

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 527
3066113

BETWEEN STEPHEN JACKSON
 First Applicant

 ALAN BAILEY
 Second Applicant

 LINDA DALZELL
 Third Applicant

A N D THE BOARD OF TRUSTEES OF
 SOUTHLAND BOYS HIGH SCHOOL
 Respondent

Member of Authority: Peter van Keulen

Representatives: Mary-Jane Thomas, counsel for the Applicants
 Richard Harrison, counsel for the Respondent

Investigation Meeting: 22 and 23 July 2020

Submissions Received: 23 July 2020 and 24 August 2020 from the Applicant
 23 July 2020 and 7 August from the Respondent

Date of Determination: 18 December 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The three applicants worked as teachers at Southland Boys High School (the School) and during the course of their teaching careers they were each promoted to Assistant Principals at the School. As Assistant Principals the applicants were part of the Senior Leadership Team for the School (SLT).



[2] In 2018 the Board of Trustees of Southland Boys High School (the Board) restructured the SLT; the Board disestablished the Assistant Principal positions and consequently the applicants all lost their employment at the School.

[3] The applicants say their dismissals were unjustified as the restructuring was a sham and a predetermined exercise designed to remove them from the School and they say the Board did not fully and fairly consult with them over the restructuring. The applicants also say they were entitled to receive supernumerary payments for February 2019. And Mr Jackson, the first applicant, complains about specific actions the School's Rector took in dealing with alleged comments made to pupils about the restructure.

[4] It is these various complaints that formed the claims I investigated. My investigation into the claims took place over two days and it covered a significant amount of written and oral evidence from witnesses and a large number of documents. As part of my investigation I also received comprehensive and helpful legal submissions from counsel. With the aid of those submissions and after analysing the evidence in detail I have been able to break down this complex and extensive matter into the key issues I needed to resolve, which I have addressed in this determination.

[5] So, it follows that in this determination I have not addressed in detail all of the evidence I received or heard in my investigation nor have I set out and addressed all of the legal submissions made. In accordance with s 174E of the Employment Relations Act 2000 (the Act) this written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly.

[6] I also record that this determination, reserved at the conclusion of my investigation, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. When I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s 174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174C(3)(b) of the Act.



Unjustified dismissal

[7] At its simplest the question to be answered for an unjustified dismissal personal grievance is, was the dismissal justified?

[8] Any analysis of justification starts with s 103A of the Act, which sets out the test for justification. In *Grace Team Accounting v Brake*,¹ the Court of Appeal considered s 103A in a redundancy situation and said at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[9] So, the question of whether a dismissal, in a redundancy situation, was justified in terms of s 103A of the Act turns on whether an employer can show that its decision to dismiss an employee for redundancy was genuine and in coming to that decision it met the notice and consultation requirements of the Act.

Was the restructure and decision to dismiss the applicants genuine?

[10] By 2015 each of the applicants had been appointed to, and held for differing periods of time, positions as Assistant Principals at the School. Prior to 2015 the School also had a Rector and a Deputy Principal. In 2015 the Deputy Principal resigned and the Board decided not to replace that position, rather it looked to use the Assistant Principals in an extended capacity, to fill the Deputy Principal function.

[11] At that time the Head of Junior School joined the three applicants in the extended Assistant Principal roles and the Rector to form the SLT. This was a change from the previous hierarchical structure of Rector down to Deputy Principal down to Associate Principals, to a structure that was flat consisting of four Assistant Principals (or equivalent) directly below, and reporting up to the Rector.

[12] In term one of 2017 the Rector retired and after a short period with an interim Acting Rector, Simon Coe was appointed as the new Rector of the School. Mr Coe commenced as Rector in term 3 of 2017.

¹ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541.



[13] The SLT operated with Mr Coe as Rector from term 3 of 2017.

[14] In May 2018 the Board put forward a proposal to restructure the SLT. That proposal involved the return to a hierarchical management structure with the creation of an Associate Rector position directly below the Rector and then three management positions below the Associate Rector. The three positions below the Associate Rector were the Head of Junior School, Senior Kai Arahi (Dean) and Senior Curriculum Leader; with all three Assistant Principal positions being disestablished.

[15] After a period of consultation and discussion this proposed structure was implemented by the Board and the applicants' positions were disestablished in November 2018. As a result in January 2019 the applicants' employment came to an end.

[16] During the period of consultation up to the termination of the applicants' employment, the applicants' employment with the School was governed by the Secondary Teachers Collective Agreement (STCA).

[17] Counsel for the applicants and for the Board acknowledge that:

- (a) The Board has discretion to perform its functions and exercise its powers as it sees fit but this is subject to any enactment and general rule of law of New Zealand² as well as the requirements of the STCA.
- (b) The School's Rector is the Board's Chief Executive in relation to the Schools' control and management and subject to complying with the Board's general policy directions, he has complete discretion to manage the School's day-to-day administration.³
- (c) The Rector and the Board are able to make decisions about the structure of the School's operations and how it delivers services.

