Note: This determination includes an order prohibiting publication of certain evidence

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 520
5528679

	BETWEEN	CAROL ANN WARD Applicant
	AND	ST PETER'S SCHOOL TRUST BOARD Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Scott, Counsel for the Applicant Emma Miles, Counsel for the Respondent
Investigation Meeting:	12 December 2014
Determination:	17 December 2014

DETERMINATION OF THE AUTHORITY

A. Under s127 of the Employment Relations Act 2000 St Peter's School Trust Board must reinstate Carol Ward, on an interim basis and on the further conditions stated at paragraph [63] of this determination, to her position as a teacher pending the hearing of her personal grievance.

B. The order for interim reinstatement is made in reliance on an undertaking as to damages given by Ms Ward.

C. Publication is prohibited, in relation to this matter, of the names of three former students who were the subject of testimonial comments by Ms Ward that were of concern to the School.

D. Costs are reserved.

Employment relationship problem

[1] By letter on 10 October 2014 the Principal of St Peters School in Cambridge, Steve Robb, dismissed Carol Ward from her teaching position as head of the school's Chemistry department. The reason given for the dismissal in that letter was that comments Ms Ward had made for inclusion in student testimonials, and providing copies of those comments to the students involved, had undermined the school's trust in her, breached the school's professional conduct code and fallen short of professional standards published by the Ministry of Education. The letter of dismissal said she had "*declined to communicate*" with the principal and the school's Deputy Principal Andrew Douglas about the comments in the testimonials. She was dismissed on the grounds of serious misconduct.

[2] Ms Ward had worked at the school since January 2003. She was employed under the terms of a collective employment agreement between her employer, the St Peter's School Trust Board (the Board) and the school's Academic Staff Association. At the time of her dismissal she was on a term's sabbatical leave – an entitlement provided for full-time employees after eight years' service. Her use of this leave at this time had been approved in November 2013. Her sabbatical leave begun on 28 June 2014 and she was due to return to teach duties on 13 October 2014.

[3] Ms Ward's application to the Authority claimed her dismissal was unjustified because she did not have a proper opportunity to respond to her employer's allegations. She stated she was unable to do so as she was sick, had provided "*medical evidence of that*", and had requested the disciplinary process take place following her return to work (not during her sabbatical leave). Her claim for remedies sought reinstatement, lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[4] Ms Ward also sought interim reinstatement under s127 of the Act pending the Authority's investigation and determination of her personal grievance. The investigation meeting for that purpose has since been set for 18 and 19 March 2015 so her application for interim reinstatement concerned the period from the date of this determination until then (some 13 weeks) and the time it might then take the Authority to issue its written determination on her substantive claim (perhaps another

four or so weeks). As required by the Act Ms Ward provided a signed undertaking that, if her interim reinstatement application were granted, she would abide by any order the Authority might make about damages sustained by her employer as a result of her interim reinstatement.

[5] The Board's statement in reply to Ms Ward's claim said it had no alternative to terminating her employment and it had done "*what a fair and reasonable employer could have done given the circumstances*", being the statutory test of justification for its actions.[1] It also opposed interim reinstatement.

[6] The parties were referred to mediation about Ms Ward's application. They reached no resolution so her request for an interim reinstatement order was determined by the Authority on the basis of written and oral submissions from counsel about relevant legal principles and on the basis of affidavits from Ms Ward (sworn on 7 November and 5 December 2014) and Mr Robb (sworn on 28 November 2014). While relying on untested affidavit evidence, the Authority may also make some "*common sense assessment*" of unanswered or disputed assertions in those sworn statements to determine the respective justices of the situation in the interim period.[2]

[7] In making such a determination the Authority must apply the law relating to interim injunctions having regard to the object of the Act (which includes reference to building productive employment relationships through the promotion of good faith behaviour).[3] The first element of that analysis required Ms Ward to establish that she had an arguable case that her dismissal was unjustified and that she had an arguable case that she would be reinstated on the basis of such a finding at the Authority's substantive investigation. The second element required the Authority to assess how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues was completed. That assessment is referred to as the balance of convenience. Whether effective remedies, other then interim reinstatement, were available to the Applicant also had to be considered as part of that assessment. Finally the Authority had to take a global view of the justice of the case and decide what should be done to attain that in the interim period.

