

## MANAGING EMPLOYMENT LAW ISSUES IN SCHOOLS

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### Introduction

Managing employment law issues in schools is becoming an increasingly demanding responsibility in an era of high expectations of accountability placed on boards of trustees and teachers by successive governments and the public. Since the advent of "Tomorrow's Schools" in 1989, school boards have been "self managing independent Crown entities" with varying levels of knowledge, experience and training, operating within a decentralised education system. External bodies, such as the Ministry of Education (MoE), the Education Review Office (ERO) and the New Zealand Teachers Council (the Council), to varying degrees, place requirements on employers and/or employees, provide advice and assess/audit their performance. They are not, however, accountable for what happens in schools.

In the past 20 years, there have been societal changes leading to a greater focus on individual rights, with an increased willingness on the part of individuals to pursue breaches of those rights through the Courts. There is a greater ethnic and cultural diversity in the population, which requires new levels of understanding on the part of boards, teachers and students. There is also an increase in challenging and violent student behaviour, requiring effective management by teachers and boards. This could well be exacerbated by the current economic situation.

It is not surprising, given the above, that there can be risks for both employers and employees in the way employment relationships are managed in schools. It is incumbent on the parties to be cognisant of and to comply with the relevant obligations contained in applicable legislation and employment agreements to minimise those risks.

### 1. Relevant legislative and other obligations

#### The Education Act 1989 ("Ed Act")

Key provisions of the Education Act 1989 in terms of managing employment issues are contained in Part 7 (Control and management of state schools). Section 75 sets out the role of the board of trustees, which "has complete discretion to control the management of the school as it thinks fit," subject to the law. Section 76 states that the principal is "the board's chief executive in relation to the school's control and management". The principal must "comply with the board's general policy directions", and within this constraint, "has complete discretion to manage as the principal thinks fit the school's day to day administration". The role of the principal, who is both chief executive of the board and its employee, is particularly challenging. While a clear understanding of the differences between the roles is needed to manage employment processes, the boundaries between governance and management are not defined in the Education Act.<sup>1</sup>

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<sup>1</sup> Some guidance is provided about the roles in relation to disciplinary procedures in *Healey v the Mercury Bay Area School Board of Trustees*, unreported, 11 May 2005, AC 21/05, in which Shaw J stated that disciplinary action is not a day-to-day administration matter, but is a serious employment relationship matter which is for the board as a whole; that invoking the procedures should be handled by the board; and that the principal acts at the board's direction, not unilaterally (para 153).

In carrying out their role, boards should “exercise governance in a way that fulfils the intent of the Treaty of Waitangi by valuing and reflecting New Zealand’s dual cultural heritage”.<sup>2</sup>

#### *Other important provisions*

- Section 66, allowing boards to delegate any of its functions or powers other than the power of delegation itself and the power to borrow money (s 66A);
- Section 72, enabling boards to make bylaws consistent with legislation/the law;
- Section 65 (Staff), giving boards the power to appoint, suspend, or dismiss staff, in accordance with the [State Sector Act 1988](#); and
- Parts 10 (Teacher registration) and 10A (New Zealand Teachers Council), significant, as the Council exercises a quality control on entry into teaching and whether a teacher can remain in the profession.

### **The State Sector Act 1988 (SSA)**

Important provisions of the SSA are contained in Part 7A (Personnel provisions in relation to the Education service).

- Section 77A defines a “**good employer**” as one who operates a personnel policy providing for the “fair and proper treatment of employees in all aspects of their employment ...”, including “good and safe working conditions” and maintaining and complying with an equal employment opportunities (EEO) programme.<sup>3</sup>
- Employers have “all the rights, duties and powers of an ordinary employer”, including the power to appoint staff and terminate appointments (s 77E).
- Employers must make appointments on merit, appointing the person “best suited to the position” (s 77G).<sup>4</sup> *This is the starting point for managing employment issues. If suitable appointments are made and good faith relationships are established from the outset of the appointments process, there is a lesser likelihood of problems arising subsequently.*<sup>5</sup>
- The Chief Executive of the MoE may issue codes of conduct setting “minimum standards of integrity and conduct” for the education service (s 77B) and may prescribe matters to be taken into account in assessing teacher performance (s 77C), but has not done so. Standards for teachers for purposes of registration have been developed by the Council, however.

As state sector Crown entities, boards must comply with their “legislative mandate and obligations, including those arising from the Crown’s obligations under the Treaty of Waitangi ...”<sup>6</sup> *This includes finding ways to give effect to the principles of Te Tiriti, in dealing with employment issues.*

### **The Employment Relations Act 2000 (ERA)**

The ERA sets out the industrial relations framework for negotiating employment agreements (with collective bargaining being promoted), implementing and enforcing employment agreements in the

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<sup>2</sup> “What is Governance”, NZSTA website, accessed on 27 May 2009 at <http://www.nzsta.org.nzrexdefault.aspx?PageID=48d43baf-6d77-40ee-8b68-45be543c823a>

<sup>3</sup> It also includes “the impartial selection of suitably qualified” staff, recognition of the aims and aspirations, employment requirements and need for greater involvement of Maori in the education service, opportunities to enhance individuals’ abilities, recognition of the aims, aspirations, employment requirements and cultural differences of ethnic or minority groups, recognition of the employment requirements of women and persons with disabilities. SSA, s. 77A(2)(c) – (h).

<sup>4</sup> Sections 77A, 77D (EEO) and 77G of the SSA have been incorporated by the New Zealand Educational Institute Te Riu Roa Inc (NZEI) into the Primary Teachers’ Collective Agreement (PTCA), by the New Zealand Post Primary Teachers’ Association Te Wehengarua (PPTA) into the Secondary Teachers’ Collective Agreement (STCA) and by both unions into the Area School Teachers’ Collective Agreement (ASTCA). E.g. cl 3.1, STCA.

<sup>5</sup> For clarity, italics are used in this paper to indicate my comments, e.g. when following on from legislative or collective agreement provisions.

<sup>6</sup> Glossary, “Ownership”, - re: the Crown’s core interests, accessed on 1 June 2009 at <http://www.learningstate.govt.nz/display/glossaryitem.asp?id=128>

workplace and resolving employment relationship problems, with mediation being the primary problem solving mechanism.<sup>7</sup> Key provisions relate to the duty of good faith.

- The object of the ERA is “to build productive employment relationships through the promotion of good faith in all aspects of the employment environment” (s 3(a)). The duty of good faith is “wider in scope than the implied mutual obligations of trust and confidence”, which continue to apply (s 4(1A)(a)).
- Communication and consultation are key components of good faith relationships. Parties to an employment relationship must be “active and constructive in establishing and maintaining a productive employment relationship” in which they are “responsive and communicative” (s 4(1A)(b)).
- Parties to the employment relationship include “an employer and an employee employed by the employer” (s 4(2)(a)) and “a union and an employer” (s 4(2)(b)). *In the workplace, the “union”, in the case of PPTA, includes the school’s PPTA branch and authorised union officials.*
- Among other things, the duty of good faith applies to “any matter arising under or in relation to a collective agreement while the agreement is in force” (s. 4(4)(b)), and to consultation between an employer and its employees “about the employees’ collective employment interests ... ” (s 4(4)(c)).

