GOVERNING FOR EXCELLENCE

THE SCHOOL BOARD AS EMPLOYER: THE EFFECT OF EMPLOYMENT LAW AND THE DECISIONS OF THE EMPLOYMENT COURTS ON PERFORMANCE MANAGEMENT ISSUES IN NEW ZEALAND SCHOOLS

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Introduction

Few countries have given as much statutory power and responsibility to parent controlled school boards of trustees as New Zealand did in 1989. The most important of those responsibilities is the responsibility to the Minister of Education for the level of student achievement within the school – a responsibility that can only be met through strategic goal setting and the careful employment and effective support and performance management of the principal. The most significant power which accompanies this responsibility is the power to hire and fire the principal, a power which is, of course, constrained by prevailing employment laws.

In New Zealand the interaction of the statutory framework for school governance with the "judicial review" approach taken by the employment courts towards boards of trustees had a noticeable effect on the ability and confidence of school boards to manage the performance of their principals. It is arguable that for many of the past twenty years boards have been left in a state of confusion and uncertainty as to the extent of their employment powers and duties in relation to their employees and for the most part responded by abdicating responsibility for performance management of their principal.

Because of the mismatch between statutory intention to improve accountability and performance in schools, the legal composition and skill levels of school boards, and the tribunal-like level of natural justice requirements that the employment court imposed on boards, it could be said that the boards of trustees were set up to fail in the employment courts, and have been the weak link in the chain of educational performance management. Various educational stakeholders have made ad hoc attempts over the years to address this weakness in the legislative framework with guidance manuals, telephone help-lines for boards and board training, and there have also been signs of latitude from the courts. However, there are some underlying issues that could perhaps be better addressed by legislative adjustment to the existing governance framework.

As the twentieth anniversary of the *Tomorrows Schools* reforms approaches, recent reviews of governance by major stakeholders[1] have painted a generally rosy view of the success of the current governance model. However, all noted that even after 20 years a significant number of boards of trustees are still ill-equipped to manage the appointment and effective performance management of the principal without external support. While there have been

[1] *School Governance*: *An Overview,* Education Review Office, September 2007; Cathy Wylie, *School Governance in New Zealand-how is it working?*, New Zealand Council for Educational Research, 2007; *School Governance: Board of Trustees Stocktake, Report of Findings,* New Zealand School Trustees Association, July 2008.
See also Liz Springford, *Tomorrow's Primary Schools: Time to Evaluate Governance Alternatives,* Policy Quarterly, Vol 2 No 3 2006.

some notable developments in the area of principal training and mentoring in the last three years and some improvements in board training, it may be time to consider whether it is appropriate or helpful to give non-professionals the sole legal responsibility for employing, managing, developing and possibly firing, the professional educator who is their chief executive officer.

Other jurisdictions which may be moving towards greater autonomy for their school boards might also wish to consider whether the legal responsibilities which they impose on their parent trustees are reasonable, realistic, and in the best long term interests of all students.

Background

The Education Act 1989 (EA) heralded a significant reform of school administration in New Zealand. Before this date performance management of teachers was done by departmental inspectors of schools, who visited classrooms and reported back to principals on the competence or otherwise of individual teachers. A school board could make a decision to censure or reprimand, but not to dismiss. Procedures for dismissal included a National Teachers Disciplinary Board and a Teachers Court of Appeal. If a board believed that a teacher should be dismissed it had to gain the approval of the Director-General of Education in order to proceed to the disciplinary board. The procedure was used only two or three times a year. In practice the threshold for dismissal was very high and generally teachers were quietly encouraged to leave, or go to another school. As public servants, teachers' jobs were protected, and this lack of accountability throughout the public sector was the target of fundamental reforms during the 1980s and continuing into the 1990s.[2]

In 1989 "Treasury ['s] … goals were to rationalise the costly and inefficient educational bureaucracy, eliminate the 'provider capture' of the teacher unions over educational policy and practice, and increase parental choice and voice."[3] In the education sector businessman Brian Picot's report Administering for Excellence [4] formed the basis of reform. "The basic principle behind Tomorrow's Schools was the devolution of power within the school system from the central bureaucracy to the school community itself." [5] The report envisaged that boards of trustees would act something like a board of directors with the principal as the board's "chief executive."[6] The corporate analogy was not coincidental and was considered a guide to how the board would work.

The Statutory Framework for the Employment of Teachers and Principals and Performance Management of Schools

With the above goals in mind, a new statutory framework was set up. The School Trustees Act 1989 provided for all state primary and secondary schools to be administered by individual boards of trustees, elected for three year terms, comprising the principal, a staff representative, five parent representatives, and in the case of secondary schools, a student representative.

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[2] For detail of the nature and extent of these reforms see Jane Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment?* Auckland University Press, Bridget Williams Books, Auckland 1995.
[3] Ibid 219.
[4] Taskforce to Review Education Administration *Administering for Excellence* (1988).
[5] Dominic O'Sullivan, "School Governance and Management: The Principal –Board of Trustees Relationship" 1998 4 Waikato Journal of Education 175, 176.
[6] Education Act 1989 s 76.

The role of the employer in schools was split, with different aspects being covered by the new Ministry of Education, the board of trustees and the principal. The Ministry would negotiate salaries and terms and conditions, the board of trustees would be responsible for appointments and dismissals and would be liable for personal grievance claims, and the principal would be the day-to day manager to whom many employment functions such as appraisal and performance management of staff would be delegated.

