

[3] In April 2009 the Principal received two further complaints regarding Mr Meads. Following initial investigation these complaints were referred to the Board of Trustees (the Board). After investigating these complaints the Board dismissed Mr Meads but offered to re-employ him as a full-time teacher but without the sports coordinator role or the two management units that went with that role.

[4] Mr Meads says that his dismissal/demotion was unjustified and he seeks reinstatement to his previous position of sports coordinator and the reinstatement of the management units. He is also seeking compensation for the hurt and humiliation the Board's actions have caused him and a contribution towards his costs.

The issues for determination

[5] The first question for determination in this matter is whether or not the Board's actions in dismissing Mr Meads, and the way in which they acted, were, in the words of section 103A of the Employment Relations Act (the Act) *what a fair and reasonable employer would have done in all circumstances at the time....* More particularly:

- (a) Having been made aware of the complaints against Mr Meads, did the Board carry out a full and fair investigation into those complaints.
- (b) Was it reasonable for the Board to conclude, in the light of that investigation, that Mr Meads was guilty of misconduct.
- (c) Was it reasonable for the Board to conclude, taking into account the final written warning on Mr Meads file and their finding that misconduct had occurred, that Mr Meads should be dismissed and offered reemployment.

[6] If I determine that the actions of the Board in dismissing Mr Meads were not *what a fair and reasonable employer would have done* and were unjustified i.e. that Mr Meads has a personal grievance, it will then be necessary to determine what if any remedies should be awarded to him.

The events that led to Mr Meads' dismissal

Mr Meads' previous warnings

[7] Other than to note that it occurred, and that it involved the throwing of a tennis ball at a student, there is no need in this determination to set out the detail of the events which led to the verbal warning which Mr Meads received in 2007. However the events which led to the final written warning in late 2008 are more relevant. In October 2008 the Principal received a complaint from three girls that Mr Meads had:

- (a) thrown tennis balls at a pupil with a force that caused her pain;
- (b) made inappropriate comments to 2 girls that had a sexual connotation and
- (c) he, or a student on his instruction, kicked a soccer ball at a student causing bruising.

Following discussions between Mr McKinnon, Mr Meads and a PPTA field officer Andrew Barron, Mr Meads was issued with a final written warning on 21 November 2008 which stated:

I am satisfied that those matters which you accepted occurred amount to inappropriate responses in your professional capacity as a teacher, irrespective of student behaviour. The expectation is that you will at all times act professionally, refrain from inappropriate comments or action similar to those above. It is important to emphasise that there must be no further incidents involving any form of force being applied to students whether this is by throwing a ball at a student or otherwise.

This letter serves as a final written warning that behaviours of this nature are not to happen again and you are on notice that one possible outcome of any further disciplinary enquiry involving similar complaint may lead to the termination of your employment. It is important that you appreciate the seriousness of the situation and take responsibility for ensuring your conduct in and around students.

This letter will remain in effect as a final written warning for a period of 12 months,

The ERO report

[8] In February 2009 PHS was reviewed by the Education Review Office (ERO). Mr McKinnon says that the ERO review team in its verbal feedback suggested that the school should be more "student centred" and ensure that the school's behaviour management policy was consistently applied in interactions between teachers and students. He says that the ERO team commented that a few classrooms were "unwelcoming". Mr McKinnon says that following this verbal feedback he conveyed the ERO comments to staff at a meeting in March 2009.

The first complaint

[9] In April 2009 the school received a letter of complaint from the parents of one of the student's regarding Mr Meads' behaviour towards their son. This complaint was made following a suggestion by Mr Meads, in the student's interim report, that the student should consider taking another subject other than physical education. In the letter of complaint the parents raised two incidents (i.e. other than the comments in the report);

Incident 1: During a class in the third term of 2008 Mr Meads asked another student to "drop" their son, implying that he should give him a hiding. Mr Meads then said in front of the whole class that "someone needs to teach (him) a lesson"

Incident 2: More recently (i.e. in the first term of 2009) Mr Meads, when talking about communication, said "what happens if a FOB walks in and says they are dying of diabetes and you can't understand them?" The parents considered this comment to be racist and pointed out that their son is Samoan and has type 1 diabetes. (When interviewed shortly after the initial complaint was made the student said that he considered that Mr Meads had been talking about him as he looked directly at him when he made this comment)

The second complaint

[10] At about the same time as the first complaint was drawn to his attention Mr McKinnon received a second complaint from a student that Mr Meads had made an offensive statement to her during a class on 9 April 2009. The student said that during class Mr Meads walked up to her desk and said: "just because your f***ing family doesn't come here any more doesn't give you the right to do whatever you want

to do". The student suggested that although Mr Meads spoke quietly a student at an adjacent desk had heard what he said.

