IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 294/07
5091921

	BETWEEN	STEPHEN MICHAEL SHONE Applicant
	AND	GISBORNE INTERMEDIATE SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority:	Robin Arthur
Representatives:	Adam Simperingham for Applicant Daniel Erickson for Respondent
Investigation Meeting:	27 July 2007 at Auckland
Determination:	24 September 2007

DETERMINATION OF THE AUTHORITY

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[1] The Applicant, a school teacher currently suspended on full pay, seeks an injunction to prevent his employer, the Respondent, stopping his pay while he awaits trial on criminal charges.

[2] The Respondent ("the Board"), in reply, seeks declarations that it is contractually entitled to stop the Applicant's pay, has given him sufficient opportunity to comment on a proposal to do so, and may now convert his suspension to being without pay should it decide to do so.

[3] The matter requires interpretation of the meaning and application of clause 3.5(a) of the current Primary Teachers Collective Employment Agreement under the heading *Suspension*:

> *If the alleged conduct is deemed sufficiently serious an employee may be either suspended with or without pay or transferred temporarily to other duties.*

[4] The Applicant initially also sought an injunction against the Board requiring him to participate in a disciplinary investigation by a Board sub-committee before the criminal case against him was heard and decided in the High Court.

[5] While the criminal charges – involving allegations of indecent assault and sexual violation of teenage girls – related to events outside his official duties as a teacher at the school, the Board had wanted to conduct its own disciplinary investigation because the alleged conduct involved former pupils and inappropriate actions towards other people. The Board considered that the alleged conduct raised concerns at potential breaches of the trust of parents and adverse effects on the school's standing in the community. However, by the time this matter came before the Authority, the Board had agreed to defer any disciplinary inquiry until after the Court proceedings on the criminal charges had ended.

The Authority's investigation

[6] Mediation between the parties, required by the Authority before proceeding with its investigation, did not resolve the issue about the basis of suspension.

[7] For the investigation, the Applicant and the Board's principal, Bruce Topham, provided written witness statements and copies of relevant correspondence on the issue.

[8] As the matter involved interpretation of a collective employment agreement to which the NZEI Te Riu Roa and the Secretary of Education are both parties, I invited submissions from them. At short notice, John Robson of NZEI and (under authorisation of the Secretary of Education) Ministry official David McIntosh both provided written information in advance of the meeting. By telephone conference during the meeting I heard further helpful oral evidence from Mr Robson, Mr McIntosh and another Ministry official, Murray Jaspers. Ron Burbery, a Ministry official who had corresponded with the Board, was on leave and not available during the investigation however I was satisfied from the copies of correspondence, and evidence of the other Ministry officials and Mr Topham, that I need not talk directly with Mr Burbery.

[9] All witnesses, under oath or affirmation, confirmed their written evidence and answered questions from the Authority and counsel. Counsel also spoke to written

submissions in closing arguments. Although not set out in full here, I have considered all the evidence and submissions given during the investigation in making this determination.

The facts

[10] The Applicant was arrested and charged on 17 March 2007. He was suspended by the Board on 22 March 2007. No issue is taken with the fact or necessity of suspension in the circumstances.

[11] The Applicant is currently on bail, and, under conditions of that bail, required to live in Napier. His counsel's best estimate of a likely date for trial is June 2008.

[12] The Board's letter (22 March 2007) advising the Applicant of his suspension stated, inter alia:

> *… The Board considers that this suspension is warranted due to the seriousness of the matters at hand in accordance with clause 3.5(a) of the Primary Teachers Collective Agreement.*
>
> *This suspension will initially be on full pay. However, this may be reviewed depending on the length of your suspension.*

[13] By letter on 7 June 2007 the Board noted that the Applicant had "*been suspended (on full pay) pending an investigation into this matter*" and sought a response from the Applicant within seven days about his "*version of events*". It also warned that the Board investigation could result in termination of the Applicant's employment.