The good faith obligations have implications for employers and employees in dealing with matters such as employee performance and conduct.

Failure to comply with the duty of good faith, other provisions of the ERA or collective agreement provisions can result in a penalty, as can inciting, instigating, aiding or abetting any breach of the employment agreement (s 134). The penalty is up to \$5,000 for an individual and \$10,000 for a corporation/board (s 135(2)).

### *Employment agreements*

Under the ERA, employees must have a written agreement, which can be a collective or individual agreement. There are certain terms which must be included in a collective agreement<sup>8</sup> and some minimum conditions for workers which apply whether or not specified in an agreement.

### *Collective Agreements (CAs)*

There are 23 current CAs and 1 expired CA covering workers such as teachers, principals, support staff, caretakers and cleaners in the kindergarten and schools sector. The MoE has promulgated 20 individual employment agreements.<sup>9</sup> Principals and boards need to know which agreement each employee is covered by and its contents in order to manage the employment situation appropriately. Similarly, workers need to be aware of their obligations under their employment agreements. This is more easily done with CAs than with individual employment agreements (IEAs), as the MoE has never identified which clauses of the CA do not apply in the IEAs.

Workplace problems can arise when principals/boards do not understand or accept that a CA which is current

- is enforceable by the parties to it (the Secretary for Education and the relevant union(s));
- is binding both on employees who are or who become members of the relevant union and on principals/boards; and
- if breached, can be costly in relationship and financial terms.

## **2. Standards**

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<sup>7</sup> The focus in this paper is workplace employment relationship issues, rather than on collective bargaining.

<sup>8</sup> See ERA, ss 55 – 56.

<sup>9</sup> The data is based on the information provided on the Ministry of Education website, accessed on 2/5/09 at <http://www.minedu.govt.nz/educationSectors/Schools/SchoolOperations/EmploymentConditionsAndEvaluation/CollectiveAgreements.aspx>

It is accepted in the education service that fair and reasonable standards of performance and conduct must be met by teachers (including principals) to maintain a quality education system which provides the opportunity for students to reach their potential in a safe environment.

There are what seem to be a myriad of standards expected of teachers, which may be expectations, guidelines or legal obligations. Some are requirements, such as

- the professional standards for teachers contained in the CAs (e.g. Supplement 1, STCA);
- the general categories of conduct to be avoided contained in the CAs (as in cl 3.4.5, STCA);
- the criteria for registration set by the Teachers Council;<sup>10</sup> and
- local requirements set by boards which are consistent with legislative and collective agreement requirements.

While the requirements described above apply in all state schools, there are additional standards placed on teachers in particular types of schools. In integrated schools, for example, there are obligations for teachers related to the special character of the school. Kura kaupapa Maori and wharekura will operate according to tikanga Maori, with particular expectations of teachers.

Other expectations/standards are aspirational, such as those as expressed in the Teachers Council Code of Ethics.<sup>11</sup>

There are codes of ethics developed by the PPTA and NZEI which apply to their members and are administered by the relevant union.

In addition, there are expectations placed on boards and teachers by local communities. This is particularly important in Maori and Pacific Island communities, where consultation processes need to be carried out appropriately.

### **3. Dealing with concerns/complaints**

Boards at times have difficulty deciding which process to use in dealing with complaints. They may have developed a school complaints policy which they expect to be followed either prior to or instead of following the required processes set out in the relevant CA. Such policies may be applied with respect to low level complaints best dealt with at an informal level, however the collective agreement procedures must be invoked at the appropriate time. There must be a clear, written indication to employees as to the type of process being used and where they are in the procedures so that they are able to understand what is happening and can respond appropriately. Where school policies are not consistent with the provisions of the relevant collective agreements, significant problems can arise.

It has been said by some boards and legal advisers that the procedures contained in the CAs in the education sector are too prescriptive, particularly when compared with agreements in other sectors, and that this presents too many difficulties for boards. A comparison would show that current procedures are less prescriptive and involve shorter time frames than those in place prior to 1989. It can be argued that more detailed procedures are an advantage and provide protection both for employers by giving guidance as to how to proceed, thereby making compliance easier, and for employees, who are more likely to experience a fair process and outcome.

#### **Selecting the correct procedures<sup>12</sup>**

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<sup>10</sup> The Council sets the standards/criteria to be met for the different types of registration and LATs (Limited Authority to Teach). To be registered, the Council must be satisfied that the teacher is of good character, fit to be a teacher, is satisfactorily trained to teach and has satisfactory recent teaching experience (Ed Act, s 122). Consultation has been undertaken about a new set of standards (the *Registered Teachers Criteria* (RTC)). The draft standards are being trialled and should be implemented in 2010. Teachers Council website, accessed on 24 May 2009 at <http://www.teacherscouncil.govt.nz/policy/projects.stm>

<sup>11</sup> The principles contained in the Code “... are intended to educate, motivate and inspire members of the profession”. The Code is “a statement to learners, parents, whanau and the wider public about what may be expected of all registered teachers in their professional roles”. Ibid. *How the Code will be used remains to be seen, particularly if a teacher's practice falls well below the expectations.*

It can be difficult for principals/boards to decide whether a matter is one of performance and should be dealt with under cl 3.3 (Teacher Competence) or one of conduct to be dealt with under cl 3.4 (Teacher Conduct and Discipline). There may be elements of both performance and conduct in the matter causing concern. In general, when it is a question of not having the knowledge/skills to able to do something, it is a matter of competence. However, if a teacher knows what is expected and has the knowledge/skill to comply but will not do so, it is a matter of behaviour/conduct.

#### **4. Teacher Performance/Competence**

It is important for all employees to have a written letter of appointment which includes the title of their position and specific responsibilities attached to it. In addition, there needs to be a clear, agreed job description which is kept up-to-date. Without this, employers and employees cannot be certain about the nature of a job, which leads to problems in evaluating performance.<sup>13</sup>

#### **Collective agreements provisions relating to performance**

There are a number of CA provisions relating to teacher performance.

##### **a. Professional development.**

- Boards must provide professional development opportunities for teachers (cl 3.3.1).
- Teachers are required to continue to participate in professional development under the professional standards.

##### **b. Appraisal**

Boards have had to ensure that performance management systems are in place since 1997 and are required to see that principals and teachers are appraised annually. A common model used in appraising teachers has been for the appraiser and appraisee to identify agreed goals, for professional development to be provided as appropriate and for there to self-evaluation and an evaluation by the appraiser in relation to achieving the goals. Schools generally include assessment against the professional standards as part of this process. Principals must also be appraised against their performance standards. It is critical for educational professionals to conduct such appraisals. As boards do not usually have expertise in this area, they may engage agreed independent appraisers to carry out a performance review.