Accountability of a Board for Student Achievement in Schools

The board is the legal entity responsible for the educational success or failure of a school. It is accountable to the Ministry under its Charter (EA s 63). Reports from the Educational Review Office on the performance of a school are addressed to the board, not the principal. If the school is performing badly it is the responsibility of the volunteer, part-time parent trustees on the board to see that its employees, the principal and the teachers, perform better.

Accountability for Employment Practices

The State Sector Act 1988, section 74A , provides that, in relation to personal grievances or disputes about the interpretation or application of a collective, the employer in schools is the board of trustees. Section 77A (1) requires boards of trustees to be a "good employer", as defined in subsection 2.

Section 77C deals with performance management of teachers. The board has the legal responsibility of ensuring that an annual performance agreement and appraisal process for the principal is developed and implemented, in line with guidelines from the Ministry and other stakeholders. Although boards have in recent years been strongly advised to seek external professional advice for the appointment or performance management of their principal *there is no statutory requirement for them to do so.*

Boards have the right to appoint as they see fit and to suspend or dismiss, subject to any employment agreement applying at the time and subject to provisions of any Act relating to registration of teachers (s 77E). Importantly, section 77E (2) affirmed that *the board has the rights, duties and powers of an* ***ordinary employer****, unless expressly provided to the contrary in the SSA 1988.* The intent of this clause was to put private and public employees on the same footing. Section 77F provides that in matters relating to decisions on individual employees (whether matters relating to the appointment, promotion, demotion, transfer, disciplining, or the cessation of the employment of any employee, or other matters), the employer shall act independently. Commentary suggests that this is a reference to acting independently of political influence.[7]

Who Controls The School?

Section 75 of the EA provides that the board has complete discretion to control the management of schools as it thinks fit.

Section 76 states that the principal is the board's chief executive in relation to the school's control and management. He or she must comply with the board's general policy directions

[7] Brookers Employment Law 2008, Brookersonline, SS77E.05, SS775.04.

and has complete discretion to manage, as the principal thinks fit, the school's day-to-day administration.

These two sections provide the sum total of statutory guidance on the relationship between the principal and the board and their respective roles in the running of the school. The lack of clarity around this issue was a substantial gap in the legislation and meant that initially it was left to the courts to provide guidance on what they considered the intention of the legislature in relation to this division of roles.

The Employment Relations Act 2000 (ERA)

In New Zealand, all employees who believe they have been treated unfairly may use the personal grievance provisions of the Employment Relations Act (State Sector Act s 73). The most common grounds are unjustifiable dismissal, constructive dismissal, and disadvantage caused by some unjustifiable action by the employer. Mediation is the preferred method of resolution.

The Skills of the Board

At this stage it is worth looking more closely at the composition of boards since much depends on their competence. Brian Picot's task force made an assumption of "individual competence" that[8]

> …assumes that most people are competent to carry out the tasks given to them and that nearly everyone will have a genuine commitment to doing the best job possible for all learners…
>
> The concept of competence also extends to parents. We feel that parents want to be involved more fully in various facets of the education of their children and the overall direction of our proposals is to encourage this.

It is clear that the Education Act 1989 also made the same assumption, as indicated by the very heavy responsibilities which it placed on the board. It is now nearly 20 year's since implementation and it is time to consider whether these assumptions and expectations are reasonable. The five elected parent representatives who form the majority of the board bring with them, every three years, a new set of skills and experience. They almost never include educational management skills. Boards in larger or high decile schools may have legal or accounting or other professional expertise that they can call on, but even these professionals have to learn how their particular skills apply to educational management. Although boards are allowed to co-opt board members with special expertise, this does not happen as often as it is needed, and some boards are simply not aware of what they do not know. The School Trustees Association encourages people to stand for the board by stating that all that is needed is a commitment to education and common sense,[9] but this is patently not true if a good job of governance is to be done. It also requires a substantial commitment to training. Work patterns have changed since 1989 and it may be that in 2008 fewer parents have that time to commit. Forty percent of boards in the 2004 elections did not have enough candidates to require the holding of an election. [10] Many trustees are doing their duty and while they may want to have more say in their children's education they do not necessarily want the legal

[8] Taskforce to Review Education Administration *Administering for Excellence* above n 4, 4.
[9] "Board Trustees Serving the Community" *Christchurch Press,* 27 Feb 2001 7.
[10] STA News April 2001.

responsibilities that go with it. It is not uncommon for a board to be substantially replaced every three years - approximately 40 percent of boards in the 2007 elections were completely replaced with new trustees. As a result there may be very little growth of institutional knowledge or governance skills. For all these reasons one has to ask whether the statutory composition of the board matches the legal obligations imposed on it by the Ministry and the employment courts.

Board's Ability to Manage Staff Performance

The board generally delegates the performance management of staff to the principal in his day-to-day management of the school. Procedures for appraisal, professional development and competency proceedings are set out in detail in the Collective Agreements. Failure to follow these procedures closely will almost always lead to a finding of unjustifiable dismissal by the employment courts.