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[1] Section 103A of the Employment Relations Act 2000 (the Act).
[2] *Wellington Free Ambulance Service v Adams* [2010] NZEMPC 59 at [17]-[18].
[3] Section 127(4) of the Act.

[8] An order for interim reinstatement may be subject to any conditions the Authority thinks fit.[4]

Order prohibiting publication of certain evidence

[9] Although neither party sought an order or raised this issue I thought it fit, under clause 10(1) of Schedule 2 of the Act, to prohibit publication (in relation to this matter) of the names of the three students who were subject of the testimonials in which Ms Ward wrote the comments of concern to Mr Robb. The identity of the students was not relevant to the dispute between Ms Ward and the Board and it was neither fit nor fair that their names might become a matter of public record in relation to this matter.

The testimonials and how the School went about investigating its concerns

[10] On 15 August Mr Robb learned of comments written by Ms Ward for a student testimonial. According to his affidavit he was "*shocked and horrified*" by those comments. Ms Ward's 5 December affidavit said the comments "*were not meant to be included in the final testimonial*" but were for tutor group teachers to use "*as they wished*" in writing the student's testimonial. Ms Ward's typed comments for the testimonial covered about two-thirds of an A4 page under various headings such as Attitude, Participation, Academic Matters. Under a heading of "*Approach with teacher and peers*" Ms Ward wrote the following:

> *She is easy to get on with, and have a laugh with. She has never used me, abused me, but has always treated me with respect as a person, which is more than I can say for many of her peers and the staff I have to work with. A simple hello from [the student] on many days have been the difference between me going home feeling like I'm a worthless piece of crap to be beaten down or going home feeling at least one person as* (sic) *acknowledged me that day.*

[11] As well as sending those comments to teachers involved in preparing the testimonials, Ms Ward sent a copy to the student. She deposed that was her standard practice since 2012 so the students knew she had completed her part of the testimonial preparation process.

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[4] Section 127(5).

[12] Mr Robb arranged for inspection of other testimonial comments prepared by Ms Ward for 2014. Two others were found to have the following sentence repeated from the first one:

> *She has never used me, abused me, but has always treated me with respect as a person, which is more than I can say for many of her peers and the staff I have to work with.*

[13] Although not entirely clear from the affidavits it seems Ms Ward had also sent her draft comments to those two students as well.

[14] Mr Robb said he was concerned that Ms Ward's "*emailing of the negative comments*" would spread to other students, parents and staff and he wanted to hear Ms Ward's response to his concerns. While Ms Ward was on sabbatical leave she was still employed and engaging in some school work (such as providing testimonial comments) so he felt it was appropriate to contact her.

[15] On 19 August 2014 Mr Douglas – whose responsibilities included human resources matters – emailed Ms Ward seeking a meeting with her on 27 August. She replied a few hours later saying that she was leaving for Wellington before then and asked Mr Douglas to put any questions or concerns in writing so that she could forward them on to her lawyer.

[16] Ms Ward deposed that she had asked for the concerns to be put in writing so that she could seek legal advice. She thought that necessary because of what she called "*past interactions*". This was a reference to what she said were previous problems with Mr Douglas, Mr Robb and the School's science faculty head teacher Sarah Hay that had got to the point where Ms Ward had instructed a solicitor to act for her in late 2013. She said employment issues at that time were resolved with no formal or informal warnings against her and an agreement to move on positively.

[17] Mr Douglas responded to Ms Ward's reply to his 19 August email with a one line response to her request to put the concerns in writing: "*I will do that. Enjoy Wellington.*"

[18] On 4 September Mr Douglas sent Ms Ward a letter by email asking her again to meet with him and Mr Robb to discuss concerns about the student testimonial

comments. The letter, prepared with legal assistance, said a testimonial should not reflect a teacher's personal feelings towards the school or its staff and students. It described the comments "*if made by a teacher employed at St Peter's*" as extremely unprofessional and possibly breaching school policies and professional standards for fully registered teachers. Mr Douglas wrote that he and Mr Robb were "*very keen to establish the context and facts of this situation*" and asked her to reconsider her "*decision*" in declining to meet with them previously. He suggested they could discuss the matter by telephone and encouraged her to have a support person or representative in any conversation or meeting with them. He also noted that the conduct of concern to them could lead to a formal warning or other disciplinary outcomes, including dismissal.