Teachers are professionals and expect to be appraised as such. A number of schools have moved to a 'tick-the-box' performance assessment system with a long list of criteria, designed to measure accountability. This may constrain reflection in the appraisal process and creative teaching, while increasing workload and stress for principals and teachers. Whether or not this type of assessment assists in improving teacher performance and student learning is debatable.

##### **c. Attestation**

In order to progress to the next salary step, teachers are attested annually against the professional standards (cl 4.2.3(a)). If there are issues to work on, a programme of support and development may be put in place (cl 4.2.4). The salary increment may be withheld while the issues are being addressed for a designated period of time. If at the end of that time, standards are met, the

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<sup>12</sup> While the provisions relating to performance and conduct of the Primary and Secondary Teachers' Collective Agreements are not identical, they are similar. The Secondary and Area School Teachers' Collective Agreements are nearly identical. The comments in this part of the paper are based on the STCA provisions.

<sup>13</sup> In *Healey v the Mercury Bay Area School Board of Trustees*, unreported, Shaw J, May 2005, AC21/05, the lack of a clear job description was a source of friction between Ms Healey and the Principal. Judge Shaw, in determining remedies in a successful constructive dismissal claim, considered that although the principal had justifiable areas of concern about Ms Healey's performance, "there is a very strong possibility that these would not have arisen had the issue of the job description been sorted out early ...." (para 174).

increment is paid. If they are not met, the programme may be extended, or if concerns are significant, competence procedures may be considered.

#### **d. Teacher Competence [clause 3.3, STCA]**

The aim of the procedures is to assist the teacher concerned to gain/regain a satisfactory level of competence rather than to dismiss the teacher.<sup>14</sup> While the process increases the workloads of those assisting and the teacher concerned and causes stress additional to the usual stresses of teaching, the process does not take as long as it did prior to or in the earlier stages of “Tomorrow’s Schools”.<sup>15</sup>

It is too often the case that issues which arise and could be readily addressed are ignored or are mentioned with no professional development provided. An incident occurs subsequently which is “the last straw” for the principal, who may want to fast track the competence process, leading to procedural unfairness. The principal needs to keep an open mind in invoking and carrying out the procedures, without making an assumption that the teacher will not reach the appropriate standard.

The principal as professional leader of the school acts on behalf of the board (with delegated authority) in competence matters, until the completion of the two stages of advice and guidance/monitoring. The board then makes the decision about the outcome of the process.

#### **The Process**

- All teachers are entitled to reasonable opportunities for appropriate, effective professional development (cl 3.3.1). *If such opportunities have not been provided, the first requirement when an employer is considering whether to proceed to initiate competence procedures will not have been met.*<sup>16</sup>
- *Where there is doubt about whether concerns warrant competence procedures or there is no indication of prior mention of difficulties and assistance provided to the teacher, a period of “pre-competence” procedures can be put in place.*
- If there are matters of competence causing concern, the teacher must be informed as soon as possible (cl 3.3.2). *The concerns should be specified in writing, including evidence to support them) so that the teacher can understand the concerns and reasons for the implementation of the procedures, which is the first step for the teacher in engaging with the process. This is in line with the ERA good faith requirement for parties to be “communicative”.*
- The following should occur (cl 3.3.2 continued):
  - The process needs to be handled in a way that seeks to protect the mana and dignity of the teacher concerned.
  - The teacher must be informed of the entitlement to whanau, family, professional and/or union (*field officer*) support and representation at any stage.
  - an appropriate assistance and personal guidance programme must be put in place. *This is often referred to as stage 1, and is usually for a minimum of 10 school weeks.*<sup>17</sup> *A realistic matrix indicating the concerns, required changes, methods of evaluation and programme of support should be developed in consultation with the principal as the professional leader of the school, the teacher concerned and the parties’ representatives.*
  - if the concerns have not been remedied, the employer may move to stage 2 (sub-clause 3.3.2 (a)). The teacher is advised of the specific concerns in writing and how they can be remedied, of the right to consult and be represented by the union (*field officer*) at any stage,

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<sup>14</sup> In *McKean v the Board of Trustees of Wakaaranga School* AK AC 1/07 26 January 2007, in discussing the PTCA competency procedures (implementing a programme of assistance and personal guidance), Chief Judge Colgan stated that the “contractual emphasis is on assisting and resolving such competency issues” (para 8).

<sup>15</sup> *Fowler v Waiatu College Board of Trustees and NZ Post Primary Teachers’ Assn*, Finnigan J, 13 July 1993, CEC 35/93 describes the classification system and competence procedures in place in 1987 and beyond, which included the involvement of officials of the former Department of Education. Disciplinary procedures are also described. This case covered a protracted period of time, which included a 2-year suspension of Mr Fowler.

<sup>16</sup> In this section, the STCA procedures are stated first, with additional comments in italics.

<sup>17</sup> The time period is based on the fact that it is unlikely that professional concerns can be remedied in less than a school term. The ten weeks is a reduction from the 13-week stages which occurred during the 3-term school year.



of the time frame for the process (a reasonable period to remedy the identified concerns – normally 10 school weeks) and of the monitoring or guidance that will be provided. *In PPTA's experience both guidance and monitoring continue and are indicated in matrix, which is refined, in consultation with the teacher.*)

- At the end of this period, an assessment is made. The process and results of the evaluation are recorded by the employer and sighted and signed by the employee. *If concerns have not been remedied, the principal submits the report to the board, with documentation considered during the process.* The board invites the teacher to comment in writing, orally or both to the board before it takes any action.
- If the concerns have not been remedied, the board may dismiss the teacher with 1 month's salary in lieu of notice. If the teacher is a unit holder, the board may remove a unit (units), if this is warranted, rather than dismissing the teacher.
- The appeal process against the decision or process is a personal grievance or a dispute. Whether a decision to dismiss or reduce a position in status or whether an employer's action is justifiable "must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred" (s 103A of the ERA).
- Any dismissal must be reported to the Teachers Council. A copy of any report to the Council must be made available to the teacher. *The Council outcomes can be: no further action, conditions being attached to the teacher's practising certificate or cancellation of the teacher's registration. Appeals against decisions of the Council are to the District Court.*

### **Problems which have arisen: What to avoid**

- No mention of areas needing improvement or targeted professional development provided through the appraisal process prior to invoking competence procedures;
- Relying on a conversation with ERO or a comment in an ERO report about a teacher's competence. The Council has noted in a decision when considering the renewal of a practising certificate that "ERO reports were not intended to be used as the measure of the quality or competence of individual teachers";<sup>18</sup>
- No advice given from the outset that the teacher is entitled to union or other representation at any stage;
- Refusal to allow a timeframe which could lead to improvement in performance; a principal wanting to move straight into "stage 2" without having carried out "stage 1", allowing only 10 weeks for the whole process;
- Refusal to listen with an open mind to the submissions of the teacher in response to concerns or documents provided;
- No genuine consultation over the assistance and personal guidance programme and personnel to be involved in it;
- In the case of specialist teachers, e.g. teachers of Te Reo Maori or a 1-person department, the lack of a suitable person within the school to provide support/appropriately evaluate the teacher's performance; External appraisal and support and visits to other schools are needed in such cases.