The Board's investigation

[11] Following an initial investigation Mr McKinnon referred these complaints to the Board. The Board set up a disciplinary committee to carry out an investigation. This committee interviewed the students concerned and a small number of other students. Copies of all of these interview notes were made available to Mr Meads who was also interviewed.

[12] Mr Meads accepts that he was given access to all the information the Board took into account and was given an opportunity to refute the allegations against him. However Mr Meads' points out that the first incident (the "drop him" incident in the first compliant), if it occurred, took place before the final written warning was issued and should not have been taken into account in the Board's decision. He also says that much of the evidence of the students was contradictory and changed from one interview to the next. He says that under the circumstances the Board should have interviewed other student witnesses and/or placed much less weight on the contradictory and unreliable evidence. In response to this second point, the Board says that the witnesses that they interviewed were clear and credible and that to interview other students would have simply subjected those students to an unnecessary and traumatic experience and made more people aware of the complaints for little or no purpose.

The preliminary findings

[13] Having completed its investigation, on 11 August 2009 the Board wrote to Mr Meads (through his union) setting out its preliminary findings:

The Board..... has made a finding of misconduct in relation to the two allegations (in the first complaint). The Board has not made a finding of misconduct in relation to (the second compliant).

It is relevant to emphasise that, in other words, the Board had made no finding of misconduct in respect to the second complaint and that the first of the two incidents where the Board made a finding of misconduct, as Mr Meads has pointed out, occurred prior to the issuing of the final written warning.

[14] The letter of 11 August 2009 went on to say:

In terms of disciplinary outcome, the tentative view of the Board Subcommittee is that removal of management units from Mr Meads is an appropriate penalty, effectively a demotion from the Head of Sport position currently held. In addition, a further final warning would be placed on file for 12 months, together with a 12 month period of support and supervision. Termination of employment was considered by the Board Subcommittee, but it was decided that it was not warranted in the circumstances, particularly taking into account Mr Meads long history with the school.

Before making a final decision on the disciplinary outcome, the Board Subcommittee would like to receive feedback in writing from yourself and/or Paul, and I ask that this be provided to me....

[15] On 25 August 2009 the PPTA wrote to the Board making initial submissions regarding the Board's decision and seeking a meeting with the Board sub-committee so that both they and Mr Meads could make further submissions. In this letter the PPTA also said:

However, the Board's Sub-committee also submits that they remove Mr Meads of his management units. The PPTA submits that this is not a penalty open to the Board. Units must be voluntarily relinquished, or lost through competency or surplus staffing. There is no provision for units to be removed as a disciplinary penalty, unless by agreement of the unit holder. In this case, Mr Meads does not agree to this. It should be further noted, that the units are for Mr Meads sports coordinator role while disciplinary action is for conduct in his teaching capacity.

Shortly after sending this letter, the PPTA also requested that the Board Chairperson (Mr Trevor Gill) remove himself from the sub-committee as, in their opinion, there was a perception of bias in (Mr Gill's) handling of this matter. The PPTA also requested that the Board appoint an independent adviser to review the sub-committee's decision in respect of Mr Meads.

[16] On 2 September 2009 Ms Stone, on behalf of the Board, wrote to the PPTA declining their requests that Mr Gill remove himself from the sub-committee and that an independent person be appointed to review the committee's decision. On 7 September Ms Stone again wrote to the PPTA saying:

I do not agree with your legal submission that removal of management units is not open to the Board Sub-committee as a disciplinary outcome, in the circumstances where termination of employment is an option that is open to the Board Subcommittee, as in this case. Removal of management units (which may legally be considered termination combined with a new job offer) is a reasonable alternative to outright termination of Paul Meads' employment. For the sake of clarity, I confirm that this is the tentative view of the Board Subcommittee as the appropriate outcome, combined with a further final warning and a 12 month period of support and supervision, as outlined in my letter of 10 August 2009.

[17] On 9 September 2009 Simon Mitchell, on behalf of Mr Meads and the PPTA, again wrote to Ms Stone reiterating the PPTA view that removal of management units was not a disciplinary outcome that was open to the Board.

[18] On 23rd of September 2009 sub-committee met with Mr Meads and his representatives. Following this meeting Ms Stone wrote to the PPTA (as Mr Meads representatives) conveying the Board's decision in the following terms:

The Board Sub-committee has allowed all opportunities for submission that have been requested, and has fully considered all submissions, in order to ensure that the process is entirely fair and reasonable.

