board that you arranged for a colleague to request information (comprising various reports) through another member of the teaching staff when you were not entitled to that information. In addition, the Board is aware that information obtained by parents of a Hereworth student was shared with you in circumstances where the Board is unable to understand how that information could have been legitimately requested. Both of these matters are seen as serious issues concerning the privacy of information held on behalf of students and parents.

[99] However, no information was provided to the plaintiff about the identities of colleagues, the nature or identity of the reports or the identity of the parents concerned.

[100] In relation to the allegation that Mrs Fox had failed to return school records, Mr Webster advised: "You have not denied that these records are in your possession and you have failed to return them."

[101] The consequences of Mrs Fox's failure to attend "the proposed meeting as requested" would be that the Board would be entitled to consider this to be a deliberate failure to follow a reasonable directive of the employer: "This may amount to serious misconduct and may lead to termination of your employment." As to some of those allegations contained in Mr Abraham's s 26 September 2009 letter, the Board considered that these had been accepted as correct in the plaintiff's s 20

October 2009 response and that such admitted conduct amounted to misconduct unless an acceptable explanation was provided for them. The same consequence was said to attach potentially to each of the other alleged misconducts.

[102] There is, in the bundle of documents, an electronic acknowledgement of the "Delivery Status Notification" concerning this letter of 9 December 2009 sent by email. It reads: "Your message has been successfully relayed to the following recipients, but the requested delivery status notifications may not be generated by the destination." The meaning of this document was not described to the Court although it may be inferred that Mr Webster's email was delivered to the gmail server to which Mrs Fox had subscribed and, the evidence indicates, through which she had, before then, received, opened and responded to a considerable volume of email traffic from the defendant. I do not understand that the email or its contents had been opened or viewed by Mrs Fox.

[103] A further "aromabadlaughs" email was sent to school parents on 10

December 2009. Referring to its "Update on Issues as of today", the email referred to a number of events between the school and Mrs Fox. There is no reference in it to the significant letter sent by Mr Webster the previous day or its contents. If, as the Board suspected and I have concluded, Mrs Fox and/or Dr Fox were involved, at least indirectly, in the provision of information on which these emails were based, the absence of a reference to the 9 December 2009 letter in the 10 December 2009 "aromabadlaughs" email tends to confirm that the former was not received and read by the plaintiff.

[104] The evidence discloses that Mr Webster spoke to Dr Fox on Wednesday 16

December 2009 in the mid to late morning. That is confirmed by Mr Webster's email to Dr Fox (at the latter's own hotmail address) sent at 11.53 am, referring to their recent telephone conversation. This was about two days before the meeting scheduled by the Board to which Mrs Fox had been invited. In his email Mr Webster advised: "... it can only be assumed that there is some attempt by you (and/or your wife) to avoid communicating with the Board and receiving the letter."

[105] Dr Fox responded substantively (on behalf of the plaintiff) to the Board on the early evening of 16 December 2009. He indicated that complaint had not yet been made to a number of the bodies and persons specified in Mr Webster's letter. He denied being "aromabadlaughs" and that he and Mrs Fox had not had any input into the content of those emails. Dr Fox contended that Mrs Fox had no files which

she was not entitled to keep copies of. He indicated a preparedness for Mrs Fox to provide a further copy if requested. There were other denials and some obfuscations provided by Dr Fox. He wrote in conclusion to Mr Webster: "Again if you feel you must proceed along your chosen path we are quite happy to see you eventually in the employment relations court." Dr Fox invited Mr Webster: "... unless you have something new to offer, [to] await the outcome of relevant investigations."

[106] Dr Fox's email was sent on by Mr Webster to Board members and the

headmaster with the comment:

Nothing in the email convinces me to change the strategy set out in yesterday's email to you.

I suggest that Dr Fox's reply is considered alongside the other material when

we meet tomorrow.

[107] On 17 December 2009 Mr Webster confirmed by email to Dr Fox that the meeting scheduled for the following day would take place with Mrs Fox still being entitled to attend. Mr Webster advised that Dr Fox's previous email would be considered by Board representatives together with other information available to them as set out in the lawyer's 9 December 2009 letter.

[108] Early on the morning of Thursday 17 December, Dr Fox replied to Mr

Webster materially:

We feel 2 days notice for a busy hospital doctor and a new mum insufficient time to arrange a meeting. Especially to arrange leave, flights down to hawkes bay etc. Against a background of 4 months of attempted meetings on our behalf.

One thing that we can agree on is that a meeting between the incumbent board and their legal representative is likely to be unproductive.

...

P.S; in future please send hard copies of all correspondence to our old

Hawkes bay address, further e-mails from you will not be recognised.

[109] I conclude that Mr Webster's email was received by Mrs Fox's internet service provider but that she was unaware of that because she did not have access to emails. As the evidence stands, and in the absence of explanation by Mr Webster who elected to be counsel despite his intensive involvement in these events, I conclude that his advice to the Board about Mrs Fox having received and read his

email was incorrect. So, too, was the inference that was drawn by Mr Webster, and adopted by the Board, that Mrs Fox had deliberately made herself incommunicado.

[110] The Board doubted the truth of Mrs Fox's explanation for the delay in receiving the defendant's email. That scepticism of the Board was one of the considerations going to the defendant's decision to push on with its disciplinary investigation meeting on 19 December 2009 at which it was aware Mrs Fox was unlikely to be present. That absence in turn led to its conclusion that Mrs Fox had disobeyed a lawful and reasonable direction which underpinned the decision to dismiss her.

[111] Mr Webster (as the Board's solicitor and adviser) was critical of Mrs and Dr Fox's contended failure to notify him or the Board of any email address change or of any known fault which prevented Mrs Fox from receiving emails at her email address. Mr Webster's letter to Mrs Fox continued that "more importantly, you have not provided the Board with an alternative email address, mailing address or physical address to send communications to". Mr Webster wrote: "Therefore, it can only be assumed that there is some attempt by you (and/or your wife) to avoid communicating with the Board and receiving the letter."

[112] There are other references throughout Mr Webster's letter to "the Board" considering matters and making decisions in relation to the 18 December 2009 meeting.

[113] At midday on 18 December 2009 a subcommittee of the Board (comprising Messrs Beamish, Mackintosh and Scrymgeour), together with Mr Webster, met to discuss the plaintiff's situation. As she had previously indicated to Mr Webster that she would be unable to do so, the plaintiff was not present. Those present made a preliminary decision to dismiss Mrs Fox for serious misconduct. I address later in the judgment the evidence about this decision and how it was made.

[114] On 21 December 2009 Mr Webster wrote to the plaintiff summarising the

outcome of the "disciplinary meeting" which had been held by the subcommittee on

18 December 2009. I set out the detail of this important letter at [143]-[167] of this judgment.

[115] On 10 January 2010 a letter from Dr Fox to the Board in response to its 21

December 2009 letter was received by it.

[116] The next relevant event was the defendant's meeting referred to in the previous correspondence, at 12 noon on 12 January 2010. Again, reliance is placed on the handwritten notes of Mr Webster of the contents of this meeting which was not in person but conducted by a telephone conference call between the participants. Although Messrs Beamish and Macintosh were recorded as being present, Mr Beamish's name appears twice in that regard and "Ross" (which I infer referred to Mr Scrymgeour) is recorded as having voted for the meeting's resolution. This resolution was proposed by Mr Beamish and was that Mrs Fox be dismissed. Messrs Beamish, Mackintosh and Scrymgeour voted in favour of this proposal. There is no reference in the notes to Mr Webster's presence but he was clearly a participant in the telephone conference call and the notes of the conference are his. I assume the notes are accurate, and Mr Webster did not give evidence about this.

[117] The formal letter to Mrs Fox advising of her dismissal was sent by Mr

Webster on the same day as the "meeting", 12 January 2010. It records relevantly:

2 The sub committee of Hereworth School Trust Board met by teleconference at 12 noon on Tuesday 12 January 2010.

3 The sub committee reviewed the interim decisions made at the meeting held on 18 December 2009 and then went on to consider the

10 January 2010 communication.

4 It was the decision of the sub committee that nothing in that communication altered the views expressed in our 21 December

2009 letter or the interim decisions reached.

5 Accordingly, a decision was made on behalf of the Board that you be dismissed summarily and that the decision be formally communicated to you.

[118] There is no evidence of subsequent ratification of the subcommittee's decision to dismiss Mrs Fox which might have been taken by the Board at its next meeting after 12 January 2010.

"Aromabadlaughs"

[119] As already noted briefly in the summary of relevant events, "aromabadlaughs" is a reference to the series of anonymous emails sent to parents, staff, and other members of the school community which the defendant suspected emanated from, or was otherwise connected to, the plaintiff. These emails which purported to come from "concerned Hereworth parents", or variations on that theme, started in November 2009 and they continued intermittently until some months after her dismissal. Mrs Fox has always denied any involvement in the sending or content of these emails although, from the outset, they clearly referred to her circumstances and accurately. The defendant's case is that it is very difficult, if not impossible, to identify the precise source of such emails when sent through a site known as

'hushmail' designed to preserve anonymity.

[120] Although at no stage identifying the plaintiff by name, the emails both clearly referred inferentially to Mrs Fox as the teacher concerned. She would have been easily identified to those recipients who may have read them. They were very critical of the school, its management and its academic standards. They were similarly critical of Mrs Fox's treatment by the school and were very supportive of her. They were trenchantly critical of the Board, its chairman and members, and of Mr Abraham personally.

[121] The defendant was, unsurprisingly, very concerned about the fact and content of the emails because they both dealt with what it wished to remain as confidential information. The Board put in significant energy and resources to attempt to identify either the author of the emails, or the source of the author's information. It was unsuccessful in doing so. The Board believed that if Mrs Fox was not the author of the emails, then she or her husband, Dr Fox, were the source of much of the information contained in them. Mrs Fox and Dr Fox, in turn, denied being either the authors of, or contributors of information for, the emails and said that they considered as a serious possibility that the authorship or the source of the leak was from someone closely connected to the Board or the school generally.

[122] Eventually, before it dismissed Mrs Fox, the Board conceded that it could not, by objective evidence, sheet home to Mrs Fox responsibility for the sending or authorship of the "aromabadlaughs" emails. However, a strong sense of suspicion that this was so, persisted with the Board and its advisers.

[123] The Employment Relations Authority concluded that the Board had failed to persuade it on the balance of probabilities that Mrs Fox was either responsible for the emails or for their content. After a no doubt more intensive analysis of evidence in this case, I have concluded that Mrs Fox and/or Dr Fox were probably the source of the information from which the emails were created. That is for the following reasons.

[124] First, there is no evidence to support the theory advanced by Mrs Fox from time to time during these events, that it was the Board itself, or someone associated with it, which or who was responsible for the emails or their contents. I discount this possibility.

[125] Next, the timing and content of some of the information contained in the "aromabadlaughs" emails meant that this (precisely accurate) information could only have been known to a relatively few Board members and their close advisers and the headmaster on the one hand, or to Mrs and Dr Fox on the other. Given the content of the emails, I doubt very much that the Board, or those close to it, was the source of the information or the author of them.

[126] The evidence establishes that Mrs Fox conferred closely with her husband about all of these matters related to her employment. Indeed, Dr Fox was, for substantial periods, Mrs Fox's advocate, representative, and adviser. I conclude that whatever was known to Mrs Fox about her dispute with the school was almost immediately and completely known to Dr Fox, and vice versa.

[127] Dr Fox conceded in evidence that he (and Mrs Fox) spoke to some close confidants about the events as they occurred during the dispute between the parties. Although the evidence goes no further than this, for example identifying who those confidants were or the degree to which Mrs Fox was aware that her disclosure would

be used for the content of the "aromabadlaughs" emails, that connection between Mrs and Dr Fox and the "aromabadlaughs" emails has been established by the defendant's case.

[128] The “aromabadlaughs” emails were probably composed and sent by a person or persons other than Mrs Fox. Their content consisted of information probably relayed by Mrs Fox and/or Dr Fox to the plaintiff’s personal confidants and supporters. There is no evidence that the plaintiff intended the information which she passed on to those persons to be included in the “aromabadlaughs” emails. It is understandable and reasonable that someone, in the throes of an employment dispute such as Mrs Fox’s, would confide in supporters and friends in the circumstances at the time when that information was conveyed. It is unlikely that Mrs or Dr Fox insisted on their communications being confidential or that the person or persons responsible for the emails felt bound not to pass on the contents of these disclosures by Mrs and Dr Fox. Mrs Fox did not herself receive the “aromabadlaughs” emails except as were referred on to her by the school after they had been received by others.