[14] The Applicant's solicitor replied that, due to his commitments, no reply could be given before 13 July. In response, the Board's solicitors, on 18 June, protested at the delay:

> *If there is going to be an ongoing delay, our client will review the nature of Mr Shone's suspension. Currently, he is suspended on full pay. Clause 3.5 of the Primary Teachers Collective Agreement provides for suspension "with or without pay".*
>
> *We invite you and Mr Shone to reconsider your timeframe for a response. If the position remains that Mr Shone will not be responding until 13 July 2007, our client will have to consider whether to change the status of Mr Shone's suspension to being without pay.*

[15] On 28 June, the Applicant applied for the Authority to enjoin the Board from

adjusting his pay until the criminal charges in the High Court in Gisborne were resolved. Grounds given for the injunction included the prospect that answering questions for the purposes of the Board's investigation compromised the Applicant's right to silence and would cause him to disclose his defence which could lead to an unjust outcome in the criminal proceedings.

[16] Meanwhile, the Board, through Mr Topham, had been corresponding with the Ministry about funding issues raised by the Applicant's suspension on full pay. The Board sought Ministry assistance to fund a replacement teacher's salary.

[17] The dilemma for a school board in circumstances such as the present is this. If it suspends a teacher on pay, it continues to use that teacher's salary entitlement but does not have the teacher at work in the classroom. It needs to arrange and pay a replacement teacher but has no salary entitlement with which to employ him or her. It needs replacement funding.

[18] In an email on 1 May to Mr Burbery – whose duties in the Ministry include dealing with such resourcing issues – Mr Topham advised that a School Trustees Association officer had suggested the school need "*take no further action as the Ministry of Education would reimburse the school the relieving costs after the first eight days*".

[19] Mr Burbery replied the same day advising the Board "*should immediately undertake its own investigation and invite* [the Applicant] *to a disciplinary meeting to address the accusation and employment concerns*".

[20] Importantly for present purposes, he continued:

> *Additional staffing to support a suspension where the teacher suspended is subject to Police investigation is provided as a matter of course from day 1. However, such support should not be used as a reason by the insurer or Board to prevaricate on taking action to address the employment issue.* [my emphasis]

[21] After the Board had raised the proposal to change the Applicant's suspension to being without pay, Mr Topham sent an email asking whether Mr Burbery agreed with the "*Board continuing to pursue suspension without pay*" and whether it could recover legal costs from the Ministry for doing so.

[22] Mr Burbery's reply was emphatic:

> *Whether or not the Board continues to pursue this action is entirely up to them. The Ministry, however, will not provide additional resources to fund litigation either to this or some future point. That must come from either the Board's own resources or that of its insurer.*

[23] The Ministry generally funds boards for the number of teaching positions provided under each school's staffing entitlement. It also operates a policy to allocate additional staff for special reasons. This Special Reasons Teaching Allowance policy ("the SRTA policy") provides for short term, emergency staffing to deal with unusual or exceptional circumstances. This is different from relief teacher funding which is provided for extended absence of regular teachers due to illness, but not suspensions.

[24] The SRTA policy includes providing cover staffing to replace a teacher suspended for "*criminal rather than competency issues*".

[25] As Mr McIntosh explained in his witness statement:

> *In particular, an exemption may be considered where a decision to suspend has resulted from a situation in which a Police investigation has commenced, or is likely to be commenced in response to criminal allegations, or where there is serious risk to students or staff.*

[26] The SRTA policy notes that:

> *Sometimes in complicated cases the Board may not know when the problem will be resolved (e.g. in an ongoing Court process). In this situation SRTA should still be approved for a fixed period of time only; at the end of this period the Board may apply for further support if necessary.*

[27] The oral evidence of Mr McIntosh and Mr Jaspers was that the Ministry invariably agrees to fund alternative staffing where a teacher is suspended on pay awaiting trial on criminal charges. The rationale for the policy was explained by Mr Jaspers as being to ensure the Ministry was not involved in any "*prejudgment*" on the issues involved. Mr Robson's evidence, on behalf of NZEI, was to the same effect. As manager of the Union's legal and advocacy services, he had not heard of any cases of teachers being suspended without pay while awaiting criminal charges.