[19] A similar letter – but suggesting a specific meeting date of 18 September – was sent by email to Ms Ward on 12 September. There was disputed evidence on whether she had seen that letter by remotely logging into the school information system.

[20] On 23 September Mr Douglas sent Ms Ward a further letter stating that he would meet with Mr Robb on 26 September to discuss the matter and make a decision on how to proceed. She was invited to attend in person or by telephone. He also wrote that her "*refusal to meet with us to discuss this matter may be a breach of your statutory duty to act in good faith in your employment relationship*" and that, if she did not participate, a decision "*will have to be made on the information available to us and without taking into account any information from you*". Again she was advised termination of her employment could result.

[21] On 25 September Ms Ward's lawyer Simon Scott wrote to Mr Douglas advising that Ms Ward was "*on sabbatical and absent from this district*". He said the meeting "*unilaterally scheduled*" for 26 September would need to be vacated and asked for a full copy of the testimonials and previous letters (as Ms Ward had the 4 September letter but not the 12 September letter from Mr Douglas).

[22] A lawyer acting for the school provided the requested information the next day and invited Mr Scott, by email, to suggest a suitable meeting time for him and Ms Ward on one of three days in the following week. The lawyer's email said the school

could hold the meeting by telephone conference call "*if geographic location [was] an issue*".

[23] Three days later Mr Scott responded that Ms Ward had seen a doctor and was "*currently unfit to attend any meetings*". Mr Scott wrote that he would forward a medical certificate and a meeting would need to be arranged once Ms Ward was clear to resume work. The school's lawyer responded that the school was happy for Ms Ward to participate by conference call or respond in writing. The next day the school's lawyer sent a further email advising that "*his clients*" would meet on 2 October to make a decision on the matter and Ms Ward and Mr Scott were welcome to attend in person or by phone. He also wrote that "*in the absence of Ms Ward being able to attend, [the school] hope that [she] will be able to provide some form of input to the process before that time.*"

[24] On 1 October Mr Scott sent the school's lawyer what he referred to as "*a report*" from Dr Shamse Shaheed in Palmerston North, dated 26 September, and said Ms Ward had an appointment to see her usual doctor in Cambridge on 6 October "*on her return from sabbatical*".

[25] Dr Shaheed's report, on the letterhead of a Palmerston North medical centre, included the following narration (as written):

> *Miss Carol Ward was seen me on 26/9/2014. She was expressing her current health problems including her stress, related to her work place. I understood she is suffering from lots of stress at this stage. My feeling here is that, over the years she was inappropriately treated in her work place and that is possibly causing mental health problem. It also could turn into further health problem in future.*

[26] On 7 October Mr Scott sent the school's lawyer a medical certificate from a Cambridge general practitioner, Dr Trevor Ryan. The certificate stated Dr Ryan had seen and examined Ms Ward on 6 October and in his opinion she was "*medically unfit to attend*" (what it does not say) from 6 October and "*should be able to return*" on 20 October 2014. On 13 October Dr Ryan saw Ms Ward again and issued a further medical certificate stating she was medically unfit from 20 October until 10 November 2014.

[27] Meanwhile Mr Douglas had sent Ms Ward a further letter on 8 October. It advised he and Mr Robb had met to discuss her testimonial comments and "*in the absence of any information to the contrary [they] had no option but to conclude*" that she wrote the comments and "*did so intentionally*". It said writing the comments undermined the trust that the school, staff and students had put in her; breached the school's code of professional conduct; and fell short of professional standards for secondary teachers. It said he and Mr Robb considered her conduct was serious misconduct and had made a preliminary decision to terminate her employment at the school as of 13 October. It said her "*refusal to communicate with us regarding this matter prior to your current illness has made our consideration of this issue very difficult*". She was invited to provide a response to the preliminary decision by 10 October.