[18] Counsel for the respondent says the Board could restructure as it did because it acted within the powers and discretion to act as outlined. Counsel also says the Board's restructure

² Section 13 of Schedule 6 of the Education Act 1989.

³ Section 67 of the Education Act 1989.



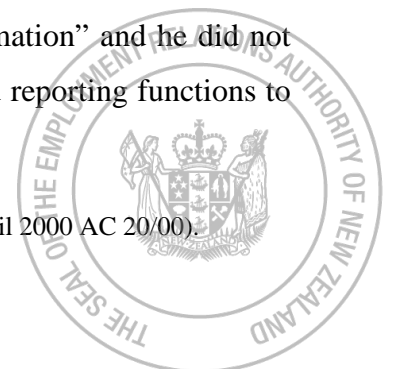
is similar to the restructuring undertaken in *van Etten v The Board of Trustees of John Paul College*,⁴ which the Court held was justified.

[19] I accept that the Board acting within its powers and restructuring in a way that is objectively acceptable informs the legitimacy of the restructure but it does not mean the restructure is genuine. As counsel for the applicants submits it is not the applicants' case that the Board could not restructure or that what was proposed may not have been a legitimate structure, rather counsel says the restructure was not genuine because it was a sham designed and carried out to remove the applicants from their roles in the School.

[20] In support of this submission counsel identified a number of complaints the applicants had about the way they say the Rector and the Board dealt with them in their day to day work and in the course of consultation for the restructure:

- (a) The School's accountant told Mrs Dalzell that the new Rector would clear all the deadwood out of senior management.
- (b) The Rector marginalised the applicants in 2017, particularly in their roles as Assistant Principals, by distancing himself from them, being reluctant to engage with them, reducing the number of SLT meetings, failing to give clear direction or goals for the School to the applicants, and not discussing the applicants' roles with them in terms of expectations and requirements for 2018.
- (c) This marginalisation is further evidenced by the Rector failing to involve the applicants in any of the major changes he implemented including a restructuring of the administration function, the School's financial situation and plans for addressing one of the key areas relating to the allocation of management units, the ERO review and the School's Strategic Plan.
- (d) The Rector unilaterally changed the applicants' roles including increasing their teaching hours for 2018 and removing work from them.
- (e) The Rector criticised the applicants for "leaking information" and he did not trust them; he changed aspects of the SLT meetings and reporting functions to address his concerns.

⁴ *van Etten v The Board of Trustees of John Paul College* (unreported, Travis J, 3 April 2000 AC 20/00).

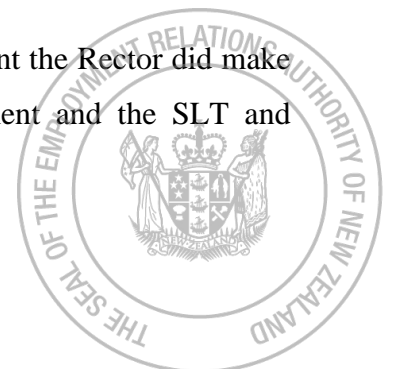


- (f) The basis for the proposed restructure changed in the course of consultation with the financial concerns, which appeared to be a significant concern at the outset, becoming a marginal factor by the end of the consultation period.
- (g) The proposed structure was designed so that applicants could not apply for the Senior Kai Arahi and Senior Curriculum Leader positions.
- (h) The numerous flaws in consultation evidenced predetermination and an ulterior motive to the restructuring proposal.

[21] I put little or no weight on the hearsay evidence about comments of the School's accountant; even if I accept the comment had been made, there is no evidence to show how the accountant came to form this view or why she expressed the view as she did. In short the statement made by the accountant to one of the applicants (if it was made) does not prove the Rector or the Board had a particular view on clearing out "deadwood".

[22] The submissions about the Rector's relationships with the applicants and his various interactions with them are more compelling and have required a close and detailed analysis. My conclusions on the evidence and the submissions are:

- (a) It is clear that the working relationship between the Rector and each of the applicants was fraught and not effective. I am satisfied that the Rector did not engage fully with the applicants over their roles and how he hoped the SLT would operate; the Rector did try to consult and discuss aspects of the applicants' roles and the operation of the SLT with the applicants, but in the end he withdrew from engaging as it was easier to make his own decisions on what needed to happen. Whilst the responsibility for this falls on both the Rector and each of the applicants, part of the problem was that the Rector also failed to express concerns he had about how the SLT operated effectively, so for example, he did raise concerns about confidentiality but did it in such a way that he left the applicants believing he did not trust them.
- (b) The failure to build effective working relationships meant the Rector did make unilateral decisions about the operations of management and the SLT and



about aspects of the applicants' roles. This left the applicants feeling marginalised.