Issues

[28] The Board accept that throughout it is bound by statutory obligations under s4 and s103A of the Employment Relations Act 2000 ("the Act") to act in good faith and as a fair and reasonable employer would in all the circumstances. Under the

Education Act 1989 the Board is able to appoint, suspend and dismiss staff. Under the State Sector Act 1988 it must act independently and as a good employer.

[29] The issues for resolution include:

(i) What does clause 3.5(a) of the collective agreement allow the Board to do?

(ii) Whether the board's proposal for suspension without pay was properly motivated, in respect of pursuing a disciplinary investigation, ensuring secure staff funding and prudent use of taxpayer funds?

(iii) What orders or declarations, if any, should be made?

Interpreting the agreement

[30] Collective agreements are to be interpreted with reference to their factual matrix or surrounding circumstances, including matters such as the background to the transaction and the practice of the industry or sector in question. The Authority adopts an objective approach to interpretation, looking at what a reasonable person in the field, knowing all the background, would take the words to mean, not what parties may say they intended. If the words are clear and can only have one possible meaning, that will determine the interpretation. The interpretation of an agreement is not to be narrowly literal but must accord with business commonsense. Subsequent conduct of the parties after the agreement came into existence may also be relevant to interpretation: *ASTE v Hampton* [2002] 1 ERNZ 491, 499-500, paras [18]-[24] (EC).

[31] The plain words of clause 3.5(a) require a board – as the employer – to consider three steps in circumstances that might require suspension of a teacher.

[32] Firstly, there must be "*alleged conduct*" that is "*deemed*" to be "*sufficiently serious*". Although not expressly stated, it is clear from the context that the process of 'deeming' – that is assessing the seriousness of the alleged conduct – is to be carried out by the board. It must first make a decision on whether the alleged conduct is 'serious enough' to move to the next step of consideration.

[33] Secondly, the board must decide whether to exercise the discretion given under the clause to apply one of three options. The clause does not automatically require the board to do so – rather the wording is that it "*may*" do so. (Before doing

so, the board must also under clause 3.5(b) of the agreement – applying the principles of natural justice – provide the teacher with a reasonable opportunity to make submissions about the alleged misconduct and the appropriateness of suspension.)

[34] Thirdly, the board, if choosing to exercise the discretion to suspend, must choose between one of three options. There are only three. It may suspend the teacher on pay. It may suspend the teacher without pay. Or it may transfer the teacher temporarily to other duties (that being another form of suspension in the sense that the teacher is suspended from her or his usual duties).

[35] On a plain reading of this clause there is no difficulty discerning the obligations of a board in respect of the first and second steps in considering a suspension. However at the third step, there is no express wording of the clause to indicate how the parties intended a board to decide between the three options.

[36] It cannot be that particularly serious allegations – as those in the present case certainly are – automatically require suspension without pay. That clearly is not what is provided for in the clause – rather once the hurdle of *sufficient* seriousness is reached, all three options appear equally open to a board. None are stated to be required or more likely in any situation.

[37] This silence on how the parties to the agreement intended a board to choose between the options cannot be answered by a plain reading as there are not clear words open only to one possible meaning. Accordingly that aspect of the clause requires consideration of the factual matrix, including industry practice, to determine what a reasonable person, knowing all the background, would take the words to mean. Subsequent conduct of the parties may also be examined to check the sense of whatever interpretation is arrived at by this process as being the intention of the parties.

[38] The parties to the Collective Agreement are NZEI and the Secretary of Education. The Secretary, through her or his officials in the Ministry, negotiates the agreement on behalf of the school boards who are defined in it as the employers.

