IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 20
ARC 92/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHRISTOPHER SCOTT ROY Plaintiff
AND	BOARD OF TRUSTEES OF TAMAKI COLLEGE Defendant

Hearing:	13, 14, 15, 16 and 17 July, and 30 September 2015 (Heard at Auckland)
Appearances:	S Govender, counsel for plaintiff RM Harrison, counsel for defendant
Judgment:	14 March 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

INDEX

Issues

[1] Christopher Roy claims that he was dismissed constructively and unjustifiably by his employer, the Board of Trustees of Tamaki College in Auckland (the Board). The Employment Relations Authority held that Mr Roy's personal grievance was not raised with his employer within the 90 days allowed for doing so and that, in any event, he entered into an agreement with the Board which settled this claim and which must preclude him from pursuing it.[1]

[2] Mr Roy has been granted leave by this Court to raise his grievance with his employer out of time.[2] The question of a settlement of his grievance, and all other claims against the Board, are linked so inextricably with the facts of his alleged constructive dismissal that it was agreed by both parties from an early stage that it would be an issue to be determined after hearing his grievance. However, if the settlement question is concluded in favour of the Board, it will preclude Mr Roy from having the merits of his alleged constructive dismissal determine the case.

[3] If the case survives the challenge to settlement and he was unjustifiably dismissed, Mr Roy seeks remedies for unjustified constructive dismissal including his reinstatement in employment with Tamaki College and/or monetary remedies for his losses including his subsequent inability to obtain employment as a teacher.[3]

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[1] *Roy v Board of Trustees of Tamaki College* [2013] NZERA Auckland 514.
[2] *Roy v Board of Trustees of Tamaki College* [2014] NZEmpC 153.
[3] It is remarkable that over the course of five amended statements of claim, including at least the latest of which was prepared with the assistance of counsel, no claim for monetary remedies was made, whether in addition to, or as an alternative to, the reinstatement that Mr Roy has constantly sought. This was rectified only by the plaintiff's oral application during the course of the hearing, which was allowed.

[4] Counsel under-estimated the time required to conclude the hearing in July and, for a number of reasons concerning the availability of relevant persons, remaining evidence and final submissions were not able to be heard until about two and a half months later.

[5] Another event intervened during the break between hearings. Shortly after the Court adjourned on 17 July 2015, Mr Roy wrote to a number of staff members of the school including at least one who had recently given evidence. The subject matter of his letters was the events in this case and, in particular, the evidence which had been given by some of the defendant's witnesses. At the resumed hearing on 30 September 2015 the defendant applied successfully for leave to introduce that evidence, and the Court's reasons for doing so are set out in a brief interlocutory judgment issued on that day.[4] I will return to that evidence because it has assisted the Court to determine some questions of veracity and disputed credibility in the case.

Background

[6] Mr Roy is a qualified and registered secondary school teacher with appropriate relevant academic and professional qualifications and experience. He was employed at the school as a full-time long-term relieving teacher from 16 February to 22 April 2007. From 23 April 2007 Mr Roy was employed on the school's permanent staff until October 2010 when his employment ended in circumstances that are the subject of this case.

[7] Mr Roy describes himself as an atheist and regards participation in what he describes as "the religious rituals and functions of the school" as inimical to his strong beliefs. He considers that being required to participate in such events amounts to a breach of his rights not to do so and, thereby, to unlawful and unreasonable treatment in his employment. There is no doubting the strength or sincerity and fortitude of the plaintiff's atheistic philosophy, but that is not the issue to be determined in this case. Nor is the question for decision whether state schools

[4] *Roy v Board of Trustees of Tamaki College* [2015] NZEmpC 173.

are or should be religiously neutral, particularly in their employment of staff, although the judgment will touch on these issues necessarily.

[8] Tamaki College is a co-educational state secondary school and a significant proportion of the student body is other than Pakeha New Zealanders. There are substantial numbers of Maori students and students of other Pacific Islands origins. As is now common in Auckland, there are also students from a multitude of new migrant groups in the community.

[9] The "religious rituals and functions of the school", in which Mr Roy objected to participating, were not religious events generally or Christian religious events in particular. Such now commonly accepted events as powhiri (welcome ceremony), karakia (prayers) and songs at assemblies, all contain elements that are Christian but which might probably be described as incidentally so. Important though such events are in the cultural life of the school, they are not parts of the educational curriculum of studies to which the school is bound pedagogically. Rather, these events reflect the wishes for them of students, staff, boards of trustees and the school's broader community.

[10] I did not understand Mr Roy to cavil so much with the existence of these cultural events per se: rather, his objection was what he assumed to be an expectation that he would participate in them as a member of the school's staff.

[11] The question to be decided in the case is not whether the school complies with principles of secularism in state schools. Mr Roy does not allege (at least in this proceeding) that he has been discriminated against unlawfully because of his atheistic beliefs. Rather, the issues appropriately encompassed by this case include the fairness and reasonableness of Mr Roy's treatment by the Board as an employee, including whether he was dismissed unjustifiably and whether he is precluded from so claiming by what it says was a settlement with the Board of the parties' disputes.

Plaintiff's statement of claim

[12] This sets out the nature of Mr Roy's claims against the school, how these amount to a personal grievance or personal grievances, and the remedies claimed for them.

[13] The plaintiff claims that his 5 October 2010 written resignation, given orally on 27 September 2010 and to take effect on 11 October 2010, came as the result of coercion by the defendant, its representatives, and its agent, who was an adviser employed by the New Zealand School Trustees Association Inc (NZSTA). The plaintiff claims that the coercion exercised by the defendant included the imposition on him of intolerable work conditions and threats by representatives of the defendant about the adverse consequences to him if he were to institute legal proceedings challenging his dismissal which the defendant had signalled it would defend. The plaintiff says that in these circumstances, he had no real alternative but to accede to the defendant's instruction to sign a record of settlement despite having no intention to resign voluntarily from his employment.