### **Areas to consider**

#### *Provisionally registered teachers (PRTs/beginning teachers)*

Trained PRTs are entitled to receive and boards are obliged to provide two years of advice and guidance to assist PRTs to achieve the standards required for full registration. They should not be placed on competence procedures during the first two years of teaching.

#### *Dealing with cultural issues*

There have been concerns raised about the performance of some overseas teachers who were trained or have taught primarily overseas, which relate more to cultural differences or language issues than competence. Some concerns raised by students or parents have appeared to be

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<sup>18</sup> Decision of NZTC (nztc 06-01), accessed on 24 May 2009 at <http://www.teacherscouncil.govt.nz/cnc/process/tcdecisions/nztc06-01h.stm>

racist. Employers have an obligation to provide appropriate support for the teacher concerned and educative processes for students with respect to cultural differences.<sup>19</sup>

### *Health issues*

Health issues can impact on a teacher so that performance concerns arise. This situation is difficult for boards which have obligations to students and other employees, as well as to the teacher concerned, when the health issues persist. It is important for boards as good employers to provide support so that the teacher concerned has the opportunity to get well, rather than to increase pressure by invoking competence procedures or making it difficult for the teacher to use his/her paid sick leave entitlement. Many schools provide support by granting sick leave without pay, if this is needed, and providing opportunities for counselling (e.g. through an Employee Assistance Programme (EAP)).

### **Mandatory reporting**

Boards are required to report to the Teachers Council in certain circumstances in relation to teacher competence or discipline. To avoid repetition, mandatory reporting requirements applicable in both cases are discussed here.

#### ***Boards must immediately report to the Council when***

- they dismiss a teacher (s 139AK(1) of the Education Act 1989);
- a teacher resigns, if within the previous 12 months the board had advised the teacher of dissatisfaction with or an intention to investigate any aspect his/her conduct or competence (s 139AK (2));
- they receive a complaint about the conduct or competence of a former teacher within 12 months of the end of the teacher's employment at the school (s 139AL);
- they have reason to believe that the teacher has engaged in serious misconduct (s 139AM);
- ***a teacher fails to reach the required level of competence despite having undertaken competency procedures (s 139AN).***

***A board which does not report to the Council in the instances described above is committing an offence and could be fined up to \$5,000 (s 139A0).***

Teachers must self report

- convictions that carry a maximum penalty of three months' imprisonment or more, regardless of the actual sentence imposed;
- criminal proceedings resulting in a conviction, within seven days of the conviction (s 139 AP).

### **Two cases - competence procedures**

There appear to have been few cases in the Employment Relations Authority or the Employment Court which have dealt with teacher competence procedures in the schools sector.<sup>20</sup> This may be because over 90% of teachers in the state sector are members of either PPTA or NZEI and issues relating to invoking and applying the CA procedures are able to be resolved by the parties and their representatives before and during the process. While there may not be agreement about the interpretation of the provisions, a fair process which should assist the teacher to meet the professional standards and which should stand up to scrutiny can usually be agreed upon, thereby minimising the risks for all.

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<sup>19</sup> One example of appropriate support: A principal who intended to place a Chinese teacher on competence procedures as students complained of difficulty in understanding the teacher, instead arranged for the teacher to have professional development with a speech expert. This resolved the difficulty.

<sup>20</sup> Cases involving teacher competence have generally had complicating features, such as stress-related illness, a mixture of competence and disciplinary issues and procedures, and/or relationship conflicts.



## ***McKean v the Board of Trustees of Wakaaranga School***<sup>21</sup>

It appears that this was the first case in which the interpretation and application of the competency procedures of the PTCA was considered by the Employment Court.

Mr McKean was a primary school teacher, who was not a member of NZEI, and was, therefore, employed on an individual employment agreement.<sup>22</sup> He considered that he had been disadvantaged unjustifiably by the board by the way it invoked competence procedures and changed the level of his class while he was on sick leave without consultation or informing him of the change prior to his return to the school in the next school year after a period of continuous sick leave of around 8 ½ months. He also considered that he had been unjustifiably dismissed on grounds of incapacity. The dismissal was upheld by the Employment Relations Authority in 2004 and by the Employment Court in 2007. For purposes of this paper, discussion will focus on the interpretation of the teacher competence clause and procedures.<sup>23</sup>

The following were key points held by the Chief Judge relating to the competence procedures:

- The competence “provisions must be interpreted and applied according to the general scheme of the agreement as a whole”, which includes the good employer and EEO obligations incorporated from the SSA 1988 (para 8).
- “The examples of such competency matters” (failing to meet the relevant professional standards) “... are serious and **objectively** measurable elements of competency” (para 8). (*The emphasis is mine.*)
- “Given the potential consequences of the competency provisions ...”, the good faith obligations of the ERA “... applied to the employer’s implementation of cl 3.6.1”. “The implementation of appropriate assistance and personal guidance ... was ‘*any matter arising under or in relation to a collective agreement while the agreement is in force*’: s. 4(4)(b)” (para 9).
- “Where a principal has concluded that there are concerns of **such significance** regarding competency that the provisions of clause 3.6 may be triggered, statutory obligations of good faith as well as the implied contractual obligations of trust, confidence and fair dealing between the parties, require notification ... to the affected employee of the putting in place of the appropriate assistance ... measures under clause 3.6.1” (para 10). (*The emphasis is mine. Procedures should not be implemented over minor or short-term matters.*)
- The assistance and personal guidance measures/programme “... should be of a nature and duration to both allow real improvement and for a fair assessment of whether improvement has occurred”. The employee must be aware of the processes and “therefore able to participate meaningfully in them” (para 11).
- If, after carrying out the formal steps of cl 3.6.1, a principal concludes that the concerns have not been remedied, the more detailed clause 3.6.2 comes into operation. Only if the formal steps of cl 3.6.2 fail to resolve the principal’s concern, may the board “*where justified*”, dismiss the employee (para 12).

The Chief Judge considered that the implementation of competence procedures disadvantaged Mr McKean in his employment in that the implementation could result in his dismissal (para 70), but found that the commencement of the procedures did not disadvantage Mr McKean unjustifiably in his employment (para 77).

The Chief Judge determined that there was no unjustified disadvantage in employment in changing a primary teacher’s class level, as primary school teachers are trained to teach all primary school class levels (para 64), or in doing so when the teacher is facing performance and competency issues (para 65). (*This differs from the situation in secondary schools, as secondary school*

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<sup>21</sup> AK AC 1/07, 26 January 2007. Chief Judge Colgan noted that the lawyers involved could not identify any other cases where this had occurred.

<sup>22</sup> For a timeline of events in the case, see Bill Hodge’s paper, “The latest issues in employment law for the education sector”, *LexisNexis Law and Education Professional Development*, 20 June 2008, pp 2-3.