[28] Mr Scott wrote to the school's lawyers on 9 October asking for the "*threat of dismissal*" to be withdrawn as Ms Ward was on sick leave and the school had been advised on 29 September that she was unable to attend any meetings (with "*two doctors reports*" provided since then). He also advised that she would seek interim reinstatement if she was dismissed.

[29] By letter on 10 October, signed by Mr Robb and Mr Douglas, the school confirmed its preliminary decision to dismiss Ms Ward for serious misconduct. It stated that she was given the opportunity to discuss her testimonial comments with them "*several times and [had] declined to communicate with us in any way regarding this matter*" and had "*chosen not to provide us with any feedback or response to our preliminary decision*". It stated her termination of employment was effective from 13 October under clause 25.3 of the collective agreement. The clause reference appeared to be a typographical error (as that clause referred to alternative employment in a redundancy situation), with the intended reference likely to have been to clause 23.3. The latter clause allowed the Board to dismiss an employee without notice for serious misconduct.

[30] Mr Robb's thinking on these points was explained in the following two paragraphs of his affidavit. Deposing as to the school's position by the end of September he gave this evidence:

> *Our requests were either ignored or excuses were made which was extremely problematic for us. We were fast approaching the beginning of a new term and we appeared to have a Head of Department acting erratically and not wishing to explain or defend her actions. Given that Carol had acted in such an unprofessional way by sending emails to students and, potentially, to the student and parent body albeit by word of mouth, and that she was not prepared to meet with us to defend or explain her actions, and that she was clearly not wanting to return to School, having burned her bridges with her colleagues by her own actions, it became evident that we may need a new teacher for Term 4.*

[31] Of the preliminary decision (on 8 October) to dismiss her for serious misconduct he deposed:

> *Carol has not at any point suggested that she did not write the testimonial comments. Carol chose not to respond to any communications regarding the testimonial comments for six weeks before stating that she had become unwell. We had to reasonably accept that Carol intended to state to students that members of staff had used and abused her and had not treated her with respect. These testimonials were seriously damaging to our school's reputation. We could not have a Head of a Department informing a student that they feel like a "*worthless piece of crap*".*

[32] The 10 October letter ended with a statement that a summary of information gathered would be forwarded by Mr Robb to the New Zealand Teachers Council for their consideration. It appeared to be a reference to this requirement of s 139AK of the Education Act 1989:

> ***Mandatory reporting of dismissals and resignations***
>
> *(1) When an employer dismisses a teacher for any reason, the employer must immediately report the dismissal to the Teachers Council.*
>
> *…*
>
> *(3) Every report under this section must be in writing, and must include,—*
>
> *(a) in the case of a report of dismissal, the reason for the dismissal; …*

[33] Employers who fail, without reasonable justification, to report a dismissal to the Teachers Council commit an offence and face a fine of up to $5000.

Arguable case of unjustified dismissal?

[34] Against that background the first factor for consideration in determining Ms Ward's interim reinstatement application was whether she had an 'arguable case' that – assuming she could prove all the facts she alleged – she had some tenable (but not necessarily certain) prospect of success. She had to establish not only an arguable case that she was unjustifiably dismissed but also an arguable case that, if her

grievance were successful, it would be reasonable and practicable to reinstate her employment rather than solely provide monetary compensation for her grievance.[5]

[35] The threshold of 'arguable case' is usually met once a grievant disputes the basis of the purported justification for the dismissal and seeks to put the employer to the proof of it. In a personal grievance application of this type, the onus is on the employer to justify the dismissal both procedurally and substantively.

[36] The Board submitted Ms Ward had no arguable case of unjustified dismissal on the following basis:

(i) She had refused to attend any meetings, did not put forward any responses, and deliberately and continually obstructed and avoided the school's attempts to communicate with her despite being offered options to assist with logistical difficulties.