[14] The plaintiff says that he was required by the school's Principal (Soana Pamaka) to participate in the religious rituals and functions of the school despite Mrs Pamaka being aware of his atheism and his view that such participation was an "objectionable violation" of his conscience and human rights. He cites, as examples of these compulsions exercised against him, an incident that took place on 1 August 2009 when he says that he was assaulted by Mrs Pamaka and a member of the Board (Alfred Ngaro) because he did not bow his head during a prayer at a school sports function. Next, the plaintiff alleges that in February 2010 he had sought to be excused from a college powhiri because he was uncomfortable with the religious nature of the event. He says that the Principal refused to allow him to be exempt from participation in this function, saying that he was obliged to attend the religious functions in the school as part of his duties as a teacher.

[15] Next, the plaintiff says that the Principal, Mrs Pamaka, threatened (albeit indirectly) his employment status and support for his Art Department if he did not accept, as a condition of his employment, the imposition by the school on him of

Christian religious faith. Mr Roy says that after he had refused to attend this powhiri, he was abused verbally by another senior staff member but that this action was sanctioned by the Principal. The plaintiff says that, following his complaint to the Human Rights Commission (HRC) about these incidents in February 2010, on 8 June 2010 the defendant conducted an internal review of the powhiri and the plaintiff's subsequent complaint to the HRC, resulting in the defendant sanctioning the other staff member's verbal abuse of the plaintiff.

[16] The plaintiff says that on 29 June 2010 the HRC convened a dispute resolution meeting pursuant to the Human Rights Act 1993. Section 85 of that Act precludes evidence being given about what occurred in the course of that dispute resolution meeting or mediation. It provides essentially:

> **85 Confidentiality of information disclosed at dispute resolution meeting**
>
> (1) Except with the consent of the parties or the relevant party, persons referred to in subsection (2) must keep confidential—
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> (a) a statement, admission, or document created or made for the purposes of a dispute resolution meeting; and
>
> (b) information that is disclosed orally for the purposes of, and in the course of, a dispute resolution meeting.
>
> (2) Subsection (1) applies to every person who—
>
> (a) is a mediator for a dispute resolution meeting; or
>
> (b) attends a dispute resolution meeting; or
>
> (c) is a person employed or engaged by the Commission; or
>
> (d) is a person who assists either a mediator at a dispute resolution meeting or a person who attends a dispute resolution meeting.

[17] The plaintiff says that following the HRC dispute resolution meeting, the defendant required him to prove that it would be detrimental to his wellbeing if he was not to be excused from any religious event at, or in connection with, the school. The plaintiff says that the defendant required him to undergo a medical examination and to be reported on by a registered clinical psychologist, although reserving to itself the final decision as to whether detriment had been established and so the plaintiff could be excused. He says that on 15 July 2010 he underwent examination by a registered clinical psychologist at a cost to him of $3,500.

[18] The plaintiff says that such was the level of intolerable humiliation to which he was subjected by the defendant, that on 26 July 2010 he stated publicly that the

Principal, Mrs Pamaka, was autocratic and that she was discriminating against him because of his ethical and atheist beliefs. The plaintiff says that, thereupon, the Principal and several staff members complained to the Board about his public statement.

[19] The plaintiff says that at a meeting of the Board convened on 4 August 2010 to investigate these complaints, they were upheld and he was censured and warned for a period of six months, evidenced by the sending to him and placement of a warning letter on his personnel file. He was also required to apologise to all affected staff by email, and to the Principal in person. The plaintiff complains that he was wrongfully directed by the defendant to raise his concerns only with the Board's Mr Ngaro or the school's Deputy Principal, Mr Harris, after Mr Roy had complained to, and sought advice from, a number of government agencies including several unconnected with state secondary education.

[20] The plaintiff says that on 30 August 2010 he sent an email to the Principal stating his belief that the defendant had acted unfairly and unlawfully in the course of its investigation of the complaints against him on 4 August 2010, and he requested that the Principal apologise to him. The plaintiff says that on 16 September 2010, the Principal, Mrs Pamaka, wrote to the Chairperson of the Board setting out her complaints against the plaintiff under the heading "Matter of concern".

[21] The plaintiff says that on 22 September 2010 he received a letter from the defendant requiring him to attend a disciplinary hearing (eventually held on 27 September 2010) in which the defendant alleged that his conduct was unbecoming a teacher and might warrant disciplinary action resulting in dismissal. The plaintiff says that the Principal's allegations against him were upheld by the Board at the meeting on 27 September 2010 but that he was given inadequate opportunity to put his case to it. He says he was found guilty by the Board of gross professional misconduct unbecoming a person in the teaching profession. He claims that he was given the option of resignation or dismissal and, as an incentive to resigning, was offered a sum of money by the defendant. The plaintiff says that when he expressed his disagreement with the Board's proposals, he was threatened with having to pay substantial legal bills if he undertook and lost proceedings in relation to these.

[22] In these circumstances, the plaintiff claims that he elected, unwillingly and under duress, to choose the option of resignation and, having signed an agreement to this effect, was required to depart from the school with less than an hour's notice. He says that these events constitute a constructive dismissal and that this was unjustified.

Tests applicable to employer's actions

[23] In determining the justification for the Board's acts and omissions in relation to Mr Roy, both during his employment and particularly during those events leading to its termination, the statutory tests are those which were then set out in s 103A of the Act. Summarised, these are that the Court must determine whether what the defendant did, and how it did it, were what a fair and reasonable employer would have done, and how, in all the circumstances at that time.[5]

[24] Mr Roy says that the initiative for the termination of the plaintiff's employment having come from the Board and although it purported to be a resignation by Mr Roy, the end of his employment nevertheless came about by constructive dismissal in all the circumstances. If that is so, the fair and reasonable employer test under s 103A therefore extends to the means by which that constructive dismissal was effected. This includes what the defendant claims was the settlement by the parties which should now preclude Mr Roy from bringing these proceedings.