- (c) So, from the applicants' perspective they did not have good working relationships with the Rector, the Rector did not engage with them as frequently or as appropriately as they expected, and the Rector did make unilateral changes to their roles and how management operated. They felt marginalised and believed the Rector did not trust them.
- (d) But, I am not prepared to infer from this that the Rector's proposal for restructuring, which was supported and signed off by the Board, was designed to remove the applicants from their roles. In his evidence the Rector was clear that it was not any relationship difficulties that informed his view of the need to restructure. Mr Coe accepts he was not happy with the way the SLT operated and how the School's management was carried out, but this was structural and about the responsibilities allocated to the roles – it was not about the people in the roles or their performance.
- (e) From his experience in his first few months working at the School Mr Coe believed that the roles distributed amongst the SLT in the flat structure did not work. And this view was not just one formed by Mr Coe and his experiences; he says the previous Rector and the Acting Rector had shared their concerns in this regard when he spoke to them.
- (f) Mr Coe wanted, and believed the School's management functions would benefit from, a hierarchical structure where the Rector's functions could be allocated down to an Associate Rector when needed, which was not available under the flat structure. The Rector also believed some of the current management functions of the Assistant Principals were better consolidated into the one Associate Rector function and other aspects of the Assistant Principal positions could be dealt with by a Head of Faculty and a Dean taking on more management, stepping up to the roles of Senior Curriculum Leader and Senior Kai Arahi.

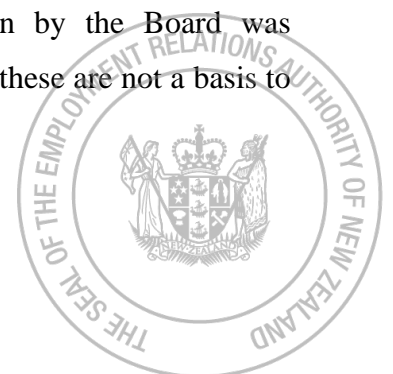


(g) I accept Mr Coe's evidence on this point and believe he was genuine in producing the proposed structure to address his perceived need in the School's management and he was not informed by a desire to remove the applicants from their roles at the School.

[23] The evidence shows the School had some financial concerns in 2017 when Mr Coe commenced as Rector. These concerns informed some of the changes Mr Coe implemented at the School. And, importantly the financial savings were an aspect of the restructuring he proposed and were identified in the proposal that was circulated for consultation purposes. However, in the end any financial outcomes from the proposed structure were not a primary driver for the proposal and the significance or importance of the financial savings diminished through the period of consultation. This was something that Mr Coe readily acknowledged and it does not undermine the legitimacy of his proposal nor does it lead me to conclude that the proposal to restructure was not genuine.

[24] As described the proposed structure disestablished the Assistant Principal positions and replaced them with an Assistant Rector, a Senior Curriculum Leader and a Senior Kai Arahi, in a hierarchical structure. In terms of the Senior Curriculum Leader and a Senior Kai Arahi, the Rector and the Board decided that these proposed roles were not new positions but teaching roles with additional management responsibility. This meant the roles were not standalone positions which needed to be advertised rather they were promotion opportunities for existing positions – opportunities which were offered to, and taken up by, existing staff of the School and not the applicants. I am not satisfied that this was the correct approach, but for the purposes of assessing if the restructure was genuine I accept that the Board believed this was correct and this is why it excluded the applicants from applying for the two roles. This is problematic for the Board's position on consultation and in particular whether the outcome of consultation was predetermined, but I do not think this means the reason for restructuring was not genuine.

[25] I will consider whether the process of consultation over the restructure was fair in detail below, but for now I note that the consultation undertaken by the Board was problematic but any failings in consultation were just that, failings and these are not a basis to conclude the proposed restructure was not genuine.



[26] In conclusion, having considered counsel for the applicants submissions and having assessed the evidence I am satisfied that the Board's restructure was genuine. That is, it was genuine from the perspective that there was a legitimate structural and operational basis for proposing the restructure and it was not a sham with the proposed restructure being designed and created simply to remove the applicants from their roles in the SLT and the School.

Was the process of consultation a fair one?

[27] Whilst the Board's restructure may have been genuine that is only half of the assessment I need to consider for whether the applicants' dismissals were justified. In *Grace Team Accounting*, the Court of Appeal confirmed that the other aspect of the justification of a dismissal in a redundancy situation is whether the process by which the consultation over the restructuring was a fair one. And, in this regard, the requirements of s 4 of the Act are relevant.

[28] In *Stormont v Peddle Thorp Aitken Limited*⁵ Judge Inglis summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[29] Based on s 4 and s 103A of the Act and the guidance in *Stormont* it is my view that I need to consider:

- (a) Did the Board set out its proposal with sufficiently precise information for the applicants to be able to respond to it; i.e. did the applicants properly know what was proposed before they gave their views on it?
- (b) Did the Board provide the necessary information in a timely manner?
- (c) Did the applicants have an appropriate opportunity to respond to the proposal before any decisions were made by the Board?