The decision of the Board Sub-committee in relation to penalty is as follows:

1. Termination of Mr Meads' Sports Coordinator position on notice through to the commencement of term 1, 2010, coupled with an offer of employment in a teaching position without Management Units from term 1, 2010;

2. *As from term 4, 2009 Paul Meads will not be required to perform the duties of Sports Coordinator, but will be entitled to receive payment for the Management Units through to the commencement of term 1, 2010;*
3. *Support processes will be put in place, including assistance, mentoring and guidance, for a period of 12 months;*
4. *Final warning to be issued and remain in place for 12 months.*

Please advise as soon as possible, and in any event within 14 days from the date of this letter, whether Mr Meads wishes to accept the offer of teaching position without Management Units from term 1, 2010.

In reaching its decision, the Board Subcommittee has made a compassionate decision which addresses the issues of concern in relation to misconduct, while allowing Mr Meads to continue in his employment at the school if he wishes to do so.

The respective submissions

[19] The parties have requested that I issue a determination in this matter as early as possible to ensure that the matter of Mr Meads status is decided before the commencement of the school year in 2010. In the interest of brevity therefore I will not canvass the respective submissions in great detail. Set out below, however is an attempt to summarise the pertinent points of the submissions.

Submissions on behalf of Mr Meads

[20] Mr Mitchell argues that the Board cannot establish that it conducted a full and fair enquiry and should not therefore prefer the evidence of the students over Mr Meads. He points out that the *second complaint* was not upheld. In respect to the first complaint Mr Mitchell says:

- (a) The interviews with the complainant and witnesses were carried out in an extremely leading manner.
- (b) Mr Meads denies both the allegation of "dropping (the student)" and calling the student a FOB.

- (c) In respect to the “drop him” incident it was impossible for Mr Meads to defend himself because of the time delay, there were variations in the student statements, Mr Meads has no recollection of making any such statement and the complaint should be dismissed.
- (d) In respect to the FOB allegation Mr Meads denies making the statement and says there was no discussion about health problems.
- (e) Only two students were saying this incident had occurred and these two students were friends, and they gave contradictory evidence.
- (f) Mr Meads has 20 years experience working with multi ethnic communities.

[21] Mr Mitchell argues that where facts are disputed the employer should seek further evidence to ensure that the investigation is full and fair [*Timu v. Waitemata DHB* (ARC 90/05,7 June 2007 Couch J)]. He suggests that further witnesses were available who could have confirmed Mr Meads’ statements as to what occurred.

[22] In respect to penalty Mr Mitchell argues that the Board, in its letter of 11 August 2009 accepted that *termination of employment..... was not warranted under the circumstances*. He says that removal of management units is not a penalty open to the Board in terms of the Collective Agreement. He has drawn my attention to the Employment Court decision in *Richardson v. Board of Governors of Wesley College* [1999] 2 ERNZ 199, in which the Court considered a provision such as that in the current case and where Judge Travers said:

The CEC does not permit the Board to impose a lesser penalty than dismissal in cases where serious misconduct justifies summary dismissal has been found. In such circumstances, it is dismissal or nothing.

In Mr Mitchell's submission, having established only misconduct (and not serious misconduct) and despite the presence of the warnings, the Board is not entitled to dismiss Mr Meads or as an alternative, to remove his management units as this is not permitted by the collective agreement.

Submission on behalf of Pukekohe High School

[23] In her submissions on behalf of PHS Ms Stone says:

- A full and fair enquiry was carried out and there was a fair and reasonable opportunity for Mr Meads to explain his actions to the Board.
- Mr Meads' denial of wrongdoing was fairly considered and rejected in so far as Mr Meads sought to maintain that the "drop him" and "FOB" statements were not made.
- In all the circumstances of this case the Board was not required to interview further witnesses in relation to the FOB comment.
- The impact of the time delays in bringing the complaint was considered and discounted on balance given the seriousness of the complaints
- No hasty decisions were made, all relevant material was considered and there was no evidence or reasonable inference of bias or predetermination.