(ii) Ms Ward produced a medical report from her doctor after six weeks of avoiding communication with the school, "*only appear[ed] to become unwell as the meeting to determine her actions [became] imminent*", and visits by her to Wellington (on 23 August) and then to Napier (25 September) did not suggest she was unwell.

(iii) She had not shown signs of stress or raised issues of bullying at school in 2014 yet claimed to be suffering workplace stress after three months absence from school on sabbatical leave.

(iv) Ms Ward was on notice that the meetings about her future would go ahead and the school acted fairly after giving her opportunities for responses.

(v) The decision to dismiss her was justified because her comments showed she had "*intentionally set out to discredit*" the school, which deeply impaired the school's trust in her.

[37] I have not accepted those assertions negated the arguability of Ms Ward's case, at least on the relatively low threshold required of a tenable but not necessarily certain prospect of success. The following aspects were plainly arguable:

(i) It was not clear Ms Ward had refused to participate or attend meetings. The school's 4 September letter, for example, claimed she "*previously declined*" to meet with Mr Robb and Mr Douglas but the only previous communication – the

[5] *Cliff v Air New Zealand* [2005] ERNZ 1 at [12] and s 125(2) of the Act.

19 August email exchange – contained no such refusal, simply a request from her for more information. Mr Douglas had agreed to the request but the information was not forthcoming until his 4 September letter.

(ii) It was not correct that Ms Ward did not put forward any responses to the school's inquiries. She had responded, through her lawyer, on 25 and 29 September – firstly indicating that she was out of the district and secondly that she was not well enough to attend a meeting.

(iii) A reasonable opportunity for an employee to respond to the employer's concerns – as required by s103A(3)(c) of the Act – includes being medically fit to participate.

(iv) The school's view that Ms Ward deliberately obstructed its inquiries was based on a view that her illness was not genuine but the school made no inquiry of her or her doctors to test that view.

(v) The reference in Dr Shaheed's report to stress and a possible mental health problem should have alerted Mr Robb and Mr Douglas to the need to investigate further whether the comments made in the testimonials were (as Ms Ward's submission put it) "*malicious in nature, or … a manifestation of a stress related health issue*".

(vi) The school had a higher duty than some other employers due to the potential effect of dismissal on a teacher's registration (and the consequent ability to work again in her or his area of training and experience) – described by the Employment Court as "*double jeopardy"* to a teacher's livelihood.[6] This was demonstrated by the reference, in the 10 October dismissal letter, to forwarding information to the Teachers Council.

[38] Ms Ward's submissions also raised another more technical issue over whether Mr Robb as principal had the legal authority to dismiss her or acted *ultra vires,* that is outside his powers. The point relates to the particular nature of the school as it operates under a private act, the St Peter's School Trust Board Act 1985. On one reading of its provisions, the dismissal of a teacher would require the involvement of at least the Chairman of its board (and possibly the entire board) rather than the more familiar and usual provisions in the state sector that delegate such employment functions to the principal. The question becomes more than technical in the sense that it was relevant to who Ms Ward was entitled to be heard by before a decision on the

[6] *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4 at [6].

termination of her employment was made, and then what arrangements should or could have been put in place for that purpose. If it were a decision made by an officer of the school without the authority to do so alone, it would not be a decision that could have been fairly and reasonably made.

Arguable case for likely reinstatement if dismissal found unjustified?

[39] An assessment of the prospect of the ultimate reinstatement of Ms Ward to her role, or one no less advantageous, is a necessary consideration.[7] The remedy of reinstatement may be granted where it is practicable and reasonable to do so.[8]

[40] In considering the arguability of reinstatement (if Ms Ward's dismissal were found to have been unjustified), the following longstanding guidance of the Employment Court about the exercise of the discretion to award that remedy is useful:[9]

> *The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection. That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.*

[41] That guidance was given at a time when the then-applicable legislation – the Employment Contracts Act 1991 – provided reinstatement as a remedy to settle a personal grievance of unjustified dismissal but did not accord that remedy any primacy over money remedies. That is, since 1 April 2012, again the statutory position under the present Act.