[129] The plaintiff was not responsible culpably for the sending or content of the “aromabadlaughs” emails and, in particular, if she is found to have a personal grievance, s 124 of the Act will not be engaged, at least in relation to her role in the emails. The “aromabadlaughs” emails embarrassed the defendant (and its members and the headmaster) significantly and it was frustrated by its inability to locate the source of their contents and otherwise to attempt to prevent them being sent to members of the school community.

[130] Finally, despite accepting, on legal advice, that it would not hold Mrs Fox responsible for the emails, deep and abiding suspicion remained among Board members and their advisers that Mrs Fox and/or Dr Fox were responsible for the content and were complicit in the sending of the emails. The former suspicion has now been established in evidence but not the latter.

Post-dismissal surveillance?

[131] Finally, although playing no part strictly in the justification for Mrs Fox’s dismissal but relevant perhaps to credibility and motive and, therefore, to remedies, there was another incident which occupied a significant time in evidence but can be summarised quite shortly.

[132] Some time after Mrs Fox’s dismissal, she and her husband were visiting friends in a suburban street on Auckland’s North Shore. In the same street they noticed Mr Abraham’s car which had a distinctive personalised number plate. Mrs Fox then claims to have seen Mr Abraham in the window of an adjacent house, she says staring at her and her husband. Mrs Fox assumed that this could not have been an innocent coincidence but was an example of what she considered was the Board’s and Mr Abraham’s ongoing hounding and harassment of her, even after she had been dismissed.

[133] Mr Abraham had an innocent explanation for his presence in that street at that time, which presence he acknowledged. He supported this with information about the reasons for his being there at that time (also essentially for visiting a family friend in connection with one of his children’s sporting activities) but denied that he had been staring at Mrs and Dr Fox or that he was even aware that they were present in the same street at the same time.

[134] Without doubting the depth of Mrs Fox’s suspicion about this incident, on balance I consider that Mr Abraham’s presence was not sinister and was simply an example of a statistically unlikely but nevertheless innocent coincidence that those people were in the same place at the same time. Although I accept that Mrs and Dr Fox observed Mr Abraham in a neighbouring house, I have not been persuaded on the balance of probabilities that Mr Abraham was conducting an observation of Mrs and Dr Fox or was even aware of their presence. Nothing further needs to be said about that evidence.

The employer’s grounds for dismissal

[135] These are the starting point for a consideration of the plaintiff’s claim of unjustified dismissal. They were recorded formally by the Board’s letter to Mrs Fox of 12 January 2010. This letter, which confirmed Mrs Fox’s dismissal, referred to the Board’s earlier letter of 21 December 2009 and to the letter sent by the plaintiff in response dated 10 January 2010. These letters are significant as are the responses to them. I will summarise them in reverse chronological order because they refer to and adopt, in the case of the defendant, earlier letters sent to Mrs Fox.

[136] The 12 January 2010 letter to Mrs Fox included the relatively brief account of the reasons already set out at [143]-[167] of this judgment.

[137] Referring to the “Disciplinary meeting held at Hereworth on Friday, 18

December 2009 at 12 noon”, the Board’s solicitor, Mr Webster, recorded that the plaintiff had indicated, via her husband, that she would not be attending that meeting and that she did not do so. The 12 January 2010 letter recorded that the meeting included Messrs Beamish, Mackintosh, Scrymgeour and Webster, the latter as “legal representative”. It said that the meeting considered each of the matters raised in paras 14-28 of the Board’s letter to Mrs Fox of 9 December 2009. The letter recorded that this consideration included “the evidence available to the Board and the responses received by you up to and including the very last communication, namely, your husband’s email to this firm on 17 December 2009 at 9:52am.”

[138] In those circumstances, Mr Webster’s letter of 21 December 2009 effectively sets out the grounds for Mrs Fox’s (then conditional) dismissal. It is a long letter so I will, in part, summarise its contents and, in part, quote from it.

[139] After recording that by letter of 9 December 2009 the Board’s solicitors had

requested Mrs Fox attend a disciplinary meeting at noon on 18 December 2009, the

21 December letter records that on Tuesday 15 December 2009 Mrs Fox said that she had not received the defendant’s letter of 9 December 2009. It records that the Board’s letter of 9 December 2009 was re-sent to the plaintiff on the afternoon of 15

December 2009 and its contents were referred to in a letter to the Board's solicitor

from the plaintiff's husband, Dr Fox, sent on the evening of 16 December 2009. In

his letter of 21 December 2009 the Board's lawyer expressed his scepticism about Mrs Fox's assertion that she had not received the previous correspondence and said that the solicitors would ask her to make a statutory declaration or affidavit with regard to that matter if it became material.

[140] I interpolate here that it appears that this was not done, despite the delayed receipt of the letter having become a material and even pivotal consideration in Mrs Fox's dismissal. In any event, there has now been materially unchallenged evidence on oath or affirmation given to the Court by Mrs Fox about those events and which I address elsewhere in this judgment.

[141] Resuming the narrative, the letter of 21 December 2009 then set out the

Board's "Preliminary View and Interim Decision" as follows:

9 The board has resolved as its preliminary view that you have been guilty of misconduct on the grounds set out in this letter and that as a fair and reasonable employer, the Board is entitled to terminate your employment summarily.

10 That is an interim decision pending any further response from you.

11 If no response is received by **12 noon on Monday 11 January 2010** then the Board will consider making a final decision which may include adopting the interim decision with or without amendment.

(original emphasis)

[142] Mr Webster's letter of 21 December 2009 then dealt with a number of issues under headings. The first of these was "Issues summarised in the Abraham Consultants Limited's letter dated 26 September 2009". Mr Webster identified Mrs Fox's conduct in issue as her failure to meet with her employer and to respond to specific allegations about her actions, details of which had been set out in ACL's 26

September 2009 letter. Further, the issue was said to be Mrs Fox's failure to substantiate "through proper evidence the very serious allegations that you have made about members of the teaching staff and other individuals". These "unsubstantiated allegations" were said to have:

the potential to seriously undermine the day to day interaction you have with the staff involved ... [and] ... go to the heart of the employment relationship between you and the Board and seriously damage the trust and confidence that must exist in order for there to be a sustainable working relationship.

[143] Mr Webster's 21 December 2009 letter advised Mrs Fox that the Board did not consider her 20 November 2009 communication to be an adequate response to all of the issues raised and, in particular, said it was not acceptable for Mrs Fox "to simply respond to a question with a question".

[144] Mr Webster's letter said, in this regard, that Mrs Fox had failed to inform the Board adequately as she had been requested in the ACL 26 September 2009 letter, to provide a range of specified information to enable the Board to investigate its concerns properly.

[145] Next, Mr Webster said that although Mrs Fox had been invited to attend mediation in an attempt to resolve those issues, she declined to do so.

[146] Finally, the defendant's solicitor asserted that in the absence of proper information from Mrs Fox, and in view of her continuing unreasonable refusal to meet with representatives of the Board, it was entitled to take into account the information it did have, including statements of three named staff members, together with other information to which Mrs Fox had responded, and to reach its own views about her conduct.

[147] Mr Webster advised that the Board had reached the preliminary view that Mrs Fox's conduct in the following respects amounted to serious misconduct. These were:

• refusing to meet and discuss the issues with the Board;

• alleging that other teaching staff had lied to her or had been unprofessional or rude in circumstances where there was no foundation to allege so;

• alleging that a particular member of the school staff behaved inappropriately in front of pupils when there was no foundation to make that allegation;

• alleging that she had been directed or encouraged by her supervisor to lie to parents when there was no foundation to make that allegation;

• incorrectly accusing the headmaster of being mistaken or confused in his recollection and unwilling to deal with her concerns;

• alleging that another member of the teaching staff instructed her or inferred that school reports would or should be altered, when that was untrue;

• alleging that deceiving parents was actively encouraged, although there was no foundation for that allegation;

• deliberately breaching an understanding amongst teaching staff about collaborative teaching and commencing a teaching module early against the specific instructions of her supervisor not to do so;

• alleging a breach of privacy against another member of staff when he was at all times carrying out his work under proper instruction and with the authority of the headmaster; and

• sharing her unsubstantiated concerns with the wider teaching staff by way of email communications in circumstances which either called for confidentiality, or having been requested specifically not to do so, thereby causing distress to two other staff members.

[148] Paragraph 24 of Mr Webster's letter of 21 December 2009 continued:

Furthermore, the Board, acting as a fair and reasonable employer, believes that the serious misconduct goes to the heart of the employment relationship and has irreparably destroyed the trust and confidence required to maintain a working relationship between you, your fellow teachers and management. The Board has resolved as an interim decision to dismiss you summarily from your employment notwithstanding that you are currently on maternity leave.

[149] The next heading in Mr Webster's letter was "Failure to follow a reasonable directive". Mrs Fox was said to have been the subject of a formal warning given on

19 November 2009 for failing to follow a reasonable directive of the Board. The (second) directive was said to have been a requirement to attend the disciplinary meeting on 18 December 2009 as advised in an email sent to Mrs Fox at her usual email address on 9 December 2009 and in respect of which delivery to her was said to have been confirmed.

[150] Mr Webster's letter continued that, despite Mrs Fox's denial that she had received that email at any time before 16 December 2009, she had not explained, "by way of system failure or other cause", why the 9 December 2009 email had not been received by her. That was said to have occurred in circumstances where no fewer than 12 similar emails had been received by her when sent to the identical email address earlier in the year.

[151] Further, Mr Webster asserted that despite Mrs Fox's refusal to attend the 18

December 2009 meeting, she had not included a suggested alternative meeting time which the Board had expected her to have done in good faith when her continued employment was in jeopardy.

[152] Mr Webster wrote that the Board had reached the preliminary view that Mrs Fox's failure to attend the 18 December 2009 meeting constituted serious misconduct because it breached a formal written warning in respect of the same conduct, being a failure to follow a reasonable directive of the Board. In this respect, also, Mr Webster's letter said that the Board had reached an interim decision to dismiss her summarily.

[153] The next topic dealt with in Mr Webster's letter of 21 December 2009 was "Potential breach of good faith". This related to the Board's concerns about the "aromabadlaughs" emails sent to parents in which the school, its senior management and the Board "had been criticised and undermined". Mr Webster recorded that Mrs Fox had denied any involvement with the emails, although he asserted that she had not answered specifically the question whether she had any "association" with their drafting. It recorded that, as recently as on 16 December 2009, Mrs Fox had denied,

through her husband as her agent, that she had any input into the content of the emails. Mr Webster recorded:

35 ... Candidly, the Board finds that difficult to accept especially when one of the Concerned Hereworth Parents emails ... makes specific mention of the caution "if you elect to discuss these matters externally, you do so at your own peril".

[154] That scepticism was said to have arisen because the quoted phrase had been contained in a private communication from ACL to Mrs Fox dated 29 September

2009 "and could only have been supplied to the author of the ... emails by you or with your authority or through your instrumentality".

[155] The letter continued:

36 However, in the absence of any further proof of your involvement, and in the circumstances of your continued denial of input into the emails, the Board makes no finding in respect of this issue and simply reserves its position in the event that further information becomes available which assists the Board in resolving its concerns.

[156] The letter noted, however, that the Board was still concerned about Mrs Fox's preparedness "to use the media to further your cause" and also that she had not "distanced yourself from these emails or attempted to lessen the effect and mitigate the damage they have caused".

[157] The next heading in Mr Webster's 21 December 2009 letter was "Seeking to obtain information to which you are not entitled". It recorded that a member of the school's teaching staff had reported that Mrs Fox had arranged for a colleague to request various pupil reports through another member of the teaching staff when she was not entitled to that information and that it had then been obtained by parents of a student as a result of Mrs Fox divulging this information. That was said to have been in circumstances where the Board was "unable to understand how that information could have been legitimately requested by you whilst you were on maternity leave". Mr Webster said that despite an opportunity having been given to Mrs Fox to respond to that allegation by attending the disciplinary

meeting on 18

December 2010, she had declined to do so. In this regard, also, Mr Webster recorded that the Board had reached the preliminary view that Mrs Fox's conduct "in

requesting such information" constituted serious misconduct that justified summary dismissal.

