

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 131
5422543

BETWEEN CATRIONA MADAY
Applicant

A N D AVONDALE COLLEGE
BOARD OF TRUSTEES
Respondent

Member of Authority: James Crichton

Representatives: Rebecca White, Counsel for Applicant
Paul Pa'u, Advocate for Respondent

Investigation Meeting: 20 November 2017, 21 November 2017, 23 November
2017, 24 November 2017, 25 November 2017,
26 November 2017, 20 December 2017 and
21 December 2017, all at Auckland.

Submissions Received: 19 February 2018 and 30 March 2018 from Applicant
19 March 2018 from Respondent

Date of Determination: 30 April 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant (Mrs Maday) was first employed by the respondent (Avondale or the College) as a teacher in 2003 and she joined the permanent staff in 2008 and then served continuously in that capacity until her dismissal by the College on 10 July 2014, such that her final day in the employment was 20 July 2014.

[2] Mrs Maday says that she was unjustifiably dismissed from her employment and was subjected to unjustified disadvantage as well.

[3] Mrs Maday taught English and NCEA Level 2 Classical Studies.

[4] The school year for 2013 commenced on 4 February and the Level 2 Classics taught by Mrs Maday began then.

[5] A decision was taken to run a research assessment at the beginning of this course of study and that decision, which was not made by Mrs Maday but was made by the Head of Department (HoD) for Classics resulted in student disquiet and complaints.

[6] The complaints, which began to multiply, were a mixture of concerns about Mrs Maday as a teacher and concerns about the appropriateness of the research assessment at the beginning of the school year when the students had not had the benefit of any substantive teaching in the subject area.

[7] The first complaint received was the subject of a meeting held on 26 February 2013 wherein senior management of the school met with Mrs Maday to seek to agree a resolution. Mrs Maday proposed to meet with the complainant in the presence of a senior school manager to address the concerns. Avondale refused to provide Mrs Maday with the name of the complainant.

[8] Mrs Maday continued to experience difficulties in classroom management with the Level 2 Classics class and sought advice and guidance about this from senior managers. Amongst other things, she arranged to send two disruptive students to a senior manager and on 15 March 2013, in an effort to address the disruptive behaviour of a small number of students, Mrs Maday addressed the class about her background and qualifications. Having done this, she emailed the HoD Social Sciences, Mrs Hanna, telling her that she had done this, and Mrs Hanna was supportive of that action.

[9] On 22 March 2013, a further series of complaints were notified to Mrs Maday by the delivery of a letter to her by one of the school's deputy principals. That letter proposed a meeting at which Avondale's Industrial Relations Advisor, Mr Pa'u, would be in attendance.

[10] This letter was the first occasion that Mrs Maday had received notification that there had been further complaints (that is beyond the initial complaint which she had been advised of on 26 February 2013).

[11] Mrs Maday sought the advice and assistance of the Post Primary Teachers Association (PPTA) and one of PPTA's legal officers, Dr Dzintra King, became involved.

[12] One of Dr King's first actions was to write to Mr Pa'u asking for the identity of the complainants which to that date had not been disclosed.

[13] In his provisional response, Mr Pa'u indicated that there were now wider concerns about Mrs Maday and that a "competency matrix" would be prepared.

[14] By email dated 27 March 2013, Mr Pa'u advised Dr King that Avondale refused to identify the complainants, relying first on Mrs Maday's reactions in the initial meeting about the first complaint which had been held on 26 February 2013, and Mrs Maday's address to her students on 15 March 2013.

[15] As to the first, Avondale maintained that Mrs Maday's approach at the 26 February 2013 meeting was confrontational and judgmental and as for the second, it was contended for Avondale that Mrs Maday's statement on 15 March 2013 about her qualifications and experience had made students feel "threatened".

[16] On 28 March 2013, three more complaints were sent to Dr King; each of these complaints was concerned more or less exclusively with Mrs Maday's statement to her class on 15 March 2013.

[17] On 4 April 2013, two further complaints were forwarded and in addition, Mrs Maday was told that her absences from school in preparation for the putative meeting would be treated as sick leave, despite the fact that she was not ill.

[18] By email dated 5 April 2013, as well as providing the draft matrix, Mr Pa'u appeared to suggest to Dr King that Mrs Maday needed to accept that she had performance issues.

[19] On 9 April 2013, after Mrs Maday had returned to duty at the school, her blood pressure became dangerously high and she was held at the school's health clinic until her blood pressure dropped sufficiently to be taken home by her son. The following day the first of two meetings with the college was held. Mrs Maday says that that meeting was characterised by the college's representatives being "very insistent that I agree to having performance issues and continued to say that the

college would escalate the process if I did not agree”. In particular, Mr Lewis, Avondale’s principal, said that if Mrs Maday could not accept the validity of the complaints then the issues could not be resolved at a lower level.

[20] This appears to be a reference to the school’s previous practice wherein the subject teacher would accept the concerns and then submit her or himself to a support and guidance programme.

[21] On 15 April 2013, a further complaint was received from Mr Pa'u. This was, in fact, a complaint relating to Mrs Maday’s year-12 Cambridge English class, and the complainant was originally down to meet Mrs Maday at the parent/teacher evenings, but Mrs Maday had been unable to attend because of ill health. Avondale then chose to treat this matter as a further complaint which Mrs Maday was required to address.

[22] There was a second meeting between the parties on 13 May 2013. This meeting was principally called to review the further interviews that had been conducted with the complainants. Again, according to Mrs Maday, the focus of the college was on getting her to agree that she had “general competency issues”.

[23] Avondale say that the concerns expressed by the students in the revised interview notes were “very clear” and that it was appropriate for Mrs Maday to identify which allegations she did not agree with.

[24] For Mrs Maday, Dr King maintained that while Mrs Maday accepted the views advanced were the perceptions of the students that did not make them right.

[25] On 4 June 2013, Mrs Maday raised a personal grievance for disadvantage which was based on three elements:

- (a) The refusal of Avondale to provide the names of the complainants;
- (b) Avondale’s refusal to provide a sufficient degree of particularity to enable Mrs Maday to respond to the complaints; and
- (c) The Board’s decision to implement an informal competency programme on the basis of those allegations.

[26] The school then proceeded to implement its informal competency assessment programme being driven by a senior manager at the school who Avondale determined

would be both Mrs Maday's mentor and her assessor. Mrs Maday sought a separate mentor, without success.

[27] By early August 2013, there seemed to be general agreement that there had been a positive improvement in Mrs Maday's teaching and the Board of Trustees were advised of that fact.

[28] However, the positive progress came to nought because of disagreements between Mrs Maday and her assessor, Mrs Watkinson and Ms Carter, the HoD English.

[29] The issue with Mrs Watkinson related to a student survey which Avondale proposed to conduct in Mrs Maday's classroom to seek to measure the improvement in her teaching. Mrs Watkinson proposed that she indicate to students that this survey was to be a school-wide process so as to protect Mrs Maday's privacy, but Mrs Maday objected to this categorising of the survey as a misrepresentation of the position.

[30] In relation to the issue with Mrs Carter, the latter was to complete the final lesson observation of the informal competency programme. Mrs Carter raised the final lesson observation with Mrs Maday in the presence of other staff. Mrs Maday had already been reprimanded for engaging with other staff (Mr Cooper) about her employment difficulties, and so Mrs Maday objected to this conversation continuing in a public forum.

[31] She sought to leave the room but was followed by Mrs Carter and in the course of the continuation of the conversation, Mrs Maday said something to the effect that Mrs Carter had made things worse from the beginning. This was a reference to an earlier disagreement on which Mrs Maday thought the school had chosen to rely.