⁵ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.



(d) Did the Board consider the applicants' responses before making conclusions on the proposal?

(e) Overall, did the Board have an open mind such that consultation was not a charade?

[30] The Board's obligations in regard to consultation do not stop with consultation over the restructure. Once consultation on the restructure was completed and the Board decided to move forward and disestablish the Assistant Principal positions, it needed to consult with the applicants over alternatives to dismissal.⁶ I will therefore also consider if it met this obligation.

[31] The Board's consultation over the restructuring commenced on 24 May 2018, when each of the applicants received an email from Mr Coe with letters advising of a restructuring proposal and requesting their attendance at meeting the next day.

[32] On 25 May 2018, Mr Coe and John Rabbitt, the Board Chair, met the applicants and provided them with the Leadership Restructuring Proposal Consultation Document (the First Consultation Document), which set out the basis for the proposed restructuring outlined in paragraph [14] (the Proposed Restructure).

[33] On 28 May 2018, Mr Jackson sent an email to Mr Coe with the following three questions about the First Consultation Document and the Proposal:

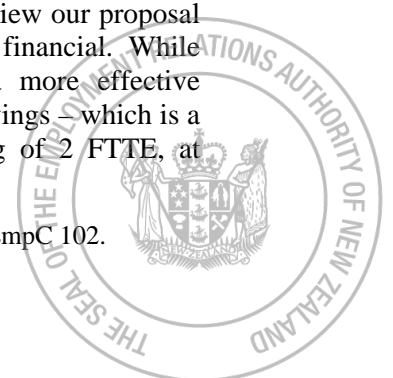
1. Can you explain the financial savings to the school under the proposed model.
2. Will the Associate Rector/Associate Principal position be externally advertise and if so why?
3. Can you explain the reason for not filling the Senior Curriculum Leader or Senior Kai Arahi positions from the current Assistant Principals.

[34] Mr Coe responded to these questions on 31 May 2018. He advised:

2. *Question 1 – financial savings*

You will appreciate from having had a chance to review our proposal that the reason for the changes is structural as well as financial. While the primary focus is intended to put in place a more effective leadership structure, there would also be financial savings – which is a factor. The current proposal would have a saving of 2 FTTE, at

⁶ Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102.



present we are 1.1 FTTE over our teaching allocation. The proposed change would in effect give the school another teaching resource and a saving of up to 6 management units.

...

4. *Question 2 – reasons for not filling the Senior Curriculum Leader or Senior Kai Arahi positions from Assistant Principals*

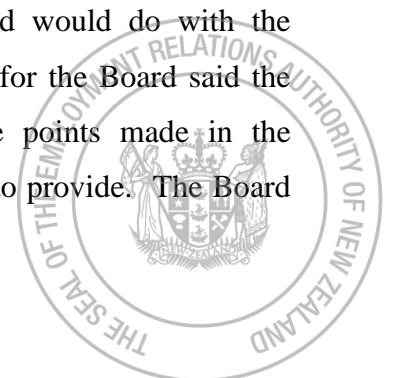
The proposal we have presented to you for consideration proposes that we create roles which are both Teachers with responsibility rather than new roles per say. For the appointees to these proposed roles this would mean an increase in teaching hours and a decrease in units. That is why we are not proposing that these roles would be filled with the Assistant Principals.

This is consistent with the advice that the Assistant Principals and the PPTA gave towards the end of 2017 year when we proposed an increase in teaching load for the Assistant Principals. Both the APs and the PPTA were very clear that an increase in teaching hours and a reduction in Units would be a substantial change and would thus trigger a redundancy.

[35] On 13 June 2018 the applicants provided their initial responses to the First Consultation Document and the Proposed Restructure. And the applicants met Mr Coe and Mr Rabbitt (with their respective legal advisers) to discuss the Proposed Restructure and the applicants' feedback.

[36] I have read the transcript of this meeting, considered the evidence from the applicants and Mr Coe and conclude:

- (a) Whilst it is clear there was a lot of miscommunication, various issues were raised by the applicants including whether the financial saving of the new structure exceeded the cost of restructuring, understanding what the Associate Rector role provided in terms of management, whether the Board understood its obligations under the applicable collective agreement, what the timing would be for the Proposed Restructure, and overall, the concern that the Board was just using restructure to get rid of the applicants.
- (b) There was also some confusion over what the Board would do with the applicants' responses but in the end the representative for the Board said the Board would consider the applicants' responses, the points made in the meeting and any other feedback the applicants wanted to provide. The Board



would then decide what the next steps would be, but there would be an opportunity for the applicants to comment on any recommendations arising out of the Board's consideration of the applicants' responses and feedback.