[158] Finally, under a heading "Failure to return school records", Mr Webster recorded that Mrs Fox had been asked by email on 27 November 2009 to return hard copies of a number of student assessment reports which were required by another member of the school's teaching staff. Mr Webster asserted that Mrs Fox had not at any time denied that she had these reports but he said that she had failed to return them. Again, the letter recorded the Board's preliminary view that her conduct, in failing to return the hard copies of those documents, constituted serious misconduct for which summary dismissal from employment would be justified.

[159] The 21 December 2009 letter, summarised above, in turn referred to Sainsbury Logan & Williams's (Mr Webster's) letter of 9 December 2009 to Mrs Fox. To complete the picture of the allegations for which she was dismissed, it is necessary also to summarise aspects of that (9 December) letter although necessarily more briefly than have been set out in relation to its successor.

[160] The 9 December 2009 letter invited Mrs Fox to attend a meeting with the Board on 18 December 2009. It set out the subject matter of the meeting and said that the Board's concerns would be put to Mrs Fox and consideration would be given to any responses that she might have to those. The letter noted that "The Board is aware that you are currently away from Hawkes Bay ... and ... [a]ttempts to ascertain when you were due to return have been met with silence". Mr Webster's letter said that the matters could not be delayed from the Board's point of view because:

5 The issues that concern the Board are likely to go to the core of the employment relationship between you and the Board. They are not issues that can be overlooked or postponed. One of the main reasons for the timing of the meeting is the recent series of email communications from "Concerned Hereworth Parents"4 which has escalated and heightened the need for resolution.

[161] The letter noted the Board's belief that Mrs and Dr Fox had formally complained about these matters to the New Zealand Teachers Council, the Charities

4 What I interpret to be the "aromabadlaughs" emails.

Commission, the Registrar of Incorporated Societies, the Privacy Commissioner, the New Zealand Police, the Bishop of Waiapu (because of his role in the governance of the school), and the Human Rights Commission. In relation to its invitations to Mrs Fox to meet with it, including in mediation, the letter noted:

10 You have not taken up any of those invitations because you have imposed your own (and in the opinion of the Board unreasonable) conditions which require furnishing a written apology and excluding certain members of the Board in deference to others.

[162] The letter indicated that at the planned 18 December 2009 meeting the Board would be represented by its Chairman Mr Beamish, a member Mr Mackintosh, the headmaster Mr Scrymgeour, and Mr Webster as its legal representative. The Board said that the meeting was of such importance that it would pay for the air fares of Mrs Fox and her husband and any incidental costs related directly to her attendance at the meeting. The letter then set out the issues of concern which were those summarised subsequently in the 21 December 2009 meeting which I have already related and will not reiterate.

[163] Under the heading "Consequences", Mr Webster noted:

29 If you do not turn up for the proposed meeting as requested, the Board will be entitled to consider that as a deliberate failure to follow a reasonable directive of the Board. This may amount to serious misconduct and may lead to termination of your employment.

30 Some of the allegations made in the 26 September communication have been accepted by you as being correct in your 20 October response. The Board considers that conduct to amount to misconduct unless an acceptable explanation is provided. If the Board finds that there is serious misconduct as a result, then as a fair and reasonable employer it may be in a position to consider the termination of your employment.

[164] The letter also referred to what it described as Mrs Fox's "suspected involvement in the recent "Concerned Hereworth Parents" emails"5 and stated that

"the implicit threat in your 20 October communication to speak to the media, unless

5 The "aromabadlaughs" emails.

explained by you, may constitute serious misconduct and lead to the termination of your employment."

[165] Finally, the letter strongly urged Mrs Fox to immediately obtain legal advice and to confirm her attendance at the proposed meeting.

[166] It may be seen from this cumulative correspondence that the employer's grounds for dismissal were numerous, various and contained in a series of inter- related letters sent by email between November 2009 and January 2010. These will need to be assessed, both individually and collectively, for the purpose of making decisions about justification under s 103A for Mrs Fox's dismissal based upon their contents.

Conclusions of law

The nature and powers of the defendant

[167] Because of the potential importance of the defendant's powers, rules and procedures, during the September 2014 phase of the hearing the Court called for the trust deed which established the defendant.6 Although I was provided with a document drawn (in 1925) by the same firm of solicitors as now act for the Board, upon examination this document was a deed effecting a transfer of land upon which the school was to be established. Despite the appropriate governmental agency apparently having accepted this deed as the founding constitutional document of the defendant, that is not its nature. Mr Webster assured the Court that his firm's records, which survived the 1931 Napier earthquake intact, had been searched and

that this was the only relevant document relating to the Board that was able to be located. Whatever its nature, it does not establish the defendant as a legal entity or, in particular, regulate its conduct including how decisions are made; how members of the Board assume that role; whether the Board is empowered to delegate its functions to subcommittees; or any other similar issues which affect the propriety in

law of the defendant's actions affecting Mrs Fox as have been challenged by her.

6 See the power to call for evidence under s 189 of the Act.

[168] This preliminary question is relevant as to the Board's powers which it purported to exercise in its actions affecting, and ultimately its dismissal of, Mrs Fox. The Board appears to have come into existence and been incorporated originally in the 1920s under the provisions of the Religious, Charitable and Educational Trusts Act 1908. This legislation was repealed by the Charitable Trusts Act 1957. Section 63(4) of that latter Act deemed the Board's continued registration under the former Act.

[169] The Charitable Trusts Act 1957 (and its relevant predecessor) are both silent about any minimal constitutional or governance obligations of a charitable trust. Under the 1957 Act, s 10(2)(c)(i) simply requires that, upon application to become a corporation, a society or trustees of a society, supply a copy of rules providing for its constitution or, in the absence of any rules, a statutory declaration "setting forth the purposes of the society, the manner in which persons become members or cease to be members thereof, and the manner in which the society operates".

[170] As part of the general law, trustees and executive members of a charitable entity are subject to certain legal duties. These include: to perform the terms of a charitable trust; to execute a trust according to its terms; not to deviate from the terms of the trust instrument; not to profit personally from the trust; not to delegate the trust; to act impartially; and to invest prudently. They are also obliged to comply with laws generally, in this case, now the Employment Relations Act where the Board is an employer of employees.

[171] The leading New Zealand text, the Law of Societies in New Zealand, outlines the general rule against delegation of powers by trustees as follows:7

While a society may act through agents and individual officers, the common law rule that an agent may not delegate his or her duties and authorities (delegatus non potest delegare) applies to trustees. Among or related to the trustees' duties of diligence and prudence, is the duty not to delegate their duties or powers. Generally a trustee must act personally and is not permitted to delegate his or her powers and duties either to a co-trustee or to a stranger, and is personally responsible for the exercise of judgment and the performance of duty. ...

7 Mark von Dadelszen *Law of Societies in New Zealand Unincorporated, Incorporated, and*

Charitable (3rd ed, LexisNexis, Wellington, 2013) at 6.7.1.

[172] As to the application of the ultra vires doctrine, the text says:8

A failure to comply with the constitution may lead to actions of the entity being held to be invalid on the grounds that those actions are ultra vires. Such invalidity will most commonly be declared in court proceedings based on contract or as a result of judicial review proceedings.

[173] Counsel for the defendant, Mr Webster, developed an interesting argument about the powers and duties of the defendant based on a legislative analysis. This was not challenged by Mr Churchman in argument. Although Mr Webster's firm had always acted for the defendant including at the time of its commencement, no documentary confirmation of counsel's assertions was able to be produced.

[174] Mr Webster's submission appeared to accept that the 1927 deed which was produced to the Court as the defendant's original trust deed, and which appears to have been accepted by the registration authorities as such, was not such a document. That was a proper concession because, as I have already noted, its content does not support that description of its nature. Relying on other unspecified material, Mr Webster advised the Court that the defendant was established in 1926 and was registered under the provisions of the then operative Religious, Charitable and Educational Trusts Act 1908. Part II of that Act ("INCORPORATION OF TRUST

BOARDS") provided:9

5. The trustees of any trust for religious, charitable, educational, or scientific purposes acting with the authority of the body for which they act, and any society for religious, charitable, educational, or scientific purposes, may file in the office of any Registrar of the Supreme Court a memorial in the form in the Third Schedule hereto; and thereupon the said society or trustees, and their successors in office, shall be deemed to be incorporated as a Board under the name set forth in the memorial.

[175] The Third Schedule to the Act 1908 set out a short and simple form of application as follows:

8 At 4.4.1.

9 Religious, Charitable and Educational Trusts Act 1908, s 5.

THIRD SCHEDULE.

WE hereby apply to be incorporated under the provisions of "The Religious,

Charitable, and Educational Trusts Act, 1908."

(1.) The name of the Board to be the Society or Trust Board. (2.) The registered office of the Board to be at

Dated at , this day of , 19 .

Witness—

A. B.,

Justice of the Peace [*or* Solicitor].

[176] Section 6 provided for a form of certificate to be issued by the Registrar of the (then) Supreme Court which was to be conclusive evidence in all Courts that the Board named had been duly incorporated and of the time of its incorporation.

[177] Section 7 provided that every Board incorporated under that Act was to have perpetual succession and a common seal, was empowered to hold real and personal property of whatever nature, to sue and be sued in all proceedings, whether civil or criminal, and to "do and suffer all that corporate bodies may do and suffer". The succeeding sections of the Act granted Boards specific powers, although principally related to property.

[178] Section 11 provided:

11. Deeds may be made by any Board under its common seal, attested by the trustees or any three of the trustees for the time being constituting the Board; and all other contracts may be made in writing, signed by any person in the name and on behalf of the Board acting under a resolution in writing passed at a meeting of the trustees.

[179] Section 12 provided:

12. All acts or deeds done or made by any person acting *bona fide* as such trustee shall be valid notwithstanding any defect that may afterwards be found in his appointment, and the signature of any person purporting to act as such trustee shall be *prima facie* evidence of his being such trustee.

[180] Mr Webster submitted that presumed registration of the defendant under that Act and its successor legislation, did not impose upon the Board any obligation to have or adhere to any constitution or set of rules as would, for example, be required in the case of an incorporated society. Mr Webster accepted that the trustees of the defendant would be required to act in accordance with applicable legal principles including under legislation governing trusts and pursuant to the common law and

other relevant legislation. Otherwise, however, counsel submitted that the law should expect those trustees to act in accordance with the principles and mores of the Anglican Church and the Diocese of Waiapu within the purview of which the Board came.

[181] Mr Webster relied on the chapter in the Laws of New Zealand dealing with "Charities: Religious Bodies as Trustees".10 At 128 of this chapter, the position of the Anglican Church is dealt with. This, in turn, refers to the Anglican Church Trusts Act 1981 which deals with the holding of property by that Church for any religious, charitable, educational or other purpose connected with the Church or any part of it. It provides that such property may be held by authorised trust boards or by trustees.

Authorised trust boards are specified by a statute in sch 1 to that Act. Mr Webster told me that the defendant appears in that schedule as an authorised trust board. The listing of such boards is pursuant to a gubernatorial Order in Council on the advice of the Minister of Justice and given at the request of the General Synod of the Anglican Church. The text continues:11

An authorised trust board may exercise certain powers set out by statute in addition to and notwithstanding anything to the contrary in the instrument creating or relating to the trust.

[182] Section 3(1) of the Anglican Church Trusts Act provides that the powers of authorised trust boards are set out in sch 2 to the Act. Of the 18 statutory powers specified in sch 2, only number 17 can relate arguably to the employment of staff. It empowers the defendant "to enter into such contracts and do or perform such things as in the opinion of the Board will be for the benefit of any trust administered by it."

[183] Given the absence of a trust deed or similar constitutional document setting out the powers of the trustees, guidelines that the trustees themselves have very recently drawn up for conduct of their affairs in light of the events which occurred in this case, cannot have governed matters retrospectively. Indeed it may have been the experience of these events which impelled the defendant to move to define its procedures. In these circumstances, I have reached the following conclusions about

the defendant's powers in relation to the employment of Mrs Fox.