<sup>23</sup> The competence procedures considered in McKean were contained in clause 3.6 of the then current PTCA (2001 – 2003). The relevant clause in the PTCA 2007 – 2010 is 10.7. The STCA and ASTCA clauses are similar to the PTCA clause, but there are differences. Boards need to apply the provisions of the applicable CA.

*teachers cannot be required to teach subjects or levels they are not trained or qualified to teach. This would particularly be so if a teacher were subject to competence procedures.)*

The Chief Judge commented that because the mandatory reporting requirements of the Education Act 2009 could result in “professional sanctions” or cancellation of a teacher’s registration, **“the formal professional consequences of the commencement of the competency procedures under the collective agreement mean that commensurately high standards of procedural fairness by Board of Trustees as employers towards teachers as their employees are not only appropriate but necessary and affect the interpretation of the relevant provisions of the collective agreement”** (para 16). (*The emphasis is mine.*)

The Chief Judge could not say that the board in this case “acted impeccably in the steps that it took to investigate and assess Mr McKean’s competency ... but the Court’s concern is substantial fairness and reasonableness rather than minute or pedantic scrutiny and expectation of precise contractual compliance” (para 70). He later concluded that “although there was evidence of several minor elements of unfairness to Mr McKean, overall the defendant’s conduct of this dismissal was not so unfair that it should thereby be categorised as unjustified” (para 86).

*These above-mentioned comments raise questions, given that the ERA requires compliance with contractual provisions, and taking into account the Chief Judge’s comments in para 16 (in bold, above) re: the need for “commensurately high standards of procedural fairness”.*

An interesting conclusion from the Chief Judge was that “... the schools’ professional educational objectives were not assisted by the aggressively legalistic approaches and response of Mr McKean’s solicitors....” Also interesting is his speculation that “if a professional educational response and attitude had met the school’s attempts at compliance with the competency provisions, matters may have turned out differently ... for Mr McKean”, but that this did not occur, as he was not a member of “the relevant teachers’ professional body, the NZEI” (para 75).

Chief Judge Colgan did not agree with Mr McKean that the principal should not have been present at the meeting where Mr McKean was dismissed, as he “was a member of the Board ex-officio and its professional adviser” (para 93). *I respectfully submit that the principal is a full member of the board, rather than a member ‘ex-officio’, as was the case before 1989, and that the findings in Healey<sup>24</sup> and NZEI v Board of Trustees of Auckland Normal Intermediate School<sup>25</sup> relating to the role/presence of the principal in disciplinary procedures should be followed by boards.*

### ***An employee (Applicant) v an employer (Respondent)***

Another case where issues of teacher competence and stress were considered was *An employee (Applicant) v an employer (Respondent)*<sup>26</sup>. The employee was employed as a head of department in at the school concerned from the beginning of term 1, 2001. In this case, Philip Cheyne, Member of the Authority, briefly described the 2-staged competence procedures of clause 3.3.2 of the applicable Secondary Teachers’ Collective Employment Agreement (STCEC 2001 - 2003)<sup>27</sup>, which are the same as those in the current STCA.

The issue of how a board should treat an ERO reviewer’s comment (verbal or in a draft or final ERO report) about a teacher was considered as questions about the teacher’s performance were first raised at the end of term 1, 2001, when an ERO reviewer told the principal that she had almost intervened during her observation of the teacher’s lesson due to an “unsafe” learning environment.

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<sup>24</sup> *Healey v the Mercury Bay Area School Board of Trustees*, unreported, 11 May 2005, AC 21/05 (para 166).

<sup>25</sup> [1992] 3 ERNZ 243.

<sup>26</sup> Unreported, 21 October 2005, Cheyne P, CA 138/05, CEA 347/03, CEA 54/05. An order prohibiting publication of the identity of the parties is in place, as there is an ongoing employment relationship, and to assist the teacher to put the negative issues behind her. For more detail, see John Hannan’s paper, “Employment law in the education sector”, *LexisNexis Law and Education*, 20 June 2008.

<sup>27</sup> *Ibid*, para 4.

The principal raised the matter with the teacher on the first day of term 2 and tried to put in place lesson observations to ascertain whether there were concerns. *(Given that ERO's auditing role does not include assessments of individual teachers, this was appropriate, as a comment by a reviewer, cannot lead directly to the implementation of competence procedures.)*

A period of sick leave followed. Lesson observations and student interviews took place after the teacher returned to work in late July. Towards the end of August, the principal notified the teacher that there were matter of competence causing concern and provided a structured programme of advice, guidance and support from the school and external sources. The competence procedures ended in March 2002, as the teacher had met the professional standards as required. *In most cases, this would have been the end of the matter.*

The teacher had lodged a personal grievance in October 2001, which was finally concluded in October 2005. The teacher alleged that her employer's decision to investigate her competence and the process used were unjustified actions which resulted in her "suffering extreme stress and depression".

With respect to the competence procedures, Mr Cheyne noted that the STCEC stated that where there are matters of competence causing concern, the employee shall be advised "as early as possible". Mr Cheyne accepted that the principal did not report the concern immediately, but had taken advice from the PPTA Field Officer and NZSTA before deciding what to do about the ERO complaint. There was no written complaint from ERO and no evidence of matters causing concern until after observations were carried out. Mr Cheyne also felt that as cl 3.3.2 did not apply at this point, the school was not obliged to advise the teacher of her right to support and representation.<sup>28</sup>

Mr Cheyne found that the teacher had "suffered no disadvantage as a result of the decision" to invoke competence procedures (para 27). The school offered a structured programme of advice, guidance and support, which Mr Cheyne saw as providing the teacher "with advantages in her day-to-day working situation". It is noteworthy that Mr Cheyne concluded that it is the right of a teacher to decline to engage in the programme, as the teacher in this case did (para 28).

*While the competence procedures themselves, once started, did not take an unreasonable time to carry out and the result was positive, it has taken 4 years to work through the employment relationship problems.*

*One has to ask whether there were actually concerns caused by a lack of competence in this case, as staff had not raised this prior to the ERO visit and the teacher met the required standards, having chosen not to engage in the programme of advice and guidance. It appears likely that the concerns resulted from the depressive illness that affected the teacher at the time.*

*It is clear, considering the outcomes of the two cases discussed above, that invoking competence procedures where there are concerns of significance to be addressed does not amount to a disadvantage to the employee.*

## **5. Teacher Conduct and Discipline**

### **a. Standards**

Some standards relating to teacher conduct/discipline are contained in the criteria for registration set by the Teachers Council, with expectations contained in the Teacher Council Code of Ethics.