[32] In any event, on the basis of those two issues, Avondale chose to suspend the informal competency process, alleging health and safety concerns, and a formal process was then initiated. A third meeting between the parties took place on 5 September 2013. It was said that its purpose was to decide whether disciplinary consequences would arise from the two issues with Mrs Watkinson and Mrs Carter respectively. The formal process was initiated by letter dated 18 September 2013 and an updated competency matrix was provided on 17 September 2013. That matrix

contained the same concerns as the first matrix plus two new areas of competency which related to the issues with Mrs Watkinson and Mrs Carter respectively.

[33] The process was to involve lesson observations by Mr Lewis, the principal, and one of the deputy principals, Mr Hill. It was to last ten weeks.

[34] At the conclusion of the school year, Avondale determined to continue the programme into the new school year.

[35] The impression Mrs Maday received from Mr Hill's observations were that he was generally happy with her performance while Mr Lewis's observations produced a rather more negative tone.

[36] The final observations were made on 13 and 14 February 2014 and Mrs Maday maintains that she was never clearly told what she needed to do to meet the requisite standard.

[37] Mr Lewis provided his report to the Board on 28 May 2014 which indicated that Mrs Maday had failed to remedy his concerns about her performance.

[38] The Board's personnel subcommittee met with Mrs Maday on 18 June 2014 to discuss the report of the principal and as a result of that meeting, further statements were sought by the Board subcommittee.

[39] Despite that, on 3 July 2014, the Board finalised its view that Avondale's competency concerns that Mrs Maday had not been met and on 9 July 2014 there was a further meeting between the Board subcommittee and Mrs Maday and her supporters as a consequence of which the Board determined to dismiss her with effect from 10 July 2014.

[40] As a consequence of the decision to dismiss Mrs Maday, the Board was under a mandatory obligation under the Education Act 1989 to report its decision to the Education Council.

[41] After its obligation to investigate the referral had been completed, the Education Council concluded that the evidence before it did not satisfy them that the teacher had not attained the required level of competence.

[42] On 1 October 2014 Mrs Maday raised a personal grievance for unjustified dismissal.

[43] The matter came before me after some preliminary matters had been dealt with by another Member and I dealt with the substantive investigation into Mrs Maday's employment relationship problem over eight hearing days.

The investigation meeting itself

[44] As is clear from the foregoing, this matter took a significant number of days to investigate. As a consequence, it put significant strain on both the parties and their respective witnesses.

[45] So far as the school was concerned, hearing time either took staff away from their other professional obligations and/or removed days of what would otherwise have been holiday time to be used for rest and recreation.

[46] For Mrs Maday and her family, and the witnesses that gave evidence for her, the position was no better. The stress of involvement in any proceeding of this type takes its toll and is inherently stressful.

[47] The issues that were on point were challenging enough; the personal allegations that were initially directed by the principal protagonists at each other were both profoundly unhelpful to the resolution of the employment relationship problem and, equally important, irrelevant to the issues in dispute.

[48] I do not want to dwell unnecessarily on this point, especially as I persuaded those protagonists to remove the personal allegations from the proceeding, but I feel obliged to again make the point that the issues in play in an employment relationship problem must, to be relevant, be causative or potentially so, and personal claims questioning the integrity of key players is most unlikely to ever be relevant and is almost always unhelpful.

[49] As I have observed in previous determinations, even if it were true that a protagonist was, to put it colloquially, a bad person, even a bad person is entitled to be treated fairly and in accordance with the law in an employment context.

[50] That said, the fact is that the parties obliged me by withdrawing those personal allegations which did nothing to assist me in my investigation and which were

themselves completely irrelevant to the resolution of the employment relationship problem. And for the avoidance of doubt, I observe that I found no evidence whatever of a lack of integrity or any other failure of character in any of the protagonists in this matter.

[51] I was impressed with the professionalism of all of the members of the teaching profession who gave evidence in this matter, irrespective of who they gave evidence for, and I was impressed as well with the integrity with those other witnesses, such as family members and members of the Board of Trustees, who gave supporting evidence.

[52] I was particularly impressed with the former students of the College who gave evidence. They all struck me as fine young people and I wish them all well in their future endeavours.

[53] I also want to thank the representatives who, while fighting their corner assertively and diligently, never overlooked the truism that in addition to a duty to their respective clients, they also had a duty to me, and I say clearly that both of them discharged that duty.

The issues

[54] There are two personal grievances for the Authority to investigate, the first in time being an allegation of unjustified action causing disadvantage, and the second being the allegation of unjustified dismissal. While it is tempting to simply address each of those grievances in turn and then consider remedies, if either or both grievances were found proved, the factual denseness of this employment relationship problem requires a wider compass.

[55] Accordingly, I propose to address the following questions:

- (a) Did Avondale properly investigate the allegations against Mrs Maday?
- (b) Was the initial informal advice and guidance programme properly implemented?
- (c) Does Mrs Maday have a personal grievance for unjustified disadvantage?
- (d) Does the conclusion of the Education Council assist?

- (e) Was the formal advice and guidance programme properly addressed?
- (f) Does Mrs Maday have a personal grievance for unjustified dismissal?
- (g) If remedies are available to Mrs Maday, can she be reinstated?
- (h) Are other remedies available to Mrs Maday?

Did Avondale properly investigate this matter?

[56] I have carefully reviewed the evidence for the Avondale College Board of Trustees and assessed that evidence against the evidence presented for Mrs Maday, and I have concluded on the balance of probabilities that Avondale College have failed to discharge their obligation to treat Mrs Maday fairly and equitably in the investigation initiated because of student complaints.

[57] I am driven to that conclusion because of a number of signal failings in their process and because of the established and well-known case law around the treatment of professional employees and the special care which must be taken by employers in that regard.

[58] I mention now for the sake of completeness that I am not required to recite all of the evidence that I have heard, in this determination. What I am required to do is to set out the principal findings of fact that I have made and the reasons for those findings of fact.

[59] Central to my anxiety about the fairness of the employer's investigation is my concern about whether the employer had conveyed to Mrs Maday the nature and extent of its concerns about her performance as a teacher with a sufficient degree of particularity to enable her to identify the mischief and seek to correct it. This is partly, but not entirely, about the anonymity of the complainant students. The law on anonymous complainants is quite clear and is stated, ironically, by Avondale in its submissions where it refers to the case of *Porter vs the Board of Trustees of Westlake Girls High School* 1998 1ERNZ 377. In essence, the Court said that in exceptional circumstances, an employer could withhold the identity of complainants, but in those circumstances, “...it was incumbent on the employer, acting fairly and reasonably as it was obliged to do, to have ensured that the process was fair in other respects”.

[60] Even if I were to be persuaded (and I have not been) that the names of the complainants were within what *Porter* refers to as “*that exceptional category*” of cases where names should be withheld, a fair and just employer must then ensure that the process was fair in other respects.

[61] Indeed, I fancy that in circumstances where the names of complainants have been withheld, there must be an added onus on the employer to ensure that it is treating the employee fairly and justly because it is denying the employee that basic right of being able to confront the accuser.

[62] And it is a basic right in our jurisprudence that one may confront one’s accuser, know that person’s name, hear them openly make their allegation, and have a proper opportunity to respond to it.

[63] All of that was denied to Mrs Maday and despite the College’s attempts to persuade me otherwise, I am not persuaded that the rest of their behaviour made up for that significant deficit.

[64] Not only is the right to confront one’s accuser fundamental to both our civil and criminal law, but arguably is an additional focus in the education sector where one of the key processes of addressing wrongs within the school system is by way of a restorative justice process which is habitually used in disputes, not just between teachers and students, but between teachers and teachers and students and students.

[65] Mrs Maday referred to that process in her evidence as being her expectation of how she would have wanted to address the concerns that appeared to have developed amongst a particular class of students and, of course, that whole process was denied to her because the school refused to provide the names of the complainants.

[66] As Mrs Maday herself made clear, if she had known who the complainants were, she could have met with those individual students, potentially in the company of a senior school manager, and worked through, collaboratively, how the complaint about her might best be resolved. But that whole process, or the prospect of it, was denied to her and I remain unpersuaded by the College’s attempt to satisfy me that they could not have taken appropriate steps to get some or all of the complainants on the record.