The Board's Role in the Performance Management of the Principal

Performance management or review of the principal is the responsibility of the board of trustees and is one of its key roles. The Collective Agreements for principals require that the process of review, and the criteria which must be met, must be recorded in writing as the performance agreement, and although the principal must be consulted, a board has the final say on what goes into the agreement. A principal who is not happy about the criteria he must meet has the right to attach written comments to the performance agreements if he thinks it is not reasonable. The principal must assist the board and provide any information that the board requires. Principals must be advised if they are failing to meet standards and given a reasonable opportunity to meet them.

It is common for boards made up of parent representatives to fail at any stage of this process and for a number of different reasons. The most obvious reason is that the parent representatives are lay people attempting to manage professionals. They may be reliant on the principal for guidance in the performance of their tasks. Secondly, and very importantly, the parents have a role conflict which limits their desire and ability to challenge a cruising or non-performing principal. There are two key conflicts:

1. The task requires them to both manage, monitor, develop and support the principal. For many it is very unclear when they should move from supporting and developing to managing and monitoring.
2. The parent representatives all depend on the principal in some way. They may be in the difficult position of having to raise performance issues with the principal one day and see the principal the next day as an apologetic parent of a misbehaving child. This kind of role switch takes considerable skill and is a conflict which most parents would rather avoid.

The board may not have a performance agreement at all, or they may not update it regularly. The agreement may have been kept secret between the board chair and the principal, in the mistaken understanding that all stages of the process are confidential. The chairperson should have a significant role but may be intimidated or restrained by professional deference towards the principal. The board may believe that the principal sets their own goals (earlier assessment models used this process for both teachers and principals). If an outside appraiser is not used the board may be reliant on the principal to effectively assess him or herself. Even

if an outside appraiser is used they may be a friend or colleague of the principal or have some other relationship which limits their ability to challenge, extend and develop the principal. The goals set may be limited in their scope. The measurements may not be understood by board members.

If deficiencies are discovered, the principal may deny them and the board may not have the knowledge, confidence or desire to challenge the principal. If the principal has maintained significant control over the process the board may not have the evidence it needs to take any necessary action. If dismissal occurs, the detail in the procedures in the collective agreement makes it easy to find grounds for challenge.

The greatest irony is that in many schools the principal must train the board as to how it should manage him or her.

The complexity of the performance management relationship is obvious. It is not surprising that, particularly before guidelines were available, boards have had some fairly disastrous breakdowns in their relationships with their principal. [11]

The problem for boards of trustees is that once the relationship has broken down it would be very difficult for a board to say that it had an unbiased approach. All will have been involved with the issues over an extended period of time. All will have personal relationships with the various personnel involved.

The Employment Case Law on Boards of Trustees and Bias

In the interests of accountability and improved performance, the State Sector Act 1989 clearly intended that employers of teachers and principals should not be held to any higher standards of fairness and procedure than private employers. However, a review of the case law suggests that the employment courts throughout the 1990s held school boards of trustees to tribunal like standards of impartiality and procedure.

In particular, there is repeated evidence in the case law that the particular statutory make-up of boards made them very susceptible to having their decisions challenged on grounds of bias or technical faults in procedure. The courts were unable to agree or provide consistent guidelines to boards as to what constituted bias in a board's dealings with its employees.

To explain the degree of confusion caused by employment court decisions it is instructive to review the judicial commentary on issues of bias and procedure in relation to boards of trustees over the last 15-20 years. [12].

NZPPTA v BOT of Kelston Boys High School [1992]

The issue of bias was examined at length in *NZPPTA v BOT of Kelston Boys High School*[13], where a teacher had been drinking before school and became involved in an argument with other teachers. Amongst other complaints the grievant claimed that the board acted in breach of natural justice, that he did not get a proper hearing and that the board was biased and acted

[11] See n 50.
[12] A detailed review of employment court commentary on procedure and bias in relation to boards of trustees is contained in a longer article published in 2004 . It is available on line at www.sgsl.co.nz.
[13] [1992] 2 ERNZ 793

for an improper motive. The court ruled that the board was biased because the staff representative trustee was involved with the hearing. He had been the PPTA representative and in that role had confidential and frank discussions with the grievant.

In considering whether bias was a ground for challenge, the court noted that: [14]

> Originally a disqualification in circumstances where a decision maker was bound to act judicially, the prohibition on bias has subsequently come to apply in circumstances where it is necessary for the rules of natural justice to be applied to decision-making. The more recent abolition of **the distinction between the rules of natural justice and the rules of fairness** means that bias is an element of decision making which can be the subject of challenge **where there is a duty upon a decision maker to act fairly.**

The court cited Cooke J in *Marlborough Harbour Board v Goulden*[1985]2 NZLR 378,383:

> "…we think that the position had probably been reached in New Zealand where **there are few, if any , relationships of employment, public or private, to which the requirements of fairness have no application whatever**. Very clear statutory or contractual language would be necessary to exclude this elementary duty."

The distinct contrast with the standard applied to a private employer is demonstrated by the obiter comments of Fisher J in *Peters v Collinge,*[15] "no-one would expect an employer contemplating a dismissal to approach his or her task with a mind untainted by preconceptions". ELC[16] also comments "Because, inevitably, the employer will, in many cases, have already formed some impression of the employee, the standard of open-mindedness required in the employment context is not as exacting as that which might apply, for example, to a Court of law".