The Council's Rules provide additional detail. In the 2004 Rules, serious misconduct is defined as " ... conduct by a teacher that adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or reflects adversely on the teacher's fitness to be a teacher; and

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<sup>28</sup> *While the consideration of whether to invoke the procedures is the point when an employer must advise the teacher about the right to representation, it is good practice to give that advice as soon as issues of competence are raised.*

is of a character or severity that meets the Teachers Council criteria for reporting serious misconduct .....<sup>29</sup>

There has been acceptance over the last 45 years of the types of behaviour which could be seen to be teacher misconduct. These were first promulgated in the Education Act 1964 and are contained in the three teacher CAs. They are generally relied on by boards when invoking the disciplinary procedures. They are as follows:

- (a) Disobedience of lawful orders or instructions;
- (b) Negligence, carelessness or indolence in carrying out her/his duties as a teacher;
- (c) Gross inefficiency as a teacher;
- (d) Misuse or failure to take proper care of school property or equipment in her/his custody or charge;
- (e) Absence from duty without valid excuse.
- (f) Conduct in her/his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service.<sup>30</sup>

The criteria most commonly applied by boards are (a) and (f).

## **b. The procedures**

Prior to 1989, secondary teacher disciplinary procedures were covered by the Secondary and Technical Institute Teachers Disciplinary Regulations 1969. The first stage of the process, a preliminary investigation, was carried out by a sub-committee of the board of governors of a school. The board could give warnings, but could not dismiss teachers. If the matter was serious and was not resolved at board level, the case was referred to the Teachers' Disciplinary Board (TDB), whose members were experienced, had legal expertise and dealt with cases nationally, so that procedures and decisions were likely to be consistent and justifiable. The TDB could impose a range of penalties, including dismissal without notice. Teachers affected had a right of appeal to the Teachers' Court of Appeal.

From 1989, boards of trustees were expected to carry out both the initial investigation/enquiries and the formal investigation, whether or not the board members were experienced or knowledgeable about such processes. The current procedures may be said to provide more risks for boards than previous procedures because of the power to dismiss employees. This is also a greater risk for employees.

## **The process**

Allegations of teacher breaches of discipline (i.e. misconduct or serious misconduct) are usually referred to the principal or board. When there is a complaint/allegation about a minor matter, this should be dealt with by the principal informally. The principal should inform the teacher that there is a complaint/concern as quickly as possible and gauge whether there is a need to pursue the matter through the CA teacher conduct and discipline procedures<sup>31</sup>.

The following steps must occur so that CA provisions are complied with and there is a fair process carried out in accordance with the principles of natural justice.

- Boards should handle questions of conduct or discipline in a way which protects the mana and dignity of the teacher concerned, in so far as possible. The teacher must be informed of the right to have whanau, family, professional and/or Association (PPTA) support (cl 3.4.1).

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<sup>29</sup> Section 4(1), The New Zealand Teachers Council (Conduct) Rules 2004, 2004/143, Wellington.

<sup>30</sup> Clause 3.4.5, STCA. The list is not exhaustive, and it is not intended that the matters listed must always be treated as a disciplinary matter.

<sup>31</sup> The relevant clauses are 3.4 (STCA), 2.4 (ASTCA) and 10.4 – 10.6 and 10.8 (PTCA).

- The principal/board must inform the teacher of the complaint (cl 3.4.2) with specific details and documentation (e.g. *names, dates, events*), so that the teacher knows what s/he is accused of and is able to respond.
- PPTA members must be advised that they are entitled to consult the Association (the field officer) and to be represented by him/her **at any stage** (cl 3.4.2). (*The emphasis is mine.*) *This must occur before the teacher is asked to respond to the complaint.*
- Initial enquiries are carried out, if the employer considers it appropriate, to establish whether or not the formal investigation of this matter (disciplinary procedures) should be initiated, (cl 3.4.1). *Initial enquiries occur in almost all cases, and are carried out in the form of a meeting where the teacher is invited to respond, with representation.*
  - *The person conducting the enquiries must be authorised to do so by the board. The principal usually carries out the enquiries, unless s/he is the complainant or has a conflict of interest.*
  - There may be an agreed resolution of the matter at this stage. The STCA states that this may occur when the facts are clear and acknowledged. *It may also occur in other circumstances, as appropriate.*
- If the matter is not resolved, it may be referred to the board to carry out a formal investigation. *This is generally carried out by a sub-committee of the board authorised to investigate the matter. On occasion, an independent investigator is employed.*
  - The board or its agent must advise the teacher in writing of the reason the formal investigation is being initiated, **invite** the teacher to respond in writing and advise the teacher of her/his right to request Association (PPTA field officer) assistance and to be represented at any stage (cl 3.4.3 (a)). (*The emphasis is mine.*)
- The board must conduct an investigation before any disciplinary action is taken. The teacher must be invited to attend the investigation and to make submissions verbally and/or in writing directly and/or through his/her representative (cl 3.4.3(b)).
- If the complaint is upheld, the teacher and/or his/her representative must be given the opportunity to make submissions as to mitigating circumstances and penalty before disciplinary action is decided on by the board. The board must take these into account, as well as any period of suspension imposed (cl 3.4.3(d)).
- The outcome may be: no further action, a verbal or written warning (usually with an expiry date), professional development and/or apologies. If there is a finding of serious misconduct, the board may dismiss the teacher concerned without notice (cl 3.4.3(3)). *It is important for boards to differentiate between misconduct and serious misconduct. Because boards take complaints seriously, they sometimes consider that all complaints amount to serious misconduct, when this is not warranted.*
- If the board “is satisfied” that the welfare or interest of any student or staff member so requires, it may either suspend the teacher (on full pay except in exceptional circumstances, *which have never been defined*)<sup>32</sup> or transfer the teacher to other duties at any time before the matter is concluded (cl 3.4.3(c)).
  - A board must hear submissions from the teacher concerned and/or his/her representative before deciding to suspend.
  - Clause 6.2 of the Secondary Principals’ Collective Agreement (2004 - 2007) provides that a board will not suspend a principal without allowing a reasonable opportunity for the principal or his/her representative to make submissions to it. The board must take the submissions into account and use its best endeavours to keep the suspension period to a minimum. *These are useful guidelines for the suspension of employees generally.*
  - To date, the cost of the suspended teacher’s salary is paid by the MoE.
- The board must report the dismissal of a teacher to the Council. A copy of the report should be made available to the teacher.

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<sup>32</sup> In *Shone v Gisborne Intermediate School Board of Trustees*, unreported, 24 September 2007, AA294/07,

R Arthur found that the PTCA did not specify when suspension without pay might be justified, but that a board could not suspend a teacher facing criminal charges without pay, because of the right to be presumed innocent until proven guilty.

- A teacher who believes that s/he has been unjustifiably dismissed or has been disadvantaged by an unjustified action of the board may pursue a personal grievance or a dispute (if there are issues over the interpretation or application of the collective agreement clauses).

#### *Other process considerations*

In order to protect the mana and dignity of a teacher who is Maori, the board could incorporate into the process tikanga Maori, with the agreement of the teacher. This may include the assistance of the local whanau early in the process to help resolve matters. There are ways that the boards can facilitate this without compromising the entitlements of the teacher or the legal requirements placed on boards.<sup>33</sup>

Board should consider

- the racial composition/ethnicity of any person/committee carrying out initial enquiries or a formal disciplinary investigation
- involving an individual/people acceptable to both parties to attempt to resolve the matter in a way which is culturally appropriate, for example, mediation.

