# SCHOOL BOARDS OF TRUSTEES IN THE NEW ZEALAND EMPLOYMENT COURTS: PROBLEMS OF BIAS AND PROCEDURE

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*This paper examines the effect of employment law and the decisions of the employment courts on performance management issues in state primary and secondary schools in New Zealand.*

*In particular it looks at the role of the board of trustees as employer within the statutory framework for education. I suggest that the board's particular legal nature, its statutory composition and the lack of clarity about the board's rights, powers and duties, restrict its ability to deal with poor performance, incompatibility and misconduct.[1] When these are combined with the prevailing employment court focus on procedural issues, in particular the question of bias, the chances that a board of trustees will "get it right" are reduced.*

*Because of the above statutory defects and external legal pressures I conclude that the board of trustees is currently set up to fail in the employment courts, and is therefore the weak link in the chain of educational performance management.*

[1] Issues relating to redundancy and fixed term appointments, which have also featured in the case law, are not considered in this paper.

## I. Introductory Background

The Education Act 1989 heralded a significant reform of school administration in New Zealand. Before this date state schools were administered from a centralized bureaucracy in the Department of Education, operating through regional boards. 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. Procedures for dismissal existed in the Education Act 1964 Part VI s159, and included a disciplinary board and a Teachers Court of Appeal. A school board could make a decision to censure or reprimand, but not to dismiss. If they believed that a teacher should be dismissed they had to gain the approval of the Director-General of Education in order to proceed to the national Teachers Disciplinary Board. This was an independent body chaired by a lawyer appointed by the Minister. The Privy Council characterised the process as "elaborate"[2] but it was used only two or three times a year. When the procedure was subject to judicial review by an aggrieved teacher, the courts held that the regulations that governed the processes should be seen as a code and it was not the job of the courts to engraft further requirements of procedural fairness.[3] 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.[4]

"Treasury dedicated the entire second volume of *Government Management* to education restructuring. Its 'devolutionary' 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."[5] In the education sector businessman Brian Picot's report *Administering for Excellence* [6] formed the basis of reform. As part of the general trend towards reducing government influence in the economy it favoured devolution of administrative and policy functions of the regional education boards to local communities, who would govern through a board of trustees. "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." [7] The report envisaged that boards of trustees would act something like a board of directors with the principal as the board's "chief executive."[8] The corporate analogy was not coincidental and was considered a guide to how the board would work.

The increased parental involvement and responsibility that was envisaged and encouraged brought the parents into the employment relationship as part of a legal entity with rights and liabilities that school boards had not previously had.[9]

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[2] *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705,713.(PC) This was a case of judicial review taken on procedural grounds by a teacher who had been dismissed for incompetence. The chief complaint was that he had not been present during the initial investigation. The Privy Council held 3-2 that the procedures provided in the statutes already had detailed requirements to ensure fairness and that no further natural justice requirements needed to be added.

[3] Ibid 718.

[4] 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.

[5] Ibid 219.

[6] Taskforce to Review Education Administration *Administering for Excellence* (1988).

[7] Dominic O'Sullivan, "School Governance and Management: The Principal –Board of Trustees Relationship" 1998 4 Waikato Journal of Education 175, 176.

[8] Education Act 1989 s 76.

## II. WHO IS THE EMPLOYER AND WHAT ARE THE EMPLOYER'S OBLIGATIONS?

With the above goals in mind, a new statutory framework was set up. To increase parental input the role of the employer 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 would be delegated. First it was necessary to set up the school boards.

### *Education Act 1989.*

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, an optional student representative. Its provisions were shortly afterwards incorporated into the Education Act 1989, Part IX. Parent board members are essentially volunteers, being paid $55 per monthly meeting to cover such expenses as babysitting and transport.

*The Legal Nature Of The School Board*

The 6th Schedule of the Education Act 1989 (EA 1989), paragraph 1, describes a board of trustees as a body corporate with perpetual succession and a common seal. This contrasts with the board of directors of a company, which may, in the case of financial or legal difficulties, decide to dissolve itself.[10] The board may own property, may sue and be sued and otherwise do and suffer everything that bodies corporate may do and suffer. The apparent right to litigate is not accompanied by any funding. In practice a board is subject to litigation, most frequently in the employment area, but is reluctant to undertake litigation of its own accord. It became apparent in the early 1990s that schools would have to purchase indemnity insurance, but this inevitable consequence of legal liability was not foreseen in the statute and few schools were prepared.

*Accountability of a Board for Performance Management in Schools*

It became apparent in the early 1990s that some boards were not able to cope with the requirements of governance. Originally the Minister might dissolve a board and replace it with a Commissioner if the board was failing in its duties by reason of mismanagement, dishonesty, disharmony, incompetence or lack of action. This mechanism provided help too late, and the Educational Amendment Act 1998 (2) allowed the Secretary of Education to require boards to get special assistance (S 64A EA 1989). This also was found to be too little too late, so the Educational Standards Act 2001 repealed the previous efforts at dealing with poorly performing schools and introduced sections 78H-T, allowing and requiring boards to get

[9] In *Furnell*, the school"s board was named as the respondent but the legal fees were paid by the Department of Education

[10] *Hobday v Timaru Girls' High Trustees* [1994] 2 ERNZ 171,179.

specialist help at many different levels, ranging from advice only, to complete replacement by a Commissioner. Commentary at select committee stage makes it clear that the purpose of this amendment was to lower the threshold for intervention and to shift the focus of boards of trustees from "primarily dealing with compliance and financial management problems to addressing educational performance as well."[11]

These provisions reflect the statutory approach to performance management 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 64). 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 board to see that its employees, the principal and the teachers, perform better. Thus, at law, student achievement in schools is primarily the legal responsibility of the volunteer and untrained board, as opposed to the professionals whom it employs.