10 Margaret Soper, *Laws of New Zealand Charities: Religious Bodies as Trustees* (online ed) at 127.

11 At 128 (footnotes omitted).

[184] The Board must act by its duly appointed members, the trustees. In the absence of any express provision to this effect, at least a simple majority of the trustees was required for the Board to make decisions lawfully. Although the trustees could not delegate decision-making powers in the nature of governance, either to a smaller number than themselves collectively or to non-trustees, they were entitled to delegate managerial functions in relation to the Trust to both smaller numbers of themselves (committees or subcommittees) and to others. Where governance decisions and actions were required, however, such delegates could not make those governance decisions on behalf of the Board. Those delegates could investigate, report and recommend, but such governance decisions had to be taken by at least a simple majority of the trustees at a meeting of the Board.

[185] The plaintiff was employed by the defendant Trust Board, that is the trustees collectively. Decisions and actions about the day-to-day management of the plaintiff's employment were able to be delegated both to the headmaster and/or to a committee of trustees. However, neither the headmaster nor other non-trustees could take part in decision-making, including such as may have been delegated to a committee of trustees. The Board, being the plaintiff's employer which appointed her, was required to itself take significant employment-related decisions, including suspension and dismissal and that was by at least a simple majority of Trust Board members meeting as a board. The Board, as employer of the plaintiff, and those who acted as its agents, both individual Board members, the headmaster and Mr Abraham/ACL, were subject to the same rights and obligations under employment legislation as were other employers. So, too, indeed was the plaintiff, as the Board's employee, entitled to the same rights and bound by the same employment obligations as employees generally.

[186] I deal later in the judgment with whether the Board's actions were in

compliance with these legal requirements of the Board as employer.

Discussion

An education or employment issue?

[187] Behind the parties' stances on the issues that manifested themselves from July 2009, and which eventually resulted in Mrs Fox's dismissal, were questions about the nature of their dispute and, therefore, of the appropriate way of dealing with it.

[188] Mrs Fox regarded her dissatisfactions with her manager's directives of her to be a teaching issue, but not an employment one, or at least one that did not constitute an employment relationship problem. The defendant regarded these, and especially Mrs Fox's broader publication of her dissatisfactions, as being an employment issue to be dealt with as such.

[189] In my assessment, both were partly right and partly wrong. Although these disagreements started out as a disagreement between professional educators about how student assessments should be made and recorded (an educational issue), when she did not achieve her desired aims with her professional colleagues, Mrs Fox's actions created a dispute that went beyond that of a professional pedagogical disagreement (creating an employment relationship problem). Her claims exhibited her lack of trust and confidence in the headmaster and eventually the Board. On the other hand, the defendant's initial refusal to allow Mrs Fox to deal with these professional educational issues or to involve other teaching staff and parents in a professional resolution process affecting them, also contributed to these problems not being resolved other than by Mrs Fox's eventual dismissal. Mrs Fox was also wrong in refusing to acknowledge the existence of a serious employment relationship problem.

[190] These matters were further complicated by Mrs Fox's employment status at the relevant times. On 31 July 2009 Mrs Fox commenced a period of parental leave to which she was entitled and the duration of which she had advised the school would probably be one year. It was known to the staff at the school, including the headmaster, that Mrs Fox's child was born in August 2009 and that the purpose of her parental leave was to allow her to care for her child full-time. Although a

temporary replacement teacher was appointed for the duration of Mrs Fox's likely leave, the plaintiff remained as a member of the school's staff and indicated a wish to stay involved with the school in a professional and general capacity during her leave.

[191] Does the relevant legislation assist in determining the status of the relationship during that leave and, therefore, what the parties may or may not do lawfully? Part 5 of the Parental Leave and Employment Protection Act 1987 addresses aspects of the nature of the employment relationship between Mrs Fox and the Board during her agreed period of parental leave. That leave being of more than four weeks' duration, s 41 of that Act was engaged. The Act creates a presumption

(for the purpose of any proceedings under that Act) that the employer will:12

... be able to keep open for the employee, until the end of the employee's parental leave, the employee's position in the employment of the employer unless the employer proves that the employee's position cannot be kept open

...

[192] There is no question in this case of the Board not being able to "keep open" Mrs Fox's position for the statutory reasons set out in s 41(1)(a) and (b).

[193] Section 42 relieves an employer of any obligation to pay remuneration and holiday pay for a period of parental leave. That is commensurate with the expectation that the employee will not perform his or her usual work during that period, and cannot be directed by his or her employer to do so.

[194] Section 43 ("Continuity of employment") states that "[w]here an employee resumes service with the same employer at the end of

a period of parental leave or while the employee is entitled, following parental leave, to preference in obtaining employment with the employee's employer ...", certain rights and obligations dependent on "unbroken service" arise. The section also deals with superannuation scheme rights. None of these matters is directly in issue in this case.

[195] Section 46 ("Failure to return to work") makes provision for failure, without cause, "to return to work at the end of that period of parental leave". That is

prefaced by the opening words: "If an employee who takes up parental leave and

12 Parental Leave and Employment Protection Act 1987, s 41.

whose position is kept open by the employer ...". The statutory consequence of a

failure to return to work is that:13

the employee's employment shall, subject to any agreement between the employer and the employee, be deemed to have been at an end as from the day on which the period of parental leave began.

[196] That appears to presuppose that in other circumstances (of which Mrs Fox's case is one), her employment did not end from the day on which her parental leave began. Also, the notion of "leave" presupposes that a period of statutory parental leave is one in which some of the rights and obligations of employment continue and some (including the performance of work and the payment of remuneration) are suspended.

[197] Section 47 is of like effect, although dealing with a failure by an employee to take up an alternative position substantially similar to that held by the employee before taking parental leave.

[198] So, too, is s 48 which deals with the position of "workers employed to replace employees on parental leave". This refers to "a temporary employee [being] employed to replace an employee who is on parental leave ...".

[199] Section 49 is similarly supportive of a conclusion that the employment relationship and the employment contract continue during a period of parental leave. This provides, materially, that no employer shall terminate the employment of any employee during the employee's absence on parental leave or during the period of 26 weeks beginning with the day after the day on which any period of parental leave

ends.14

[200] For the sake of completeness (and although it has not been suggested to the contrary in this case), s 54 provides importantly that nothing in the Act shall affect the right of an employer to dismiss an employee for a substantial reason not related

to the employee's leave or other rights under the Act.

13 Section 46.

14 Section 49(1).

[201] One of the difficulties created for the defendant by Mrs Fox's parental leave status was that she could not be required by the defendant to act pursuant to the defendant's wishes or commands during her normal working hours as would have been the case had Mrs Fox not been on parental leave. As a matter of commonsense and good employment relations also, the defendant should have appreciated that Mrs Fox's circumstances meant that she could not always respond immediately to the school's requirements including, in particular, attending meetings called by the Board, sometimes at quite short notice. Mrs Fox's husband was as known by the Board)to be a hospital doctor who worked shifts. Further, Mrs and Dr Fox had no immediate family in Hawke's Bay (or subsequently in Northland) who may have been able to assist them with child care and so allow Mrs Fox to prepare for and attend significant meetings as were directed by the Board to take place in late 2009 and early 2010.

[202] Adding further to this situation was the fact that as from about 1 December

2009, Mrs and Dr Fox moved their residence from Hawke's Bay to Whangarei, hundreds of kilometres from the school. Mrs Fox said that a part of the reason for that move was to escape what she perceived to be the unreasonable pressure being placed by the school upon her. Dr Fox obtained other employment at another hospital so that, combined with Mrs Fox's child care responsibilities, this move made it, if not impossible, then very difficult at least at short notice, for Mrs Fox to attend the two meetings of the Board in late 2009 and early 2010 which it required her to attend and her absence from which contributed significantly to her dismissal. That move to Northland was not necessarily inconsistent with her parental leave. There is no requirement *where* the leave must be taken, although Mrs Fox would clearly have to have been able to take up her position again at Hereworth by residing more locally at the end of the leave if she elected to do so.

[203] By the time Mrs Fox had moved away from Hawke's Bay, she had exhausted her entitlements to parental leave payments so that she was then on unpaid parental leave from the school. Mrs Fox did not, however, resign as she could have and which would have avoided both the possibility of a subsequent dismissal by the school, and therefore this litigation. A resignation in these circumstances might not, however, have proved to be a completely clean break because, very arguably, the

school would have been obliged to have reported her resignation to the New Zealand Teachers Council as having taken place in circumstances of the Board's investigation of allegations of misconduct against her.

A desire to avoid adverse publicity

[204] Documentary evidence of internal emails between the school's management, its adviser and, in some respects, the Board, reveals that from an early stage there was a concern that Mrs Fox's criticisms of, and challenges to, the junior school's assessment of pupils' progress, were supported by some staff and parents. The school was anxious not to be the subject of adverse publicity in the community as was the risk, especially, of any parental support for Mrs Fox's complaints. Hereworth School survives in large part on its reputation in a relatively small local community, and in a competitive boarding school sector, as a private school charging substantial fees.

[205] I consider that this was the principal reason for the Board refusing to discuss these pedagogical concerns that Mrs Fox clearly wished to ventilate, and was also behind Mr Abraham's recommendation to the Board that it seek to resolve Mrs Fox's employment issues in confidential mediation but to exclude from this what might be termed her 'educational' complaints. Those were two tactical decisions by or on behalf of the Board that contributed to the plaintiff's eventual dismissal.

[206] Nevertheless, the case must be decided on employment law principles and against the employment relationship problem that had emerged clearly out of a professional educational issue, at least by October 2009.

Refusal to mediate

[207] The defendant was very critical of Mrs Fox's refusal to engage in mediation with it under the auspices of the Napier office of the (then) Department of Labour's Mediation Service. It is correct that Mrs Fox did refuse to engage in mediation in Napier but some further explanation of the very unusual circumstances surrounding the Board's request for mediation and the plaintiff's response is necessary.

[208] As I have just concluded, the Board's concern was not only to resolve what it categorised correctly as the difficulties in its employment relationship with Mrs Fox, but also to prevent or at least minimise adverse publicity about the plaintiff's own concern and the concerns of some other staff members and parents about educational issues at the school. The Board was aware that employment mediation conducted under the auspices of the Act was strictly confidential so that Mrs Fox would be significantly constrained by law from disseminating the content of any discussions protected by mediation confidentiality.

[209] Dr Fox, who was Mrs Fox's trusted confidant and adviser, had concerns about the Napier Mediation Service's impartiality in the case. These concerns arose from hearsay information and rumour passed to him which Dr Fox took seriously. In these circumstances, he advised Mrs Fox not to engage in Department of Labour mediation in Napier but, at the same time, to offer to undertake mediation in another centre, Auckland being suggested. She did so but the compromise was not agreed to by the Board.

[210] Although neither Dr nor Mrs Fox could, at the time of refusing to participate in mediation, establish the truth or otherwise of the advice that they had received, events which transpired subsequently did tend to confirm their suspicions. Although a good deal of pre-trial effort was expended in attempting to get to the bottom of this issue, its relevance to this proceeding is limited and so I will refer only briefly to the evidence which the plaintiff says justified her in refusing to participate in mediation but for which she was sanctioned by the defendant. More detail is contained in the

Court's interlocutory judgment delivered on 20 August 2014.15

[211] A subsequent very detailed inquiry into Mrs and Dr Fox's complaints of Mediation Service misconduct was undertaken at the Department's request by a senior retired Deputy Secretary and Chief Legal Adviser of the Department of Labour. This disclosed unprofessional conduct in relation to the Fox/Hereworth case by a particular member of the support staff of the Napier Mediation Service (although not a mediator). This person had a number of personal and informal

dealings with the defendant's agent, Mr Abraham, about mediation in the dispute.

15 *Fox v Hereworth School Trust Board (No 6)* [2014] NZEmpC 154 at [15]- [30].

These dealings with Mr Abraham were far from neutral and professional as they ought to have been by a public mediation service, and portrayed it in a bad light when revealed later.