[67] For any entity that deals with complaints, it is an absolutely stock standard retort to an anonymous complaint that the matter cannot be dealt with, and will not even be put to the party complained about unless and until the complainant is prepared to be named and to stand by their complaint.

[68] Nothing I heard suggested to me that the College had taken any proper steps to encourage even some of the complainants to go on the record.

[69] Moreover, there was even an example of a situation where a complainant would, in the normal course, be identified to Mrs Maday, being treated by the College as if it were another anonymous complaint.

[70] This was the situation with a parent who had made an appointment to see Mrs Maday at a parent/teacher evening which Mrs Maday was unable to attend because of ill-health. The school's senior management enfolded that situation into its anonymous complaints process, notwithstanding the fact that if Mrs Maday had not been ill on the night in question, she would have been able to meet with the parent, know who she was, and address her concerns face-to-face.

[71] That very fact suggests to me an implacable disregard for the College's obligation to deal with Mrs Maday in good faith.

[72] So my first and fundamental concern is the failure of the College to ensure that at least some of the complainants (perhaps a representative sample) were prepared to be named so that a normal process of engagement between complainant and the person complained about could be facilitated by the school.

[73] But worse than that, even if I were to be persuaded that the school had taken all proper steps to obtain the consent of some or all of the complainants to be named (and I am not), there is still a fundamental obligation on the school to ensure that the matters complained of are identified with a sufficient degree of particularity to enable Mrs Maday to respond. I am not satisfied that that was ever the position.

[74] Throughout the proceeding, all that I heard was generalised complaints that students in a particular class taught by Mrs Maday were having various generalised difficulties in engaging with her.

[75] Complaints seemed to focus on her being grumpy and unapproachable, being late for class, sitting at the back of the room, and generally not assisting the students to learn properly.

[76] But I would have expected that if those allegations were to be made in a way that enabled Mrs Maday to respond appropriately, then they would have been made with dates and times and sufficient detail to give Mrs Maday a proper opportunity to respond.

[77] What I am satisfied she was confronted with was generalised allegations that she was not fulfilling her professional obligations as a classroom teacher, appropriately.

[78] What happened when she tried to defend herself by providing some context to those allegations or even seeking to respond to them directly, was she was criticised for being defensive or even more remarkably for failing to plead to the allegation that she had performance deficits.

[79] The evidence is very clear that from the earliest meeting between the school senior management and Mrs Maday, there was considerable enthusiasm from the College's representatives for Mrs Maday to confess her professional failings, in order that somehow the College could deal with those failings at a low level rather than escalate them up the management chain.

[80] So my second concern about the school's process is that it failed absolutely to ensure that the allegations Mrs Maday was facing were identified to her with a sufficient degree of particularity to enable her to properly respond. As I have already made clear, I consider this obligation to be all the more paramount because of the failure of the school to get any of the complainants to go on the record. And I am satisfied on the evidence that the degree of particularity provided in respect to the allegations Mrs Maday faced was simply not detailed enough to meet the legal test.

[81] Moreover, I think the evidence clearly discloses that when Mrs Maday sought to defend herself by addressing some of the generalised complaints as best she could, or even just by providing some context, those attempts to address the school's perceived concern were criticised as evidence of defensiveness or an unwillingness to accept the obvious reality.

[82] I observe that if Mrs Maday can be criticised for failing to address the particularity of the complaints, that says more about the lack of detail in the complaints than it does about her response. Furthermore, Mrs Maday's efforts to provide context, while not strictly speaking a response to the generalised allegations, is, I fancy, inevitable given the lack of specificity in the complaints themselves.

[83] An example of what I mean is Mrs Maday's efforts to explain the challenges that she faced with the year-12 Classics class. There was, by all accounts, a frank discussion about those challenges at the meeting held on 26 February 2013, less than a month into the first term of 2013.

[84] The context that I refer to was essentially Mrs Maday's evidence that the class in question was challenging, that there were behavioural problems with some students and there were a mixture of abilities.

[85] While, of course, none of those observations of themselves respond at all to what was then a single complaint that Mrs Maday was addressing, they do go some way to providing an environment in which the College might be on notice that there was a need to investigate what was actually going on in this classroom.

[86] That context which Mrs Maday provided is also relevant to the circumstances in the early part of that school year because the HoD Classics, Mrs Elmes, had determined that the year would begin with a research assessment which the students would have to tackle without having had much in the way of classroom teaching prior to having to complete the research assessment.

[87] While I would not contend that the research assessment was causative of the complaints, it certainly provided the genesis for those complaints and the fact of the matter which the College seemed not to want to give Mrs Maday any credit for, was that she was absolutely blameless in determining the timing of that research assessment; that decision was made by Mrs Elmes without any input at all from Mrs Maday.

[88] To summarise this point, I do not think that the College took proper steps to investigate what was happening in that classroom once they knew about the imposition of the research assessment and the challenging behaviours of some of the students in that class.

[89] My next anxiety is one that I identified during the investigation meeting when I sought to establish from what was before me, the extent of the complaints made against Mrs Maday and, in particular, which classes they came from. With a couple of exceptions, all of the complaints came from one class. That one class was the year-12 Classics class. That was the class which had the research assessment imposed on the students at the beginning of the school year for which Mrs Maday played no part, and that class had some behavioural issues which Mrs Maday had sought assistance from the school hierarchy for, and which she was very clear about when she met with senior management on 26 February 2013, and subsequently.

[90] My point is that class represented a quarter of Mrs Maday's teaching load in the first half of 2013. It is difficult to see how the College could ignore the juxtaposition between the source of the vast majority of the complaints and a single class with virtually no complaints from students in other classes.

[91] I think that a good and fair employer, when confronted with that sort of information, would immediately want to focus on what was going on in that classroom so as to ensure that teaching and learning were being supported and that problems, if any, were addressed at source.

[92] But there is no evidence that the College took any steps to assess what was happening in that class until much later in the school year. Indeed, the college's response to the receipt of a number of complaints from students in that particular class was to draw up a proposal for informal advice and guidance based exclusively on the allegations made by the students. There is no evidence that those allegations were subject to any investigation, rigorous or otherwise. They were simply accepted at face value.

[93] Of course, when the school began to engage with Mrs Maday's advisers, they indicated darkly that there were significant performance concerns about Mrs Maday (the performance concerns which she says she has never been advised of) but that they were "parking" those performance concerns in order to deal with the complaints from the students.

[94] So it may have been that there were performance concerns about Mrs Maday which were wider than just this class, but if that was the case, Mrs Maday had never been told about those concerns. Indeed, all of the feedback that she had had,

including performance appraisals and the like, was that she was fulfilling her professional obligations.

[95] It also seems to me quite extraordinary that the only complaint that Mrs Maday was told about promptly was the very first one, which seems to have been received in the school on 22 February 2013 and resulted in a meeting with Mrs Maday on 26 February 2013.

[96] From that date down to 22 March 2013 (nearly a calendar month) Mrs Maday was blithely unaware that further complaints had been coming into the school from students and/or parents of her year-12 Classics class and that not only had those complaints been coming in, but that the school had been interviewing the complainants using Deputy Principal Mr Goold, and it was not until 22 March 2013 that Mrs Maday was handed a letter from the College inviting her to a meeting to discuss these complaints.

[97] Does it matter that Mrs Maday did not know that more complaints were coming in? I answer that question in the affirmative because the complaints were being received from the students that she was teaching in the year-12 Classics class. She was oblivious of those new complaints, having been apprised only of the very first complaint.

[98] As counsel for Mrs Maday astutely points out in her closing submissions, it seems reasonable to assume that the students in the year-12 Classics class thought that Mrs Maday would know about the complaints when she did not. So her efforts to try to address the obvious challenges in that classroom would likely have been viewed by the students as evidence of her trying to respond to the growing number of complaints. But she did not know there was a growing number of complaints. She only knew about one of them.