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[7] *Madar v P&O Services (NZ) Ltd* [1999] 2 ERNZ 174 (CA) at [23].
[8] Section 125(2) of the Act.
[9] *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

[42] Having regard to the Court's guidance and the statutory criteria, if Ms Ward were found to be unjustifiably dismissed, she should (having sought it) be awarded reinstatement unless it were not practicable and not reasonable to do so or the remedy should be denied due to factors considered under the s 124 inquiry about contributing behaviour by the employee.

[43] Assessing the reasonableness of reinstatement requires "*a broad inquiry into the equities of the parties' cases*" and into the prospective effects of an order for reinstatement not only on Ms Ward and the Board but also any relevant third parties such as, in this case, other staff and the school's students.[10]

[44] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Ms Ward could be a sufficiently harmonious and effective member of the school's staff if she were ultimately reinstated to her former position (or a similarly advantageous one) as a teacher and head of department.[11] The question of practicability has been described in the following way:[12]

> *[P]racticability is not the same as possibility. ... Whether the [employer] has established on the balance of probabilities that it would not be practicable to reinstate [the dismissed employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[45] The Board submitted permanent reinstatement of Ms Ward would be futile given its loss of trust and confidence in her as a result of her "*disparaging*" testimonial comments and her conduct through the disciplinary process. It was a proposition based on the very point in dispute – as to the motivation for her comments and whether her conduct in the disciplinary process was reasonably seen as

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[10] *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].
[11] *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).
[12] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 286 (confirmed by the Court of Appeal in [1994] 2 ERNZ 414 at 416).

deliberately obstructive as Mr Robb and Mr Douglas had concluded it was. More arguable was the difficulty her testimonial comments (about being used, abused and disrespected by many of the staff she had to work with) created for the prospects of restoring productive working relationships with the (unnamed) staff to whom she referred. Mr Robb also deposed that two other teachers of Chemistry (including Ms Hay) would resign if Ms Ward returned to work at the school – although that was, at best, second hand or hearsay evidence.

[46] Another factor in the practicability of reinstatement – and hence the arguability of its likelihood – was that the school had appointed a new head of Chemistry (from within its existing staff) on 7 November 2014. The position, as a full time role for 2015, was advertised in the *Education Gazette* on 24 October. However the school was aware from 9 October of Ms Ward's intention to seek interim reinstatement (and, impliedly, permanent reinstatement, although that was omitted from remedies she sought until her counsel lodged an amended statement of problem on 14 November).

[47] Ms Ward's evidence on the arguability of her permanent reinstatement as a likely practicable and reasonable outcome rested on her assertion that she was now "*medically cleared to return to work*" (although no supporting documentary evidence of that was included in her application or affidavits lodged in the Authority). She doubted the two teachers Mr Robb feared would resign would do so and, although Ms Ward described Ms Hay as "*an instigator of bullying*", she was "*100% sure*" issues between them could be resolved through mediation.

[48] On the available untested evidence I concluded the prospect of Ms Ward's reinstatement (if she were found to be unjustifiably dismissed) was arguable, but only weakly so. Real issues about the prospects for working productively with other staff would need to be explored thoroughly at the Authority's investigation meeting. However those issues are not likely to be resolved on the basis of speculation or subjective declarations about what Ms Ward and the other staff will or will not do if one or other outcome results.

Balance of convenience

[49] An assessment of the balance of convenience considers the respective injustices – or relative hardships – to the parties (and relevant third parties) for the period until the merits of the case can be fully investigated (with the evidence of witnesses properly tested through questioning) and determined by the Authority.[13]

[50] The Board submitted those potential injustices or hardships were relatively greater for it due to various factors that I have summarised as follows:

(i) Ms Ward had alleged bullying had occurred and she wanted processes put in place to ensure her safety if she were reinstated on an interim basis but the school did not have details of her concerns and did not know how it could make satisfactory arrangements in the interim period, so was put at risk of being further accused of acting unlawfully.

(ii) Three other teachers of chemistry – including Ms Hay – had told Mr Robb of difficulties working with or trusting Ms Ward and those teachers would have their own work and positions disrupted if she were reinstated on an interim basis.