[212] That said, however, the fact that Mrs Fox did not have that level of information when she refused to go to mediation does not exonerate her decision completely. That is for at least two reasons. First, the arguable bias exhibited by the staff member in the Mediation Service cannot be attributed to the defendant or even its representative, Mr Abraham. Mr Abraham's conduct in his dealings with the Mediation Service did not fall into the same category as that which failed to meet the standards expected of the Department of Labour. It is correct, also, as Mr Webster (in his role as counsel) pointed out for the defendant, the unprofessional conduct was that of a support officer and not of one of the mediators who would have dealt with the parties directly in mediation and assisted them in a neutral and professional capacity. Nevertheless, the support officer's role was an important one in several preliminary respects and could have affected the manner in which mediation would have been dealt with.

[213] So whilst Mrs Fox's refusal to engage with the Mediation Service may, with the benefit of hindsight, appear to have been an understandable and perhaps justifiable decision, that refusal to mediate can probably now be seen as a neutral factor between the parties. It should not, however, have been a factor taken into account by the Board as it was and to the extent the defendant did, in justifying its summary dismissal of Mrs Fox.

[214] There was no requirement in Mrs Fox's employment agreement to agree to mediation which is otherwise a voluntary process, and any unreasonableness on her part was matched by the Board's refusal to countenance mediation taking place other than with the

Department of Labour in Napier.

The significance of impugned words and phrases

[215] The plaintiff attributes sinister motives to several of the defendant's representatives arising out of words and phrases used by them, both written and spoken. The most prominent of these was Mr Abraham's written advice to Mrs Fox

in his letter of 26 September 2009 that if she chose to publicise the issues between her and the defendant, she would do so "at [her] peril". Mrs Fox regarded this as a threat of physical intimidation and said that this threat influenced and even dictated her conduct in a number of subsequent dealings, or lack of them, with the defendant.

[216] Similarly, although less sinisterly, Mrs Fox attributed to her supervisor, Mrs Cameron, dishonest and unethical motives when the latter used the word "fake" in relation to how she (Mrs Cameron) responded to parents and other staff when teachers, including Mrs Fox, implemented changes unilaterally rather than discussing with colleagues and joining in collaborative decision making.

[217] Next, the headmaster, Mr Scrymgeour, described himself to Mrs Fox as "compromised" when discussing with her his role in attempting to resolve the plaintiff's professional difficulties with Mrs Cameron. The plaintiff also challenges his motivations in light of his use of this word.

[218] In each case the user of the impugned words conceded, with the benefit of hindsight, that he or she may have expressed things differently and better. Each nevertheless emphasised that the particular words or phrases used could not be assessed in isolation but had to be judged in their context. Each also said that he or she did not intend to convey the sinister or egregious meaning Mrs Fox claimed to have taken from each of those communications to her.

[219] I have also considered whether cultural linguistic differences may account for Mrs Fox's misapprehensions about these communications. This is a complex exercise which, unaided by expert evidence, a court is not necessarily well placed to determine. I have, however, had the benefit of evidence of Mrs Fox's vocational and professional background, have observed her giving evidence at length and have analysed that evidence as well as written correspondence with others. To the extent that it is safe to do so, the following are my conclusions about this aspect of the plaintiff's apprehensions concerning communications with her.

[220] Mrs Fox was educated professionally in England. She holds an Honours undergraduate degree in physiotherapy and subsequently trained to be a teacher in

the United Kingdom. She taught in primary schools for six years in England, India, Australia, and New Zealand. Mrs Fox's husband, who was her close confidant and adviser in her dealings with the defendant, is a medical doctor who qualified in England and has subsequently worked, predominantly in hospital medicine, in England, Australia, and New Zealand. Dr Fox is a Fellow of the Royal Australian College of General Practitioners and I assess him to be, like the plaintiff, an intelligent and very competent and confident communicator in the English language.

[221] I am satisfied, in these circumstances, that any misapprehension by the plaintiff of the nature of these communications which she regarded as serious threats against her, is not attributable to cultural linguistic considerations.

[222] I have concluded that, viewed in its context, each of these communications was not intended to bear, and could not reasonably bear, the meaning Mrs Fox says she took from it. In communications between persons, especially where these are made in circumstances that might subsequently lead to conflict or are made in the midst of fraught relationships, context is very important. Mrs Fox has, on each occasion in my assessment, both read into the statements the worst possible intentions of their makers, and failed or refused unreasonably to acknowledge even the possibility of an alternative and innocuous meaning in the context in which they were said or written.

[223] So, where Mr Abraham told Mrs Fox that she would do something at her peril, this was both intended to mean, and could only reasonably have been taken to have meant, that there could be serious professional teaching and employment consequences to Mrs Fox if she publicised her dispute with the school as she had threatened to do. The words in context could not reasonably have conveyed an intention to do physical or like harm to Mrs Fox.

[224] Mrs Cameron's use of the word "fake" was both intended to mean, and ought to have been interpreted as meaning, that Mrs Cameron would attempt to downplay or disguise disunity amongst teaching staff until a professional collegial position could be established. And when Mr Scrymgeour referred to himself as being "compromised", he meant, and ought reasonably to have been taken to mean, that in

his role as facilitating a meeting between Mrs Fox and Mrs Cameron to attempt to resolve professional differences, he could not act as Mrs Fox's advocate, holding as he did the position of manager of both women in the school's administrative hierarchy.

A 'preliminary' decision to dismiss?

[225] As the summary of the relevant facts reveals, on 19 December 2009 the Board's solicitor announced to the plaintiff what he described as its "preliminary decision" to dismiss the plaintiff and the reasons for that. Mr Webster's letter left the plaintiff with an opportunity to provide the decision makers with further information or submission which, by implication, indicated the theoretical possibility that they might further consider and change that preliminary decision. The letter provided a time limit for that response (between 19 December 2009 and 11 January 2010), generally regarded as a holiday period although the defendant did not offer any opportunity for a meeting between the parties before the defendant made a final decision. Mrs Fox was expected to respond in writing. Indeed, as it transpired, there was no face to face meeting even amongst the committee who conferred by telephone conference call on

12 January 2010 when they decided to dismiss Mrs Fox.

[226] Such "preliminary" decisions of employers are now an increasing feature of dismissals. It is simply not possible to tell how often employers are dissuaded from that preliminary decision, because litigation is unlikely to ensue in that event. There is a real risk, however, that in such circumstances employees may proverbially shrug their shoulders and think that there is no point in seeking to change the employer's view because it appears that minds have already been made up. The Court has commented on this practice in another (school) case, *Edwards v Board of Trustees of*

*Bay of Islands College*16 and has warned against it in view of risks for employers and

their advisers inherent in it.

[227] That was not the plaintiff's response here, however. In this case the plaintiff both sought to dissuade the employer from its preliminary decision to dismiss and,

16 *Edwards v The Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [306]- [312].

importantly, sought further information from it regarding the grounds for that decision.

[228] The Board's lawyer's brief handwritten notes of the telephone conference call on 12 January 2010 essentially record only that the committee members considered that Mrs Fox had not done anything to cause them to change their minds and formally confirmed her summary dismissal.

Breaches of good faith by the plaintiff?

[229] Despite Mrs Fox and Dr Fox on occasions in evidence seeking to dissociate themselves individually with the words and deeds of the other, I am satisfied on the evidence that at all material times Dr Fox acted as Mrs Fox's agent with both actual and ostensible authority. Although Mrs Fox may now regret at least some of the more extreme and even outrageous things written on her behalf by Dr Fox, she is, nevertheless, fixed with responsibility for all of those communications so far as the defendant is concerned. That is so especially when, at least until the Authority's determination was challenged in this Court, Dr Fox was Mrs Fox's representative, including in litigation, who insisted upon the defendant dealing with him in that capacity.

[230] Throughout this saga, the tone and sometimes the content of Dr Fox's letters sent on behalf of the plaintiff did not assist her cause. That said, I consider that a fair and reasonable employer in all the circumstances would have looked beyond and ignored the shrill and even sometimes gratuitously offensive accusations of Dr Fox about the Board's members, representatives and agents. The defendant had engaged an experienced solicitor expressly for this purpose when Mrs and Dr Fox's invective directed at Mr Abraham was considered by the Board to be a distraction to its dealings with Mrs Fox on their merits. Although Dr Fox had, unjustifiably in my assessment, also criticised Mr Webster's professional conduct, accusing him of unprofessional practice and threatening a complaint to the New Zealand Law Society, the solicitor's role included to give the defendant dispassionate legal advice about the difficult situation in which the Board found itself. It is plain now to see that the defendant had, by late December 2009/early January 2010, become

frustrated by, and exasperated with, Mrs and Dr Fox. The Board (or at least two members of it) decided, in effect, that 'enough was enough' and determined to finalise these affairs realising that litigation would inevitably ensue, as it has.

[231] The defendant categorises Mrs Fox's responses to its attempts to resolve their differences between July 2009 and early January 2010, as failures or refusals by her to act towards her employer in good faith. It says that these failures or refusals both contributed to the justification of its dismissal of Mrs Fox but even if not, should nevertheless operate to reduce or eliminate any remedies to which she may be entitled if she was dismissed unjustifiably. The acts or omissions relied on by the defendant include Mrs Fox's refusals to meet with the defendant or its representatives and her refusal to engage in mediation through the Department of Labour's Mediation Service in November 2009.

[232] These submissions invoke a number of statutory and contractual rights and obligations as follows.

[233] In addition to implied mutual contractual obligations of trust, confidence and fair dealing between Mrs Fox and the Board, s 4 (good faith in employment relations) of the Act is engaged. Under s 4(1)(a) the parties were required to deal with each other in good faith. Under s 4(1)(b), and without limiting the scope of the general good faith dealing, neither was to do anything to mislead or deceive the other or anything that was likely to mislead or deceive the other. Under s 4(1A)(b) the parties were "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...".

[234] In relation to the dealings between the parties from a point at which the Board can be said to have proposed to make a decision that was, or was likely to have, an adverse effect on the continuation of Mrs Fox's employment, it was obliged to provide her with "access to information, relevant to the continuation of [her] employment, about the decision; and ... an opportunity to comment on the

information to [her] employer before the decision is made".[17]

17 Employment Relations Act 2000, s 4 (1A)(c).

[235] Each side relies on one or more of these obligations in supporting her or its case against the other.

[236] Section 4(3) is also arguably engaged. It provides, in respect of the subs (1) obligation summarised above, that they do "... not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held

about an employer's business ...". "[B]usiness" is not intended to be interpreted in a narrow way relating only to commerce in the private sector. I conclude that an "employer's business" can include the defendant's "business" of operating a school and employing staff in that enterprise, as the Board employed Mrs Fox.

[237] A finding of a breach of the mutual contractual obligations of trust, confidence and fair dealing, or of s 4 good faith obligations may, in the case of the plaintiff's claims against the defendant, constitute or contribute to the existence of a personal grievance. A finding of one of these breaches against Mrs Fox may either serve to justify the employer's actions or constitute grounds under s 124 of the Act to reduce any remedies to which she might otherwise be entitled if the Court finds the defendant liable. Both parties' breaches of these obligations to one another will have those consequences in this case.

Decision on causes of action

Declaration of breaches of good faith

[238] There were a number of failures on the part of the defendant to act towards Mrs Fox in good faith. Although, as I have already noted, there were also a substantial number of failures or refusals by Mrs Fox (and/or, as her representative, Dr Fox) to act in good faith towards the Board, the only good faith cause of action to be decided is Mrs Fox's against the Board. If that is established, Mrs Fox's breaches of the s 4 requirements and/or of the implied contractual obligations of trust and confidence can and will be reflected in remedies, not only for the defendant's breaches of its good faith obligations but also in any remedies to which she might otherwise be entitled under other causes of action.

[239] Because this is not the plaintiff's principal cause of action, I intend only to highlight some of the defendant's breaches of its good faith/trust and confidence requirements. First, the defendant misled or deceived Mrs Fox that the "independent consultant" engaged by the Board to investigate her complaints, made in mid-2009, was in fact not independent at all but an influential member of the Board (Deputy Chairman). That breach of good faith was not corrected, as it should have been, at several opportunities that presented themselves to the headmaster and the Board. By the time the "independent consultant's" true identity had become known to Mrs Fox, it was too late for the Board to acknowledge its error and redeem itself by engaging, as it should have (as a fair and reasonable employer), both someone who was truly independent, skilled and objective and who had a professional educational background.