[99] Arguably, the various courses of action that she tried, to develop her relationship with that class, were doomed to failure. She was acting in good faith, conscious of only one complaint and a challenging classroom environment, whereas the students were very much aware of the growing number of complaints and were talking about the complaints process (as was evident from the testimony I heard from the students). Everything Mrs Maday was trying in the classroom, was seen by the students, with jaundiced eyes, as being her response to a large number of complaints.

[100] Amongst other things, Mrs Maday arranged for two troublesome students to go to a senior manager's classroom instead of participating in Mrs Maday's lessons.

[101] Then, she tried something that had been suggested at a recent professional development session provided in the College. She told her class (minus the two troublesome students) about her background and qualifications, and she reported that process after the event to Mrs Hanna, the HoD Social Sciences and was complimented by Mrs Hanna for that experiment.

[102] But the students perceived Mrs Maday's observations on that day as an attempt to discourage further complaints, or at least I think I can draw that conclusion from the evidence that I heard regularly from the student complainants to the effect that Mrs Maday told them not to complain about her.

[103] So my next concern is that the College improperly collected a number of complaints about Mrs Maday and rather than make them available to her as they came in, it is apparent that Mr Goold, who did not give evidence before the Authority, interviewed all of the student complainants but did not provide the complaints to Mrs Maday until there were a number and at that point, Mrs Maday was given a formal letter requiring her to attend a meeting, and containing the extraordinary implication that she knew, or ought to have known, about the growing number of complaints. How could she know unless the College told her, since all of the complainants were sheltering behind the cloak of secrecy?

[104] Not only was there a failure to provide Mrs Maday with the complaints contemporaneously with their receipt by the school, but the proposed meeting between Mrs Maday and the College which took place on 10 April 2013, involved both the principal and the school's employment relations adviser Mr Pa'u. This team, with the greatest respect to them, would seem to give the lie to the school's continuing mantra that they wanted to deal with matters at the lowest possible level. Were that so, it is difficult to see why both the principal and his external employment relations adviser would need to be present.

[105] Moreover, there seemed to be a complete misunderstanding about the extent of Mrs Maday's knowledge about the complaints and the extent to which she had previously engaged with senior management at the school. Even at my investigation meeting in late 2017, the school's principal, Mr Lewis, continued to believe that

Mrs Maday had met with one of the school's deputy principals, Mr Goold. But she had not. There had been a scheduled meeting, but Mr Goold had been called away on other business and there had never been a meeting on the subject between Mrs Maday and Mr Goold.

[106] So my considered view is that Avondale College misdirected themselves in the way in which they dealt with the student complaints. First, they ought to have produced some clear evidence to me that they had made an effort to get at least a representative sample of the complainants to go on the record. There is no evidence that that happened at all. The school seems to have been quite comfortable proceeding with anonymous complaints, notwithstanding the risk that by so doing, they would not be able to treat Mrs Maday with the level of fairness and justness that the case required.

[107] Furthermore, I am not satisfied that, assuming anonymity was inevitable, that the College made a proper effort to particularise the allegations. The allegations seem to me to be general and when Mrs Maday responded generally or to provide context, she was accused of being defensive or defiant. It seems to me self-evident that a particularised allegation giving details of precisely what it is that is alleged, when and where it is supposed to have happened and who else might have witnessed the behaviour complained of, can be responded to one way or the other, but that was never possible in this case in respect to any of the allegations made against Mrs Maday.

[108] The very fact that the vast majority of the complaints came from one class would surely suggest to a fair and reasonable employer that that class needed to be investigated in order to establish what was going on there. But far from conducting any immediate investigation, the College's default position seems to have been to accept the complaints at face value and then proceed to demand buy-in from Mrs Maday, such that when she failed to confess that she had performance deficits, it was considered that she was being difficult.

[109] Finally, the failure to provide the complaints to Mrs Maday when they were received in the school meant that she continued teaching that class, oblivious of the fact that the number of complaints was growing exponentially, something which I am satisfied the students knew full well, and that fact coloured the students' response to Mrs Maday's legitimate and proper efforts to address the challenges in that classroom.

Was the informal advice and guidance programme properly implemented?

[110] I have already referred to the College's escalation to an advice and guidance programme based exclusively on a series of anonymous complaints from students without any evident investigation of those allegations. Despite the school's evidence that it sought to deal with these matters at the lowest possible level, the more or less immediate move to an advice and guidance programme gives the lie to that.

[111] Moreover, again as I have already mentioned, both Mr Lewis, the principal, and the school's employment relations adviser were involved in the meetings which set up the initial advice and guidance programme, which hardly suggests dealing with the matter at the lowest possible level.

[112] When the matrix of concerns was prepared by the school, it dealt exclusively with the complaints the school had received about Mrs Maday, despite Mr Pa'u's indication in correspondence with Dr King, for Mrs Maday, that the school had "*other ongoing and serious performance issues*" about Mrs Maday.

[113] The juxtaposition of those issues is interesting. Mr Pa'u's communication with Dr King on 26 March 2013 suggests that the draft matrix that would subsequently appear would evidence the school's concerns about quite serious ongoing competency issues. When the draft matrix was actually produced on 5 April 2013, it was concerned exclusively with complaints received from students and parents.

[114] Having received the draft matrix, the parties then met on 10 April 2013 and the evidence of that meeting suggests that the College continued to emphasise its enthusiasm for dealing with matters "at a lower level", despite the fact that the principal and the school's employment relations adviser were already involved in the matter and present at the meeting.

[115] Moreover, the College gave the very clear message to Mrs Maday that she needed to agree that she had performance issues, and agree to the validity of the complaints which would enable the College to deal with the matter at a low level.

[116] But the matrix simply records a summary of what the students allege; the College did no investigation whatever into those allegations before recording them in the matrix. It is absolutely fundamental to the process in employment law that an

employer must not simply accept the validity of an allegation before seeking to have it responded to by the employee complained about.

[117] This principle is enshrined in the justification precept set out in s.103A of the Employment Relations Act 2000 (the Act). That section enunciates the fundamental precept of employment law on justification by imposing the test the employer must satisfy and identifying as a prerequisite, the conducting of a proper investigation.

[118] Here, there was no investigation. Despite what Mrs Maday recalls Mr Goold saying (words to the effect that *of course the school would not simply accept what the students said*) it appeared that that was precisely what the school was doing. They simply recorded the complaints in the matrix as if they were allegations which had been investigated and established at least to the extent that a response was required, that there was a case to answer.

[119] So not only were the allegations general in character, they were also entirely without any proper investigation. It is conceivable that if the College had delved into the matter, they might have been able to reject some allegations as not being matters that needed to be put to Mrs Maday and equally importantly, in respect to those allegations that the College was satisfied it required an answer to, some investigation would have promoted a refinement of, and particularising, of the detail that underpinned the complaint.

[120] Moreover, the process leading up to the 10 April 2013 meeting would appear to have been informed by entirely mistaken conclusions. Mr Pa'u was present at the 10 April 2013 meeting. It was he that emphasised the need for Mrs Maday to agree that she had performance deficits, and that the school would escalate the process if she did not agree.

[121] And it was Mr Pa'u who on 27 March 2013 emailed Dr King, and copied Avondale's principal, to set out the basis for the school refusing to consider releasing the names of the complainants. All three arguments advanced by Mr Pa'u are mistaken.

[122] The first mistaken basis for withholding the names is the belief that Mrs Maday met with deputy principal Mr Goold and that at that meeting, she exhibited defensive and defiant behaviours which did not suggest that Mrs Maday was approaching matters in the right spirit. The difficulty with this statement is that

Mrs Maday never met with Mr Goold on this matter (there was a meeting scheduled but he was called away on other business). The evidence which I heard about the meeting came from Mrs Maday and from Mrs Elmes, and neither of those two witnesses supported the claim Mr Pa'u makes about Mrs Maday's behaviour. If the College wanted to demonstrate what happened at that meeting and were unhappy with the evidence advanced by the two witnesses available (Mrs Maday and Mrs Elmes) then they should have called other witnesses to try to disturb the balance of the evidence I heard.