[24] Ms Stone submits that, *based on this full and fair enquiry* a finding of misconduct was open to the Board. The Board accepted that Mr Meads behaviour was conduct unbecoming as a teacher and Mr Meads was guilty of repeated misconduct justifying termination of his employment under clause 3.4 of the CEA. Having made the finding of misconduct the Board's considerations included:

- the inappropriate and threatening nature of Mr Meads behaviour towards a student in both instances (the "drop him" and the "FOB" comments).
- The ERO report feedback.
- The behaviours were not isolated one off events and Mr Meads had been issued a final written warning in November 2008 for similar inappropriate and aggressive behaviour.
- The importance of student safety.
- Mr Meads had been categorically put on notice in November 2008 (final warning) and in March 2009 (ERO verbal report) that he needed to improve his behaviour and that aggressive and threatening behaviour would not be tolerated.

[25] In her submissions Ms Stone summarises the Board's position as:

It is submitted that the decision to demote Mr Meads was not only reasonable, but in the circumstances of a final written warning, was a generous gesture to Mr Meads in allowing him to remain in the school environment, and providing the assistance that is required in order to turn around behavioural concerns.

Applying the statutory test of justification from another point of view; would a fair and reasonable employer (who was responsible for the safety and welfare of students) allow this situation to continue? The answer is clearly no. Mr Meads' recent history of complaints and discipline included:

- *Mr Meads was issued with a verbal warning in 2007 in relation to a complaint of aggressively standing over and "branding" a student.*
- *A student was removed from Mr Meads class in 2008 following a complaint of throwing a ball at the student's head.*
- *Mr Meads was issued with a final written warning in November 2008 for making inappropriate comments with sexual connotations to students and for throwing a tennis ball at a student.*

The Board subcommittee was entitled to say "enough is enough" and impose a harsher penalty than a warning, namely termination and an offer of re-employment, to make Mr Meads take notice and make changes to his behaviour. Outright termination was justified but not imposed, Mr Meads was offered re-employment, an offer which he has accepted.

[26] In respect to whether or not the collective agreement allows the employer to remove management units as a disciplinary outcome Ms Stone also cites the *Wesley College* case. She, however argues that that case shows that the Court approved the removal of management units (by termination and re-employment). She also points out that Mr Meads was given a further opportunity to make submissions on the disciplinary outcome - specifically that he be dismissed and re-employed without management units.

Discussion

[27] Despite the suggestion in the Board's letter to Mr Meads of 11 August 2009 that *removal of management units ... is an appropriate penalty, effectively a demotion from the head of sport position currently held*, there is no doubt that the disciplinary outcome being considered, and eventually taken, was dismissal, albeit with the concurrent offer of reemployment to a teaching position without management units. This was clarified in the Board subsequently letter (7 September 2009) and Mr Meads was given a proper opportunity, as required by the Collective Agreement, to comment on that proposed outcome.

[28] It is well-established that, in cases of dismissal, it is for the employer to justify its actions and that those actions and the way in which they acted are to be judged against those of *a fair and reasonable employer ... in all circumstances at the time....*

Did the Board carry out a full and fair investigation into the complaints.

[29] The Board Chairman, Mr Gill, was adamant that the evidence in front of the sub-committee was clear: Although the students spoken to were not always consistent regarding the details of the various incidents they were convincing in their statements overall. He says that the committee considered interviewing further students but came to the conclusion that, given the clarity of the statements they already had, the additional distress caused by any such interviews would far outweigh any additional material that could be provided. On balance the committee concluded that the various incidents had occurred. I accept that the Board were on the horns of a dilemma. I also accept however that the committee were clear and unanimous in their opinion that the evidence before them was sufficient for them to conclude that the incidents probably occurred. The committee's failure to interview further students was reasonable under the circumstances and is not in my finding sufficient to render the investigation process unfair. As it happens, as I will explain shortly, such interviews could only have made a difference to the final outcome in respect to one of the three incidents under investigation.

Was it reasonable for the Board to conclude that Mr Meads was guilty of misconduct.

[30] Mr Gill says that because in respect to the second complaint one of the witnesses had been told what to say (rather than actually witnessing events), the subcommittee concluded that the second complaint should not be upheld. Given the Board's decision not to interview other students this conclusion was prudent. Having concluded that it would be unfair to make a finding of misconduct in respect to the second complaint the Board was then left with only the two incidents relating to the first complaint. While it was reasonable, under the circumstances, to conclude that both incidents relating to the first complaint had probably occurred, one of those incidents occurred prior to the final written warning issued in late 2009. It would clearly be unfair for an employer to "punish" an employee for an incident of misconduct in breach of a warning when the incident occurred before the warning was issued. The Board were left, therefore with only one incident of "misconduct" which occurred after the final written warning, on which to base a decision in respect to disciplinary outcome,

Was it reasonable that Mr Meads should be dismissed and offered reemployment.