*Accountability for Employment Practices*

The obligations and duties of boards are contained in their charters. New sections in the Educational Standards Act 2001 require that the school be managed, organized, conducted and administered for the purposes set out in the charter, which includes national educational guidelines (NEGs) and national administrative guidelines (NAGs). NAG 3 requires boards to develop and implement personnel and industrial policies, within policy and procedural frameworks set by the Government, which promote high levels of staff performance, use educational resources effectively and recognise the needs of students. Boards are required to be a good employer as defined in the State Sector Act 1988 (SSA 1988) and comply with the conditions contained in employment contracts applying to teaching and non-teaching staff. The board is ultimately responsible for the entire performance management process, which may include the need to dismiss.

Under s 65 of the 1989 Education Act the board may appoint, suspend and dismiss staff in accordance with the State Sector Act 1988.

Section 66 is an important section which has been at issue in the courts.[12] Boards may appoint a special sub-committee of trustees for a specified purpose and delegate to the committee any of its powers and functions it thinks fit, apart from the power to borrow money. This means that a board could delegate its powers in s 65 to a subcommittee.

Section 66A allows the board to similarly delegate its powers to staff. Thus a board could theoretically delegate all of its power to appoint or suspend or dismiss to the principal. In practice boards regularly delegate powers to appoint classroom teachers to the principal. Confusion over whether a principal had the power to suspend was an issue in *Richardson*.[13] In that case the board was chastised for not formally delegating the power and recording it in the minutes. There is thus an issue of whether boards have formally delegated.

The Education Act seems to allow for the possibility that all three of these functions might be delegated to the principal. It raises the interesting question of whether, if the board has decided

[11] Educational Amendment Bill (No2) Version 2, 24-07-01. Commentary.
[12] *Richardson v Board of Governors of Wesley College* [1999] 2 ERNZ 199.
[13] Ibid.

to delegate all employment issues, the principal can be accused of bias if he dismisses after considering the issues himself. He or she would then be in the same position as other employers and there would be no requirement for parent representatives to become involved in adjudicating on the matter. Since the question of bias in board of trustee hearings is a major issue in the case law, the removal of this potential procedural defect could simplify matters considerably. This is especially relevant when considered in the light of section 77E(2) of the State Sector Act 1988, which affirms that the employer shall have all the rights duties and powers of an ordinary employer. This would mean that the higher requirements of the courts regarding bias could not be applied to educational employment decisions.

*Who Controls The School?*

Section 75 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 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. There has been much comment about the need for each to keep to its own business but very little clear guidance as to what this means. This issue has been discussed by the courts and will be looked at more closely when we examine the case law on bias in the employment relationship between the board and the principal.

## *State Sector Act 1988*

*The Board's Employment Responsibilities*

This Act applies to schools because it provides the statutory framework for all public service employees in New Zealand. Part 7 applies specifically to the Education Service. The State Services Commissioner, in consultation with the Minister of Education, is responsible for negotiating the collective employment agreements that apply in the Education Sector (s 74) and section 74A makes it clear that, in relation to personal grievances or disputes about the interpretation or application of a collective, the employer is the board of trustees.

Section 77A (1) requires boards of trustees to be a "good employer", as defined in subsection 2. This requires a personnel policy with provisions for fair and proper treatment of all employees in all aspects of their employment, including: good and safe working conditions, an equal opportunities programme, impartial selection of suitable qualified persons for appointment, recognition of the aims and aspirations of Maori people, and other provisions to ensure equal opportunities.

Section 77C deals with performance management of teachers. It allows the Ministry of Education, in consultation with the other educational stakeholders, to prescribe matters to be

taken into account by boards in assessing the performance of teachers. The board may stipulate additional performance requirements so long as they do not conflict with those of the Ministry, but such requirements would presumably be subject to tests of reasonableness if they were contested in the Employment Authority.

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) affirms 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 is apparently to put private and public employees on the same footing.

In relation to decisions about individual employees, boards as employers are required to act independently (s 77F). It is not specified whom they are supposed to act independently of. Is it the Ministry, the principal, outside influence, or personal preference? Perhaps it should be assumed that it means independently of any other person.

*The Employment Relations Act 2000 (ERA)*

The employee who believes they have been treated unfairly may use the personal grievance provisions of the Employment Relations Act (State Sector Act s 73). By far the most common grounds are unjustifiable dismissal, and disadvantage by some unjustifiable action by the employer.

The law also now prevents the taking of a common law action for "wrongful dismissal" (s 113(1)), so all actions for dismissal must be taken as a personal grievance claim, before the Employment Relations Authority.

The ERA also requires a reciprocal duty of good faith between employers and employees in all matters arising out of employment agreements (s 4(b)). This includes restructuring and changes in the workplace or working conditions which may affect employees.

In contrast to previous Labour Acts, there is now a requirement for mediation as the primary method of dispute resolution to encourage people to deal with employment problems before they become polarized.(s 143)

*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[14]

> …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 statute also made the same assumption, as indicated by the very heavy responsibilities which it placed on the board. It is now fourteen years 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. Lucky boards in larger or high decile schools may have legal or accounting 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,[15] 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 2004 fewer parents have that time to commit. Forty percent of boards in the last election did not have enough candidates to require the holding of an election. [16] 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 responsibilities that go with it. It is not uncommon for a board to be substantially replaced every three years and 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.

In the next section we consider whether the legal tests applied by the employment courts take the above factors into account. Before we consider the case law it is instructive to examine the procedural requirements of the collective agreements which bind boards of trustees, but which are not negotiated by them.