The court examined judicial review sources and public employment case law to understand what bias might mean in the employment relationship. The court cites Taylor, [17]

> 'Bias' is a predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion… The predisposition may stem from financial interest, personal relationship, ideology and inclination, the manner in which powers are exercised, or from the **composition or nature of the authority concerned**….
>
> Hence, Courts have become more prone to apply a "reasonable suspicion of bias" test to preserve the integrity of justice, but where there will be, of necessity, a form of "bias" as a result of the statutory composition and functions of authority, then something closer to actual bias, such as real likelihood of bias, will be required**.**

The court considered whether there might be an exception to the rule against bias in respect of school boards of trustees, because of their statutory make-up, which always includes a staff representative. The court found bias here, not because of the fact of being a staff representative, but because he had been involved as a confidential adviser. There was no evidence of predetermination; rather the problem was that the high degree of knowledge gave an appearance of bias. The court thus applied the higher "appearance of bias" standard.

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[14] Ibid 819.
[15] [1993] 2 NZLR 554, 556.
[16] *Personal Grievances ELC* LexisNexis Publications 2004, Section 4.15, http://www.butterworthsonline.com.ezproxy.auckland.ac.nz/lpBin20/lpext.dll?f=templates&fn=bwaltmain-hit-j.htm&2.0, 25 April 2004
[17] Taylor, Judicial Review-A New Zealand Perspective Wellington Butterworths 1991. para 13.46.

The court explicitly compared the standard of bias used in cases involving other small employers, and the standard of bias to be applied to school boards: [18]

> Whilst it is not difficult to imagine instances of employment by a sole trader or other small business enterprise in which the owner or general manager may inevitably be complainant, prosecutor and judge of alleged misconduct by an employee (in which case the court would still expect the employer to act fairly but would, we suspect, be loath to invalidate a decision to dismiss because of an appearance of bias on the part of an employer or its representative), this was a very different case. **School Boards of Trustees are creatures of statute.**

It appears from this case that a staff member will not be biased per se in handling employment issues, but may be, depending on the degree of knowledge or involvement that they had with the issue beforehand. The impartial observer, knowing the highly communicative nature of school staff rooms, might be justified in objecting that any involvement was too much. The guidelines were unclear.

It is interesting that, while acknowledging the assimilation of the education sector into private sector employment law, [19] the court continued to apply administrative law standards of bias. The cases which were relied on applied administrative law standards[20] to employment issues involving publicly elected boards or councils . However, consideration was not given to the problems inherent in the particular statutory composition of school boards, which are not publicly elected.

NZEI v BOT Auckland Normal Intermediate School [1992][21]

The grievant was a deputy principal who was dismissed by a sub-committee of the board after ongoing clashes with the principal.

In considering the powers and responsibilities of a school board of trustees the court states:[22]

> Although these proceedings are not an application for judicial review of the board's decision to dismiss… **the decision to dismiss Mr Bell was closely akin to, if not the exercise of, a statutory power, or a statutory power of decision, as is contemplated by the law of judicial review**. In addition the trustees…with the exception of the principal…are elected to office. At the relevant time this was from an elected college of parents…they are entrusted by the communities whom they represent to govern and administer schools for the benefit of those whom they represent and within the law.

Here the court explicitly applies the standards of judicial review to an employment law decision. The court concludes that while possessing the rights and powers of employers in the private sector … school boards are constrained and empowered by other criteria not imposed upon other employers". [23] In other words, the traditional processes of the public sector are held to outweigh the clear intent of the State Sector Act 1998 s 77E(2) that employers in the education sector should not be held to standards higher than ordinary employers. The "other

[18] Ibid 824.
[19] *NZPPTA v Kelston BHS Trustees (No2)* [1992] 2 ERNZ 936,941.
[20] *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, *Anderton v Auckland City Council* [1978] 1 NZLR 657, *Loveridge v Eltham County Council* (1985) 5 NZAR 257, *NZ Merchant Service Guild IUOW v Taranaki Harbour Board* [1990] 3 NZILR 181.
[21] [1992] 3 ERNZ 243.
[22] Ibid 268.
[23] Ibid 269.

criteria" that the court refers to include requirements to be a good employer (which do not refer to judicial review standards of procedure) and detailed procedures in the Award, which are already designed to ensure fairness.

It is questionable whether the court was justified in treating school decisions to dismiss as statutory decisions and exercises of state power against the individual. The issue of whether a decision affecting employment in the public sector was a "statutory power of decision" was discussed at length in *NZ Assn of Inspectors in Schools & Education Officers & Ors v Minister of Education and Ors*[24]. It was held that in the particular circumstances of the case that a decision affecting redundancy entitlements was a statutory power of decision. The court put a limit on the effect of the SSA 1988: "while it must be acknowledged that one of the purposes of the State Sector Act 1988 is to put State sector employers into the same position as private sector employers (see s.59(2)) there are limitations to that metamorphosis" [25] There has been no clear explanation of why this should be so in relation to school boards of trustees.