[240] Next, in his inquiries purportedly into the complaints that Mrs Fox had made to the headmaster, on which he had engaged Mr Abraham to investigate and report, Mr Abraham failed to consult or consult sufficiently with Mrs Fox or other persons who may have been able to have supported her complaints. By the time that Mr Abraham said that he required Mrs Fox to attend a meeting at which the allegations against her would be laid out, it was, in my assessment, altogether too late for Mr Abraham to conduct an independent and objective assessment of Mrs Fox's own complaints. Mr Abraham was prematurely and improperly diverted in his task of investigating Mrs Fox's complaints into building a case against her which eventually led to her dismissal. Mr Abraham was the Board's agent and it is thus responsible in this proceeding for his actions. They were in breach of s 4(1A)(b) of the Act which required the defendant (and, therefore, Mr Abraham) to be active and constructive in maintaining a productive employment relationship in which he and the Board were responsive and communicative. Further, under s 4(1A)(c) Mr Abraham's execution of his brief became closely associated to a proposal that the Board would make a decision that had, or was likely to have, an adverse effect on the continuation of Mrs Fox's employment. Mr Abraham and the Board failed or refused to give Mrs Fox access to information relevant to the continuation of her employment and/or a proper opportunity to comment on that information before decisions were made.

[241] Finally, I will mention what has been described as the home surveillance incident which caused Mrs Fox considerable anguish, and about which she was deeply suspicious. The defendant's reluctance to communicate with her about it, further exacerbated the already antagonistic relationship between the parties. The defendant was not communicative and honest with Mrs Fox as it should have been when she asked about what she considered was a major intrusion into her privacy.

[242] When the school suspected, justifiably, that a parent had removed, surreptitiously and without consent, some student information from a teacher's desk, the school's senior management immediately suspected that the parent would have taken this information to Mrs Fox's home. Another member of staff was directed to try to ascertain whether the parent's vehicle was outside or at Mrs Fox's home. That other staff member did so and reported to the headmaster, confirming the school's suspicion that this removal of information was, or was to be, associated with Mrs Fox. When this allegation was formulated and put to Mrs Fox, it included advice that the parent's vehicle had been seen at her home. Mrs Fox assumed the worst, that the school, perhaps through Mr Abraham as a private investigator, had put her under and/or her home under surveillance whilst she was absent on parental leave. That concern, which Mrs Fox conveyed to the school, was not alleviated, as it could have been, by the school disclosing frankly the circumstances in which the vehicle had been seen at Mrs Fox's home. The school refused to disclose this information that, at least if disclosed promptly, might have alleviated a growing list of suspicious concerns that Mrs Fox had about the school's management, the Board and Mr Abraham. It was not until evidence was provided for the purpose of this hearing (that is, even after the Authority's investigation) that the school eventually disclosed not only how that observation had been made, but who had made it, and how and why. In this regard, also, the defendant breached its good faith obligations of not only communicativeness and responsiveness but of fundamental fair dealing.

[243] These findings reiterate those of the Authority against the Board and Mr Abraham, albeit in arguably less critical terms than they were described by the Authority.

[244] Other than to declare these breaches by the defendant of its statutory and contractual good faith obligations, I do not propose to apply any sanction to them in view of the conclusions that I have reached on the closely associated questions of unjustified disadvantage and unjustified dismissal and the remedies granted for these.

Unjustified disadvantage decision

[245] This is said to include the formal employment warning given to Mrs Fox following her refusal to attend the Board's meeting on 19 November 2009 and was contained in Mr Webster's letter of the same date, 19 November, to her. The serious misconduct which the Board said warranted the final formal employment warning was the plaintiff's refusal to attend a meeting with the Board in Havelock North on

19 December 2009. The Board categorised this as a lawful and reasonable instruction which it said Mrs Fox disobeyed without just cause.

[246] I have already referred to some relevant elements of the parental leave statute which were applicable to Mrs Fox's circumstances at the time of her alleged misconduct which led to the employer's warning. Unfortunately, the parties' failure to address in submissions whether (and if so to what extent) the parties' respective employment obligations were altered as a result of the employee being on parental leave, has meant that I am not able to determine that issue in this case. It may be that an employer is not entitled in law to give an employee on parental leave directions to attend disciplinary meetings and to do other things that the employer could lawfully do absent the parental leave.

[247] I reserve the question of the consequences in law of an employee being on authorised parental leave, for another case after fully informed argument and submission.

[248] I propose, however, to assume for the purpose of this case only that the Board was, in all the circumstances, entitled to direct Mrs Fox as if she was not on leave. The plaintiff has not contended that her leave status caused those directions to be unjustified for that reason. Further, the evidence shows that in spite of being on

parental leave, Mrs Fox continued to engage, frequently and intensively, with the

Board on issues related to her employment during her period of parental leave.

[249] In these circumstances, was the Board's direction to Mrs Fox to attend the meeting on 19 November 2009 a reasonable direction as well as a lawful one? Was her refusal to do so a reasonable response in the circumstances? Was the Board justified in sanctioning her refusal to attend by giving her a formal employment warning?

[250] Mrs Fox was then still resident in Hawke's Bay. She had been in recent and confrontational communication with the Board. It was legitimately attempting to deal with the parties' employment relationship problem and it was not unreasonable for the Board, after Mrs Fox had delayed or stymied previous informal attempts to meet with, to have required her to do so. The Board could not, of course, compel Mrs Fox to do so but it could, reasonably in my view, make known to her the consequences of an unreasonable refusal and impose those consequences.

[251] For these reasons I conclude that although Mrs Fox's employment was disadvantaged by the employment warning given to her by the defendant, that was not an unjustifiable disadvantage and this grievance claim fails.

[252] The other disadvantage grievances claimed by the plaintiff include the warning contained in Mr Abraham's letter to Mrs Fox of 29 September 2009. For reasons set out in a discussion of this issue, I do not accept either that Mrs Fox was disadvantaged in her employment by this warning or that it was unjustified in all the circumstances.

[253] Finally, I understand that the plaintiff contends that Mr Abraham's conduct in investigating Mrs Fox's complaints on behalf of the Board, also amounted to an unjustified disadvantage to her. Although it suffered from some remarkable deficiencies, including a lack of consultation with the plaintiff, I consider that those flaws were remediable by the Board which invited Mrs Fox to engage with it about the ACL report. That this did not occur, and that lost opportunity was predominantly a result of Mrs Fox's reaction to the ACL report and refusal to engage with the Board

except on her terms. In these circumstances, although amounting to a breach of good faith by the Board towards Mrs Fox, this does not amount to an unjustified disadvantage personal grievance.

Unjustified dismissal decision

[254] Would a fair and reasonable employer, in all the circumstances, have dismissed the plaintiff and have done so in the way that the defendant did?

[255] I deal first with the fairness and reasonableness of the defendant's decision- making process, the second limb of the test set out in s 103A of the Act. There are two preliminary questions here. First, could the Board delegate in law its power of dismissal of its employee? Second, even assuming that the Board was empowered to delegate its functions (including its functions in relation to employment) to a subcommittee of Board members as it purported to do, did the Board act in accordance with the exercise of that delegated power?

[256] As at early December 2009, the Board had seven members, its Chairman Mr Beamish and Messrs Mackintosh, Thomas, Abraham, Signal, Hamilton and Skerman. The Board met at its regular monthly meeting on Monday 7 December

2009. All Board members were present except Mr Skerman. Also present properly, although not a member of the Board, was the headmaster Mr Scrymgeour. There is no indication from the minutes, however, that Mr Abraham recused himself from Board discussions about the plaintiff. Given his role, previously and then currently in relation to Mrs Fox, Mr Abraham should have absented himself from discussion and decision-making about Mrs Fox.

[257] The Minutes of that Board meeting note, relevantly:

Simon [Beamish] initiated discussion around the role of a smaller group to continue dialogue and to meet when necessary with Stuart Webster and [Mrs and Dr Fox]. This group to be able to act on behalf of the Board on such matters. Simon [Beamish], Jock [Mackintosh] and Tom [Hamilton] to represent and to communicate progress back to the Board.

[258] The Board thereby appointed this subcommittee of three of its seven or, if Mr

Abraham is to be excluded for practical conflict of role purposes, six members, to

deal with the ongoing issue of the parties' employment relationship problem and to

report to the Board, which was Mrs Fox's employer.

[259] The next relevant event participated in by the subcommittee was the "disciplinary meeting" held on Friday 18 December 2009 at 12 noon. I have already set out the circumstances in which Mrs Fox was invited to that meeting but declined or refused to attend.

[260] The handwritten notes of that meeting (Mr Webster's) record the presence of Messrs Beamish, Scrymgeour, Mackintosh and Webster. The apologies of Mr Hamilton are recorded in those handwritten minutes and a name which appears to be "Doug Abraham" was listed as the first apology but crossed out. In any event Mr Abraham was not present at the subcommittee's meeting, although he was anxious to find out what had happened as soon as he could early the following morning. So two of the subcommittee of three were present. The notes of the meeting indicate that the participants decided that Mrs Fox should be dismissed but in a manner that the notes describe "as a preliminary decision".

[261] Early on the following morning, 19 December 2009, in response to Mr Abraham's inquiry about what had occurred at the meeting on the previous day, Mr Beamish advised Mr Abraham:

Because we encountered the BS18 about Emma not receiving the e-mail and only having a couple of days to travel to HB we are sending them a letter we constructed in draft form yesterday. I can share this with you when Stuart [Webster] has tied it up. It essentially gives them to the 11th of January to reply.

The termination pre Xmas we talked about and decided that it would be wiser to carry this out in January. I can't see the outcome being any different.

[262] Mr Beamish, at least, appeared to have made up his mind about Mrs Fox's future at the school and had indicated that he could or perhaps even would, be difficult to persuade otherwise. His email to Mr Abraham appears to speak also on behalf of the other members of the subcommittee present at the previous evening's

meeting.

18 A genteelism for "bullshit".

[263] Mr Webster's letter to the plaintiff, finalised after the 18 December 2009 meeting and sent to her on 21 December 2009, includes the following relevant references:

9. The board has resolved as its preliminary view that you have been guilty of misconduct on the grounds set out in [Mr Webster's letter of 21 December 2009] and that as a fair and reasonable employer, the Board is entitled to terminate your employment summarily.

10. That is an interim decision pending any further response from you.

11. If no response is received by 12 noon on Monday 11 January 2010 then the Board will consider making a final decision which may include adopting the interim decision with or without amendment.

[264] "The Board" had not, however, decided to terminate Mrs Fox's employment. Two of three members of a subcommittee, delegated to investigate and report to the board, purported to have done so at a meeting also participated in by the headmaster.

[265] Would a fair and reasonable employer have decided to dismiss the plaintiff in all the circumstances in excess and breach of its purportedly delegated powers to do so? This, in turn, requires a consideration of whether such breach or breaches were minor or practicably inconsequential and did not affect adversely the plaintiff's position. This is the test now recognised by subs (5) of the current s 103A of the Act but which is not applicable legislatively to the facts of this case. However, it also represents the judge-made law of procedural fairness in effect at the time when the events in this case occurred. As has been said before, the Court is concerned with substantive fairness and substantive reasonableness and not minor or pedantic procedural breaches which may have no practicable effect on the grievant.

A properly constituted decision to dismiss?

[266] The minutes of the Board's subcommittee meeting held on 18 December

2009 record that those present were "Simon Beamish; Ross Scrymgeour; Jock Mackintosh; SJW". The latter initials refer to Mr Webster, the Board's legal adviser. Apologies were recorded from "Tom Hamilton" and, as already noted, Mr Abraham's name appeared before

Mr Hamilton's but was deleted. At the end of the notes, which record that the meeting was closed about an hour after it began, is the

following reference: "Individually, and in the collective decision to terminate (as a

preliminary decision)."

[267] The handwritten notes of the subcommittee's meeting by telephone conference call on 12 January 2010 recorded that the attendees were: "Simon Beamish, Jock Mackintosh, Simon Beamish (sic)". Although Mr Scrymgeour was not recorded initially amongst those present, the repeated reference to Mr Beamish may have been intended to be to Mr Scrymgeour. That is because, in the record of the resolution reached, his name is recorded (along with those of Messrs Beamish and Mackintosh) as agreeing with Mr Beamish's proposal for "termination".