[39] From Mr Robson's unchallenged evidence for NZEI, it appears that provisions

for suspension of teachers were, until the late 1980s, set out in a departmental administration manual. However in the first Teachers Award (1 April 1989) made following the State Sector Act 1988 the following provision was included:

> *If the alleged conduct is sufficiently serious an employee may be either suspended on pay or transferred temporarily to other duties pending an investigation under (d). In exceptional circumstances an employee may be suspended without pay.*

[40] The present wording of what is now clause 3.5(a) was adopted in 1992 and is repeated in similar or identical terms in NZEI-negotiated agreements for school support staff, kindergarten teachers, primary principals and other school staff groups.

[41] Perhaps usefully I have no evidence of the intentions of the negotiators in 1989 for providing three options in cases of suspension, nor for removing in 1992 the reference to exceptional circumstances as a basis of suspension without pay. Although invited to do so, neither NZEI nor the Ministry were able to provide any background information on the purpose of the reworking of the wording.

[42] The question for resolution in the particular circumstances of this case is whether – as a matter of interpretation – the wording of clause 3.5(a) allows the Board to suspend the Applicant without pay while he awaits trial on criminal charges.

[43] I find the answer to be 'no' for the following reasons.

[44] A reasonable person, knowing all the background, would take the parties to have intended that in operating the provisions of clause 3.5(a), a board would do so in a manner consistent with all its other obligations at law. These include complying with all legislation relevant to a board's role as an employer and an agency of the Crown delivering education services to their local community. The intention would also be to operate the clause in a reasonable manner, in the sense of taking into account all relevant factors and discounting all irrelevant factors.

[45] Among those obligations and relevant factors for a school board as a crown entity is the need to act consistently with the New Zealand Bill of Rights Act 1990 ("NZBoRA"). This includes, at s25(c), "the right to be presumed innocent until proven guilty according to law".

[46] While this right is subject to reasonable limits prescribed by law (NZBoRA s5), the powers and obligations of a board under the Employment Relations Act, State Sector Act and the Education Act are to be interpreted consistently with the Bill of Rights (NZBoRA s6) provided such meanings do not render the provisions of those statutes invalid or ineffective (NZBoRA s4).

[47] In short, to the extent that it can effectively do so, a board as a good employer bound by good faith, is to give effect to those rights, including the presumption of innocence. That obligation, I find, forms part of the factual matrix in which clause 3.5(a) of the Collective Agreement must be construed.

[48] A board decision to suspend a teacher without pay, in the circumstances of an impending trial on criminal charges, carries the inevitable taint of a presumption of guilt rather than innocence. Such tainted presumptions cannot properly have been intended by the parties in providing for the options set out in clause 3.5(a).

[49] The presumption of innocence is a principle important to the rule of law in our society. Whether or not the presumption is true in any particular case is not the issue. It is not open to a school board, or this Authority, to put aside the rule of law and usurp or pre-empt a decision that properly rests with the criminal courts.

[50] For that purpose the Applicant must be presumed innocent until the decision in his trial on criminal charges, when the decision of the Court will either confirm or displace that presumption. A teacher innocent of the charges should not have to bear the financial burden of losing his or her income while awaiting trial – and that is the benefit of the presumption to which the Applicant is entitled until the Court makes its decision. Accordingly, if the Applicant is presumed innocent, then can be no basis for suspending his pay while he awaits trial, and that, I find, must have been the mutual intention of the parties in agreeing the present wording of clause 3.5(a).

[51] It must be acknowledged that the clause does allow for suspension without pay. The question must be asked as to whether it has any application. It must have some or the parties would not have included the words. However the clause was drafted, and must have been intended by the parties, to cover a very wide range of circumstances in which suspension of a teacher may be considered. The event of a

teacher awaiting trial on criminal charges can only be one, narrow category of such circumstances which I have found, for what are really reasons of wider legal policy, could not have been intended to result in suspension without pay. There will undoubtedly be a wide range of other circumstances for which suspension without pay (or transfer to other duties) was intended by the parties to available as options for a Board. I need say no more about what those might be, other than that the present circumstances of the Applicant and the Board are not among them.