(iii) Potential resignations and concerns among those staff could result in other disruption to students, other staff and the school's wider community.

(iv) It was not practical to constantly supervise Ms Ward to ensure she did not repeat "*damaging acts*" similar to her testimonial comments.

(v) Ms Ward's work, if reinstated on an interim basis, might be of little value to the school given limitations that either it or she would require and given her uncertain health status.

[51] Ms Ward submitted the balance of convenience favoured her for the following reasons (also summarised or paraphrased by me):

(i) She had provided an undertaking as to damages and could further undertake to confine her activities to usual teaching tasks and not to complete any further testimonials.

(ii) The school (and more particularly its students) would benefit from her continued teaching work (given that Mr Robb in his affidavit and one of the other teachers critical of her had both described her as "*an excellent teacher*").

[13] *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

(iii) She was prepared to be reinstated on a 'garden leave' basis if required by the school.

(iv) Any delays in appointing permanent teachers could be alleviated by the use of temporary staff (which was already done).

(v) The school had the funds to pay her during the interim period while she needed to be paid to meet mortgage commitments (with a long term risk that she might otherwise have to sell her house).

[52] Ms Ward submitted that any award of damages that she might eventually receive was not an adequate or effective alternative remedy to interim reinstatement. Her reputation was damaged by dismissal after a long period service (10 years) at what she described as one of New Zealand's best schools. She was unlikely to find another job in her specialised area before Christmas and may have to move away from Cambridge for work, which would have social and emotional as well as financial costs for her (as it would involve moving away from family support).

[53] Weighing those various factors I concluded the balance of convenience – or rather the burden of inconvenience or relative hardship – lay with Ms Ward. The decisive factors – in the particular circumstances and on the untested evidence – were the potential disruption to teaching (of greatest concern to the school) weighed against the financial hardship to Ms Ward of being without wages from 10 October 2014 until 18 March 2015 (and from then until the Authority determination was issued). It was a burden I concluded was more justly borne by the school as the disruptive effects it feared could be ameliorated by conditions of interim reinstatement providing the school with a discretion to either place Ms Ward on 'garden leave' or to arrange for her to do useful work away from the school campus.

Overall justice

[54] Standing back from the detail of the affidavits and the parties' submissions, I concluded the overall justice of the case, for the interim period, lay with Ms Ward.

[55] In reaching that conclusion I considered the respective strengths and weaknesses of the parties' cases on the substantive issues (as best as that can be done at this early stage).

[56] The strength of the Board's case is in the apparently undenied conduct of Ms Ward in writing comments in the three testimonials that were disparaging of some students and staff at the school – knowing that, on her evidence, those comments would be seen by some teachers – and then sending her draft testimonials to the three students (who could then do what they wanted with them, including showing parents, other students and people outside the school community). She was entitled to have her own thoughts and criticisms about colleagues and students if she felt, for instance, that there were ongoing issues about how she was treated at school. However expression of such matters should responsibly have been made to the appropriate managers and colleagues in the appropriate forums – both as a matter of professional conduct and her good faith obligations, under s4(1A) of the Act, to be constructive and communicative in maintaining productive employment relationships. Ms Ward had a union – the school's staff association – and knew how to get legal advice and representation if she felt she needed it (as she had in 2013 and, on getting the 19 August email in 2014, she had intended doing so again).

[57] The weakness in the Board's case lies with its apparent early conclusions that Ms Ward was declining to respond and that her information about health problems was – in my words, not the Board's or Ms Ward's – a 'go-sick-and-delay' tactic.

[58] If Mr Douglas and Mr Robb had a real concern or suspicion that the material provided by two doctors did not reflect any genuine illness or health problem affecting Ms Ward at the time, they should have made further inquiries about it to her lawyer. If they had done so and Ms Ward had refused, for example, to agree to provide further information (such as giving her doctor permission to provide more information about her diagnosis or prognosis), Mr Douglas and Mr Robb would have been on stronger ground to proceed as they did. While vaguely worded, the phrase in Dr Shaheed's note about a possible "*mental health problem*" was an alert that Ms Ward's conduct might be more appropriately dealt with as a health matter rather than a disciplinary one. It was a signal that a fair employer could reasonably be expected to follow up, whatever suspicions it might have about its probabilities as an explanation. Its relevance was that if there were substance to the suggestion that Ms Ward's conduct was based on a health problem, different conclusions might have been drawn about the deliberateness or intention of her actions than those reached by Mr Robb and Mr Douglas in making their decision to dismiss her.