[268] Although, therefore, the minutes or notes of the 18 December 2009 meeting do not record Mr Scrymgeour's participation in the resolution of the subcommittee for Mrs Fox's conditional dismissal, the records of the 12 January 2010 meeting indicate that despite not being a member of the Board and not being a member of the subcommittee delegated by the Board on 7 November 2009 to investigate and report to it, Mr Scrymgeour voted for or endorsed Mr Beamish's recommendation that Mr Fox be dismissed.

[269] The preliminary decision made on 19 December 2009 to dismiss the plaintiff was made by what purported to be a subcommittee of the defendant Board. The plaintiff has challenged the lawfulness of the Board's purported delegation of its powers to the subcommittee. Mrs Fox has also challenged the apparent participation in the decision to dismiss of others including the Board's solicitor and the headmaster, neither of whom was a Board member.

[270] On 12 January 2010 the final decision to dismiss was taken by the same two members of the subcommittee at a meeting with the same non-member, Mr Scrymgeour, and with the Board's legal adviser present.

[271] The final detail of the minuted delegation by the Board of its powers reinforces its limited nature which did not include the Board's power as employer to dismiss the plaintiff. The three subcommittee members were "to represent and communicate progress back to the Board".

[272] The Board (being the seven or if, for practical purposes in this case by discounting Mr Abraham, six members) was Mrs Fox's employer. Mrs Fox was entitled to a consideration and decision about her employment, including especially her summary dismissal, by the members of the Board or at least those members capable in law of participating in its deliberations and actions at the time. Despite the Board members' now united resistance to Mrs Fox's subsequent claims of unjustified dismissal, it is simply not possible to predict whether there might have been a different outcome for Mrs Fox and, if so, what that might have been, had the whole Board determined the serious allegations against her and the consequences of those.

[273] At least one member, Mr Hamilton, had been well enough disposed towards

Mrs Fox as to have sought a negotiated resolution of the dispute with her.

[274] Nor is it predictable what might have been the outcome had the headmaster Mr Scrymgeour, who was not a member of the Board, not participated in the decision- making as he ought not to have done. He was, in effect, a complainant and the subject himself of a serious complaint by Mrs Fox. He was influential in his participation in the dismissal, and it was tainted by this.

[275] The Court cannot now have regard to the set of rules or guidelines that the Board appears to have adopted after these events and the emergence of these issues which may have permitted it subsequently to do what it did. Given the absence of a formal constitution or rules in a deed of establishment, it must be dubious at least that the members, for the time being, of the Board more than 70 years after its establishment, can informally create rules and principles for its operation without properly amending the trust deed which established the Board. Such rules cannot operate retrospectively to affect Mrs Fox after the events of this case in any event. I did not understand that Mr Webster for the Board sought to rely on these in justification for Mrs Fox's dismissal. I infer that they were referred to in order to show that the Board had now addressed the absence of express powers to act in situations such as this.

[276] Therefore, even assuming for the purpose of this judgment that the Board was empowered in law to delegate its powers and functions to a subcommittee to exercise, the purported exercise of those powers by the subcommittee beyond the those delegated was, therefore, unjustified and unreasonable. The two of the three members of the subcommittee went beyond their brief of 7 December 2009 to investigate and report to the Board. Further, the decisions it purported to make were participated in by someone not entitled by the delegation to exercise that power, the headmaster. For completeness, I conclude that despite his intensive role in communications with Mrs Fox and his critical advice to the Board, there is no evidence of Mr Webster's participation in the decision-making.

[277] Importantly, also, the full Board did not purport to ratify or adopt subsequently the decision of its subcommittee to dismiss the plaintiff as it might have to thereby arguably validate an unlawful decision of only two members.

[278] The plaintiff was entitled to a full, fair and unbiased consideration of her case by her employer, the Board, constituted of its members. Its minutes confirm other evidence heard by the Court that this did not take place. This alone makes invalid and unjustified the purported dismissal of the plaintiff.

[279] A fair and reasonable employer, in all these circumstances, would not have acted unlawfully as outlined above to dismiss an employee. For this reason, and on formal legal grounds, the plaintiff's dismissal was unjustified under s 103A of the Act in the form in which it was applicable before 1 April 2011.

Other grounds of justification

[280] The principal, but certainly not the sole, ground for the decision taken on 18

December 2009 and confirmed on 12 January 2010, was that Mrs Fox had refused unreasonably to attend a meeting as directed by the Board on 18 December 2009 and that this was serious misconduct taking the form of a refusal to comply with a lawful and reasonable instruction by an employer. Again, I assume solely for the purposes of this judgment, that the Board was entitled in law to direct an employee to attend a significant meeting affecting her employment whilst she was on authorised parental leave.

[281] Context is important, not least where the reasonableness of an instruction, disobedience of which forms the basis for dismissal, is to be analysed. The following relevant contextual facts were known to the defendant or ought reasonably to have been known to it, and have been take into account by it.

[282] In December 2009 Mrs Fox was on a period of approved parental leave after the birth in August 2009 of her first child. At about the beginning of December 2009 she and her husband had moved from Hawke's Bay to Northland where Dr Fox had a position at the Whangarei Hospital. Dr Fox was Mrs Fox's obvious and very active agent in matters to do with her employment and he was contactable both by his personal email and at his workplace, Whangarei Hospital. Mrs Fox also had a mobile phone which had an answer-phone or voicemail facility attached to it.

[283] The Board's formal written requirement of Mrs Fox to meet with it on 18

December 2009 was sent by email from the Board's solicitors to Mrs Fox's hotmail email address on 9 December 2009. By 16 December 2009 Mr Webster's email had not been returned electronically as undeliverable but, at the same time, had not been opened by Mrs Fox. Further, she had not responded to it in circumstances where previously she (or her husband for her) had responded promptly and forthrightly to less significant emails about her employment.

[284] On 16 December 2009 Mr Webster got in touch directly with Dr Fox and, on the same day, sent him another copy of the 9 December 2009 email sent to Mrs Fox.

[285] Mrs Fox then, promptly and through Dr Fox, communicated with the Board's solicitors saying that it was not possible in all the circumstances for her to travel, less than two days later, to a meeting in Hawke's Bay (despite the Board's preparedness to pay for the costs of travel) and to answer on that day the serious allegations against her which, if established to the satisfaction of the Board, may have resulted potentially in her dismissal.

[286] Accepting as I have, for the purpose of this case, that the Board's instruction to Mrs Fox was not unlawful, I am satisfied that it was, in several respects, an unreasonable instruction by the time that it was received by Mrs Fox. Employers'

instructions to employees, disobedience of which may result in dismissal, must be both lawful and reasonable. By the time of its receipt by Mrs Fox, the Board's request or instruction to attend in Hawke's Bay only a very few days later, was unreasonable.

[287] This case raises the difficult (and apparently unique) question of the Board's entitlement to make these demands of an employee on authorised parental leave, and of the consequences of the plaintiff's refusal to comply. Mrs Fox was on authorised parental leave from work until August 2010. As I have already said, decision of the case does not turn on what the Board was entitled in law to do in relation to that parental leave status. Aside from the "aromabadlaughs" emails, there were no, or no sufficient, circumstances which compelled the defendant to deal with her employment issues urgently, or otherwise required it, for good reason, to have Mrs Fox attend at the Board meeting on 19 December 2009.

[288] When the Board's solicitor was advised that Mrs Fox had not received the email of 9 December 2009, neither he nor the Board made proper inquiry as to why that might have been so before assuming it was misconduct by her. The Board's chairman and solicitor simply disbelieved Mrs Fox that she had not received Mr Webster's email until 15 or 16 December 2009 and, thereby, considered that her failure was in fact a wilful refusal to comply with a lawful and reasonable direction for which failure or refusal she had no excuse. The formal warning was issued for refusing to comply with the direction to attend the meeting on 19 December 2009.

[289] The Board did not do what a fair and reasonable employer would have done in all the circumstances then prevailing, which was to have inquired further regarding the non-receipt of the email while postponing the meeting in any event. It was not entitled, under s 103A, to rely upon its uninvestigated assumptions about her non-receipt of the emailed letter of 9 December, in dismissing Mrs Fox.

[290] For the foregoing several separate reasons, I conclude that the Board's dismissal of Mrs Fox was unjustified. Applying the then relevant s 103A test, dismissal was not what a fair and reasonable employer would have done in all the

relevant circumstances and how the Board dismissed the plaintiff was not how a fair and reasonable employer would have done so.

Remedies

Remedies generally

[291] First, the plaintiff seeks compensation for lost remuneration from the date of her dismissal to the date of hearing. Because Mrs Fox was on unpaid parental leave when she was dismissed, and was not due to recommence paid employment with the defendant until about 1 August 2010, her claim to remuneration compensation must be and was calculated from this date. In final submissions Mr Churchman conceded that the evidence established also that had Mrs Fox not been dismissed as she was, she would nevertheless have had her second child at about the same time as she did. She would then probably have taken a further period of parental leave of between six and 12 months from her position with the defendant. In these circumstances, Mr Churchman conceded that it would be

appropriate to deduct a sum equivalent to 12 months' remuneration ($59,204) from the claim for compensation of $243,647.23, the latter representing four years and six months' lost remuneration. So Mrs Fox's claim is now for three years and six months' lost remuneration, being the sum of

$184,443.23. The plaintiff also seeks interest on that sum at Judicature Act rates.

[292] Next, the plaintiff claims compensation in a sum equivalent to eight per cent of the remuneration loss awarded, representing pay for annual holiday entitlements she lost as a result of her employment being terminated.

[293] Mrs Fox's next claim is for compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to feelings. She claims the sum of $20,000.

[294] Finally, Mrs Fox asks that the Authority's costs award ($21,000) be set aside and that she have costs in both the Authority and this Court. That costs award is set aside. By consent, the questions of costs have been adjourned for subsequent determination if necessary.

Mitigation of loss

[295] The defendant claims that Mrs Fox failed to mitigate, at least sufficiently, her loss of remuneration consequent upon her dismissal. She says, however, that she has attempted sufficiently to mitigate those losses although had been unable to do so to the last date of the hearing.

[296] In addition to the personal, non-financial consequences to her, a statutory consequence of her summary dismissal for serious misconduct saw Mrs Fox subject to a mandatory referral to the (then) New Zealand Teachers Council.

[297] From the date of her dismissal in mid-January 2010 and until the end of July

2010, Mrs Fox did not suffer any loss of remuneration, that she might otherwise have had from the defendant, because she was on an agreed period of unpaid parental leave. In spite of the New Zealand Teachers Council investigation of her conduct, Mrs Fox then sought to obtain teacher registration in British Columbia, Canada, with a view to moving there to teach. The relevant provincial registration body there made inquiries of the defendant when it received Mrs Fox's application for registration. There is no dispute that the defendant dealt with this inquiry slowly and deliberately, requiring, for example, Mrs Fox's specific authority before it would divulge information about her to the British Columbia registration body. Obtaining Mrs Fox's consent was a time-consuming exercise because the defendant was not aware of her whereabouts.

[298] Before she could obtain British Columbia teacher registration, however, Mrs and Dr Fox moved to a country town in Western Australia where Dr Fox obtained employment in the local hospital and in which state Mrs Fox had been previously registered as a teacher. She promptly put her name and CV in a system that matches potential applicant teachers with vacancies in schools, allowing the former to apply for the latter. Mrs Fox felt obliged to, and did, disclose the manner in which her last employment (with the defendant) had ended. She says that she was not successful in obtaining a teaching position in the town in which she resided until at least the dates of hearing.

[299] She attributes that disinterest in her as a potential teacher to her dismissal for serious misconduct by the defendant. I accept that, for someone who was acknowledged universally as a talented and successful teacher before mid-2009 to fail to obtain any alternative position is probably attributable substantially to her dismissal and the reasons for it. As already noted, Mrs Fox has had a second child whilst living in Australia so that it would be fair to allow a further period of 12 months (for parental leave) to be discounted when determining her obligation to mitigate her loss by seeking alternative employment.