In any event the court found a lengthy list of procedural defects in the dismissal process which made the dismissal unjustified. On the question of bias the court held that the principal could and should legally have stood down because he was acting as prosecutor and judge. The court also held that the chairman of board was clearly biased, not because he had extensive knowledge of the background situation, but because he was a close confidant of the principal, and manifested an early predisposition for disciplinary proceedings before giving the grievant the opportunity to put his side of the story. Also he was openly antagonistic to staff support for the grievant, mistakenly took into account the fact that the grievant had talked openly about the dismissal, and had several times expressed the view that the board should "support the principal". The court held that the latter was an irrelevant consideration in the decision and incompatible with obligations of fairness towards its employees. [26]

With respect, a board might well consider it was a relevant consideration in the employment situation. If the board of trustees decide to support a grievant in a serious matter such as this, they know that this will be at the cost of their relationship with their "chief executive" on whom they are generally, completely dependant for advice. They may nevertheless decide to go ahead, but to say that the relationship between the principal and the board is an irrelevant consideration is impractical and ignores reality.

The court also later suggests the removal of the principal from proceedings will avoid an appearance of bias on the part of the board. In fact the aggrieved teacher may have good reasons for claiming that even without the principal being present at the final decision making process, the remaining members of the board will not be unbiased. In addition to having constant contact with the principal and very little with staff (especially in the case of secondary schools), the board members are, as parents, dependant on the principal for the advice and information. It is arguable that because of personal relationships there will always be a real likelihood of bias on any board of trustees that maintains a respectful and cooperative relationship with its principal.

In this case, bias was only one of a number of factors. The procedural errors were not technical ones and were so numerous that even if the board had been treated as a private

[24] [1990] 2 NZILR 962, 989-999.
[25] Ibid 996.
[26] Ibid 280.

employer the result would have been the same. However the number of procedural errors listed by the court and the recommendations at the end of the judgement were a warning sign that there was a mismatch between the requirements the courts were placing on boards of trustees and their ability to meet them. The court acknowledged that "The legislation is broad and does not provide a comprehensive guide to the appropriateness of trustees in decision making roles where there may be allegations of a conflict of interest or bias, at least in employment matters." [27]

Hobday v Timaru Girls High Trustees [1993][28]

This was a long-running conflict between an employing board and their employee principal over the governance and management of the school. A principal, whose management style was said to have become closed and autocratic, became unpopular with significant numbers of staff and parents. A new board was elected with the declared intention of dealing with the principal. Once in office it took an aggressive approach to the principal and questioned her performance frequently at board meetings.

This was an example of the potential of "parent power" that parents had been led to believe was their right after Tomorrow's Schools. Unfortunately, in attempting to exercise their powers to dismiss a principal in whom they no longer had trust and confidence, the board made the mistake of breaching a significant number of the principal's rights as an employee.

In a strongly worded judgement the dismissal was held to be substantively[29] unjustifiable and procedurally unfair.[30] In particular, there was extreme bias and predetermination by several board members. They had sought election to the board with the purpose of exercising firm control over the principal. This developed to "a commonly held view that the board should in future take disciplinary action against the plaintiff with a view to removing her from office."[31] The board members were closed-minded and emotionally incapable of treating the plaintiff fairly. The involvement of a teacher member of the board was clearly wrong because of her "hostile attitude towards the principal",[32]and because she was both a complainant, witness and decision maker in the dismissal process.

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[27] Ibid 293.
[28] *Hobday v Timaru Girls' High Trustees* [1994] 2 ERNZ 171.
[29] Comment on the substantive justification in these cases is not the focus of this paper, but the issue in *Hobday* was a crucial one: to what extent could a board control the running of the school. The court held that the board had interfered in the day-to-day management of the school in a way that prevented the principal doing her job. Palmer J considered that the intent of the legislation was that there should be a relationship of "co-operative common sense". While this was certainly the hope of all concerned, Rodney Harrison QC, writing earlier in the same year, concluded that "In the ultimate resort…it is submitted that the Board's authority as both employer of the Principal and as overall controller of the management of the school must necessarily be paramount." (*Education and the Law in New Zealand* Legal Research Foundation Seminar, April 1993,75.) In its decision to reinstate the principal because of the board's manifest failures as an employer, the court may not have given full weight to the unavoidable legislative fact that the board is the employer and controller of the manager and is entitled to have the final say on the direction and ethos of the school. By comparison, a board of directors dismissing a CEO who was at odds with his board would be unlikely to be told to reinstate him or her. As a result of the decision the entire board resigned and was replaced by a commissioner. The principal remained at the school for a further three years. The school's roll dropped from 650 to 349. In 2001, seven years later, the roll had only climbed back to 395.
[30] *Hobday v Timaru Girls' High Trustees* [1994] 2 ERNZ 171, 855.
[31] Ibid 784.
[32] Ibid 768.

The court did not have to examine whether there were fine legal questions of "real likelihood of bias", because the members of the board were criticised for actual demonstrable bias. However a number of aspects of the functioning of the board which were criticised by the court are almost inevitable, given the composition of any board.

The board members had "inappropriate communication with core members of dissident staff".[33] One board member is criticised for obtaining derivative information from his wife, who was a staff member at the school, and thereby forming preconceptions.[34] Board members will inevitably be contacted by parents and staff, and the smaller the community, the more likely that such exchanges will occur. Although it is clear that board members should redirect most complaints to the principal or through official channels, this may not be appropriate if the problem *is* the principal or the complainant believes they will not be listened to.