[14] Taskforce to Review Education Administration *Administering for Excellence* above n 6, 4.
[15] "Board Trustees Serving the Community" *Christchurch Press,* 27 Feb 2001 7.
[16] STA News April 2001.

*The Secondary Teachers Collective Employment Agreements*

For the sake of brevity we will look only at the Secondary Teachers' Collective Agreement 2002-2004[17]

The STCA includes the SSA 1988 s 77A (2) "good employer" requirements. It also provides some very detailed guidelines for appointment procedures. Clauses on teacher competence (3.3.2) specify in considerable detail the step-by-step process which the employers must go through before they can dismiss based on incompetence. A board's appraisal process should link smoothly with this procedure.

*Performance Management*

The performance management of teachers is considered to be the responsibility of the principal in his day-to-day management of the school. Small groups of teachers are usually checked by a senior teacher, who is in turn checked by a member of the senior management team. The latter are usually appraised by the principal.

The Professional Standards for secondary teachers are part of the Collective Agreement (Supplement 1). In addition schools must provide professional development. Some claims of disadvantage have been based on lack of appropriate professional development.[18] Employees should be advised as early as possible of any defects and given adequate assistance and guidance. All warnings must be given in writing, listing specific concerns and how they can be remedied. The teacher also has to be advised of his right to consult the union and to be represented at any stage.

Failure to follow these procedures will almost always lead to a finding of unjustifiable dismissal.

*Suspension*

The procedure for suspensions or dismissals for misconduct is even more detailed and has within it considerable potential for confusion.

- First (3.4.1) the employer must determine whether disciplinary procedures should be initiated. The employer must therefore make initial enquiries. The teacher must be informed of any allegation of breach of discipline and their right to consult the union.

Once a decision has been made to initiate formal procedures the employer must (3.4.3):

- Advise the teacher in writing of the reason, invite the teacher to respond in writing, and advise the teacher of their right to union or other representation.
- Undertake an investigation and invite the teacher to attend and make a statement, either personally or through his representative.

[17] Ministry of Education Website http://www.minedu.govt.nz/index.cfm?layout=document&documentid=7669&indexid=1014&indexparentid=1013 28 May 2004.
[18] *O'Neill v Te Puke High School Board of Trustees* unreported HT 69/01 8 October 2001 Wm Hodge

However the employer may suspend immediately without the above procedure if the welfare and interest of any student or employee at the school so requires. The case law suggests that the threshold would have to be very high to justify immediate suspension (*Richardson*[19]).

- Where a breach of discipline is held to have occurred the employer cannot impose any penalty without first giving the teacher the opportunity to make representations and taking into account any period of suspension already imposed.
- In the case of a finding of serious misconduct the employer may dismiss the teacher without notice.

There is no indication of what constitutes serious misconduct justifying dismissal without notice, however (3.4.5) provides some suggestions of behaviour that might warrant disciplinary action:

1. Disobedience of lawful orders or instructions, negligence, carelessness or indolence in carrying out his duties as a teacher.
2. Gross inefficiency as a teacher.
3. Misuse or failure to take proper care of school property or equipment.
4. Absence from duty without valid excuse.
5. Conduct, in his/her capacity as a teacher or otherwise which is unbecoming to a member of the teaching service.

There are a number of potential pitfalls for boards in the above process.

The first is that "employer" in the agreement refers to the board, and any board which has not formally delegated the power of suspension to the principal will need to be fully involved at all stages of the process. The actions of any principal acting without that formal delegation will be held invalid.[20] Theoretically the principal could be delegated to deal with the whole of the procedure. However, in practice it is usual for the principal to conduct the initial investigation and the board to become involved once a decision has been made to initiate formal proceedings.

Secondly, once the rest of the board become involved, the case law indicates that they must take care to reach their decision following administrative law principles of natural justice. Some of those natural justice requirements are fulfilled by following the procedure of the collective agreement, but others arise during the decision making process itself. In particular, in addition to procedural failings, boards have been challenged on grounds of bias and improper motive.

The third potential pitfall for many boards is that if they are insured they must notify their insurer at the start of any disciplinary or competency procedure or they will not be covered. It may sometimes be a matter of judgement when a process has started.

Teachers have not been slow to use the personal grievance procedures available to them under the Employment Relations Act 2000. In addition to the cases through the tribunal and the employment courts, a large number of cases are settled at mediation. As the mediation process is confidential, it is hard to estimate how many dismissals are routinely challenged and bought off during mediation by boards who decide it is cheaper to pay out than to fight the issue any

[19] *Richardson v Board of Governors of Wesley College* [1999] 2 ERNZ 199.
[20] Ibid.

further. In this boards have much in common with other employers, who are also subject to this kind of pressure. Although most (but not all) schools are now covered by insurance, with an average excess of $2500, schools are still reluctant to use school funds for fighting cases on principle.

The conduct that might warrant discipline, and the procedures that must be followed, are almost identical to those contained in s158 and s159 of the Education Act 1964. Thus, despite substantial structural reform in the public service generally, the complexity of the procedural requirements is only minimally reduced. Under the Education Act 1964, the procedure was in the Act and could only be challenged in the courts through administrative law remedies such as judicial review. After the Education Act 1989, the procedures were contained in the collective contracts, and although they could be challenged in the Employment Court, the case law below demonstrates that the court applied judicial review standards to schools, rather than general employment law standards.