[123] It is equally troubling that Mr Lewis, the principal, continued to maintain as late as December 2017 that Mr Goold had met with Mrs Maday to discuss the complaints when no such meeting had ever taken place.

[124] The second principle that Mr Pa'u relied upon to resist the release of the names of the complainants was the suggestion that Mrs Maday had behaved improperly in consulting the PPTA branch chairperson once she got Mr Goold's letter of 22 February 2013. This was because the letter specifically instructed Mrs Maday not to discuss the complaint matters with staff or students.

[125] But surely it cannot be right and just to prevent Mrs Maday from seeking advice from her union about a matter which must have been of great concern to her. To suggest, as the school appears to do, that Mrs Maday was breaching a lawful and reasonable instruction by speaking to the PPTA chair for Avondale, seems to me to draw a very long bow. She is entitled to take advice from her union and to that end it is quite inappropriate of the school to suggest that she did anything wrong in that regard.

[126] The third basis on which the school's employment relations adviser proposed that the names of the complainants be withheld was because Mrs Maday had excluded two students from the class, allegedly in breach of school regulations. But as I have already made clear earlier in this determination, she excluded those two students because she was instructed to do so by the head of social sciences. So that allegation, too, is misconceived.

[127] Putting all of that together, I think it reasonable to conclude that the very basis on which the school sought to exclude the names of the complainants was entirely wrong-headed insofar as it was based on Mr Pa'u's email of 27 March 2013 and

indeed, that email suggests that but for those entirely erroneous bases for withholding the names, the names of some or all of the complainants could have been disclosed. Nowhere in the email is there any suggestion that all of the complainants refused to be named, or even that the school has engaged with the complainants to see if they will be prepared to release their names.

[128] But even setting aside the issue of the anonymity of the complainants, I would also observe that the 27 March 2013 email proceeds on an entirely mistaken basis about what had actually happened in respect to the complaints process up to that point because it suggests that Mr Goold's involvement resulted in him engaging with Mrs Maday in respect to a number of complaints, whereas that is not the position at all. Mr Goold's only potential involvement was in respect of the very first complaint and even then, because he was called away to something else, he was never actually talking with Mrs Maday about the complaint face-to-face.

[129] Because the email proceeds on the footing that Mrs Maday knew about the other complaints during the balance of the period between 26 February 2013 and 22 March 2013, it is also critical of Mrs Maday for her talk to her class about her qualifications and experience. The entirely misguided link is made between Mrs Maday having that discussion with her class and being aware of a growing number of complaints. I have already made the point that while the students receiving Mrs Maday's message about her qualifications and experience will have seen that through the lens of their knowledge that there were a growing number of complaints about her, Mrs Maday was oblivious to that intelligence because she simply had not been told by the school that there were more complaints.

[130] So it is quite wrong of Mr Pa'u to suggest, as he does, that Mrs Maday has behaved improperly in addressing her class in the way that she did. Nor does the College seem to be cognisant of the fact that Mrs Maday was complimented on her decision to have that discussion by the HoD social sciences, Mrs Hanna, who did not give evidence at my investigation meeting.

[131] It was not until 5 April 2013 that Avondale added the gloss that the names of the students could not be released because the school's "*....primary concern is ensuring these students are safe*". Dr King asked why students would not be "*safe*" and was given precisely the same list of complaints as were set out in Mr P'au's email of 27 March 2013 as the basis for the students not being "*safe*".

[132] At the 10 April 2013 meeting, there was an agreement that further interviews with the complainants would be undertaken with a view to obtaining further and better particulars of their complaints. The intention was, as Dr King explained, to give Mrs Maday as much opportunity as was possible to know the detail of what was alleged so that she had the best possible chance of responding to the concerns.

[133] Dr King's evidence is very clear that at no time was that sufficient particularity obtained and therefore, Mrs Maday was still prejudiced in her ability to respond appropriately to the complaints.

[134] Moreover, Dr King sought a list of the questions that the College was proposing to ask the complainants, and this was never provided. I venture a view that had that list of questions been provided, Dr King would have been able to identify very quickly that the nature of the further enquiries that the school was undertaking were insufficient to ground any proper detail which would enable Mrs Maday to respond appropriately.

[135] A second meeting took place on 13 May 2013 when the further interviews the College had conducted with the complainants were available and a revised matrix was prepared. The email from Mr Pa'u to Dr King proposing the 13 May 2013 meeting dwelt extensively on the challenges the students in the year-12 Classics class were having because Mrs Maday had been away from the school for over a month, embroiled in this competency issue. The tone of the email, however, is unfortunate because it rather implies that it is Mrs Maday's fault that students are now complaining about the absence of a specialist Classics teacher during this month-long absence and running up to exams in term 3.

[136] Of course, Mrs Maday was away from the school because the school had proposed that she take leave while this competency process was on foot, and so it is unfortunate that the email creates the impression that she is somehow responsible for further complaints from students because she is not there to teach them.

[137] Again, the email from Mr Pa'u also seeks Mrs Maday's agreement to performance deficits, as had been a feature of the previous correspondence.

[138] That theme was reiterated at the meeting. Mrs Maday's evidence, which I accept, is that an early stage in the meeting, Mr Pa'u said the school wanted to

commence a support and guidance programme, that they were looking for acceptance of that by Mrs Maday, as well as an admission by her that she had competency issues.

[139] Mr Pa'u referred to the interview notes as being “*very clear in identifying what the perceived concerns were*”.

[140] Dr King said that the interview notes were only the perception of students and she made the fundamental point, which I have already made in this determination, that there had been no assessment by any professional of Mrs Maday’s classroom practice since these complaints were received.

[141] To put that issue another way, the College seemed to accept as accurate each and every one of the complaints made by students without any investigation of the voracity of those complaints and without any assessment of the quality of Mrs Maday’s teaching practice by any competent professional.

[142] Without any independent verification, the school seemed determined on instituting a support and guidance programme. As Dr King observed to me in her oral evidence, her concern was not just with the content of the matrix but the very fact that the competency process was being initiated so soon and before any proper investigation for assessment by a teaching professional. I consider those concerns well founded.

[143] It is also evident from the material concerning the 13 May 2013 meeting that there was a significant exchange between the parties towards the end of the meeting wherein the school said its performance concerns justified the support and guidance programme. Dr King said that it was not clear to her which of the student concerns were competency issues for the school and she asked that that be spelt out by the school. This observation again highlights the point I am making that at no time did the College ever independently assess the students’ concerns and identify which of them were competency issues and which were not. Again, as I have said earlier in this determination already, there was no independent assessment by a professional of Mrs Maday’s teaching practice in that class, despite the wealth of evidence that there were issues with that class. That wealth of evidence included Mrs Maday’s own observations that the class was challenging, that there were a range of skillsets, and that there were some students with behavioural issues. In addition, the

implementation of the assessment programme at the very beginning of term 1 2013 was clearly identified as a participating problem.

[144] Despite all of that evidence from a range of sources, the school chose to simply implement a support and guidance programme for Mrs Maday based exclusively on untested allegations by unnamed students before any of the school senior managers had been anywhere near the classroom where Mrs Maday taught.

[145] There was a third meeting between the parties on 5 June 2013 at which Mr Pa'u set out the performance management process by the school. For the first time, there were to be actual observations of Mrs Maday's classroom practice as well as, it was said, internal and external professional development and a student survey to conclude the end of the eight-week programme.

[146] Ironically, the informal support and guidance programme went remarkably well up to, but not including, the final processes. During the formal process, all parties seemed to be pleased with the progress that was being made, so much so that Mr Lewis caused an email to be sent by Mr Pa'u to Dr King, commending Mrs Maday for the progress that was being made. In addition, the Board of Trustees was given positive advice about progress.