Further, the court stated the board should not have acted upon staff problems, even if brought to their attention by the staff representative, until they "had been openly discussed and addressed by staff with the principal and an opportunity afforded to Mrs Hobday in consultation with the staff to introduce alleviating/correcting measures…the actual intervention of the board upon the initiative of the staff representative would have been premature."[35] The court acknowledged that such a meeting was unlikely to occur in the circumstances, but the court's advice does not take account of the even more likely circumstance that staff concerns may not reach the board at all. It is an unusual staff representative who is prepared to contradict or criticise the principal at a board meeting, either explicitly or by implication. A requirement for complaints to be addressed to the board in writing forces an individual staff member to risk personal retribution. The very difficult question of how a board is to communicate satisfactorily with its employees has been ignored. For the parent representative there is no clear or realistic guideline as to what is unacceptable communication that might amount to a suggestion of bias.

In the following case a succession of boards and two commissioners had attempted to deal with a non-performing principal. When the current board acted they were also challenged for bias, even though they had appointed an independent investigator. The High Court took a pragmatic approach.

Thompson v Grey Lynn School Board of Trustees [1998][36]

The plaintiff was the principal of the school, seeking judicial review of decisions of the board. The school had been subject to five critical reviews by the Educational Review Office (ERO) all of which raised serious concerns about the management of the school and the roles of the board and the principal. After a further critical review in 1997 the board resolved to appoint an independent investigator to examine the serious issues relating to the principal's performance. The principal claimed bias in the making of this decision and that a subsequent decision to suspend him until the investigation was completed was ultra vires and biased. He also claimed that a later meeting was improperly constituted and its decisions were therefore invalid. In the High Court Potter J took a non-technical approach to various complaints about meeting procedure on the grounds that boards had broad discretion to vary their own

[33] Ibid 765.
[34] Ibid 777.
[35] Ibid 760.
[36] C.P 74/98 27 April 1998 HC Auckland, Potter J. The judge had spent some years as Chairperson of the Epsom Girls Grammar School Board of Trustees.

procedures, and their intentions were clear. The court held that "the remedy of judicial review should be sparingly utilised in the context of the Education Act…unless the rights of students, and I would include, the rights of staff, are seriously threatened."[37]

The plaintiff claimed that trustees showed actual or presumptive bias in exercising their statutory powers of decision to conduct an investigation. The court held that "the defendant in carrying out its statutory obligations to control the management of the school …must observe the principles of natural justice."[38] Nevertheless, it was held that " It is necessary to distinguish …between previous knowledge or understanding which is integral to the performance by Board members of their statutory function, and a situation where board members have shown themselves to be actually biased…"[39] The court looked with approval on the fact that the board appointed an independent investigator to investigate the issues raised by the ERO report, and that in so doing they had sought to exclude the risk that trustees' own knowledge of the situation might cause them to be biased.

The plaintiff in this case considered that the ERO report was biased because the review team had interviewed members of the board, but the court did not consider it inappropriate for the board to have input into the ERO report. Both the ERO team and the independent investigator had interviewed a wide range of people.

Notably, the court did not consider that previous adverse comments by board members as to the character and professionalism of the plaintiff established bias. It is particularly notable that the Acting Principal, who had previously called the plaintiff a "bloody liar", was not required to abstain from the decision to investigate the principal. Her presence on the board was seen as essential because of her role. [40]

> There is nothing in the evidence before me in relation to the decisions taken by the board to date, **which demonstrates actual bias** by Ms Bernard against the plaintiff, nor is it a situation where the mere presence of Ms Bernard on the board, which is required by statute, so tainted the Board, that the Board was incapable of taking the decisions it has to date, without bias or predetermination.

The court was not prepared to accept the plaintiff's submission that the whole board, because of its contribution to various reports to the Ministry and ERO, was complainant, witness and judge. It considered that the board's statutory role required it to do so and it would be negligent if it had not acted on the concerns. Individual members did not have to disqualify themselves because they had knowledge of the situation, as this was inevitable.

Here it appears that an actual judicial review is applying a lesser standard of bias than the employment courts. This decision seems more ready than previous decisions in the Employment Court to take into account the statutory composition of the board.

Sutherland v Board of Trustees of Marlborough High School [1999][41]

The grievant was deputy principal of a college who was summarily dismissed for serious misconduct. The plaintiff objected to the composition of the disciplinary committee. Some of the committee members were too close to the principal and some had been appointed to the

[37] Ibid 17.
[38] Ibid 20.
[39] Ibid 21.
[40] Ibid 26.
[41] [1999] 1 ERNZ 665.

board by the principal. One elected member of the board had recently begun working at the college.

The court considered that the board member who had recently been employed in the school by the principal "obviously was going to be perceived to be an interested party in her capacity as a member of the casual teaching staff, responsible more or less directly to the main complainant, the principal of the college, and dependant on her continued good will for future work. As far as bias by the other members was concerned the court said that [42]

> …The plaintiff was entitled to be judged by a committee all of whose members were free from the taint of the appearance of bias…**it would scarcely be surprising if they did not attach a degree of respectful weight to what their colleague the chairperson, told them and what the principal, on whom they had relied for accurate information in the past about the management of the school, also told them. There is nothing reprehensible in any of that.**

Goddard CJ considered that there had been no demonstration of predetermination before the hearing, and therefore no actual bias and nothing substantial on which to base claims of apparent bias, with the exception of the presence of the casual employee. In the end, despite applying an appearance of bias test, the court concluded that [43]

> …the employer is not a court and is not required to conduct a trial. And is entitled to look out for its own interest, provided that it carries out a fair inquiry in the way in which this is well understood by those familiar with employment practices. Thus no objection can be taken to a committee of the board embarking upon the enquiry. Indeed, that is expressly authorised by the contract, although the employer can be said to be judge in its own cause.