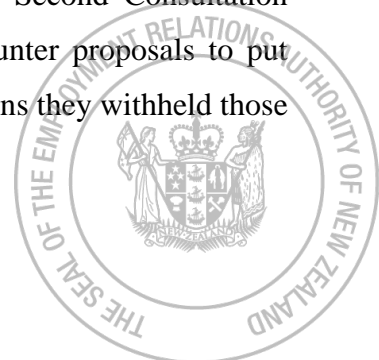
- (c) From the applicants' perspective their representative summarised one of their key concerns at the end of that meeting when she stated that it had been made very clear that the applicants did not have enough information about what was proposed and why.

[37] On 24 July 2018 the applicants completed their submissions on the Proposed Restructure, notwithstanding their view that they needed further information, including answers to questions they had posed in the meeting, and that they wanted to submit alternatives to the Proposed Restructure once they had the further information.

[38] On 7 August 2018, the Board issued its Leadership Restructuring Proposal Second Consultation Document (the Second Consultation Document). This document:

- (a) Contained additional information about the Proposed Restructure, but the Proposed Restructure remained unchanged.
- (b) Included a section which purported to answer the questions raised by the applicants by consolidating the questions into just 6 summary questions and providing an answer to each.
- (c) Confirmed that the roles of Senior Kai Arahi and Senior Curriculum Leader would be filled from existing Kai Arahi and Curriculum Area Leaders – with the last group being an incorrect reference to Heads of Faculty and Heads of Department.
- (d) Was provided to the SLT, Kai Arahi, and Curriculum Area Leaders – with this last group again being an incorrect reference to Heads of Faculty and Heads of Department.

[39] On 20 August 2018, various submissions in response to the Second Consultation Document were provided to the Board. The applicants also had counter proposals to put forward for consideration but as they still had some unanswered questions they withheld those proposals pending receipt of the additional information they sought.



[40] The applicants did not receive copies of the submissions made by other staff.

[41] Then on 30 August 2018, the Board held a meeting in which it considered the submissions and decided to proceed with the Proposed Restructure.

[42] The applicants were not aware the Board meeting on 30 August 2018 had been convened and that the Board had discussed the Proposed Restructure. On 1 September 2018, the applicants sent a letter to the Board requesting answers to the questions they had raised in the 13 June 2018 meeting.

[43] Then on the evening of 3 September 2018 the applicants were advised by email that the Board had decided to proceed with the Proposed Restructure and that their Associate Principal positions were being disestablished, effective 28 January 2019.

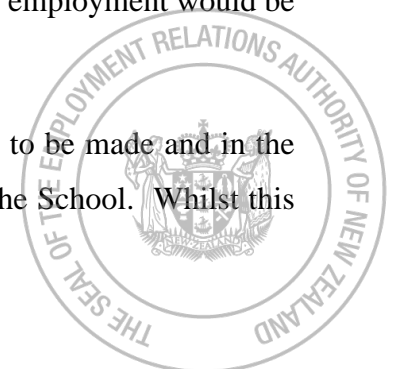
[44] Notwithstanding that the Board had decided to proceed with the Proposed Restructure and had advised the applicants that their positions would be disestablished, the Board responded to the applicants questions of 1 September 2018 on 11 September 2018. This response included the following:

It is clear there are structural weaknesses in our current Senior Leadership Model, which unfortunately results in overlapping responsibilities or gaps in delivery. That's not fair on our boys, their parents or staff. These weaknesses are what we are seeking to fix with the changes we have made.

It's important to understand these changes are not driven by financial savings or savings in unit allocations.

[45] What followed from that point was a difficult period for the applicants who felt let down by the Board and had no trust in the Rector. As a result all of the parties appeared reluctant to engage in any further consultation. That said there was some consultation but the options appeared limited and, in my view were not fully explored, including whether any of the applicants should apply for the new Associate Rector position. On reflection it seems to me this consultation was just an exercise in completing formalities and all the parties appeared to simply let the school year end with no meaningful discussion about alternative roles for the applicants. In the end the Board confirmed the applicants' employment would be terminated and applicants took their long service leave payments.

[46] And there was also confusion over appropriate announcements to be made and in the end the applicants left with little or no recognition of their service to the School. Whilst this



adds little to the analysis of unjustified dismissal it was disappointing and very difficult for the applicants to end their careers with the School in this way.

[47] I have set out the key events comprising consultation, some of the detail or my summary of the detail because these are my findings that have informed my conclusions on the consultation process.

[48] My first conclusion is, it is clear to me from the evidence on consultation including the applicants evidence and the documentary evidence, that the applicants had two areas of concern about the Proposed Restructure pertaining to the overall benefit to the School:

- (a) The financial savings - whilst the Board had set out short term savings in management units and allocation of teaching hours, which the applicants disputed, there did not appear to be any assessment of the overall cost by the Board. So the applicants had been asking for financial information including the cost to the School of the Proposed Restructure as well as any projected savings, budgets and forecast in terms of roles and staffing to support any savings or financial gains.
- (b) The rationale for the Proposed Restructure - in the applicants' view the outdated hierarchical model did not respond to the School's needs. The applicants wanted to understand what the Associate Rector would add to management that that was different from their roles and what it might add to the SLT and the overall management of school. Likewise the applicants also wanted to understand what the proposed Senior Kai Arahi and Senior Curriculum Leader would add to management, not just to the SLT but to the management of Kai Arahi and Heads of Faculty and Heads of Department and how this differed and improved what they already did as Assistant Principals.