[52] Having reached the conclusion stated as to the intention of the parties, objectively assessed, I have also considered whether information about 'industry practice' and subsequent conduct of the parties confirms the interpretation given. It is consistent with the approach taken by the Employment Court in interpretation cases, as recently discussed in *Hansells (NZ) Limited v Ma* (unreported, AC 53/07, 14 September 2007, Travis J) at paras [38] and [65].

[53] The Ministry of Education – headed by the Secretary who is party to the agreement on behalf of employer boards – operates a policy which provides funding for replacement teachers, effectively acknowledging that a board must opt to provide suspension on pay in such circumstances. The Ministry's rationale for the policy – again consistent with the interpretation of the clause reached – was expressed by Mr Jaspers in this way: "*The bottom line for us is to make sure we are not involved in any prejudgement*".

[54] Mr Robson's evidence – although not tendered as necessarily comprehensive – confirmed that, in NZEI experience, where criminal charges require suspension of a teacher from his or her duties, the suspension is on pay. That, too, suggests the conduct and practice of boards generally is consistent with the construction of the clause given here.

The Board's proposal for suspension

[55] However, if I were wrong on the interpretation reached and suspension without pay was open in the present circumstances to a board under clause 3.5(a), I now turn to the specific proposal of this Board to consider changing the basis of the Applicant's suspension.

[56] For reasons given below I find that the Board's proposal was not reasonable and was one with which it cannot fairly proceed.

[57] As is clear from the Board solicitors' letter to the Applicant's solicitor on 18 June, the proposal to change the basis of suspension to being without pay was motivated, at least in part, by frustration at what the Board saw as delays in response to its request for the Applicant to take part in the Board's disciplinary process. The proposal was – as Mr Topham accepted – a 'lever' because the Applicant was, as it was put to him in a question, 'dragging the chain' from the Board's point of view.

[58] While the Board's anxiety was understandable, a threat to the financial security of the Applicant – himself in what must have been similarly anxious circumstances – was not what a good employer, acting fairly and reasonably, would do. Even if the presumption of innocence were not a factor affecting the interpretation of clause 3.5(a), it is a relevant factor that the Board should have weighed in framing such a proposal – and there is no evidence that it did so.

[59] Rather it sought to exert financial pressure to secure participation in a disciplinary investigation process which it subsequently accepted should be delayed for the reasons set out by the Applicant in his application to the Authority, including the effect such an investigation could have on his criminal trial.

[60] Neither do I accept the Board's argument that its proposal in June was driven by ongoing insecurity about funding for a replacement teacher or that – as claimed in its Statement in Reply – it had "*been instructed by the Ministry to attempt to minimise the liability associated with that funding*" (my emphasis).

[61] From 1 May the Board had an unequivocal statement from Mr Burbery that additional staffing would be funded "*as a matter of course from day 1*" where the teacher suspended was subject to Police investigation.

[62] The Ministry's 'instruction' – or at least Mr Burbery's advice to the Board – was not to 'minimise' funding liability by shifting the basis of the Applicant's suspension to being without pay, but rather not to delay its own investigation of the

allegations and employment concerns.

[63] The Board's subsequent initiative on whether the suspension was to be on pay or not was its own concern, not something that the Ministry required as a condition of ongoing replacement funding.

[64] The reasons for the Board's proposal, put to the Applicant in its solicitors' letter of 2 July include that:

(i) the Applicant is likely to be imprisoned and have his teacher's registration revoked if convicted on the charges he faces; and

(ii) a lengthy delay is likely before criminal proceedings are complete so "*ongoing payment will significantly prejudice not only [the Board] but also the taxpayer*".