Witness credibility

[25] This is a case in which there are a number of sharp conflicts about what was said and done by the plaintiff on the one hand, and representatives of the defendant on the other. Although some of those conflicts do not require resolution for the decision of this case, many do. They are so starkly conflicting that the Court must, in finding something proven, necessarily reject the contrary evidence about it. In some instances there is contemporaneously generated documentation which tends to

[5] Employment Relations Act 2000, s 103A as it stood before 1 April 2014.

confirm or disprove witnesses' accounts of events from memory. In other cases it will have to be a decision made without that sort of assistance.

[26] With one exception (the school's NZSTA representative who died before the hearing), the Court has had the opportunity to see and hear the relevant witnesses give their accounts and be questioned about them. More importantly than simply observing a witness read from a pre-prepared statement in the artificial environment of a courtroom, the Court has been able to apply a number of verification techniques in assessing the credibility of a witness's account of events. Perhaps uniquely in this case, also, the Court has had the advantage of considering what the plaintiff later asserted was said at an earlier stage of the hearing by others in the courtroom (witnesses, counsel and me) where there is a full audio recording of everything said and from which a transcript was prepared and distributed during the hearing. There has been no complaint made about the accuracy of that transcript.

[27] In cases such as this, Judges prefer generally not to, and usually do not have to, reach generalised, pervasive and adverse views about the credibility of a witness. Many discrepancies between people's accounts of events differ for a variety of reasons but which do not amount to a finding that a witness has misled the Court, deliberately or recklessly, in that person's evidence. Loss or confusion of memories as a result of time lapse, confusion between what was seen and heard and what the witness may have wished to see and hear, converting assumptions to recollections of events seen and heard, and hitherto unknown associated events may, along with other factors, all contribute to a witness's account of events seen, heard and otherwise sensed, being disbelieved and rejected by a court. Those are all instances in which it is unnecessary and inappropriate to go so far as to say that the witness has misled or sought to mislead the Court deliberately or recklessly, even though that evidence is not accepted.

[28] I regret, as Judges do on occasions such as this, to conclude that where it conflicts with evidence called for the defendant and is not corroborated by other evidence, I am sceptical about the veracity of Mr Roy's accounts of relevant and crucial events in this case. He is not a consistently reliable witness of truth. It is, however, unnecessary and would be inappropriate to attempt to ascribe conclusively

a reason or reasons for Mr Roy's unreliability. Given the very recent, stark and easily contradicted nature of some of that evidence, it may be that Mr Roy hears only what he wishes to hear, especially after ruminating on what has actually happened, even if this means changing radically what he has previously thought, said and agreed to.

[29] The following examples of recent events illustrate this phenomenon and my reasons for finding much of his evidence unreliable.

[30] As already noted, I have done so in part by reference to the claims that Mr Roy made in letters to witnesses and others that he wrote shortly after the conclusion of the evidence in this Court in July 2015, which are the subject of the interlocutory judgment issued on 30 September 2015 admitting those documents in evidence.[6] Mr Roy acknowledged in evidence that he had written those letters and did not resile from what he attributed in them to people having said at the July hearing. The Court has the benefit of both a digital recording of what was said in court at that time, and a contemporaneous transcript of the hearing which was made available to counsel in July. Mr Roy acknowledged that he had received the transcript before writing these letters but said that he had not bothered to read it. In composing those letters he can, at best, only have been relying on his memory of what had been said very recently, or at least what he says he believed had been said.

[31] Mr Roy asserted in a text message that he wrote after the July hearing that I had referred to a member of the school's staff who did not give evidence (Jason Borland) as having "[stirred] up religious hatred". A thorough check of the transcript reveals that this, or words to this effect, were not said by anyone at the hearing, let alone by me. Similarly, Mr Roy asserted that I had said in the course of the hearing that the plaintiff had been "marginalized". A thorough check of the transcript reveals no such reference.

[32] In a letter dated 10 August 2015 to the school's staff, Mr Roy asserted that a witness for the school, Mr Dunn, said or claimed that Mr Roy was a Roman Catholic. Although there are references in the transcript to Mr Roy saying that

[6] *Roy*, above n 4.

another staff member, Mr Harris, was a Roman Catholic and the Principal, Mrs Pamaka, also saying that Mr Roy had said that he was a Roman Catholic, there is no suggestion that this claim emanated from Mr Dunn in evidence.

[33] Mr Roy claimed that during the course of the hearing I had said: "This is a classic case of personal grievance". There is no reference in the transcript to my having done so and this accords with my recollection and practice generally. Mr Roy is wrong.

[34] Similarly, in one of Mr Roy's letters he ascribed to me as the trial Judge the following public statement in the course of the trial: "Why did no one at Tamaki College show any concern for Mr Roy's mental and physical well-being?" Whilst I did ask a witness or witnesses whether Mr Roy's states of mental and physical health were considered during the period of the disputes, the transcript reveals, and confirms my recollection, that this was not as Mr Roy relayed it to the recipients of his August 2015 letters.

[35] In a similar category is his attribution to me of the following statement or question during the evidence: "Why [was] Mr Roy left feeling abandoned, isolated, marginalized, and alone without any mentor?" The transcript reveals no such words having been said, which again confirms my recollection of the hearing as well. In the same category are alleged to have been my words: "Why has no one at Tamaki College accepted any wrong doing for what occurred?" The transcript reveals no such statement being made by me.

[36] Finally, again by way of example, Mr Roy's letter to Mr Dunn strongly infers that Mr Dunn either forged Mr Roy's signature on the important settlement agreement or, as Mr Roy confirmed in evidence subsequently, was a party to the forgery by others of his (Mr Roy's) signature. My recollection of the evidence was that there had been no suggestion at all during the hearing that Mr Roy's signature was other than his own, and a search of the transcript confirms that this allegation of forgery was not referred to at all in the evidence. On the contrary, there are references in Mr Roy's evidence to having signed the settlement agreement, including from his own counsel (at page 9, line 3 of the transcript), and in a question

from the Court (at page 305, line 10). There was, significantly, no suggestion advanced by Mr Roy at the hearing, when asked about his having signed the agreement, that he did not do so or that someone else had forged his signature. If this serious allegation had been suggested by the plaintiff, the Court would have expected it to have been at least alluded to in evidence and proved to a high standard and one in which the alleged forger or forgers should have been on notice. None of that happened. Mr Roy's case was that he was compelled by the defendant to agree to the terms of settlement and that he signed them in these circumstances. Suggestions now of a forgery would change completely that theory of his case. I disbelieve Mr Roy's belated claims of a forgery of his signature.