## III. The Case Law on Bias

It can be argued that the State Sector Act 1988 had, as one of its goals, the similar treatment of public and private employees (SSA s 77E(2)).[21]The following survey demonstrates that a number of other factors probably came into play to thwart that goal. Some of those factors are:

- Strong teacher unions who managed to preserve the complex procedural requirements of the old Education Act in their collective agreements.
- The statutory nature of school boards, which made them potentially subject to judicial review. The employment courts have tended to apply judicial review standards of decision making.
- The statutory composition of boards, which meant that judicial review standards were applied to untrained volunteers, making decisions based on common sense rather than legal tests. There was a high possibility that such decisions would be overturned for procedural failure.
- The statutory composition of boards also meant the potential for being challenged for bias is arguably much higher than other statutory bodies because the decision makers are not only employers of the principal and staff, they are at the same time clients, dependant on the continuing goodwill of those same staff. Potential for bias is also increased by the close personal relationships that will exist in many smaller schools and communities. In courts it is sometimes accepted that it is not possible for judges to be completely independent in a small society, but that some trust can be placed in their skills and training. It may be asking the impossible to expect untrained board members in small communities to avoid all appearance of bias.
- The general movement in the employment courts over the last twenty years to transfer the procedural standards of the public service to private employers, thus countering legislative attempts to do the reverse.[22] Hodge[23] chronicles this process, characterising

[21] Jane Kelsey above n 4, 177.
[22] See for example the State Sector Act 1988 and the Employment Contracts Act 1991.
[23] Bill Hodge "The Exaltation of Procedure" Conference Papers, NZLS Employment Law Conference, Auckland, 1996.

> procedural fairness as "a judicial construct, which while legitimate, has exceeded itself."[24]

This survey of the case law will focus on the way in which the courts have applied natural justice requirements concerning procedure and bias to the actions of boards of trustees. It also considers what account the courts have taken of the particular statutory nature and make-up of boards.

The issue of bias was examined at length in *NZPPTA v BOT of Kelston Boys High School*[25], where a teacher had been drinking before school and became involved in an argument with other teachers. He took the option of a year's leave of absence, but the disciplinary proceedings were reactivated when he returned to school a year later. 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 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. Before the hearing the staff representative had been requested to stand down because of that conflict of interest.

In considering whether bias was a ground for challenge, the court noted that: [26]

> 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 chain of reasoning seems to be that the employment relationship requires fairness, fairness means natural justice, and natural justice includes bias. The contrast with the standard applied to a private employer is demonstrated by the obiter comments of Fisher J in *Peters v Collinge,*[27] "no-one would expect an employer contemplating a dismissal to approach his or her task with a mind untainted by preconceptions". ELC[28] 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".

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[24] Ibid 7.
[25] [1992] 2 ERNZ 793
[26] Ibid 819.
[27] [1993] 2 NZLR 554, 556.
[28] *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

After citing a number of judicial review cases, 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, [29]

> '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. It results in an inability to exercise one's functions impartially in a particular case. 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 relies on the test posed by Gallen J in *Loveridge v Eltham County Council* (1985) 5 NZAR 257, 264, "[Whether] it appears from all the evidence that all or any of the bodies or individuals involved had so conducted themselves that an informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the issues before them."

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 no obstacle to the full participation of an employee member of the board in relation to matters involving other staff, even though they might know the defendant or have a degree of knowledge of the circumstances supporting the allegations. However, 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.

The court helpfully decided that a staff representative is not biased merely by virtue of the fact that they have knowledge of the case, but goes on to consider Goddard CJ's comments in *NZ Merchant Service Guild IOUW v Taranaki Harbours Board* [1990] 3 NZILR 181,199[30]

> "…the test is whether there was a real likelihood of bias…. That test however has been modified somewhat in judgements of the Court of Appeal suggesting that a suspicion of bias, reasonably entertained, may be enough.
> It is implicit in these tests that the Court does not inquire whether the decision makers were in fact biased. It is a question, rather, whether justice was seen to be done…."

The court applied this higher standard. There was no evidence of predetermination; rather the problem was that the high degree of knowledge gave an appearance of bias.

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: [31]

> 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

[29] Taylor, Judicial Review-A New Zealand Perspective Wellington Butterworths 1991. para 13.46.
[30] cited in *NZPPTA v BOT of Kelston Boys High School* [1992] 2 ERNZ 793, 821.
[31] Ibid 824.

> bias on the part of an employer or its representative), this was a very different case. School Boards of Trustees are creatures of statute.

This meant that, as the statute allowed for smaller subgroups of the board to operate and make significant decisions, there was no necessity for the staff representative to be there, and his participation caused the respondent to be biased in law. The court had a discretion whether or not it set aside a decision on such grounds but in this particular case the further finding of "improper motive" weighted the court in favour of setting aside the dismissal.

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 standard appears to be a suspicion of bias reasonably entertained. Although the court allows that a certain amount of knowledge would be acceptable it is not clear how much. 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 are not clear.

Improper Motive

Improper motive was a ground for appeal because the school, having concluded a de facto agreement with the grievant that he would not return after his sick leave, then attempted to enforce the agreement by taking the disciplinary procedure. It was held that the respondent would not have acted as it did, (ie conducted a hearing and determined to dismiss the grievant) but for the arguably improper purpose of the enquiry, namely its intention to ensure that the legally unenforceable agreement for the taking of unpaid leave upon a no-return condition should be effected.

It appears that if the dominant purpose in conducting a disciplinary hearing is to dismiss someone, and those circumstances and motives are known to the members of the board then that will be "improper motive". It is likely that desire to dismiss is the dominant motive of many disciplinary hearings. However, in this case it was particularly relevant that they were attempting to enforce a legally unenforceable de facto agreement. In combination with the "reasonable likelihood of bias" of the staff representative it was enough to make the dismissal unfair.