Similar considerations arise if the disciplinary matter involves Pacific Island teachers or teachers of other ethnic groups.

#### *Disobedience of lawful orders or instructions*

At times there may be “cultural clashes” over the appropriateness of a lawful instruction, which can lead to difficulties. E.g. Maori teachers may feel that they have to choose between what they perceive from a Maori perspective to be the welfare of the students and doing what is required of them by the principal/board. If they choose to ignore the latter, they may face disciplinary procedures. If they ignore the former, they can come under criticism and pressure from Maori community. Principals and boards should work with Maori parents and teachers to avoid and resolve such situations.<sup>34</sup>

#### *Double/triple jeopardy*

In cases where an employee faces both disciplinary allegations and police charges over a related matter, the way processes are handled by the board is of critical importance. A fair disciplinary process with a reasonable time frame needs to be followed. Boards should not rush through a disciplinary procedure which could result in procedural unfairness because police charges have been laid or are about to be laid. Boards must ensure that their actions do not compromise the employee’s right to silence. When a disciplinary case is completed/carried out after a court case has been concluded, it is important that only material relevant to the allegation being considered by the school is taken into account.

Teachers can face triple jeopardy in relation to an allegation. This is disturbing when false accusations are made or minor matters are treated as if they amounted to serious misconduct. A teacher can lose his/her teaching job through the school disciplinary process, which could lead to losing the ability to teach in New Zealand (and overseas, if there are reciprocal registration/reporting arrangements between countries). S/he could be liable for serious penalties as a result of a police investigation/trial. A teacher may face several processes at the Teachers Council, e.g. investigations by the Complaints Assessment Committee (CAC), Disciplinary Tribunal, impairment committee and/or the Council itself.

#### **Problems which have arisen: What to avoid**

- Acting on/relying on verbal or anonymous complaints;
- Pre-determination, e.g. indicated in the initial letter to an employee or during hearings (when a decision is announced prior to the employee making submissions or immediately after, without the board adjourning to discuss the submissions);

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<sup>33</sup> Guidelines to assist boards of trustees to meet their good employer obligations to Māori, NZPPTA Te Wehengarua and NZSTA Te Whakaroputanga Kaitiaki Kura o Aotearoa, 2000, pp 27-28. This is referred to in cl 3.1.1 of the STCA as “Good Employer Guidelines in Respect of Maori”.

<sup>34</sup> Ibid, p 34.

- Bias, including the appearance of bias;<sup>35</sup>
- Unreasonable time frames; e.g. A letter containing allegations and advising the teacher of the right to union representation is delivered on Friday afternoon, requiring the teacher to appear at a board meeting on Monday morning;
- Not providing all relevant material/details to the teacher concerned;
- Failing to provide to the teacher and/or his/her representative the opportunity to make submissions before the board decides whether or not to suspend;<sup>36</sup>
- The principal conducting initial enquiries when s/he is the complainant;<sup>37</sup>
- Interviewing witnesses together, instead of individually;
- Failing to conduct a formal investigation, e.g. relying on paper work done by the principal or another member of the senior management team. Formerly, boards interviewed student complainants. For the most part now, any interviewing of students is done as part of initial enquiries rather than at the formal investigation;
- Failing to properly take into account the evidence; making the decision on gut feeling rather than on the balance of probabilities;
- The principal/board informing the board sub-committee of past warnings before the board has considered or upheld a complaint, with the information being used to uphold the complaint;
- Instructing the teacher not to speak to any staff members about the matter, or this would be seen as misconduct/disobedience. *While the teacher should not approach complainants or the complainant's witnesses, s/he is entitled to seek support, including from colleagues.*

## 6. Resolving Conflict in a Maori Context<sup>38</sup>

There is recognition in the CAs that an appropriate way to deal with complaints/conflict could be in a Maori context and manner, with the agreement of a principal/board and teacher. Elements of this include the following:

- The teacher must be advised in writing of the specific matter(s) causing concern;
- Meetings may be held on a marae;
- There will be “face to face engagement” (kanohi ki te kanohi);
- Whanau support can be provided for all involved;
- Guidance and advice will often be provided for all involved by kaumatua and kuia;
- Agreed resolutions are recorded in writing, signed by the parties, with a copy placed on the teacher's personal file;
- Parties may withdraw from this process, which will not give rise to a claim of procedural deficiency or unfairness;
- The employer must notify the teacher in writing if invoking the STCA competence or discipline procedures.

Conclusions drawn from two cases<sup>39</sup> which have considered cultural and employment law processes in the education sector indicate that

<sup>35</sup> See *NZPPTA v Board of Trustees of Kelston BHS (No 1)* [1992] 2 ERNZ 817 and *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243.

<sup>36</sup> In *Edwards v Julie Webb (as LSM of the Board of Trustees of Tokoroa High School)*, L Robinson, 3 March 2005, AA 79/05, the Authority determined found that “the decision to suspend the Principal was unjustifiable” and that he unjustifiably disadvantaged (para 34). This was because Mr Edwards was not given sufficient opportunity to make submissions as to the suspension (para 30), the period of the suspension was prolonged (para 33) and the conduct was not sufficiently serious to warrant suspension (para 28). The suspension was “tantamount to disciplinary action itself” (para 32).

<sup>37</sup> In *v the Mercury Bay Area School Board of Trustees*, Unreported, 11 May 2005, AC 21/05, Shaw J concluded that procedural errors in conducting 2 disciplinary cases included the fact that the Principal, who was the complainant, began an initial enquiry against Ms Healey on both occasions, acting without formal authorisation from the board, and that she was present when the board met in committee to discuss her complaint against Ms Healey (paras 155 and 157). See also *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243.

<sup>38</sup> Clauses 3.5, STCA; 2.5, ASTCA; 10.3, PTCA. The clauses are identical.

<sup>39</sup> *Te Whanau a Takiwira Te Kohanga Reo v Tito* [1996] 2 ERNZ 565, in which a customary process was used, but did not comply with the employer's obligations for procedural fairness under employment law; *Kihi v Te Roopu Rangatahi o Te Ao Marama Te Kohanga Reo*, in which the Authority found that while the requirement to be fair can include the principles of tikanga, legal obligations must be met. C Reaich, “When Tikanga and employment law meet”, *Employment Today*, August 2008, p 32.