[37] The most graphic example of those widespread conflicts of interest is Mr Roy's allegation that he was seriously assaulted by the school's Principal and Deputy Chair of the Board after a sports event with which I deal in the next part of this judgment. I have found not only that the evidence about these events given by the defendant's witnesses is to be preferred, but that Mr Roy's account is simply untrue. The reasons for that conclusion, which support my general assessment of the unreliability of Mr Roy's evidence, emerge from the subsequent account of those events.

[38] The foregoing are some examples of a pervasive unreliability of Mr Roy's accuracy and truthfulness in relation to many events in this case.

[39] Mr Roy strikes me as someone about whom three factors affect the assessment of the credibility of his evidence. The first of these is that, certainly on a number of occasions to do with this case and the events leading to it, Mr Roy made considered decisions, and took courses of action based on these, but which he later came to reconsider and regret. I conclude he sought in evidence to either minimise or misrepresent them when those original courses of action were subsequently perceived by him not to advance his case.

[40] The second feature of Mr Roy's accounts in evidence of events which has caused me to doubt their veracity, is Mr Roy's tendency to take from something that was said or done, a meaning or significance that it could not reasonably bear, but

which now suits the theory of his case. Those two characteristics of Mr Roy's veracity have required a very careful analysis of significant parts of his evidence and as a result of which I have come to the conclusion that many controversial aspects of his evidence are not able to be accepted.

[41] Another characteristic affecting Mr Roy's credibility is, in my assessment, his tendency to do and say things without sober or thoughtful regard for the potential consequences of doing so. Mr Roy tends to regard what he considers to be black and white legal rights, to be absolute entitlements literally interpreted, upon which he is entitled to rely and insist, irrespective of consequences or what might be called the inevitable shades of grey. An example of this phenomenon is Mr Roy's intemperate letters to staff members at the school sent almost immediately after the conclusion of the first hearing of evidence. These were, by any account, antithetical to his professed view that his reinstatement at the school would be both practicable and harmonious. These actions tend to confirm Mr Ngaro's comment in evidence that Mr Roy appeared to be conducting a campaign, both in support of his atheistic convictions and against the school, its Principal, and anyone associated with it, that he perceived was not allied to his cause and, in some instances, even against those whom he had expected would support him in this case.

[42] For the reasons outlined, in most if not all situations of conflict of evidence between Mr Roy on the one hand, and the defendant's witnesses (including Mrs Pamaka and Mr Ngaro as the most significant of those witnesses) on the other, I prefer the evidence of the latter. That is not simply because I doubt the reliability of much of the plaintiff's crucial evidence. It is also because those witnesses for the defendant, particularly Mrs Pamaka and Mr Ngaro, gave reliable evidence. They made concessions about the defendant's shortcomings where those were appropriate. Their evidence was consistent internally, consistent as between witnesses, and inherently probable. It also accorded broadly with documents recording events at about the time they occurred, including ones generated by Mr Roy.

Relevant facts

August 2009 incident

[43] Although this is historical and the allegations do not themselves constitute a personal grievance, Mr Roy nevertheless relied on an apparently striking and memorable incident which he said took place on 1 August 2009.[7] Mr Roy claims to have been assaulted by the Principal, Mrs Pamaka, and a member of the Board of Trustees, Mr Ngaro, at the sports pavilion at King's College in South Auckland after a social function following a rugby match between the two schools. By Mr Roy's account, the following happened.

[44] A representative of the host school is said by Mr Roy to have asked generally if anyone present objected to the recital of a prayer before a meal was consumed. Mr Roy says that the school's Principal, Mrs Pamaka, immediately called out "No", purporting to do so on behalf of all present there, or at least everyone from Tamaki College. Mr Roy says that he did not bow his head or in any other way participate in the recitation of the prayer. He claims to have been approached by two representatives of the host school who had noticed his response and indicated that if he had objected to the recitation of the prayer, it would not have gone ahead. Mr Roy confirmed that he did not have an objection to the prayer although he did not participate in it. He says that Mr Ngaro then approached him and scrutinised his appearance from close range, trying to 'eye-ball' him (as I understand Mr Roy's evidence).

[45] Mr Roy says that the host representatives who had seen Mr Ngaro's behaviour approached him (Mr Roy) again, inquiring whether he wished to have the protection of security guards but that his response was that this was not necessary as Mr Ngaro was a member of the Board of Trustees and the father of one of the players.

[7] The year of this event was in issue between witnesses based on First XV rugby matches between Tamaki and King's Colleges but there was never any question by Mr Roy that those events did not occur after one such match at King's college.

[46] Mr Roy then says that Mr Ngaro responded to the host representatives' second approach by again confronting him and again staring at him from close range. Mr Roy says that the host representatives then approached him a third time, saying that they would write to Mrs Pamaka about the incident, and asked for details of his name, teaching position, his role as a coach and manager of the visiting team.

[47] Mr Roy then says that as the school party left King's College, although still within its grounds, he found himself adjacent to both Mrs Pamaka and Mr Ngaro, the latter of whom, without warning or provocation, punched Mr Roy on the left side of his head. Mr Roy says that this was then followed by punches from the Principal to the other side of his head before players separated the parties and Mr Ngaro left the scene promptly. Mr Roy says that the school's Deputy Principal, Ms Moore, and her husband urged Mrs Pamaka to get into their car and she then left the scene as well. Mr Roy says that although he was upset and embarrassed by these events, he did not make a complaint of assault to the Police (or anyone else) because he feared at the time for his job. He says that when he finally did make a complaint to the Police almost three years after the incident, he was advised that the Police were unable to investigate the complaint because of the time delay and the difficulty of interviewing witnesses. It transpires that the Police did conduct telephone interviews with Mrs Pamaka and Mr Ngaro but, in view of their incredulous denials, took Mr Roy's complaint no further.