At a later hearing, which provided compensation after the grievant abandoned claims to re-instatement, the court lifted an interim suppression order. It cited community interest in management of schools, and the rarity of cases involving the education sector, given its relatively recent assimilation with private sector employment law.[32]

It is interesting that in assimilating the education sector into the private sector employment law, the court continued to apply public administrative law standards of bias and improper motive. The chief reason for this appears to be that the board of trustees is a statutory body. The nature of that particular statutory body was not investigated. It had in effect been given tribunal status. The cases which were referred to applied administrative law standards[33] to employment issues

[32] *NZPPTA v Kelston BHS Trustees (No2)* [1992] 2 ERNZ 936,941.

[33] *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.

involving publicly elected boards or councils, so there are grounds for making this analogy. However, consideration was not given to the high likelihood of bias due to personal relationships. The other cases, which involved harbour boards and councils, are institutions that were also likely to have legal advice on hand. In addition it was not considered whether requiring a very high standard of procedure might be contrary to the purpose of the Education Act 1989, which arguably had as one of its goals the increased accountability of teachers.[34]

*NZEI v BOT Auckland Normal Intermediate School*[35]

The grievant was a deputy principal who was dismissed by a sub-committee of the board after ongoing clashes with the principal. The subcommittee which considered the principal's complaint to the board was made up of the board chairman, the principal, and two other board members. At the meeting the chairman stated that it was important for the board to support the principal. It was resolved to monitor the grievant's conduct and to provide him with a list of matters that needed to be addressed. After advice from the School Trustees Association the board tried to re-categorise the meeting as a warning to the grievant, and as a result, one board member of the committee resigned. Although there was some improvement in conduct, four months later the subcommittee recommended the grievant's dismissal and this was passed by the whole board. After further consultation with the STA the chairman reconvened the board meeting in order to modify its resolution so as to give the grievant a chance to comment satisfactorily, failing which dismissal would result. A letter was sent to the grievant and the need for confidentiality was stressed. The personnel committee met again, commented adversely on apparent breaches of confidentiality and heard the grievant's submissions, allowing half an hour. During this time the principal was present and remained after the grievant was required to leave. The subcommittee subsequently left and decide to dismiss the grievant and purported to do so.

The Employment Court approached its decision by considering whether there had been a "fair and *procedurally correct* inquiry".[36] It is noteworthy that, in contrast to the discussion in *Kelston BHS*, a requirement for procedural *correctness* has been added to the requirement for procedural fairness. In considering the powers and responsibilities of a school board of trustees the court states:[37]

> 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". [38] In other words, the traditional processes of the public sector are held to outweigh the clear statutory statement 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

[34] *Administering for Excellence* above n 6, Jane Kelsey above n 4, 177.
[35] [1992] 3 ERNZ 243.
[36] Ibid 268.
[37] Ibid 268.
[38] Ibid 269.

"other 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 is justified, in light of the purpose of the State Sector Act in increasing accountability, 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*[39]. 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" [40] The question has not been examined in relation to boards of trustees. It has been assumed that they are exercising a statutory power. In practice, in many smaller schools, the nature of the employer board is much closer to that of a small employer than a statutory body. If smaller boards were to be treated like private employers, it would not affect the procedural requirements but it might affect the rulings on bias.

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. [41]

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. It is arguable that the inclusion of this factor should not be an indication of bias unless it is the predominant factor to the exclusion of all others. If this case had occurred under the ERA there may have been a more useful focus on mediation, but this kind of incompatibility issue still regularly defeats the mediation process,

[39] [1990] 2 NZILR 962, 989-999.
[40] Ibid 996.
[41] Ibid 280.

and in a case of conflict between people who cannot work together an employer has to make a choice.

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. They are the principal's employer but they are also dependant on him for all the advice and information which they need for decision making. They are often not professional equals and may be in a deferential relationship of respect, or harmony for harmony's sake. 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 care of their children. 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 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 statutory requirements of any board of trustees and their ability to meet them.

The court in dicta made strong recommendations that the board should "where appropriate and possible, take advice in advance of the making of significant decisions."[42] The court also 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." [43] It recommends that the board follow Ministry Guidelines. This is a clear warning to the legislature that despite intending to set up a system that allowed for greater accountability of teachers, s 77E of the SSA was not sufficient to overcome the technical hurdles of the dismissal processes in the teachers' awards. It is also a warning that the Education Act was far too vague about the respective roles of the different members of the board. The courts were willing to fill in the gaps, but in interpreting the elaborate dismissal procedures that teachers had long enjoyed, they would apply judicial review standards. A series of constantly changing Ministry guidelines, which were not legally binding, was an inadequate way of dealing with what was to become a major problem.

"These two cases both concern statutory bodies and extremely complex collective contracts in an environment where essentially inexperienced persons were dealing with the dismissal. Nevertheless, it seems clear that in such cases *a very high standard of procedural fairness* is expected."(emphasis added)[44]

[42] Ibid 293.
[43] Ibid 293.
[44] *LexisNexis Employment Law Guide* (6th Edition), LexisNexis NZ Ltd Wellington 2002, 663.

*Hobday v Timaru Girls High Trustees*[45]

This was a long-running conflict between an employing board and their employee principal over the governance and administration of the school. A principal, whose management style had 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. She sought compensation in respect of pre-dismissal disadvantage (because of the way the board had treated her before the dismissal and interfered in her day-to-day management of the school), unjustifiable dismissal, and post-reinstatement disadvantage for treatment after her interim reinstatement.