The court appeared ambivalent about what standards should be applied to the decisions of a board of trustees, and takes a different approach to earlier cases, acknowledging on the one hand that decisions need not be judicial, but on the other hand, being prepared to find bias merely by the fact of being an employee. This contrasts with a previous private employer decision where the fairness of the enquiry was questioned because the hearing was conducted by the respondent's employees. Travis J noted:[44]

> As representatives of the respondent they could not be described as independent, but there was no evidence that they had made their minds up in advance and therefore did not give the grievant a proper opportunity to be heard and to have his defence considered. The mere fact that the person making the decision is an officer of the employer empowered to deal with the issue does not itself automatically make the decision biased and thereby deny the employee the opportunity to a fair hearing.

On appeal the Court of Appeal held that that the lack of any concrete evidence supporting the alleged appearance of bias and the fact that at the relevant time the board member was no longer employed meant that the ground for bias was not established. The court commented[45]

> **This case highlights the problems of applying statements of the principle of bias developed in relation to Courts, tribunals and other bodies which operate independently of the parties. An employer exercising the kind of powers provided for in the collective agreement inevitably has a real interest in the issues and the members of the governing board at a school similarly are very likely to bring into their consideration and decisions those interests. Section 94 of the Education Act 1989 indeed requires that board members be interested**…Also relevant to the application of the

[42] Ibid 695.
[43] Ibid 697.
[44] *NZ Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883, 891.
[45] *Marlborough Girls' College v Sutherland* [1999] 2 ERNZ (CA) 611, 619.

> bias principle is the availability of the additional safeguard, … of the independent examination of the grounds for dismissal provided by the common law action.

O'Neill v Te Puke High School BOT [2001][46]

The grievant complained of disadvantage in his employment and constructive dismissal as the result of the board of trustees' decision to conduct an inquiry into complaints by a staff member in his department. In discussing possible bias on the part of members of the board, the tribunal realistically held that although, as was natural in a small community, the board members knew everyone involved and their spouses, and knew and had taught each other's children, there was no reason to believe that any members of the board had any direct involvement that would lead an objective observer to conclude that they had closed their minds. The fact that they received and made communications with members of staff was seen as natural in the circumstances and was not held to be inappropriate, as it was in *Hobday*. The fact that a board member had expressed sympathy to a party to the dispute who had received an anonymous letter was considered a normal response of a concerned employer and not an indication of predetermination. Nor was it a breach of fairness to listen to other complaints that came to the attention of the board as a result of the inquiry. "I do not consider that an employer who is considering or conducting an investigation must turn a blind eye or a deaf ear to issues that other staff bring to their attention."[47]

This case in 2001 appears to indicate a move towards an acceptance of practical reality on the part of the employment authorities.

Petersen v Board of Trustees of Buller High School [2002][48]

The grievant was a teacher against whom a complaint of sexual misconduct was lodged. The incident had occurred 22 years before, and a complaint had been lodged at the time but then withdrawn. The board of trustees appointed an independent consultant to investigate the complaint. The grievant considered the inquiry was procedurally unfair, that it should not have delegated the responsibility to determine the matter to an investigator, and had unfairly accepted the predetermination of the investigator.

When the grievant objected to the participation of certain members on the disciplinary sub-committee, they withdrew. The chairman reinstated himself since his participation had not been objected to. The court considered that his participation in the matter and the extent to which he might have formed views meant he should perhaps have withdrawn. On reflection however the Chief Justice concludes in obiter[49]

> In situations where the employee's decision maker is a board, there will inevitably be - in connection with disciplinary inquiries – a section of the board that could be called the prosecution team and that will usually include either the chairperson of the board or the chairperson of the committee conducting the preliminary enquiry….At the end of the day, however, boards of trustees do not have infinite resources and members of boards simply have to do their best to keep open minds on the subject of their inquiry. **There is certainly no reason to impose any higher standards on school boards of trustees than are required of other employers differently constituted**, and in the end I think it was entirely correct of the applicant and his counsel not to make any complaint about Mr Campbell's participation in the deliberations of the decision making committee of the board.(emphasis added)

[46] Employment Tribunal HT 69/01 8 October 2001, Wm Hodge.
[47] Ibid 37.
[48] Unreported CC 7/02 Christchurch 6 March 2002 Goddard CJ.
[49] Ibid 12.

> I have discussed his participation in detail because I am aware of its potential for causing difficulty in some situations. The question in each case must be whether the participating member of the decision-making board is too closely involved with the conduct of the complaint against the employee to be also entrusted with deciding the employee's fate…

It is not particularly clear what the court means by an "employer differently constituted". Although it seems to take account of the fact that school boards should be treated the same as other employers the second paragraph suggests that if a board is involved it is not treated as a single employer, rather its constituent parts will be assigned various roles - prosecutor, witness, investigator, judge - and that these roles are not permitted to overlap, as would happen in the case of a single employer.

In this particular case, the very serious nature of the allegations warranted a cautious legal approach. It is to be hoped, as a policy consideration, that courts will not require boards to employ investigators to deal with all incidents merely to avoid an appearance of bias. In this case the appellant who lost the case was unable to contribute more than $10,000 towards the board's costs of $126,000. The cost of getting it right was very high.