[300] Mrs Fox was not challenged in cross-examination about her remuneration loss mitigation and I am satisfied that she has done so sufficiently in all the circumstances to not disqualify her on this ground from recovery of her actual losses.

[301] Mr Webster submitted that because of Mrs Fox's employment status at the date of her dismissal (on unpaid leave), she should be found not to have incurred any compensable remuneration loss. Mr Webster's argument went as follows. Because Mrs Fox could have received no more than the maximum parental leave payment of

$458.82 per week before tax, her maximum claim for lost remuneration for three

months' ordinary time remuneration under s 128 of the Act would amount to

$5,505.84 gross. Counsel submitted that to calculate remuneration loss only from Mrs Fox's intended employment resumption in August 2010 would be unjustified and would amount to an unwarranted manipulation of the true remuneration loss suffered by her.

[302] Next, counsel submitted as a matter of principle that "If the process involving dismissal is flawed, then the Court is required to assess what might have occurred if the process was repeated correctly based on justifiable grounds for dismissal". That is correct as a statement of principle. Counsel submitted that a justified dismissal would have probably occurred within Mrs Fox's parental leave period so that her reimbursement compensation must be limited to $5,505.84 at most.

[303] Those are flawed arguments in this case for a number of reasons. First, I conclude that Mrs Fox would probably have used her 14 weeks of paid parental leave during the first 5½ months of that agreed period of leave so that she would not

have been in receipt of any remuneration or monetary state benefit at the time of her dismissal.

[304] Next, this is not a case where, if Mrs Fox had not been dismissed unjustifiably, she would have lost her job (justifiably) within a

short period in any event. Such was the absence of justification for the defendant's dismissal of Mrs Fox, that it is not a case where the Board would have "got it right procedurally" subsequently, so that the loss should be limited to the period from the date of unjustified dismissal to an early date when the Court is satisfied that the defendant would probably have dismissed the plaintiff justifiably.

[305] Finally, I am satisfied that if Mrs Fox had not been dismissed unjustifiably, she would have used the balance of her period of unpaid parental leave but thereafter returned to her employment as a teacher at Hereworth School. Section 128 of the Act which defines the amounts of lost remuneration for which the Court can order compensation, does not limit a grievant's loss to the period of three months from the date of dismissal. Rather, the amount that the Court must award is the lesser of the grievant's actual loss or a sum equivalent to three months' full-time remuneration, but any amount thereafter is subject to proof of loss in the usual way.

Other factors in setting remuneration loss compensation

[306] Where, as here, the plaintiff claims reimbursement for remuneration actually lost, the Court must factor into its calculation of such loss, contingencies including the probability of the plaintiff remaining in that employment even if she had not been dismissed, whether justifiably or unjustifiably.

[307] It is not entirely clear on the evidence why Mrs and Dr Fox moved in early December 2009 from Hawke's Bay to Northland where Dr Fox took up a new period of hospital employment. I accept that the dispute between the parties contributed to this. That relocation, and their subsequent move to Western Australia, indicate a degree of transferability of Dr Fox's employment and an expectation that he would do so as part of his professional training and development. This, in turn, requires a partial discount to take account of the contingency that Mrs Fox may well not have

remained at Hereworth School as a long-term member of staff but would instead have followed her husband in his career-progressing transfers.

[308] There is also the significant contingency that, given the degree of inter- personal conflict between Mrs Fox and some of her colleagues, she would have moved on from Hereworth School, either voluntarily or involuntarily, even if she had not been dismissed unjustifiably in January 2010. In this case, also, only a very broad brush discount can be applied, but that is no reason not to do so.

[309] Taking account of the discretion inherent in s 128 to award compensation for lost remuneration equivalent to more than three months' ordinary time pay, I assess that, before applying any s 124 reduction factors, the Court would have awarded Mrs Fox, as compensation for lost remuneration, a sum equivalent to two years' remuneration. That would have been the sum of $118,408. There will, however, have to be a s 124 reduction of remedies.

Section 124 remedy reduction for contribution

[310] Section 124 of the Act provides:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal

grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly

[311] As I have noted already, this section is engaged by the circumstances of this case. Section 4 of the Act is also relevant in examining Mrs Fox's relevant conduct in terms of s 124. This section addresses good faith obligations of parties to employment relationships and covers that between the plaintiff and the defendant. Section 4(1A) requires "the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...".

[312] The interpretation and application of s 124 has been examined recently in *Harris v The Warehouse Limited*19 and I propose to apply the analysis in that judgment to this case.

[313] I have already determined that, before consideration of s 124, Mrs Fox would have been entitled to compensation for lost remuneration equivalent to two years' salary which would have been a sum of $118,408. That is the period, barring parental leave absences, I assess that Mrs Fox could reasonably have continued to work at Hereworth.

[314] There is, of course, no application for reinstatement in employment in this case so what might have been the potentially problematic issue of the effect of s 124 on that remedy does not arise.

[315] For reasons already set out earlier in this judgment, I have concluded that Mrs Fox's actions contributed towards the situation that gave rise to her grievance to a significant extent. I have already described these and will not repeat them. These actions do require reductions of the remedies that would otherwise have been awarded to her. Those remedies are lost future remuneration and compensation for non-economic loss. I consider that a fair and just reduction of remuneration-loss compensation should be of one-third and, for non-economic loss, of two thirds.

[316] Therefore, the plaintiff is entitled to compensation for lost remuneration of

$78,934, and to compensation for non-economic loss under s 123(1)(c)(i) of the Act in the sum of $6,666, the latter being one third of the sum of $20,000 which she claimed for this consequence and which, but for s 124, she would have been awarded. I decline to award interest on those awards. I also decline to award a sum of 8 per cent representing holiday pay on the compensation for lost remuneration.

Mrs Fox did not work for this period and did not, therefore, take holidays.

19 *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [170]- [215].

Costs

[317] Mrs Fox has been found to have been dismissed unjustifiably. The Authority's costs award of $21,000, based on the defendant's success in that forum, is set aside accordingly. If the parties are unable to settle questions of costs between them, Mrs Fox may have the period of two calendar months (excluding the period 20

December 2015 to 15 January 2016) from the date of this judgment to apply by memorandum, with the defendant having the period of one calendar month thereafter to respond by memorandum, whereupon the Court will fix costs and disbursements.

Overview and observations

[318] The following is not part of my reasoning in this judgment. Because of the lengthy and extraordinary events it concerns, and the consequences for the School, I make the following comments in an attempt to assist the parties and others in similar circumstances for the future.

[319] As a small private primary school for boys, with a long established reputation, Hereworth relies for its continued existence, let alone its success, upon its ability to attract and retain fee paying pupils whose parents can be assured that their sons will have educational opportunities that are superior to the alternatives. Public criticism or displays of disunity, whether amongst staff or parents, are both likely to be well publicised (at least locally) and to affect adversely the school's reputation, even to an extent irrespective of their truth.

[320] Although this case focuses on one staff member, the evidence establishes that amongst the school's small teaching staff, Mrs Fox was probably not alone in her dissatisfaction with some of its educational practices, although she was certainly the most outspoken. The evidence establishes, also, that there was a small number of parents of pupils who were not entirely happy with the school's or their sons' performances; some of those parents could be described as disgruntled or disaffected.

[321] In these circumstances, it was vital from the school's point of view that

events such as those involving Mrs Fox during the last fortnight of July 2009, should

be dealt with promptly, effectively, and discreetly. Unfortunately with the benefit of hindsight, the headmaster, to whom that responsibility fell, did not do so as promptly, appropriately or effectively as might have avoided subsequent events that have culminated in this court case. Contributing significantly to that strategic failure, however, was the uncompromising defiance of Mrs Fox, aided and abetted by her husband and representative in these matters, Dr Fox.

[322] It was very unfortunate that, at the initial stages at least, the professional differences between Mrs Fox and her colleagues were dealt with by the defendant solely or principally as an employment relationship problem rather than professional teaching issues. Again, however, the confrontational and unreasonable manner in which the plaintiff and her husband dealt with these matters contributed significantly to their derailment and deterioration.

[323] Dr Fox was clearly a significant factor in the plaintiff's dealings with the

defendant from an early stage after the employment relationship deteriorated in mid-

2009. Mrs Fox is herself a strong-willed, assertive, and directly-spoken person. However, it is difficult to avoid the conclusion that these characteristics were both taken to extremes in her written communications with the defendant into which I am satisfied Dr Fox had input, and were exceeded by Dr Fox's own communications about these issues written to support his wife. Dr Fox's blunt, often insulting and uncompromising dealings in writing with the defendant's representatives were illustrated and confirmed in the course of his evidence during the hearing. Considerations such as civility, discretion, concessions where necessary or appropriate, and diplomacy, were notable for their absence from Dr Fox's repertoire. He appeared to advocate for Mrs Fox's case on the principle that if he thought he was entitled to say something, he would do so even if that meant in a way which was not conducive to reasonable discourse or problem-solving. He did so to a degree that often aggravated an already tense and fraught relationship between Mrs Fox and others. As Dr Fox was acting as Mrs Fox's representative she must be fixed with the consequences of his behaviour.

[324] Although the plaintiff was entitled to, it was in my assessment unfortunate that she used her husband as her advocate, both in dealings with the Board and

probably also in the Authority. That contributed to the responding conduct of the defendant which in turn compounded the difficulty of establishing any enduring resolution of the parties' employment relationship problems.

[325] When the school's initial efforts to deal with these issues had failed to do so by mid-September 2009 and the deteriorating

relationship between the plaintiff and the defendant threatened to create more problems for the school, the Board determined that the best means of defence was attack. It sought to turn the tables on Mrs Fox by investigating allegations (made by or through Mr Abraham) of serious misconduct committed by her in response to her allegations of misconduct by the school's management and some of its teaching staff.

[326] By the time Mrs Fox went on parental leave at the end of July 2009, the substance of her dissatisfactions was a professional educational issue that everyone, including the school's management, agreed warranted professional discussion and resolution. The defendant had a justifiable issue with the manner in which Mrs Fox had raised these concerns but that, too, in my assessment, could and should have been dealt with professionally in July and/or August 2009. It was not. Instead, the decision to involve Mr Abraham only aggravated an already difficult situation.

[327] Again with the benefit of hindsight, the decision of the headmaster to appoint the Board's deputy chairman, through his employment relations consultancy, to investigate Mrs Fox's complaints, was both significant and flawed. The independent expertise that Mr Scrymgeour purported to engage ought to have been of, or at least have included, a professional educational nature. Although not formalised to the extent that such professional assistance and resolution services are in the state school sector, there were, nevertheless, appropriate skilled, experienced and available educationalists in the private and independent school sector who could have assisted these parties discreetly and collegially to resolve their differences. Mr Abraham did not, however, possess those special qualifications and attributes, and the opportunity was lost, probably now to the regret of everyone involved. Mr Abraham's skills and, therefore value, lay in employment relations investigations generally, in his investigative and analytical attributes, and in his ability to stand up to an uncompromising employee so that fire could be fought with fire.

[328] Although there were several glimpses of hope for a possible pulling back from the brink and resolution of the parties' worsening differences, these did not materialise, sometimes for want of the proverbial nail. For example, a board member, Mr Hamilton, made personal contact with Mrs and Dr Fox. He not only appears to have gained a degree of their respect, which several other influential board members did not, but was prepared to make personal concessions about some aspects of the school's conduct towards Mrs Fox that may have allowed for a rapprochement with the Board.

[329] However, what appears to have been a combination of reliance on strictly legal advice to the Board and unpreparedness by some of its members and management to concede any error, even for the purpose of a resolution of the issues with Mrs Fox, meant that this could not be achieved. That is not to say that, in my assessment, Mrs and Dr Fox's pre-conditional insistence on the Board apologising to the plaintiff for Mr Abraham's conduct as its agent, was itself reasonable. As I have already noted, Mrs Fox (herself and through Dr Fox) was uncompromising in circumstances where discretion may have been the better part of aggressive and even insulting valour.

[330] As the case unfolded in court, the dawning of these realisations of lost opportunities to change the course of history, was palpable. That history cannot be revised but it can be learnt from, both in the case of the school and schools generally, and in the case of professionals and lay advocates who advise employers and employees about these sorts of situations.

GL Colgan
Chief Judge

Judgment signed at 10.40 am on Wednesday 25 November 2015