In a strongly worded judgement the dismissal was held to be substantively[46] unjustifiable and procedurally unfair.[47] 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 he board should in future take disciplinary action against the plaintiff with a view to removing her from office."[48] 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",[49]and because she was both a complainant, witness and decision maker in the dismissal process.

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.

[45] *Hobday v Timaru Girls' High Trustees* [1994] 2 ERNZ 171.

[46] 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.

[47] *Hobday v Timaru Girls' High Trustees* [1994] 2 ERNZ 171, 855.

[48] Ibid 784.

[49] Ibid 768.

The board members had "inappropriate communication with core members of dissident staff".[50] One board member is criticised for obtaining derivative information from his wife, who was a staff member at the school, and thereby forming preconceptions.[51] 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."[52] 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 guideline as to what is unacceptable communication that might amount to a suggestion of bias.

There is no doubt that the procedure by which the board attempted to remove their "chief executive" was completely flawed. The procedural requirements were discussed in the same year in *Trotter v Telecom Corp of NZ Ltd,*[53] which dealt with a senior manager who was dismissed by an incoming superior without warning of any defects in performance. They are very similar to the guidelines for dealing with any employee.

Unfortunately the Education Act had given no such guidance to boards. The Picot report and Ministry guidelines envisaged a cooperative relationship between the board and the principal but there was no indication anywhere as to what should happen if the board became dissatisfied with its principal and the relationship became less than cooperative. After this case, when the need for guidance became obvious, the Ministry and the Educational Review Office and the STA have continued to issue a stream of booklets and guidelines to attempt to clarify both how the board should supervise its principal, and what issues were those of governance and what concerned management. It has to be said that after fourteen years the governance - management issue is still not agreed upon between the main players. There are clearer processes for dealing with principal performance management, but because of many of the factors already raised in this paper, the processes are still often not implemented properly. The following section outlines why principal performance management raises major issues of bias and procedure.

The Secondary Principals Collective Agreement 2003-2004[54] in clause 4.1 provides that performance management of the principal is undertaken by the board of trustees, the process of review, and the criteria which must be met, must be recorded in writing as the performance

[50] Ibid 765.
[51] Ibid 777.
[52] Ibid 760.
[53] [1993] 2 ERNZ 935.
[54] Ministry of Education Website minedu.govt.nz . 25 April 2004.

agreement, and that 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. Failure to meets standards requires assistance and extra training.[55]

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, who are supported by strong unions. 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 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 has a significant role but may be intimidated by 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 confidence or the 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 discipline the principal. If dismissal occurs, the detail of the process makes it easy to find grounds for challenge.

The complexity of the performance management relationship is obvious. It is not surprising that, particularly before clear guidelines were available, boards have had some fairly disastrous breakdowns in their relationships with their principal. [56]

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

[55] See Appendix.
[56] See n 78.

various personnel involved. 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*[57]

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 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."[58]

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."[59] 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…"[60] 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. Although this seems a safe procedure to take in order to avoid the appearance of bias, it does raise the question of why a board cannot act on the evidence of the ERO report itself. It is doubtful that there is any great difference in impartiality between an ERO report and an independent investigator's report.

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. This contrasts with the Employment Court approach in *NZEI v ANI* and *Hobday,* although it may have been that the court considered the comments justified rather than biased. It is particularly notable that the Acting Principal, who had previously called the plaintiff a "bloody liar", was not required to

[57] 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.
[58] Ibid 17.
[59] Ibid 20.
[60] Ibid 21.

abstain from the decision to investigate the principal. Her presence on the board was seen as essential because of her role.[61]

> 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.

However the court did see fit to warn that if the board reached the point of considering dismissal, Ms Bernard's direct interest in the outcome of the decision *could* disqualify her from participating in the decision. (emphasis added)

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.

Relief was not granted. The plaintiff had not cooperated with the board's investigation and thus[62]

> the plaintiff cannot expect his failure to respond to the opportunities provided by the Board and the independent investigator to present his point of view on the matters in issue, should halt the board in the proper performance of its functions and the carrying out of its obligations…

Here it appears that an actual process of judicial review is applying a lesser standard of bias than the employment courts. Although the judgement cautions the board to be careful in future it was held that there had been no breach of the principles of natural justice. The court was prepared to overlook some flaws in meeting procedure, as they had not resulted in any injustice to the plaintiff. This decision seems more ready than previous decisions in the Employment Court to take into account the statutory composition of the board, particularly with regard to the presence of the Acting Principal. The particular circumstances, in which the board were trying to deal with a crisis situation not of their making, may have influenced the court. By contrast, in *Hobday* the board had made a significant contribution to the bad relationship.

The finding that the plaintiff lost his entitlement to relief because of his non-cooperation with proceedings is in contrast to the next case that appears before the Employment Court. While there are no issues of bias, it is an interesting illustration of the tendency in the courts to consider correct procedure, rather than fair procedure.

*Ramage v Ministry of Education*[63]

Mr Ramage, following the non-appointment of his partner to the position of assistant principal, became very negative towards his employer. He refused to attend staff meetings, cleared his pigeonhole less than once a week, greeted those who approached his classroom with hostility, and approached newspapers to publicise his dispute. Attempts by the board of trustees to take any form of disciplinary action were actively thwarted or ignored. He began what can only be described as a campaign of aggressive non-cooperation. There were complaints of assaults on

[61] Ibid 26.
[62] Ibid 31.
[63] [1998] 2 ERNZ 188

pupils, violent and threatening language to the principal and throwing furniture. The Employment Tribunal found that his dismissal by the board was justified and that the process was not unfair, despite the appellant not having received notice of the meeting because he had gone away on holiday and put himself out of reach. The tribunal considered that the defendant had a responsibility to make sure he could be contacted and was not entitled to put himself out of reach for the whole summer holidays and expect the board would stay its hand until the new term. "The tribunal found that the board had no reason to think that the appellant was departing from his usual practice of ignoring communications if he so chose, and therefore had provided the appellant with a reasonable opportunity to put his side and no unfairness had resulted." [64] The Employment Court overturned this aspect of the decision and held that because the board of trustees went ahead without the appellant at the meeting they had breached their contractual obligations under the collective employment contract, the appellant had not had a chance to be heard and numerous allegations were not brought to his attention in written form. The dismissal was therefore unjustifiable. Nevertheless the court went on to find that the appellant's conduct was so bad as to be repudiatory of the employment contract and no monetary award was made.