[65] The concern about fiscal prudence was put this way in Mr Topham's witness statement (sworn on 19 July 2007):

> *In the meantime, the Board has to obtain extra funding from the Ministry of Education. While the ongoing delay will not directly disadvantage the Board financially, it has an obligation to limit the financial impact, which ultimately falls on the taxpayer in this case. If Mr Shone is granted an injunction to prevent the Board suspending him without pay, the taxpayer will have to bear the burden of the extra cost. This burden will be significant and stretch some time into the future.*

[66] The first reason given for the proposal to stop the Applicant's pay – about the consequences of conviction – is plainly not a relevant factor. It improperly assumes an outcome to the trial and is no more a reason not to pay him than it is to pay him.

[67] The second reason including a claim of significant financial prejudice to the Board was not true at the time that it was made – and as the email correspondence with Mr Burbery shows, the Board – through Mr Topham – had been aware for some weeks that it would continue to receive replacement funding.

[68] I accept however, as was apparent from Mr Topham's oral evidence to the investigation meeting, that the Board was not fully aware of the criteria and process for continuation of that funding through the SRTA policy. The Ministry's apparent system of approving such funding for a set period and then the Board having to seek

an extension – intended to provide an opportunity for the Ministry officials to check that the situation remained the same and still within the criteria – clearly contributed to some initial uncertainty. However that uncertainty has now ceased.

[69] The only outstanding rationale – concern about overall cost to the taxpayer – has a makeweight air to it. Even if it is a relevant factor, it is one that the Board must weigh with others. As a good employer under the state sector legislation, the Board also had to consider the Applicant's interests as well as what it might perceive its own interests to be. And, as is clear from the Ministry's SRTA policy, the cost to the taxpayer was one which the state accepted in cases involving suspensions pending criminal proceedings.

[70] Accordingly, while the Board met the technical requirements of providing the Applicant with an opportunity to comment on its proposal, the proposal itself was, I find, neither fair nor reasonable in all the circumstances.

[71] For that reason I decline to make the declaration sought by the Board that it may suspend the Applicant without pay pending completion of the criminal proceedings. In doing so, however, I do not accept all the reasons not to do so that were advanced by the Applicant – particularly that a decision on the basis of suspension can be made only once under clause 3.5(a) of the collective agreement.

[72] The Board expressly noted in the 22 March suspension letter that the suspension was to "*initially be on full pay*" which might "*have to be reviewed*" depending on the length of suspension.

[73] Mr Simperingham submitted that the Board's election on which of the suspension options would be exercised – on pay, without pay or transfer – could only be made once. That, I find, it not sustained by the wording of the clause or a practical application to likely circumstances in which it is to be applied. It is open to a board to review the basis of suspension, particularly where circumstances may not be fully known at an initial stage or change as the period of suspension continues, for example where new information comes to light or the needs of the school or the suspended teacher change. It is not the case in the present circumstances, but if a teacher were suspended on pay from their usual post and an opportunity arose in a school for her or

him to return to work in alternative duties (perhaps while a colleague was on leave), a board should not be denied the opportunity to consider this because of a rigid single 'election' approach to operation of the clause.

[74] In the present case the Board was not wrong to determine the basis of the suspension on an initial basis, or to reserve the option of reviewing the position as time went by, but it did err in the basis on which it subsequently sought to make changes.

No orders presently needed

[75] In the circumstances as they stood at the conclusion of the investigation meeting, I did not understand the Board to have actually made any formal decision on its proposal to change the basis of the suspension, or that the circumstances in terms of ongoing replacement funding were such that it would now see any need to do so. Accordingly, while I have declined the declarations sought by the Board, I also see no present need to enjoin the Board as sought by the Applicant. Leave is reserved for the Applicant to apply for orders, at short notice, should that position change.

[76] If there is any issue of costs, the parties are encouraged to resolve the matter between themselves. If they are unable to do so, the Applicant may apply within 28 days of the date of this determination to have the Authority to determine costs and the Respondent shall have 14 days following the lodging of such an application to reply. No question of costs will be considered outside that timeframe.

Robin Arthur
Member of the Employment Relations Authority