- “tikanga and customary processes can - and in some cases probably should – be used to deal with employment relationship problems;
- the Court and the Authority will still oversee any such processes to ensure that they are objectively reasonable and procedurally fair; and
- if a customary process is inconsistent with the statutory concepts of reasonableness and justifiability, the statutory concepts prevail”.<sup>40</sup>

## 7. Some medical issues

### Impairment process

Rules relating to the Teachers Council impairment process came into effect on 1 May 2009.<sup>41</sup> The process enables the Council to deal with teachers “who have a mental or physical illness that may make them unfit to teach” in a “compassionate and rehabilitative manner”.<sup>42</sup> An **impairment** is defined as “ ... any impairment that may adversely affect the teacher’s ability to perform the functions required as a teacher; and includes, without limitation, an impairment caused by alcohol or drug abuse”.<sup>43</sup>)

The impairment process is an internal one, with referrals to an impairment co-ordinator coming from the Council, the CAC or Teachers Disciplinary Tribunal. The impairment co-ordinator will set up an impairment committee to consider whether there is an impairment, its nature and possible adverse impacts on the teacher’s ability to teach. The committee tries to reach agreement with the teacher as to what needs to happen. The committee’s report will consider precautions and assistance needed to enable the teacher to teach competently and safely. If the committee believes that the impairment poses a serious safety risk, it may instruct the co-ordinator to provide an interim report, recommending actions to be taken. The committee writes a report provided to the teacher concerned, the referring body, and in some circumstances to the teacher’s employer.

*While this could prove to be a positive initiative, it is a pity that outside and earlier referrals cannot be made in cases where impairment is likely to be the real issue, rather than having to wait until competence or disciplinary procedures have been carried out and a mandatory report is submitted or a complaint made. Issues may also arise relating to the disclosure of confidential material.*

### Legislative requirements for employers relating to stress<sup>44</sup>

The Health and Safety in Employment Act 1992<sup>45</sup> places significant obligations on employers to provide a safe workplace. Section 6 requires employers “to take all practicable steps to ensure the safety of employees while at work” and to “provide and maintain for employees a safe working environment”. “The extent of this duty is to take **all practicable steps** to keep employees free from harm at work.”<sup>46</sup>

The definition of harm is of particular importance in relation to the above requirement, as it means “illness, injury, or both, and includes physical or mental harm caused by work-related stress”.<sup>47</sup>

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<sup>40</sup> Ibid.

<sup>41</sup> The process is set out in the New Zealand Teachers Council (Impairment Process) Rules 2009/108, Wellington, 2009.

<sup>42</sup> Impairment Committee Position Description, NZ Teachers Council website, accessed 27 May 2009 at <http://www.teacherscouncil.govt.nz/about/structure/disciplinary/impairment.stm>

<sup>43</sup> Rule 3(1) Interpretation, New Zealand Teachers Council (Impairment Process) Rules 2009/108, Wellington, 2009.

<sup>44</sup> This is a topic in itself, but is included briefly, so that its importance is noted.

<sup>45</sup> No 96 (as at 01 August 2008), accessed on 20 May 2009 at <http://www.legislation.govt.nz/act/public/1992/0096/latest/DLM278829.html>

<sup>46</sup> A Guide to the Health and Safety in Employment Act 1992, Department of Labour website, accessed on 31 May 2009 at <http://www.osh.dol.govt.nz/order/catalogue/hseact-text/hse2.shtml>,

<sup>47</sup> Section 2 Interpretation, Health and Safety in Employment Act 1992, No 96 (as at 01 August 2008), accessed on 27 May 2009 at <http://www.legislation.govt.nz/act/public/1992/0096/latest/DLM278829.html>

While s 19 of the Act provides that workers must also take all practicable steps to ensure their own safety and not to cause harm to others (with respect to things under their control), this is only after the employer has provided proper training.

### **Medical certificates**

The basic CA provision is that teachers are not required to provide a medical certificate unless they have been absent in excess of five consecutive days (STCA, sub-clause 6.2.3(c)(i)). They are not required to specify the medical reason for the absence.

### **Disregarded sick leave**

In *Secretary for Education and Ors v New Zealand Educational Institute Te Riu Roa (Inc)*,<sup>48</sup> a dispute dealing with stress-related illness, Employment Court Judge Shaw confirmed the determination of the Authority that “the granting of disregarded sick leave under cl 6.2.5 of the PTCA (2001 and 2004) is to be done without distinction as to physiological or psychological illness”.<sup>49</sup> This is significant for the schools sector, as the MoE had maintained that disregarded sick leave (which is not deducted from a teacher’s paid sick leave entitlement) could only be granted if the sickness was a physical one and “could be traced directly to the conditions or circumstances under which the employee was working ....”

### **Medical retirement**

The medical retirement provisions of the education sector CAs<sup>50</sup> have been working well for some employees and employers. A teacher may be eligible for medical retirement in cases of serious or terminal illness. To access the provisions, a teacher’s medical specialist must state that the teacher is “wholly or substantially unable to perform the duties of the position at the school and is unlikely currently or at any time in the foreseeable future to be able to undertake new employment in any other teaching position in the Education Service”. MoE concurrence is required for the teacher to “medically retire”. Principals and union representatives have generally been working together to assist teachers in this position.

### **Conclusion**

In an era where good faith is required between parties to employment relationships and when there is accepted custom and practice that schools operate best in a climate of cooperation and good will, most issues which arise will be able to be managed reasonably through genuine consultation and communication.

In extreme circumstances where boards/principals have been unable to manage schools effectively, interventions have been put in place by the Minister of Education. A snapshot of the situation in April 2009 showed that out of 2580 primary, area and secondary schools, there were 29 commissioners and 42 limited statutory managers in place around the country,<sup>51</sup> which indicates that there is a relatively small proportion of boards and/or principals (approximately 2.75 per cent) having significant difficulty managing their personnel and other legal obligations.<sup>52</sup> There should be no school having difficulties of this magnitude, however. It is clear that more training is needed for employers and employees in relation to their rights and obligations.<sup>53</sup>

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<sup>48</sup> WN WC 30/07 30 November 2007.

<sup>49</sup> Ibid, para 30.

<sup>50</sup> For instance, the STCA provisions contained in clause 3.13 Medical Retirement and Appendix B: Medical Retirement – Serious Illness.

<sup>51</sup> Hartevelt, J., “Top schools to take over poor boards”, The Press, 16/4/09, accessed on 15 May 2009,

<http://www.stuff.co.nz/national/education/2337743/Top-schools-to-take-over-poor-boards>

<sup>52</sup> It is worth noting that there is a 2-day Employment Relations Education course prepared and facilitated jointly by PPTA, NZSTA and the Mediation Service of the Department of Labour for secondary and area school principals and senior managers. The course covers employment issues, including competence and disciplinary procedures, and is available for union and non-union members.

Employers are faced with contestable advice from the MoE, the unions, New Zealand School Trustees' Association (NZSTA), legal advisors, insurers, ERO and the Council with respect to legal requirements when standards are allegedly not met. While it may be difficult for boards to decide whose advice to take, each board will be held accountable for the consequences of its decisions. It would seem prudent to seek advice from all the relevant groups, before making a decision as to the correct/most appropriate way to proceed and to consider that advice with an open mind.

When dealing with employment law issues, parties to the employment relationship and their advisors, irrespective of differing views about professional and legal matters, should seek to agree on fair processes which do not compromise the parties' rights and which will be consistent with the relevant CA and legislative requirements. This can result in fair and justifiable outcomes, minimising the risk of/need for legal action, which should assist everyone to keep focussed on the main objectives – providing a high quality education for and striving to meet the needs of students in a safe environment.