In this case the board had clearly been unable to cope with the procedural requirements of the employment contract in the face of complete and deliberate non-cooperation by the appellant. What is of concern in this situation is that a board is unable to deal promptly with what is an extremely disruptive and damaging situation. It may be that non-cooperation with procedural requirements of the contract on the part of the employee should itself vitiate any subsequent failure of the employer to observe the procedures of the contract completely. The failure of procedure did not affect the justice of the final outcome. By comparison, the High Court in *Thompson v Grey Lynn BOT* was prepared to focus on the overall fairness rather than total compliance with procedural correctness.

It is also of concern that the board of trustees, while it may have the legal right to dismiss, is very unlikely to have the expertise to get through the procedure without attracting legal action. The School Trustees Association has for some time now advised all schools to take legal advice and consult their insurance company before making any moves to deal with competency or misconduct. The increasing legalisation of teacher performance management can only increase financial risk for schools and inhibit willingness to deal with performance issues.

*Sutherland v Board of Trustees of Marlborough High School*[65]

The grievant was deputy principal of a college who was summarily dismissed for serious misconduct. This arose from a tense and emotional incident the deputy principal had with the caretaker, and the principal's dismissive handling of her concerns. The sub-text was that the principal had been asked by the board to deal with her non-performing colleague. The case was taken as a wrongful dismissal proceeding under the ECA 1991 and 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 board by the principal. One elected member of the board had recently begun working at the college. The plaintiff felt that the disciplinary process was being used as an excuse to dismiss her.

The court was clear that the various acts of aggression, anger and disobedience did not amount to serious misconduct so the plaintiff succeeded in her claim of wrongful dismissal. The further

[64] Ibid 194.
[65] [1999] 1 ERNZ 665.

claim of improper motive did not strictly speaking need to be considered but the court did examine the issues of bias that were raised. 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 [66]

> Neither the absence of actual bias, nor the plaintiff's subjective suspicion of bias is a proper test. It is the appearance of things to an objective informed hypothetical observer, not predisposed to favour either party, that is decisive…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 [67]

> …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.

Later, in considering whether the claimant was entitled to exemplary damages the court commented that failure to provide the plaintiff with a transcript of proceedings "was extraordinary behaviour for a sophisticated employer which had the benefit of the advice of the School Trustees Association available to it in relation to matters such as these." [68] Somewhat confusingly however, the court took cognisance of the fact that although the committee's errors amounted to a breach of natural justice "this was a lay committee, in the main chaired by a provincial solicitor, albeit one reputed to be possessed of ability and claiming to be experienced."[69]

The court appears 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:[70]

> 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

[66] Ibid 695.
[67] Ibid 697.
[68] Ibid 702.
[69] Ibid 703.
[70] *NZ Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883, 891.

> 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[71]

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

Is it possible therefore for a board, like a private employer, to have preconceptions about an employee, and still be fair in the way in which they reach their decision? Common sense suggests that this would have to be possible.

*Richardson v Board of Governors of Wesley College*[72]

The appellant was a senior mistress suspended on full pay by the principal for fabricating a suicide incident, conditionally reinstated, and later dismissed for allegedly disobeying the principal's instructions. The appellant was allowed to make submissions on the penalty but was not allowed to appear personally before the board. Written submissions sent by fax that arrived one minute past the deadline were ignored.

The Employment Court held that the principal had no power to suspend as it had not been formally delegated to him by the board. It was not open to the board to pass a later resolution confirming his actions; it had to be involved from the outset.

The collective contract did not require that the appellant be present at all stages of the disciplinary investigation, but she should have been given an opportunity to make submissions to the board. . The employee must be allowed to address the decision maker in disciplinary matters, but the decision maker does not have to be the full board, so long as the subcommittee has been delegated the decision making power. The presence of the principal on the board, as the appellant's accuser, also gave the appearance of bias and the dismissal was thus unfair. A single procedural failure may not have made the dismissal unjustified, but cumulatively these factors made it so.

The discussion of bias relied largely on *NZEI v ANI* and favoured the appearance of bias test. Once again the court required the board to have an appearance of impartiality. Nevertheless it saw fit to comment "Had the allegation of bias been the only aspect of unfairness advanced by the appellant it might not of its own have been sufficient to have prevented the respondent from discharging the burden of justifying the dismissal."[73]

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[71] *Marlborough Girls' College v Sutherland* [1999] 2 ERNZ (CA) 611, 619.
[72] [1999] 2 ERNZ 199.
[73] Ibid 221.

It seems that the presence of the principal will be evidence of bias but it might not matter if that is the only thing that is procedurally wrong. This is in harmony with the approach of the High Court in *Thompson v Grey Lyn BOT*, but is quite different from the earlier Employment Court cases. There appears to be a slight change in the attitude of the courts towards the realities of the functioning of a board of trustees.

*O'Neill v Te Puke High School BOT*[74]

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 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."[75]

This may be a further move towards an acceptance of practical reality on the part of the employment courts.

*Petersen v Board of Trustees of Buller High School*[76]

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[77]

> 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

[74] Employment Tribunal HT 69/01 8 October 2001, Wm Hodge.
[75] Ibid 37.
[76] Unreported CC 7/02 Christchurch 6 March 2002 Goddard CJ.
[77] Ibid 12.

> 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)
>
> 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.

The involvement of a School Trustees Association officer as recorder of minutes during the board's deliberations was considered undesirable, comparison being made with a JP's decision in the UK being set aside because the Justice's clerk retired with them when they were deliberating.

It is questionable whether this legal analogy is relevant to the board in its role of employer. It is perhaps another example of tribunal standards being applied to an amateur body. It may be however that the seriousness of the allegations in the particular case prompted the court to consider all aspects of the procedure more minutely.

The main hearing into the truth of the allegations was conducted with a high degree of legal formality. The board solicitor was present to assist the chairman, and representatives of both sides questioned the witnesses that were called. The court could find little fault with the procedure and held that delegating the matter to an investigator was a legitimate course of action. A sub-committee could act through an agent that it had appointed. It was important that the board had not relied on the conclusions of the investigator but had clearly made up their own minds.

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.

## IV. 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[78], has been to make school boards extremely

[78] "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

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 between the board and the staff? Should all disciplinary and competency issues be decide by an independent body, as suggested in the original Picot report?[79]

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.

[79] 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."

## *The Future*

### *The Legislation*

The inability of boards of trustees to comply with employment court requirements without hiring expensive legal advice suggests that some change is required to the model. Various forms of governance that might promote a higher level of expertise have been suggested. For example: no restriction on the number of schools which could be administered by a board, no requirement that the principal should be a member of the board of trustees, no requirement that there be a staff and student representative, no requirement that the board of trustees appoint teaching staff and other employees.[80] I add the possibility that the principal could be delegated all responsibility for appointments and dismissals, with a single independent body for appeals. The appointment and management of the principal would still have to be handled by the board.

Alternatively the government might prefer to fund human resource managers or advisers for schools or groups of schools. The STA approach of providing free advice and attempting to bring boards of trustees up to the necessary skill level is a gallant attempt to deal with the situation but the constant turnover of boards makes it a difficult task. Recent policy changes to re-centralise some board functions are not seen as desirable by STA, and those who wish to see continued parent voice in schools see this as a retrograde step.[81] Nevertheless I question whether parental involvement in employment issues has been productive, or has improved teacher or school performance.

### *The Courts*

If the legislative framework is not to change, then the Employment Court has to reconcile the normal requirements of statutory bodies and the obvious inability of many school boards to function at that level. It might 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. It would make no difference as regards general procedure, as small employers in New Zealand are also held to increasingly high standards of procedure.[82] Hodge recommends the UK dismissal regime, which does not apply the statute to small employers with fewer than 20 employees. Neither schools nor small employers have the financial resources to sustain a full time human resources manager.[83]

Alternatively, as schools are statutory bodies, the courts could take the approach suggested by Bernard Banks.[84] Since courts apply judicial review standards they could apply judicial review remedies, sending the decision back to be reconsidered if it has been poorly done.

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[80] Ross Knight "School Governance: Current and Future Trends" Conference Papers, ANZELA, July 1999.
[81] Ross Knight "School Governance and Management: Key Duties/Responsibilities and Future Trends" ADLS Seminar on Education Law, 3 November 2003.
[82] In *Stanley v Pacific Pharmaceuticals Ltd*, Unreported AA 159/03 4 June 2003, the Employment Relations Authority suggested that employers should consult with employees prior to suspending them, no matter how justified the suspension may be.
[83] William Hodge, above n 23, 17.
[84] Bernard Banks "Procedural Fairness – A Case for Reconsideration" [1996] ELB 58, cited in William Hodge, above n 23, 17.

The general problem of increasing attention to correct procedure rather than overall fairness applies to both public and private employers, but there are specific problems with the application of public law bias tests to non-professional school boards. Signs of latitude in the courts' approach are a positive step.

# Appendix

*Principal Performance Management*

The performance management of principals is in theory the same review and assist process as that of teachers.

The Secondary Principals Collective Agreement 2003-2004[85] provides that

- The process of performance management of the principal is undertaken by the board of trustees.
- The process of review and the criteria which must be met must be recorded in writing as the performance agreement.
- 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.

If the feedback from the appraisal process shows particular deficiencies in performance then the principal becomes subject to the provisions of Part 6 of the collective agreement. He must be advised of the right to representation, he must be advised in writing of the matter(s) causing concern, and be given opportunity to provide an explanation or undertake corrective action, and given a reasonable opportunity to do so. Before making a decision the board may need to make further inquiries in order to be satisfied as to the facts.

In addition the Ministry provides further guidelines:[86]

1. The board must be clear about what it expects of the principal, what targets it has and the ethos which it expects the principal to uphold, and these expectations must be documented as Principal's Performance Agreement. This requires discussion as a full board and the goals should relate to the school's strategic plan.
2. Boards must also assess against the Professional Standards of Principals
3. Boards must decide how they will measure whether these standards have been achieved or not.
4. Where deficiencies are obvious or the principal is failing to meet professional standards the board must ensure that appropriate assistance and guidance are put in place.[87]

[85] Ministry of Education Website minedu.govt.nz
[86] O*fficial Notice for the Promulgation of the Professional Standards for Principals*, made pursuant to Section 77C of the State Sector Act 1988. New Zealand Educational Gazette 8 February 1999.
[87] Ibid.