[49] Second, it is clear from the evidence that the applicants also had concerns about how the Proposed Restructure was to be implemented if the Board decided to proceed, including compliance with the applicable collective agreement, the time frames for implementation and that they were excluded from applying for the Senior Kai Arahi and Senior Curriculum Leader positions.



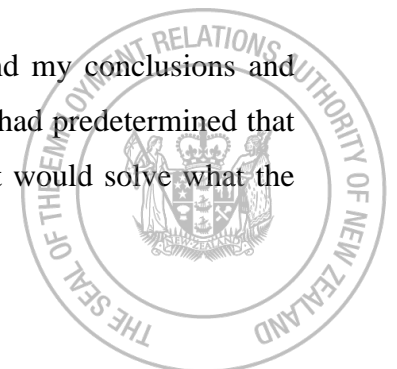
[50] Third, the Board failed to provide the necessary information on the Proposed Restructuring so that the applicants could understand these issues and respond to them. This included failing to answer the questions raised by the applicants. An example of this is the 11 September 2018 response to the applicants in which the Board stated, *it is clear there are structural weaknesses in our current Senior Leadership Model, which unfortunately results in overlapping responsibilities or gaps in delivery* but the Board failed to provide any detail. How could the applicants respond to the suggestion there were structural weaknesses in the SLT without further information identifying what the structural weaknesses were? Or how could the applicants respond to the statement that there were overlapping responsibilities when the overlapping responsibilities were not identified.

[51] This is the key failing by the Board. It meant the applicants could not properly engage in consultation and rendered what efforts they did make almost pointless. A good example is in a meeting after the decision to restructure had been made and announced, the Rector said that essentially the applicants had failed to come up with an alternative structure. Again, this begs the question how could they provide a structure to solve a problem when the Board had not properly articulated what the problem was and when the Board did not explain how the solution, in the form of the Proposed Restructure, resolved the problem.

[52] Fourth, there were also other failings by the Board in its consultation:

- (a) It failed to give the applicants time to respond to the Second Consultation Document including the giving them the opportunity to put forward counter proposals, although as I have already discussed the limited information meant that any response they did provide was potentially not going to be productive or useful.
- (b) It failed to provide the applicants with submissions and feedback from other staff on the Second Consultation Document.
- (c) It decided the applicants could not apply for the Senior Kai Arahi and Senior Curriculum Leader positions.

[53] I have reflected on the evidence pertaining to consultation and my conclusions and have drawn a further conclusion; the Rector, and therefore the Board, had predetermined that the Proposed Restructure was the right structure for the School and it would solve what the



Rector perceived to be problematic with the School's management. So whilst the restructure was genuine in that it was motivated by, and responded to, a perceived need and problem in the School, once the Rector had settled on a solution, in the form of the Proposed Restructure, that was going to be the outcome. In short, the Board did not have an open mind and consultation was a charade.

[54] In my view, a fair consultation process would have enabled the applicants to engage properly and provide full feedback, which would have likely been beneficial to the School as they had 80 years of teaching experience between them and 31 years of management experience. And, from my perspective given their enormous commitment to the School, a fair consultation process was the least the applicants should have been afforded – they deserved to be treated fairly and with more respect.

[55] Because of these various failures, the consultation process was not fair and therefore not justified. And it follows that all three dismissals were unjustified both procedurally and substantively.

Supernumerary payment

[56] The applicants' claim to be paid a supernumerary payment relates to the payment of their long service payments under the STCA. So this claim turns on the interpretation of the relevant provisions of the STCA.

[57] Clause 3.9.4(4)(a) of STCA states:

- (a) Where a teacher's position is disestablished either as a result of voluntary election or otherwise the teacher may elect to receive a long service payment. The intention of this payment is to assist the teacher to withdraw from the teaching service. The option will be available on the following basis:
 - (i) The teacher will be deemed to have supernumerary status for the period from the effective date of disestablishment until long service payment is made. This period will usually be that between the beginning of the next school year and the first (1st) of March census of the school roll. During this period, the rights and obligations of a supernumerary teacher will apply;
 - (ii)

[58] In this case, the applicants were paid their long service payments by the Board on 29 January 2019. The applicants say the long service payments should have been made on 1



March 2019 applying clause 3.9.4(4)(a)(i), as 1 March 2019 is the normal date on which long service payments are made. And therefore they should have been on supernumerary status until 1 March 2019. They are essentially saying this is the normal process as provided in the STCA and the Board could not circumvent that by unilaterally deciding to pay the long service payment before 1 March 2019.