[147] However, the good progress made unravelled at the end because of two incidents that the College chose to categorise as health and safety matters.

[148] The first of these issues was concerning a survey of students which was to be undertaken in Mrs Maday's class. There was an email sent by Mrs Maday to Mrs Watkinson, another deputy principal who was responsible for managing Mrs Maday's support and guidance programme. In the offending email, Mrs Maday is said to have accused Mrs Watkinson of misrepresenting the position in respect to the students' survey. This is because Mrs Watkinson proposed to say to Mrs Maday's class that the survey being undertaken by Mrs Maday's students was part of a school wide process, when it was not. This was Mrs Watkinson's way of "dressing up" the student survey.

[149] Mrs Maday's reference to this being a misrepresentation of the actual position may perhaps be seen as rather more strident language than is appropriate, but it is evident to me from the evidence of Mrs Watkinson that she was not greatly troubled by the email and has remained on good terms with Mrs Maday since.

[150] However, the school's management seems to have taken great exception to Mrs Maday's use of that word. Mr Pa'u, for instance, immediately opined that it appeared the College had made no progress whatever with Mrs Maday.

[151] The following day, 14 August 2013, Mrs Carter, HoD English, approached Mrs Maday in the company of other teachers and spoke about Mrs Carter's upcoming observation of Mrs Maday's class. Mrs Maday tried to extract herself from the discussion on the footing that she had been growled at for engaging in public environments with staff, but the discussion continued privately, and it is common ground that Mrs Maday spoke to Mrs Carter inappropriately.

[152] But this episode with Mrs Carter illustrates the school's lack of sensitivity as well. The two women had history. Mrs Maday thought that Mrs Carter had previously spoken disrespectfully of her teaching practice to senior managers, but had not shared that to Mrs Maday's face. Given the size of the English department, it would seem possible to find somebody else to do an observation of Mrs Maday's English teaching.

[153] After all, the College was very quick to not allow Mrs Elmes to do an observation of Mrs Maday's Classics class because Mrs Elmes was perceived to be too close to Mrs Maday, yet when Mrs Maday had had previous concerns about Mrs Carter, the school still persevered with Mrs Carter doing the observation.

[154] In any event, the school decided to suspend the stage one competency process without consulting Mrs Maday. As I have already noted, the apparent reliance on health and safety issues would appear to be misplaced as neither of the protagonists seem to have been much troubled by the issue.

[155] What is considerably surprising is that in suspending the stage 1 process as they did, the College was not prepared to acknowledge that but for the fall at the final hurdle, Mrs Maday had effectively met whatever it was the school was endeavouring to have her conform to. Otherwise Mr Lewis's message through Mr Pa'u commending Mrs Maday makes no sense.

[156] One would have thought that the school might have either given Mrs Maday credit for the progress that had self-evidently been made or in the alternative, negotiated with her a basis on which the final elements of the stage 1 process could be completed so that the matter could be signed off. The failure to even engage with

Mrs Maday's advisers on the entirely unilateral decision to bring the stage 1 process to an end is not the action of a good and fair employer behaving in accordance with the good faith principles.

[157] It follows from that observation and my earlier criticisms of the school's process with the support and guidance programme that I am not satisfied that programme was implemented correctly or appropriately, or indeed at an appropriate time. I am especially critical of the school's willingness to simply proceed with the students' complaints without conducting any investigation whatever, and without identifying precisely what the school's concerns about Mrs Maday and her performance was.

Does Mrs Maday have a personal grievance for unjustified disadvantage?

[158] I am satisfied that Mrs Maday has proved her claim to have suffered disadvantage as a consequence of the unjustified actions of Avondale Board of Trustees.

[159] That conviction is based essentially on the College's failure to investigate the complaints received from students and parents, and simply slavishly adopt those complaints without taking any steps at all to investigate them.

[160] The fact that the complainants were all allowed to retain their anonymity is a relevant factor in my conclusion, but not of itself definitive. Certainly it would have been a better and fairer process if some or all of the complainants were named. Amongst other things, that would have allowed Mrs Maday to, with the school's guidance, contemplate a restorative justice process with some or all of the complainants.

[161] As I have opined already, I am satisfied that the failure to disclose the names of complainants still places an onus on the employer to treat the employee fairly. The failure to conduct any investigation at all without invoking the competency process cannot be fair and just; nor can it be fair and just that the competency process is based exclusively on the generalised complaints of parents and students without any attempt by the employer to identify what competency issues were of concern to it.

[162] Nor did the College distinguish itself by fundamentally misunderstanding the process by which Mrs Maday received the complaints. Email correspondence with

Mr Pa'u proceeded on the entirely mistaken understanding that Mrs Maday had met with Mr Goold on the matter, had received all the complaints, and had retaliated by excluding two students from her class and by telling students not to complain when, in respect of the two last mentioned events, Mrs Maday was oblivious of all of the complaints except the very first one. And in any event, Mrs Maday denied telling students not to complain, but did agree she had spoken to the class about her background and experience and was supported in that by one of the HoDs.

Does the view of the Education Council assist?

[163] It will be remembered that the Education Council must be notified about dismissal of teachers. The Council then has a statutory obligation to consider whether the teacher affected is a fit and proper person to remain registered as a teacher.

[164] In the particular circumstances of this case, having been notified by the College of Mrs Maday's dismissal, the Education Council conducted its own enquiry and concluded that there was insufficient evidence for it to determine that Mrs Maday was not a fit and proper person to continue in the teaching profession. It follows from that conclusion that Mrs Maday could, in principle, retain her practicing certificate as a teacher.

[165] Unsurprisingly, Mrs Maday was keen for me to take the Education Council's decision into account in the conclusions that I am required to reach.

[166] I determined that, in order to assess the utility of the Education Council's decision, I needed to hear from the Education Council and accordingly I asked them if they would be prepared to attend on me and through suitable senior staff, help me to understand their process.

[167] The Council were very pleased to assist me in that regard, subject to the request that the nature and extent of their evidence be protected from publication. I readily agreed to that stipulation and accordingly, I make no observations in this determination about the nature and extent of the evidence given by the Education Council.

[168] It is enough to say that as a consequence of graciously agreeing to participate in my investigation, the Education Council satisfied me that the nature of their process was quite different from the process an employing school would need to undertake,

and also quite different from the evaluative process that I must undertake in order to make a judgement about whether the employing school had misdirected itself, or not.

[169] That being the position, I can now confirm that the decision reached by the Education Council was a decision the Council came to, using its own process and for its own purposes, and under the terms of its own legislation, and I am satisfied that that process and the conclusion that the Council reached bear not at all on either the process the school needed to undertake in determining its approach to Mrs Maday or, for that matter, the approach the Authority needs to take in reviewing the school's decision.

[170] It follows from that conclusion that the issues about what is supposed to have been said to the Education Council by various parties and what if anything the Council made of those representations is, I am satisfied, quite irrelevant to the considerations that I must undertake and to the behaviour and approach of Avondale College in the decision it has already taken concerning Mrs Maday.

Was the formal advice and guidance properly implemented?

[171] I have already noted that despite apparently satisfying the principal as to the progress that Mrs Maday was making, the informal advice and guidance process was unilaterally suspended by the College by what it described as "health and safety concerns".

[172] Not only was there no consultation whatever between the College and Mrs Maday's advisers, but also there was no credit given to Mrs Maday for the progress that, even on Mr Lewis's view, had been made.

[173] I have to say that I was not impressed with the stage 2 process at all. While it may be putting it too strongly to contend, as counsel for Mrs Maday does in her closing submissions, that Mrs Maday was "*set up to fail*" in the stage 2 process, I certainly think that it bore all the hallmarks of it being rushed, characterised by little or no useful feedback, and feedback which was so delayed as to be of no practical use to Mrs Maday in her teaching practice.