[31] I have a good deal of sympathy for the position the Board found itself in. They considered, despite formally not upholding the second complaint, that Mr Meads had conducted himself on a number of occasions and over a long period in ways which were inappropriate. Despite verbal and written warnings Mr Meads appeared not to appreciate the seriousness of his behaviour. In addition the recent ERO report suggested the Board should pay more attention to "behaviour management" and the Board clearly understood Mr Meads behaviour to fall outside the expected standard. Something had to be done! Mr Gill came up with what seemed to be the perfect solution. Emphasise the severity of the ongoing transgressions by dismissing Mr Meads but reinstate him to a teaching position thereby maintaining the services of an employee who all agreed was, in other respects, an excellent teacher.

Determination

[32] Despite my sympathy for the Board's frustration, and despite the "softening" of the dismissal by the offer of reinstatement, Mr Meads was dismissed. The justifiability that dismissal must be judged against *the actions of a fair and reasonable employer in all circumstances*. At the time it made its final decision to dismiss Mr Meads the subcommittee members had in their minds not just the single act of misconduct which had been upheld. It was appropriate that the Board take into account the final written warning but it appears to have been influenced by a good deal more. Mr Gill told me at the Authority's investigation meeting that he had been *incensed* by Mr Meads' comment on the student's interim report that the student should consider changing subjects. This subcommittee clearly believed that the incidence relating to the second complaint, despite being formally not upheld, had occurred. Despite its occurring before the issue of the final written warning the "drop-him" incident also influenced the decision. There is a contradiction, also, in what at first blush appears to be a reasonable solution. Mr Meads' transgressions all occurred in his capacity as a classroom teacher but he has been offered reinstatement to teaching duties. The management units are remuneration for non-teaching duties. While the net reduction in Mr Meads' salary (some \$8000 per annum) may be an ongoing reminder, he will continue to have contact with students.

[33] Taking all of the above into account and looking at the Board's decision dispassionately, I find that a fair and reasonable employer would not have dismissed Mr Meads. **Mr Meads' dismissal was unjustified.** I should emphasise I have reached this conclusion by a very slender margin. Dismissal is the ultimate sanction and it is for the employer to justify that sanction. When the factors to be weighed are in balance the scales must tip in favour of the employee. This is one of those cases.

Remedies

Contribution

[34] Section 124 of the Act requires that

... where the Authority ...determines that an employee has a personal grievance, the Authority... must, in deciding both the nature and extent of the remedies to be provided,

(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.

[35] Mr Meads failure to either comprehend the seriousness of his actions or to modify his behaviour, despite very clear indications from his employer, was a major contributing factor towards the situation which gave rise to his personal grievance. It is difficult to assess this contribution in percentage terms as is often done in cases of dismissal. It is more appropriate in this case to deal with each of the requested remedies in turn and to modify the remedies that might otherwise have been awarded had he not made such a significant contribution.

Reinstatement

[36] Mr Meads has asked to be “reinstated” to his former position i.e. sports coordinator, and to continue to receive the two management units which go with those additional duties. Reinstatement is not a remedy which can be proportioned. **Despite his level of contribution Mr Meads is to be reinstated to the position of sports coordinator he held prior to his dismissal and is to continue to receive the two management units.**

Additional final written warning and assistance mentoring and guidance

[37] As part of the Boards disciplinary sanction against Mr Meads the letter of 23 September 2009 imposed *a further final warning to remain in place for 12 months* and proposed that *support processes.. including assistance mentoring and guidance* be put in place for a period of 12 months. **The warning and support processes both reasonable and sensible under the circumstances and should remain in place.**

Compensation for hurt and humiliation

[38] Mr Meads gave evidence that, as sports coordinator he had been actively involved in the sporting life of the school and local community and was well recognised in that community. His removal from that position had caused a good deal of stress and embarrassment and he has undertaken cognitive therapy to assist him with his anxiety. If it had not been for the level of contribution Mr Meads made to his own situation it is likely that I would have awarded a relatively high level of compensation for this stress and anxiety. **However, given that level of contribution, no such compensation is warranted and I decline to make any award of compensation for hurt and humiliation.**

Costs

[39] Although I have found that Mr Meads has a personal grievance against Pukekohe High School, I have also found that he made a major contribution towards the situation that gave rise to that personal grievance. Although costs would normally follow the event, it would seem unreasonable in these circumstances to expect PHS to contribute to Mr Meads' costs. **There will be no order for costs.**

James Wilson

Member of the Employment Relations Authority