Conclusions

It is possible to detect a softening of the initially rigid judicial review attitude of the courts towards bias on school boards. Nevertheless the effect on school boards of early court findings on procedure, and their attendant media scrutiny[50], was to make school boards extremely cautious in their handling of non-performing teachers and principals. Parent representatives do not analyse court judgements in detail. They draw conclusions that the process is high risk, expensive and more trouble than it is worth. The financial costs of legal proceedings are not the only factor, as these are now usually covered, at least in part, by insurance. The emotional costs to the school community are also a deterrent. This has important implications because it affects the board's abilities to meet performance standards for which they are accountable to the Ministry.

If parents were to analyse the judgements it is doubtful that they would be clear about when the various members of the board should exclude themselves from decision-making. One should apparently always exclude the principal and the staff representative for safety's sake - *Thompson* is probably an exception. The chairman is almost always closely involved with the principal in decisions to discipline teachers – should they also exclude themselves? (*ANI, Petersen)* The advice is conflicting. What about ordinary parent representatives? Should a sub-committee exclude itself if it has been involved in the investigation and is prosecuting the enquiry? (*Petersen)* Will there be anyone left to make a decision? Do all incidents have to be investigated by a consultant to avoid bias? What is an acceptable degree of communication

[50] "Timaru Girls High after the siege", *New Zealand Herald* 25 Jun 1994, 3:1; "No regrets, no apologies" *Sunday Star Times*, 14 Dec 1997, C3; "Sid Thompson's long and lonely struggle", *Metro* (Auckland) Nov 1992, 137, 102-107; "Town torn by school dispute", *New Zealand Herald*, 28 Jan 1993, 1:9; "Matter of Principal", *The Press*, Christchurch, 31 July 1999, Sup 1-2; "Power struggles raged while education endangered", *New Zealand Herald*, 20 Jan 1995; 1:9; "Rural Community wounded by school furore", *Sunday Times* 13 Feb 1994. 6. "Tokoroa principal gets job back,compo", Waikato Time 17/3/2005, 3 ;

between the board and the staff? Would it be better for all disciplinary and competency issues to be decided by an independent body, as suggested in the original Picot report?[51]

Recommendations

The Courts

It is unlikely that the composition of school boards will be changed in any significant way by legislation in the immediate future. It would be very helpful if the Employment Relations Authority and the Employment Court were to reconcile their expectations of "statutory body" impartiality by school boards with the inability of many school boards to function at that level. It would also be helpful to apply the same standards of bias to most school boards as are applied to small private employers, namely an acceptance that there may be some elements of predetermination and there will always be an appearance of bias. The appropriate standard therefore should be "actual bias" rather than "appearance of bias".

The Statutory Framework

Cabinet has indicated an unwillingness to review the basic governance structures of *Tomorrow's Schools*[52]. Major restructuring may not be necessary but some legislative amendments could ensure that all school boards are better equipped to perform their employment and performance management functions:

1. All schools should be required to have an external adviser when appointing a principal and adequate funding should be provided for this. In addition we could require that principals be appointed only if they have passed am appropriate qualification that prepares them to be a principal.
2. All schools should be required to use an accredited external appraiser for the principal at least once every three years;
3. Alternatively, consideration should be given to requiring all schools to have a funded school improvement adviser (as in the UK) who could fulfil some or all of the above functions, in addition to training and mentoring the board.
4. There should be a mechanism that would allow schools to opt out of responsibility for aspects of governance which they consider they are unable to properly perform.[53] This would be separate from the section 78I(1) (EA) interventions which a board can currently request but which require that there be a serious risk to the operation of the school or the welfare or education of the students s78I(2) (EA) and which carries an accompanying stigma for the school. It would be an acknowledgement that for some schools with small parent bodies the full requirements of governance are too onerous and the principal is frequently left to carry the burden of governance tasks. One proposal is that the Ministry appoint cluster principals who would supervise a number

[51] Administering for Excellence p 69: "When all else has failed to improve teaching performance and the board of trustees feels obliged to take some form of disciplinary action**, there must be a mechanism for an independent body to review the procedures used and the action taken**…It would either confirm the action taken or reinstate the teacher. If a teacher remains dissatisfied that justice has been done, there remain the usual legal remedies open to anyone through the courts."

[52] See n1: School Governance - Board of Trustees Stocktake, page 6.

[53] In 2006 61 per cent of secondary school trustees surveyed thought they had too much responsibility, and 35 percent of secondary principals thought trustees had too much responsibility. *School governance in New Zealand – how is it working*? Cathy Wylie NZCER, page 18.

> of schools, and who would have the responsibility for the appointment, support and development of each school principal as well as ensuring that each school's strategic direction was developed in consultation with its community and in reliance on valid student achievement data.[54]

Policy changes to re-centralise some board functions are not seen as desirable by NZSTA, and some would see this as a reduction in desired "parent voice" in schools. Nevertheless it is questionable whether parental responsibility for employment and performance management issues has been productive, or has been the most effective way of improving principal, teacher or school performance.

[54] Liz Springford, *Tomorrow's Primary Schools: Time to Evaluate Governance Alternatives,* Policy Quarterly, Vol 2 No 3 2006, p37.