[174] Then the College extended the observations beyond the end of the 2013 school year into 2014. By late November 2013, other teachers at the College had been consulted on their classes for 2014, but not Mrs Maday. It was not until 4 December

2013 that Mrs Maday was told what classes she was allocated. She had no input into the process. She was allocated only core classes and so had no academic classes and, in particular, no classical studies classes.

[175] Mrs Maday's evidence (which I accept) was that the lack of consultation and the very allocation of classes to her suggested that the dye was cast as the College was effectively not factoring her into its future plans.

[176] Despite Mr Lewis indicating as early as 4 February 2014 that he had nearly finished his draft report, that was not provided to Mrs Maday until 1 April 2014. She was not surprised by the conclusion that she had not remedied the College's concerns, even though it was still not clear to her what it was that she had failed to do.

[177] Mrs Maday provided submissions on the draft report and a final report, reaching the same conclusion, was issued by Mr Lewis on 8 May 2014.

[178] After a board process, Mrs Maday was dismissed in July 2014.

[179] I conclude that this second stage 2 process was also not properly implemented by the College. First, there was no credit for the undoubted evidence that Mrs Maday had sought to change her practice to try to meet the generalised concerns which seemed to be raised by the complainants. Immediately prior to the two incidents on 13 and 14 August 2013 which brought the stage 1 process to a grinding halt, Mr Lewis was keen for Mrs Maday to be praised for her efforts in addressing the concerns.

[180] If that were true then, it is difficult to see why that "progress" is suddenly gone a day or two later. In my judgement, the College grossly overreacted to the incidents with Mrs Watkinson and Mrs Carter respectively, but even allowing for the College's view that they were health and safety matters, a good and fair employer would have given Mrs Maday credit for the progress that she had made up to, but not including the two final parts of the stage 1 process.

[181] Indeed, it is arguable that the whole genesis of the formal stage 2 process is entirely misguided because on any reasonable construction, the stage 1 process has been successful in addressing the generalised concerns.

[182] But as I say, even accepting that the stage 2 process must be allowed because of the alleged health and safety issues at the end of stage 1, there is no proper basis for denying Mrs Maday credit for achieving the progress that she had made.

[183] Moreover, the stage 2 process was commenced unilaterally, and its process was defective in that the feedback was generalised and unspecific and post-dated the observations by a significant margin.

[184] Further and finally, as the Employment Court said in *Lewis v Howick College Board of Trustees*¹

... Employers of teachers must act to a high standard when their decisions can have these consequences (a reference to the inability of teachers to practice without registration and the requirement for registration to be reviewed on dismissal).

Has Mrs Maday been unjustifiably dismissed?

[185] I have concluded that Mrs Maday has suffered a personal grievance by reason of having been unjustifiably dismissed from her employment. I reach this conclusion because I am satisfied that a fair and reasonable employer, after conducting a proper investigation, could not have concluded that Mrs Maday had failed to meet the appropriate professional standards and was therefore subject to dismissal.

[186] I have already identified in the body of this Determination the various points at which I consider that the College erred and taking them as a totality, it seems to me to follow inexorably that the dismissal is unsafe and cannot stand.

[187] In making that decision, I support the submission of counsel for Mrs Maday to the effect that the school has taken a very narrow view of the process it has to defend by focusing exclusively on what one might call “the end game”. That is, they have focused their defence on the consideration by the Board of Trustees of the principal’s draft and final report and the subsequent behaviour of the Board of Trustees.

[188] But I am satisfied that the path to those events is itself relevant because without those early decisions being in error, the final process may actually have been defensible.

¹ [2010] NZ EmpC 4

[189] But the single failure to conduct any proper investigation before deciding to invoke the competency process in the collective employment agreement must taint the whole process. So, too, does the decision to move from the stage 1 to the stage 2 process on an entirely unilateral basis without any proper consideration of the fact that Mrs Maday had effectively demonstrated competence during the stage 1 process, but got no credit for so doing.

[190] Further and finally, it is difficult to see how the final conclusion reached by the principal in his report and then accepted subsequently by the Board of Trustees can stand up to independent scrutiny when by all accounts Mrs Maday had demonstrated competence (even on the school's and the complainants' terms) during the stage 1 competency process.

[191] There were just so many errors in the school's process that it seems to me those errors compounded to produce a kind of inevitability about the outcome.

[192] The difficulties with the College's process were effectively cumulative, but nonetheless, there were a number of points at which had they but paused and looked at the position dispassionately, they might have corrected previous errors and thus removed the taint from the process. But that did not happen at any point and so I reluctantly agree with Mrs Maday's evidence that the outcome had a kind of inevitability about it.

[193] Looking at the weigh stations where the school could have corrected previous mistakes, the first point to make is that any employer should be extremely reluctant to proceed down a disciplinary or competency trail exclusively on the basis of anonymous complaints. By persevering with the anonymity of the complainants, and especially in the school system, employers are undermining a fundamental pillar of our jurisprudence and unless everything else in their process is able to compensate for that fundamental loss of the right to confront one's accuser, the employer will, of necessity, have difficulty making its case.

[194] Moreover, in the present case, not only was there a refusal to provide the names of the complainants, or any of them, but also that refusal appears to have been made on the basis of entirely erroneous information (Mr Pa'u's email of 27 March 2013 and repeated in his subsequent email of 5 April 2013) and until very late in the process, the generalised anonymous complaints were the only matters that the

employer was progressing. This is quite extraordinary because the College maintained, at the very beginning of the process, that it had concerns about Mrs Maday's professional practice anyway, but nobody had ever bothered to talk to her about those concerns and she never ever found out what those concerns were.

[195] Instead, the school proceeded exclusively on the basis of the complaints from unnamed parties, and it did so without any independent investigation or assessment of its own, until well into the process.

[196] Then the failure to build on the obvious success of the stage 1 process was another signal moment where a good and fair employer would have paused and thought about how to bring that process to a legitimate and proper end having got, by all accounts, good buy-in from Mrs Maday.

[197] Instead, because of the alleged breakdown of her relationship with Mrs Watkinson and Mrs Carter (I say "alleged" because the evidence as I understood it did not support the school's conviction that those relationships had broken down), the College proceeded unilaterally to the formal Stage 2 process. Indeed, it seems the very reason for proceeding with the Stage 2 process was the so called "health and safety concerns" generated by the exchanges between Mrs Maday and Mrs Watkinson and Mrs Carter and the closing submissions from the College rather succeed in implying that the health and safety issues were the only basis for proceeding to Stage 2.

[198] To put that point another way, the evidence would suggest that the College has simply decided that because of Mrs Maday's arguable lapse of taste in relation to her engagement with two senior managers in the school, a new and more formal process must be started which is justified not because Mrs Maday has failed to demonstrate competency in the first stage (she had), but because she had had an argument with two senior managers.

[199] Any reasonable employer looking at this course of events dispassionately would surely concede that Mrs Maday was under significant emotional and professional stress at the time and as I have already said, despite what the school says about Mrs Maday's lapses at that time, neither of the two senior managers involved seemed to me to have been greatly traumatised by the exchange with Mrs Maday. Indeed, the evidence suggests that they were both quite understanding.

[200] The conclusions reached by the Principal's report and the decision the Board of Trustees made to dismiss was effectively a finding that Mrs Maday was not a competent teaching practitioner. That decision is simply not supported by the evidence. Mrs Maday demonstrated she was meeting the school's needs in stage 1 of the process, and it appears that had Mrs Maday maintained her equilibrium on August 13 and 14 of 2013 in her exchanges with Mrs Watkinson and Mrs Carter, the competency process might have been signed off as completed and this present proceeding would not be on foot.

[201] Put shortly then, I have not been persuaded, despite Mr Pa'u's extensive efforts on behalf of his client, that a good and fair employer in the position of Avondale College could have reached the conclusion that Mrs Maday had failed to meet the appropriate professional standards in the classroom and was therefore subject to dismissal from her position as a teacher at Avondale College.