[59] However the primary weakness in Ms Ward's case also lay in the same material. Dr Shaheed's note expressed a "*feeling*" rather than a medical diagnosis and was plainly based on Ms Ward's own subjective description of being "*inappropriately treated in her workplace*". There was also a question about the nature and source of the 'stress' Ms Ward reported given that she had been away from her workplace for most of the school term on her sabbatical leave. Dr Ryan's medical certificate was similarly deficient, but in a different way, because it gave no indication of the reason for her absence. It was not clear, for example, that he had seen Dr Shaheed's note and agreed with the 'feeling' expressed and the reasons for it, or had a different view.

[60] The strength of Ms Ward's case lies in the doubtful factual base for emphatic conclusions that Mr Robb and Mr Douglas drew about her non-participation in their process and her motivation for it. The doubt – in respect of the required justification for their actions – is whether a fair and reasonable employer could have gone so far, so fast once advised of her supposed situation by her representative in late September. The focus in the statutory test is on "*all the circumstances at the time the dismissal ... occurred*". In Ms Ward's case, those circumstances included having provided her employer with a medical certificate stating that she was not fit to attend work on dates that Mr Robb and Mr Douglas nevertheless then suggested she participate in disciplinary meetings (in one way or another) and dismissed her when she did not.

[61] A number of other factors still need to be thoroughly considered – through the fully examined evidence of an Authority investigation – that may affect conclusions about the justification for Mr Robb and Mr Douglas' actions and the extent to which, if remedies were awarded, those remedies might be reduced due to blameworthy conduct by Ms Ward contributing to the situation giving rise to her grievance.

Order for interim reinstatement (with conditions)

[62] Meanwhile, Ms Ward is to be reinstated to her position as a teacher at the school. As permitted by s127(5) of the Act the order is subject to a number of conditions that I thought fit to more closely match the merits of the situation between now and final determination. The conditions are:

(i) Ms Ward is to be restored to the Board's payroll as of 14 October 2014 (at her usual rate of pay) and, from the first day of the first term of 2015, to her position as a teacher (but not to her position as head of Chemistry).

(ii) Ms Ward must – by no later than Monday 12 January 2015 – provide to the Board's counsel (through her counsel) a medical certificate confirming that (if the Board requires her to do so) she is fit to return to work on school premises with school staff and students; with leave reserved to the Board to seek at short notice variation to the orders made if the certificate is not provided or does not meet the required scope of clearance; and

(iii) The Board, at its discretion, may opt to place Ms Ward on 'garden leave' or make arrangements with her to carry out some duties within the usual range (including research, resource preparation and marking) at home to assist her colleagues.

(iv) If the Board opts to have Ms Ward return to work on the school campus, it may, at its discretion and for the interim period only, vary her ordinary or previous duties as head of Chemistry and only require her to carry out teaching duties (not departmental administration and leadership duties).

(v) The parties must co-operate, on a good faith basis, in the operation of Ms Ward's interim reinstatement and its related conditions and must seek mediation assistance if they cannot (after making best endeavours) resolve necessary arrangements for Ms Ward's return to work and dealings with other staff and students.

(vi) Leave is reserved for the parties to seek any necessary variations to these conditions but they should not seek such leave (with the exception of the leave provided at (ii) above) without first seeking to resolve any problem with mediation assistance.

[63] The Board should note that exercise of its discretion (under these conditions) regarding garden leave or limited duties at home may also, should it later need to be determined, limit the extent (if any) of reimbursement of wages that it could seek under Ms Ward's undertaking as to damages.

Robin Arthur
Member of the Employment Relations Authority