[59] I do not accept the applicants' argument. I have applied the principles of contractual interpretation⁷ and conclude that clause 3.9.4(4)(a)(i) of the STCA does not provide that long service payments must be made on 1 March of any year unless there is some mutual agreement otherwise. I conclude that it was open to the Board to make the long service payments on 29 January 2019 as it did and the effect is the applicants are not entitled to supernumerary status and the additional payment for the period 29 January 2019 until 1 March 2019.

Mr Jackson's personal grievance

[60] Mr Jackson's unjustified disadvantage personal grievance relates to an enquiry made by the Board into concerns expressed by a teacher about what Mr Jackson may have told students about the restructuring. The Board responded to the concern raised by the teacher by appointing Kevin O'Sullivan⁸ to investigate. Mr O'Sullivan did this by interviewing some of the pupils. The Board reviewed the information provided and decided not to take the concern expressed by the teacher any further.

[61] My analysis of this grievance is that there was an action by the Board in relation to Mr Jackson; investigating a complaint or concern raised about his conduct. However, this action by the Board did not cause a disadvantage to Mr Jackson's employment or a condition of his employment. Nor was the action unjustified.

[62] Therefore, I conclude that Mr Jackson does not have a personal grievance for unjustified action causing disadvantage.

⁷ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5.

⁸ It is not entirely clear what Mr O'Sullivan's status was at the time. He appeared to be a Ministry of Education appointment to assist or observe the Board during the latter stages of the restructuring process.



Remedies

[63] Having determined that applicants were unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act; each applicant seeks compensation and reimbursement.

Compensation

[64] Pursuant to s 123(1)(c) of the Act I can award compensation for humiliation, loss of dignity and injury to feelings suffered by the applicants because of the actions giving rise to their grievance.

[65] In order to assess the level of compensation for each applicant I must first identify what harm – that is the humiliation, loss of dignity and injury to feelings - each has suffered.⁹ In this regard I have reviewed the evidence from each applicant and each of their partners.

[66] The evidence shows that as a result of the way he was treated Mr Jackson:

- (a) Suffered a loss of self-esteem and lack of confidence. He became withdrawn and lacked motivation to do anything including normal social, family and personal activities.
- (b) Was hurt and broken by the process and outcome, being drained and exhausted by it. He was traumatised by the events and undertook counselling to deal with the impact on him.
- (c) Suffered from considerable stress, became depressed, was unable to sleep normally and had high blood pressure.
- (d) Incurred significant financial pressures and suffered anxiety and stress about this.

[67] The evidence shows that as a result of the way he was treated Mr Bailey:

- (a) Described the events as being the most dramatic period in his life; he was emotionally drained, had ongoing stress and hurt, suffered from sleeplessness and had elevated blood pressure.

⁹ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.



- (b) Developed a negative outlook on life, isolating himself from others and avoiding social situations as he felt humiliated, embarrassed and guilty; he lost confidence.
- (c) Suffered a financial impact, disrupting his retirement and long term plans.

[68] The evidence shows that as a result of the way she was treated Ms Dalzell:

- (a) Was devastated by the loss of her career and she lost her self-confidence.
- (b) Felt humiliated, bewildered, exhausted and defeated by the process and the outcome. She suffered from grief, felt rejected and angered by what occurred.
- (c) Described herself as feeling ashamed and shamed by what happened, and she became socially isolated feeling that she no longer had a place in the community.
- (d) Suffered with stress and anxiety manifesting in lack of sleep.

[69] Having identified the harm or loss suffered by each applicant I must now quantify that harm and loss, having regard to where the loss sits on the spectrum of loss and quantum of compensation, particularly with regard other awards of compensation.¹⁰

[70] Reviewing my analysis and reflecting on the evidence it is clear to me that all three applicants suffered equally in terms of the overall harm notwithstanding the differing descriptions of how that harm manifested in terms of humiliation, loss of dignity and injury to feelings. They all suffered with the loss of their careers bringing on loss in self-confidence and self-worth. They all felt levels of embarrassment and shame at what occurred and they all became isolated avoiding social interactions and activities. They were all emotionally drained and suffered from stress and anxiety, which manifested in sleeplessness for all and high blood pressure for two. And they each had financial pressure which disrupted their long term plans and their day to day life, again creating stress and anxiety.

[71] I am satisfied that for each of the applicants the quantum for the similar loss suffered should be \$28,000.00.

¹⁰ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.



Reimbursement

[72] The applicants seek reimbursement for the earnings they have lost as a result of their unjustified dismissals pursuant to sections 123(1)(b) and 128 of the Act.

[73] Pursuant to s 128 of the Act, my starting point for assessing lost remuneration is to calculate, for each applicant, 3 months' ordinary time remuneration and their actual loss; I then award the lesser amount unless in the exercise of my discretion I consider it appropriate to award more.

[74] Three months' ordinary time remuneration is relatively straight forward to calculate. I have used the ordinary time figure used for calculating the long service payment for each applicant. This figure is the same for each applicant and is \$1,975.34 per week and for three months the total sum is \$25,679.42.

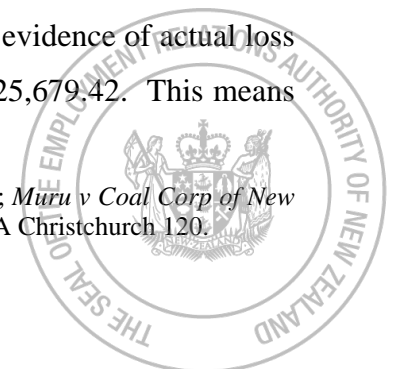
[75] Actual loss is calculated by assessing the amount of remuneration each applicant would have received had they remained employed with the School up until my determination less any remuneration they have received in this time.

[76] The calculation of actual loss for each applicant is complicated by the long service payments they received and the impact on loss and whether it should be considered in that calculation, i.e. should I effectively give credit to each applicant for the long service payment as remuneration received in the period between dismissal and my determination. In my view the answer to this question turns on what the long service payment is for – is it to compensate the employee for lost wages or is it compensation for loss of the job?¹¹

[77] The STCA identifies the intention of the long service payments as being to assist the teacher to withdraw from teaching service. This suggests it is compensation for loss of the job. In addition, the amount paid is linked to years of service and this also suggests compensation is for the loss of the job rather than compensation for lost remuneration.

[78] So, my view is the long service payments should not factor into the calculation of actual lost remuneration for each applicant. On this basis after reviewing the evidence of actual loss I am satisfied that each applicant's actual lost remuneration exceeds \$25,679.42. This means

¹¹ *Queenstown Lakes District Council v Edmonson* (1995) 4 NZELC 98,324 (EmpC); *Muru v Coal Corp of New Zealand Ltd* (1997) 5 NZELC 98,452 (EmpC); *Glozier v AlSCO NZ Ltd* [2015] NZERA Christchurch 120.



I must award \$25,679.42 unless I think, in the exercise of my discretion, each applicant should be awarded more.¹²

[79] I am not satisfied that it is appropriate to award more for lost remuneration to each applicant. There are a number of factors that influence this conclusion including:

- (a) The long service payments – despite the payments not being remuneration for calculation of lost remuneration I accept counsel for the Board’s submission that the applicants electing to take the payment is incompatible with them then claiming lost remuneration. However, I believe the Act requires me to award as a minimum 3 months ordinary time remuneration, notwithstanding this.
- (b) It is arguable that the applicants may have been able to mitigate their loss by applying for the Associate Rector position or looking for other roles in the School, including some supernumerary or retraining scenario.
- (c) Given the Rector’s view on the SLT and the need for change, which I have determined was genuine, there was every possibility that the applicants would not have remained employed at the School for a long period of time even if this flawed restructure had not occurred.

[80] So, I award each applicant 3 months’ ordinary time remuneration, which I calculate to be \$25,679.42.

[81] Each applicant is also entitled to holiday pay for the three month period of lost remuneration, which I leave to the Board to calculate.

[82] And each applicant is entitled to interest on the lost remuneration amount from 1 May 2019, which I calculate pursuant to the Interest on Money Claims Act 2016 to be \$1,165.76.

[83] Finally Mr Jackson is also entitled to be paid the employer KiwiSaver contribution on \$25,679.42 pursuant to s 123(1)(b) of the Act. This is to be calculated by the Board.

Contribution

¹² Section 128(3) of the Employment Relations Act 2000.



[84] As I have awarded compensation to the applicants, I must now consider whether each of them contributed to the situation that gave rise to their grievances.¹³ When assessing if their actions contributed to the situation that gave rise to their grievances I am looking for a causal link between their actions and the situation that gave rise to the unfair consultation, being their grievances. If I am satisfied that there is a link, then I must consider whether their behaviour was culpable or blameworthy, which would require a reduction in remedies.¹⁴

[85] Given the circumstances of the consultation I am not satisfied that there is any behaviour by the applicants that amounts to contribution and warrants a reduction in remedies.

Orders

[86] The Board unjustifiably dismissed the applicants. In settlement of these grievances the Board must pay each applicant:

- (a) \$28,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- (b) \$25,679.42 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000;
- (c) \$1,165.76 for interest on the lost remuneration amount pursuant to the Interest on Money Claims Act 2016; and
- (d) Holiday pay for the period of the three months lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[87] The Board must also pay the first applicant the employer KiwiSaver contribution on \$25,679.42 pursuant to s 123(1)(b) of the Act.

Costs

[88] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

¹³ Section 124 of the Employment Relations Act 2000.

¹⁴ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136



[89] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.



Peter van Keulen
Member of the Employment Relations Authority