Can be Mrs Maday be reinstated to a position at Avondale College?

[202] Given my conclusion that Mrs Maday has been unjustifiably dismissed from her position at Avondale College, the question of remedies arises naturally and one of the remedies sought is the remedy of reinstatement which I deal with in this section of the Determination.

[203] The law of reinstatement is clear; it can only be awarded where it is both reasonable and practicable to do so.

[204] Mrs Maday says that, despite her success in retaining her practicing certificate with the Education Council, she has been unable to find an alternative position in the teaching profession since her dismissal by Avondale College. She goes further and says that unless I reinstate her, she will never be able to return to the profession again.

[205] So what are the impediments to Mrs Maday's return to Avondale College? The first is an implacable resistance to that course of action by Avondale College. They say that the relationship between Mrs Maday and the school has irretrievably broken down and that in consequence, reinstatement is neither reasonable nor practicable.

[206] Moreover, Avondale College say that there are no positions available at the school that would be suitable for Mrs Maday or indeed that she would be qualified to

teach in. This is notwithstanding the fact that certainly during the latter part of the very long investigation meeting that I conducted into this employment relationship problem, it appeared that the College was advertising for an English teacher which is one of the subjects that Mrs Maday is able to teach.

[207] I have certainly given earnest consideration to Mrs Maday's plea for reinstatement because I understand the point that she makes about her need to return to the profession, and I accept her evidence that she has tried unsuccessfully to get alternative positions. I observe that she is in the largest labour market in New Zealand (Auckland) and yet she is still unable to obtain alternative employment.

[208] It may be that as a result of the issue of this Determination, her ability to obtain a new role in another school may be enhanced. However, she is still entitled to seek reinstatement to her former role at Avondale College and her position is that she can work with all of the staff who have been involved in her performance issues, although I note that that is not the evidence from the school's side. Moreover, Mrs Maday points out that many of the prime actors in her employment relationship problem have moved on to other roles or have left the school for other reasons.

[209] The real impediment to Mrs Maday's return to Avondale College is not, in my judgement, the issues between her and senior management at the school relating to her alleged performance deficits, but rather the unwise and intemperate allegations that she caused to be made in her original statement of problem and a document attached to it. These allegations were essentially personal criticisms of Mr Lewis, the principal, and I am absolutely satisfied that those observations caused Mr Lewis and his family and his wider professional network significant distress.

[210] I have already observed that as a consequence of a suggestion from me during the investigation meeting, Mrs Maday quite properly agreed to remove and withdraw all of those offending allegations and I commend her for doing that.

[211] In return, the school did likewise because of course having had personal and frankly irrelevant allegations made against the professional leader of the school by Mrs Maday or perhaps more accurately on her behalf, the school responded in kind and again at my suggestion, the school readily agreed to withdraw those allegations as well.

[212] I pause here to observe that none of this material is ever helpful. The old adage of playing the ball rather than the person continues to be apt. Parties need to keep reminding themselves of what it is they need to talk to or deal with, and the personal circumstances or attributes of the individual actors is neither here nor there.

[213] In any event, those matters are no longer before the Authority and that much is positive. But I fancy that the damage has been done. The allegations about Mr Lewis made by Mrs Maday or on her behalf were personal and hurtful and will have resonated around the professional community that Mr Lewis moves in. I do not think that that material and the damage that it has done enables me to contemplate restoring Mrs Maday to the staff at Avondale College. Were it not for those ill-advised and unhelpful allegations, I should have been prepared to make the orders that Mrs Maday seeks.

[214] But I am not persuaded that having allowed herself to lower her own standards sufficiently to indulge to what amounts to personal name calling she can reasonably now expect to be returned to the staff that is led by the person she attacked in such an unprofessional way.

What other remedies can Mrs Maday aspire to?

[215] Mrs Maday seeks reimbursement of all lost earnings since her dismissal, together with interest on that amount. Because I do not appear to have any information which will enable me to appropriately assess that figure, I intend to refer that matter to the representatives and ask them to provide me with information about what Mrs Maday's salary and any other benefits/entitlements were at the point at which she was dismissed, and I will then address that aspect in a supplementary Determination on that point alone.

[216] Mrs Maday also seeks compensation for each personal grievance in the sum of \$30,000. Counsel refers to the Chief Judge's recent decision in *Waikato District Health Board v Archibald*² as the most recent evidence of the Employment Court's approach to both compensatory amounts and the banding approach.

[217] Before considering the question of what quantum of compensation to award to Mrs Maday in respect to each of her personal grievances, I am obligated to consider

² [2017] EmpC 132

whether she has contributed in any way to the circumstances giving rise to her personal grievance.

[218] Having given earnest consideration to this aspect, I have reached the conclusion that despite the occasional lapses of taste perpetrated by Mrs Maday (the events of 13 and 14 August 2013 particularly) it is difficult to conclude that she has contributed in any way to either grievance.

[219] In relation to the disadvantage grievance, the elements of that which I derive from Dr King's correspondence with Mr Pa'u were that the school withheld the names of the complainants, the school did not investigate the allegations, the school did not supply details of the allegations sufficient to enable them to be responded to, and the school initiated a competency process based on the complaints alone. It is difficult to see how Mrs Maday has contributed in any way to those elements of the personal grievance.

[220] In respect to the unjustified dismissal grievance, again I conclude that the evidence does not support any contribution by Mrs Maday to the decision made by the school to terminate her employment.

[221] Of course the school maintains that Mrs Maday did not cooperate in addressing the competency issues. I do not agree. It is apparent that there was a significant measure of collaboration between the parties during the first stage of the competency process and I am satisfied on the evidence that Mrs Maday always did her best to respond to allegations that were made about her performance which were so general and unspecific as to defy a detailed and particularised response.

[222] I turn now to consider the quantum of the compensation that Mrs Maday should be entitled to. Applying the three-band approach from *Archibald*, I am satisfied that the evidence I heard suggests the high end of the mid-range loss/damage in respect of each grievance.

[223] I heard evidence from Mrs Maday herself on the effect this whole process has had on her health, her wellbeing, her confidence, and even her feeling about getting in front of the classroom again. I also heard evidence from her husband, which confirmed the view that Mrs Maday's health had been profoundly affected by the events complained of. Mr Maday noted that his wife had been diagnosed with a form

of post-traumatic stress disorder and that the clinician thought this would perpetuate until this proceeding was at an end.

[224] Evidence was also given by one of Mrs Maday's adult children and I heard a reference to the effect the employment relationship problem had on his mother by another of Mrs Maday's children, who was still a student at Avondale College at the relevant time.

[225] Taken in its totality, that evidence suggests a pretty profound effect of the process negatively impacting on health, self-esteem and general wellbeing. On one occasion in April 2013, Mrs Maday's blood pressure was so high that she had to remain at the school's health centre until her blood pressure dropped sufficiently to enable her student son to be called to drive her home because she could not remain at the school in that condition.

[226] I am satisfied then that this pair of grievances represent examples of the high end of Band 2 and accordingly, I determine that each grievance is to be responded to by a compensatory payment of \$25,000 under s.123(1)(c)(i) of the Employment Relations Act 2000.

Determination

[226] Mrs Maday has satisfied me she has two personal grievances, one for unjustified action of Avondale College causing her disadvantage and one for her unjustified dismissal from the service of the College.

[227] Avondale College is to pay to Mrs Maday the aggregate sum of \$50,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 being \$25,000 for each of the two grievances proved.

[227] Mrs Maday seeks wages lost as a consequence of the dismissal. The representatives are to confer and agree what Mrs Maday's salary was at the relevant times, together with any other normal incidents of her employment and provide that to me within six weeks of the date of this determination. Forthwith on receipt of that information, I shall issue a further determination on this aspect alone.

Costs

[228] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority