



ARE TEACHERS SPECIAL?

In 2010, the Employment Court warned that allegations of misconduct or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods, so great care is required when considering disciplinary action.

Paul Robertson checks out the state of play.

In *Lewis v Howick College* [2010] NZEmpC 4, Employment Court Chief Judge Graeme Colgan warned about the double jeopardy that teachers risk when they are subject to disciplinary action.

"[5] ... the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case, a summary dismissal for serious misconduct, affect not only that employment relationship An employer dismissing a teacher is bound by law to advise the Teacher Registration Council. As in this case, it can be expected that there will be a level of inquiry into the teacher's fitness to be registered in light of the circumstances of the dismissal and other relevant considerations. So the effect of the dismissal of a teacher is especially significant. Put simply, allegations of misconduct or incompetence place teachers

(and other similarly registered occupations) in double jeopardy of their livelihoods.

[6] Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. So, too, independent courts and tribunals considering the justification for dismissals of teachers must be conscious of that consequence and the corresponding need to examine such cases with great care. It is an onerous responsibility that the legislation has placed on boards of trustees as employers who are very much part-time, nominally remunerated, and, for many board members, without appropriate expertise either in the teaching profession or employment relations. It is important, in these circumstances, that boards of trustees as employers take and follow correct professional advice"

There. It's official. Teachers are

special. When assessing alleged misconduct by teachers extra care is required.

Following *Lewis*, have "independent courts and tribunals" acknowledged this double jeopardy? How have they taken the involvement of the New Zealand Teachers Council into account?

THE CASES

There are surprisingly few decisions where the involvement of the Teachers Council is referred to when considering misconduct by teachers.

In *Murray v CNI Early Education* [2014] NZERA Auckland 211, the manager of an early learning centre was dismissed. The Teachers Council then investigated the alleged misconduct and decided that the required evidential standard of proof had not been met in respect of each allegation. The manager was told that there was

no impediment to her continuing to work in early childcare should she wish to do so.

The manager brought a successful personal grievance against the childcare centre. The Authority found that the investigation into the alleged misconduct was carried out in a procedurally unfair way. There was no mention of 'double jeopardy', although this may have been because the Teachers Council had already considered, and had dismissed the allegations of misconduct.

In *Masina v The Commissioner, Te Kura Kaupapa Maori O Piripone* [2010] NZEMPC 141, the principal was not able to retain his teacher registration because he could not satisfy the Teachers Council that his qualifications were adequate. This ultimately led to his dismissal by the commissioner of the school. His challenge to the decision failed. The Employment Court recognised that without

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a 'licence' from the Teachers Council, reinstating Mr Masina as principal was practically impossible. The Court found that the commissioner breached his duty of good faith by not providing the principal with a letter the commissioner sent to the council. However, this breach did not disadvantage the principal, and was minor in context.

The statutory duty to report misconduct to the Teachers Council was the focus of *Morgan v Whanganui College Board of Trustees* [2013] NZEMPC 117. The Court considered allegations by a teacher that he had been blackmailed by the board of trustees as they threatened

to report him to the Teachers Council unless he chose to resign. This allegation was not upheld as the Court accepted that the board was obliged to report the misconduct, and hence a threat to do so was not improper.

Finally, we have *Lewis* itself. In this case a teacher adopted a belligerent attitude towards his head of department. Both parties made complaints about each other and the mutual enmity increased: matters were not improved by Mr Lewis' increasingly erratic behavior. Against this background the complaint against Mr Lewis by the principal was upheld and Mr Lewis was dismissed.

Although the Chief Judge referred to the importance of taking care when assessing complaints against teachers, he found the decision to dismiss Mr Lewis unjustified on more practical grounds; the board had not followed its own complaints policy and the subcommittee investigating Mr Lewis included the chairperson, in spite of her own complaints against Mr Lewis.

The Court also found that Mr Lewis's obviously poor mental health should have been factored into the investigation.

There is no discussion in the case of what the Teachers Council made of the allegations against Mr Lewis.

IS THERE A DIFFERENCE?

So, while the rhetoric of the Chief Judge in *Lewis* suggests that a higher standard of care is required when considering disciplinary action against a teacher, the facts of *Lewis*, and subsequent decisions, do not (yet) indicate that there is any practical difference in approach. The fact that the Teachers Council is an independent body, able to reach its own view on alleged misconduct, should also allay any fears of double jeopardy.



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