[48] No witnesses were called by Mr Roy to corroborate his account of these serious and dramatic events, despite it appearing that there were a number of such persons who might have been able to be traced and called to confirm (or otherwise) his account of these events. Mrs Pamaka and Mr Ngaro have always denied these allegations and have provided (at least partial) alibis in addition to their adamant and consistent denials of the truth of these allegations.

[49] To complete and confirm his account of events, Mr Roy says that he bled from the injuries from these blows and that there was blood clearly visible on his white shirt. He says that he drove a school van containing players back to the school and there met another member of staff who could not have failed to see his bloodied appearance. That other member of staff gave evidence but did not corroborate Mr

Roy's account of his appearance which, if true, may have been consistent with a recent assault upon him.

[50] There are several possible explanations for Mr Roy's account of this event. He may have been assaulted by some person or persons unknown but not by Mrs Pamaka or Mr Ngaro. Even by his own account, Mr Roy did not clearly observe who he said had assaulted him at the time. However, in the absence of any explanation as to why others may have suddenly assaulted him at King's College, this possible explanation appears improbable.

[51] Although not assaulted, Mr Roy may nevertheless be under the mistaken belief that he was attacked and injured by the defendant's Principal and a member of the school's Board. That erroneous recollection is consistent with the lack of any complaint or other reference to these events for a very substantial time until Mr Roy made this allegation publicly on Radio New Zealand's National Radio in the course of an interview about his atheistic beliefs as a teacher and his difficulties at the school as a result of these. It is noteworthy that when Mr Roy subsequently complained to the Police about being assaulted, his written statement or account of events was taken directly from a transcript of what he had said previously on the radio. It is not surprising, in my view, that the Police made a decision not to investigate these complaints further after having considered Mr Roy's allegation and statement and having spoken to Mrs Pamaka and Mr Ngaro about the allegations.

[52] I find not only that Mr Roy has failed to establish that these events probably took place but, indeed, having considered all of the evidence about them, I conclude that they almost certainly did not take place.

The 2010 powhiri

[53] I move now to events more immediately preceding the termination of Mr Roy's employment beginning with what might be described as 'the powhiri event' in early February 2010. During a staff meeting, the traditional powhiri to welcome new persons (staff and students) to the school was discussed between the staff. Unprompted and unusually, because previously Mr Roy had avoided what he

considered to be the religious elements of such events without difficulty, the plaintiff felt moved to announce loudly to the staff generally that this was a religious event and no staff member could be compelled to attend it. Mr Roy made this statement with some intensity and feeling.

[54] Mr Roy's challenging announcement was responded to by vituperatively by two senior teachers present, one of whom abused him, calling him "a fucking dick". In turn, Mr Roy's language deteriorated in his response to his critic and it is not recorded how these verbal exchanges ended at the staff meeting. They were, however, not the end of the matter. Indeed, such was the intensity of email traffic over subsequent hours that little else could have been achieved by Mr Roy that day.

[55] Following the staff meeting Mrs Pamaka emailed Mr Roy at 9.28 on the same morning, 11 February 2010, describing the nature of the school's powhiri and saying:

> It does not have any religious connections at all. What happens at the powhiri is [totally] decided by the kaumatua and the tangata whenua. No one is exempted from the powhiri for religious reasons.

[56] Mrs Pamaka advised Mr Roy that he had upset the Head of the Maori Department with the comments he made that morning. Mrs Pamaka's email concluded with a number of general statements about the school's inclusiveness, tolerance, and support for all staff, and ended with the following: "I hope that common sense, tolerance and generosity of heart will prevail".

[57] At 9.37 am on Thursday 11 February 2010 Mr Roy wrote a lengthy email to Mrs Pamaka and another staff member, Hinerau Anderson. This began:

> … prior to our briefing, Jason Borland reiterated to me that any issue related to '*religion in state secondary schools*' was of little relevance, hence I became emotional [and] upset due to the reluctance of some state and therefore tax payer funded secondary institutions to uphold the law and provide alternative options for those amongst us who regard any reference to religion either in the work force or in state schools as being offensive.

[58] Mr Roy's lengthy email then set out statistics and an analysis of legal protections to the right of freedom of religion. It continued:

> Personally, I believe that anyone who believes in any religion must not be able to either to (sic) think along *rational* lines, use *logic* to solve problems and to use *reason* to make judgements. Our secular education system is required to place emphasis [on] *rational, logic and reason* decisions.

[59] Mr Roy denied being "a 'fuckin dick'" as Ms Anderson had called him at the staff meeting and described hers as an unprofessional outburst in front of other staff which was unacceptable and unprofessional. Mr Roy also added, somewhat enigmatically: "My response to your comment to inform you to 'fuck off and keep your shit to yourself' should be taken seriously." Mr Roy continued:

> Religion as we witnessed in the staff meeting or in any section of the state workforce is not only illegal, offensive but is very *divisive*. I was educated to question religious practices, not to uphold, let alone to support religion in our state funded secular education system.

[60] Mr Roy wrote again by email at 10.06 am, copying the Head of Maori Studies, Amber George, into that communication. Mr Roy said that it had not been his intention to upset the Principal and Ms George and that "I apologise to you if I caused any offence". Mr Roy said, however, of his experiences at earlier powhiri, that these included references to Christian faith, and that things were said to be done "in the name of Jesus Christ". Mr Roy's email then contained some statements about the history of Maori Christianity, the role of the Treaty of Waitangi, the 1887, the 1964 and 1989 Education Acts, and the Human Rights Act, all of which he said did not allow the school or the Principal to insist that no one would be exempted from attending powhiri. Mr Roy insisted that the powhiri was "a religious event and all non religious people are exempt".

[61] One of the other staff members who had responded vehemently to Mr Roy's remarks at the meeting, Head of Maori Studies, Hinerau Anderson, wrote to Mr Roy by email at 11.29 am on the same day. Quite how Ms Anderson had become involved in this email discussion is unclear but I infer that either Ms George or Mrs Pamaka had forwarded a copy of Mr Roy's earlier email to her. Ms Anderson said to Mr Roy in her email:

> I couldn't care less what you think. What I do care about is the fact that you believe that you can say what you want, when you want, and there are no repercussions to your actions. You tread carefully! Your record of unprofessional behaviour towards students and staff is enough to bury your teaching career for life, so don't threaten me with your bullshit!

[62] About half an hour later, at 12.05 pm, Mr Roy responded to both Mrs Pamaka and Ms Anderson, asking the Principal to convene an urgent meeting of the three to deal with the issue. Mr Roy objected to Ms Anderson's statements, asserting: "I am entitled to say what I want; it's called freedom of speech. I will not be threatened by this unprofessional and poorly informed Christian."

[63] Then, at 12.23 pm on the same day, 11 February 2010, Mr Roy emailed Mrs Pamaka and Ms Anderson under the subject line "Legal action for defamation of character and [libellous] comments". In that email Mr Roy challenged any staff member to state that he had acted unprofessionally towards them or any students during his time at the school or at any other institution in his teaching career. He re-emphasised that he regarded Ms Anderson's "aggressive nature" as not professional or acceptable. Mr Roy completed the email by saying:

> If Mrs Soana Pamaka does not address this issue immediately, legal action will be taken both against the school for insisting upon staff members' attendance of the powhiri and against Mrs Anderson for her threatening comments.

[64] At 12.32 pm on the same day, Mrs Pamaka emailed Mr Roy, copying Ms Anderson: "You chose to exercise your freedom of speech and Ms Anderson has chosen to exercise her freedom of speech." The remainder of Mrs Pamaka's email was conciliatory and emphasised the importance of the quality of teaching for the benefit of the school's students, the need to respect others, and the necessity of thinking carefully when exercising "our freedom of speech lest we offend our colleagues. I am not trying to muzzle anyone, there is a time and place and a process for everything." Mrs Pamaka concluded by reiterating her confidence that "this matter can be sorted out sensibly and gracefully".

[65] At 1.01 pm, still on 11 February 2010, Mrs Pamaka emailed Mr Roy and Ms Anderson but broadened the pool of recipients to include Deputy Principals Harris and Moore, the staff representative on the Board, Matthew Griffiths, and Mr Dunn. Responding to Mr Roy's email headed "Legal action for defamation of character and [libellous] comments", Mrs Pamaka said:

> Please don't tell me what I have to do immediately. I do not understand why you have to threaten us with legal action Mr Roy. We are not unreasonable and we do not need legal action to sort this out. Legal action to me is like the last resort. Are we really at that stage.
>
> Please remain calm and lets deal with this matter sensibly and respectfully.
>
> Of course if legal action is what you want to do Mr Roy then I cannot stop you doing that.
>
> Personally I am surprised because I have done my very best to support you in your position as HOD of Art and feel I deserve some respect. It appears to me that this is a case of people expressing emotion while they were angry and it can be sorted out sensibly and respectfully.

[66] Mr Roy responded at 2.22 pm that afternoon in a reply that included, as recipients, all the persons to whom Mrs Pamaka had written at 1.01 pm that afternoon. Mr Roy's email began in a conciliatory way when it said:

> … Hopefully we can defuse this emotionally charged situation. It's easy to see how members of the teaching profession can act in an aggressive and unprofessional manner towards one another, when it only takes one individual to question the compulsory nature of having to participate in a religious event in our 'secular educational system'. The extreme response that I've received from Mrs Anderson, both in her 'You're a fuckin dick' comment, made directly at me in the staff meeting to her libellous comments.
> …
> I know that you have supported me personally throughout my time at Tamaki College. I value your professionalism and you do have my respect.

[67] Mr Roy's email then continued to make reference to broad questions of religious practices in the State education system and relevant legislative provisions. He concluded:

> Hopefully common sense will prevail. There are Christian schools for Christians to attend, like Mrs Anderson if they desperately want to have religion as an integral part of their occupation. However, I will never accept being verbally abused and have my employment status threatened for insisting upon my legal rights.

[68] These events blew up early and continued for much of the day although by its end there were conciliatory elements in the correspondences of Mr Roy and Mrs Pamaka, perhaps reflecting implicitly that both considered that things had gone too far. As it transpired, however, the day's events were not addressed as they should have been and became the smouldering embers for further inter-personal conflict that led eventually to the termination of Mr Roy's employment.

A complaint to the Human Rights Commission (HRC) and other correspondence

[69] On 16 February 2010 Mr Roy lodged a complaint with the HRC about the recent events at the school. It appears that he did not send a copy of his HRC complaint to the Board but one was likely to have been received by it from the Commission itself. After setting out at length his issues with the school, Mr Roy concluded by saying that he sought "a reasonable resolution to the problem" and requested that someone mediate between Mrs Pamaka and himself. He expressed the wish that Mrs Pamaka should understand his personal perspective on religion in the school and that his employment status there should not be jeopardised because he did not share Mrs Pamaka's perspective on religion.

[70] On Tuesday 16 February 2010, that is the same day as Mr Roy wrote to the HRC, he sent an email to a number of persons at the school including the Principal, Ms George, Ms Anderson, Mr Griffiths, Ms Moore, and "Dale". Beginning "Dear staff members", Mr Roy outlined the nature of contact which he had then recently made with officials of the Ministry of Education in Wellington and purported to convey advice that he had been given by the Ministry's legal representative which supported Mr Roy's position. Mr Roy then related similar information about his informal approaches to the HRC and a similar expression of support of his position by the Commission. Mr Roy's email noted that a formal complaint had been made by him to the HRC. He continued:

> I should never have had to personally apologise for not attending the Powhiri to Ms Amber George or any other staff member. I know that my continued employment at Tamaki College is no longer an option, despite being one of the most proactive staff members at Tamaki College. My resignation from my position can be (sic) at Tamaki College is inevitable.

[71] Denying that he was racist and asserting that his university honours degree and his completion of a Te Reo Maori language course confirmed this, Mr Roy continued in his email: "I am not a 'fucking racist cunt' or 'just a fucking dick' or an 'arrogant fucking bastard' along with many other terms that I have been referred [to] over the past few days." Mr Roy concluded his email to these staff members by saying:

> I am simply one of 45% of Aotearoa New Zealand's population who are not willing to participate in religious activities within our state funded education and 'entirely secular education' system. Far too many of my friends have had abortions, taken contraception devices, believe in stem cell research and have no concerns about lesbians etc. I will not subject myself or adhere to any religious belief value or systems.

[72] Mr Roy's HRC complaint was directed to the school's response to his non-attendance at the powhiri five days previously, on 11 February 2010. Mr Roy complained that he had been told by the Principal, Mrs Pamaka, that he was obliged to attend the powhiri and that no staff member was entitled to be absent, I assume as a matter of deliberate choice. He also complained about the Principal's advice to him that the powhiri was not a religious event and asserted that, from his previous experience, it contained "numerous religious references to Christianity". Mr Roy's complaint to the HRC was that the Principal had refused or at least declined to discuss these matters with him as he had requested. Mr Roy's letter to the Commission concluded that he sought only:

> … a reasonable resolution to the problem which has arisen. I'm requesting that someone mediate with Mrs Pamaka and me. I only want her to understand my personal perspective on religion in our secondary school and that my employment status within this institution should in no [way] be jeopardized simply for not sharing her perspective on religion.

[73] Mr Roy later learnt that his request to the HRC had been passed on to the Board which had discussed it at its monthly meeting in May 2010. He claims, however, that the Board's response to his complaint to the HRC was to form a subcommittee consisting of Mr Ngaro (the Board's Deputy Chair), Mike Bull (a parent representative) and Mr Griffiths (the staff representative) to investigate "the complaint". It is unclear whether this "complaint" was Mr Roy's to the Commission or Mrs Pamaka's to the Board after receiving notice of Mr Roy's complaint to the Commission.

[74] On 6 May 2010 Mr Roy sent an email to Mrs Pamaka and other senior school staff addressed "Dear Christians" under the subject line "Religious issue that arose in a state (secular) school". This email was sent after Mr Roy's attendance at a Year 13 school camp. After advising the recipients that it was illegal under education, human rights and employment laws "to deliberately insult and be extremely offensive to any non-Christian in the secular state of Aotearoa New Zealand", said that he had been

requested to leave the camp dining room whilst "the Christians made reference to their religion prior to a prayer and the meal being presented." Mr Roy said that he had:

> … deliberately made it clear to everyone present, that it was not acceptable and normally, the senior management person should have simply stated to all those present 'please come and eat your meal or something similar'.

[75] Mr Roy noted that he was "extremely offended and deeply insulted", and that some students:

> … felt it offensive and a display of both ignorance and arrogance to refer to Christianity. … Tamaki College is not a Christian institution; it is an institution for people of all religious and non-religious perspectives.

[76] The Board's minutes of its meeting of 26 May 2010 include an acknowledgement of receipt of Mr Roy's letter and that the Board resolved to conduct its own investigation into those matters, appointing Messrs Ngaro, Bull and Griffiths to do so. The Board's minutes of its 22 June 2010 meeting record that the subcommittee, appointed at the previous meeting, tabled a report. The minutes continue: "It was decided that Mr. Roy be given a copy of the Report and that a further meeting would be held at the Remuera Golf Club on the 29th June." This referred to the prospective HRC mediation to be held at a neutral venue.

The HRC mediation and fall-out

[77] On 29 June 2010 a mediation meeting, convened by an HRC mediator, saw the parties gather at a neutral venue. Present were Mr Roy, the Principal Mrs Pamaka and the three members of the Board's subcommittee previously delegated to investigate matters, Messrs Ngaro, Bull and Griffiths.

[78] Whether Mr Roy's and the Board's mutual dissatisfactions were settled in mediation conducted under the auspices of the HRC, is a disputed question between the parties as is, if so, the terms of a settlement reached. Any settlement in September 2010 could not have constituted a resolution of the plaintiff's personal grievance of unjustified constructive dismissal because it occurred a significant time before Mr Roy's resignation. What happened in that attempted mediation is an

important element of the justification for the Board's actions and, indirectly, to whether it can be said to have dismissed him constructively and unjustifiably.

[79] Giving evidence first, the plaintiff proposed to tell the Court about what transpired during the HRC mediation convened at his request at a neutral venue and conducted under the auspices of an independent mediator employed or engaged by the HRC. Because the contents of conversations between the parties during the mediation were potentially privileged, counsel were required to confirm to the Court, pursuant to s 85 of the Human Rights Act,[8] that both parties consented to the disclosure to the Court of statements or admissions made for the purposes of the HRC's dispute resolution meeting, including information that was disclosed orally for the purpose of that meeting. I was satisfied that the requisite consent had been given to waive what would otherwise have been the confidentiality of that information.

[80] The two sides in the case disagreed about much of what had been discussed between them at the dispute resolution meeting (or mediation) and, very unfortunately in my view, no written record of any settlement was created, at least for the parties' use, either by them (with the assistance of the Mediator) or apparently by the Mediator herself at or following the meeting. Nor was any written record of the outcome of the mediation (including, potentially in Mr Roy's case, that no settlement was reached) produced to the Court.

[81] In these circumstances, it has been necessary to determine, on the balance of probabilities, what, if any, agreement was reached between them about the future of their employment relationship and, in particular, issues of Mr Roy's participation in religious events or other school occasions or activities containing what he considered to be Christian religious elements.

[82] Accepting the defendant's evidence on this issue in preference to the plaintiff's, I have concluded that a settlement of Mr Roy's dissatisfactions and, more importantly, agreement on how these issues would be dealt with in future, was achieved under the auspices of the HRC mediation. That is also consistent with the

[8] Set out previously at [16].

immediately subsequent conduct of the parties: the Board's representatives invited Mr Roy to join with them in lunch and although he rejected that proposal, I conclude that this was not because a resolution had not been reached between them but, rather, was because Mr Roy did not wish to associate socially with people whose religious views he disagreed with. A settlement is more consistent also with Mr Roy's subsequent allegation of the breach of the confidentiality of the mediation by the school. His allegations about the contents of that breach or those breaches do not indicate that he was dissatisfied that a resolution had not been reached.

[83] I have concluded that there was misapprehension on Mr Roy's part about what was said by Board representatives during the mediation. This cast considerable doubt upon the accuracy of Mr Roy's account of that event. For example, Mr Roy subsequently claimed (and continued to assert in evidence) that the Board required him to produce, at his own cost, an expert medical opinion to exempt him from attendance at such school functions he considered to be religious. Although Mr Roy did indeed go ahead and, at not insignificant cost, obtain a report about this from a registered psychologist that he subsequently sent to the school, I do not accept that the Board insisted upon or otherwise required this, whether as a condition of agreeing to his ad hoc absences from school activities or otherwise. Although there may have been some discussion at the mediation about what it might take to convince the Board of the genuineness of Mr Roy's grounds for doing so, I conclude that any suggestion of obtaining an expert medical opinion that may have been made would probably have emanated from Mr Roy himself and was not a condition upon the accommodating of his beliefs imposed by the school.

Following the mediation, the mediator emailed the parties, copying the email to Paula and Hemi Pirihi, the Commission's Kaiwhakarite (administrators/ facilitators). The operative part of that email included the following:

> You stated that your complaint was resolved by today's mediation discussions, Chris.
>
> Because the complaint has been resolved the Commission will take no further action on it and the file will now be closed.
>
> I understand that you will all engage in further dialogue. You are welcome to contact Hemi or me if we can be of any further assistance.

[84] By email sent to the Board's staff representative, Mr Griffiths, on 20 July 2010, Mr Roy inquired when the next meeting of the Board was to be held. His email included the following statement:

> As you may recall at the meeting chaired by the Human Rights Commission three weeks ago, they informed those gathered that under the Human Rights Act 1990 any person wanting to be excused from participating in a religious event i.e. the school's gathering in the auditorium on [Fridays] (an assembly is a classical Greek word referring to when all religious people were asked to leave the room to enable those elected representatives to think with clear heads) must prove that it is detrimental to their well-being.
>
> This is something that I have now completed as a result of being assessed by a registered clinical psychologist. The usual professional consultation costs $3500. I think that the school's BOT [needs] to know that I found this an unacceptable measure to undertake and that I'll be making submissions regarding this issue to other professional persons and organizations.

[85] On 26 July 2010 Mrs Pamaka wrote to Mr Roy advising him that, on Friday 23 July 2010, she had received complaints about his conduct at a staff briefing, including a statement that he made about Mrs Pamaka in her absence and allegations about the treatment he had received from the Principal. Mrs Pamaka's advice was that she was referring these matters to the Board.

[86] On the same day, 26 July 2010, Mr Roy sent an email to all school staff. The subject line was "Roy/Pamaka comments at last Friday's staff briefing". Answering his rhetorical question at the start of the email "So, why has the professional relationship between Soana [Mrs Pamaka] and me reached this point?", Mr Roy recounted for his colleagues a positive previous professional relationship, describing it as "friendly and respectful" but changing at the time of the 2010 powhiri incident. He claimed again that the powhiri was a religious event but that the Principal would not back down from her position that attendance for staff was compulsory.

[87] Mr Roy then described what had happened during the HRC mediation, saying that while progress was made on some issues, the parties had been unable to agree upon whether Mr Roy should be entitled to be absent from the powhiri assembly on religious grounds. He continued:

> After the meeting, the HRC mediators and I discussed the issues within the four BOT members and Wally Noble (the school's Kaumatua] being present.

> As a consequence of our discussions, I've proceeded to prove that its *'detrimental to my well being'* to be present in assemblies.

[88] Mr Roy attached to his email a letter he said he had intended originally to be only for the Board and which would be presented to it shortly at its July meeting. He asserted that because these matters were now within the public arena, "all staff should know what is being debated behind the scenes regarding compulsory attendance of religious events at Tamaki College".

[89] That attachment, which was addressed to the Board's staff representative and intended for the Board, was dated 23 July 2010. The relevant essence of it may be summarised as follows. Mr Roy identified a particular area in which he said progress had been made with the HRC at mediation, being the practice of karakia and, in particular, the Christian nature of these. He said, however, that the parties had not resolved the more fundamental issue of what he described as:

> … the compulsory attendance of the full format of the assembly which at times can consist of up to forty five minutes of Christian religious observation in the form of Christian songs etc.

[90] Mr Roy claimed that the HRC mediator expressed the view that, to be released from attendance at, or participation in, such ceremonial events, Mr Roy had to demonstrate that it was detrimental to his wellbeing to do so. Mr Roy said that he disagreed with this statement of the legal position which he said that the mediator had made. Relying on s 28(3) of the Human Rights Act, Mr Roy asserted that the Board was required to accommodate his religious or ethical beliefs or practices so long as any adjustment did not "unreasonably disrupt the employer's activities". Mr Roy asserted that his absence from assemblies would not bring a disruptive element to the Board's activities. He pointed out that he had obtained a report from a clinical psychologist at significant cost to himself and that:

> Personally, I find it incomprehensible that as a middle-aged, mature, MA honours graduate and someone who also has decades of teaching experience, that I had to be subjected to this kind of medical assessment. It has been humiliating, degrading and financially unacceptable.

[91] Mr Roy criticised Mrs Pamaka's "peoples skills", saying that she had not listened sufficiently to his concerns and had not been understanding of them. He

said that Mrs Pamaka should have demonstrated "less arrogance, which was at times offensive and had she demonstrated a greater willingness to compromise her perspective, I would not have had to undertake this somewhat absurd action." Mr Roy quoted statistics about the percentages of the New Zealand population identifying themselves as Christian, saying that this only now amounted to about 43 per cent of the population, which percentage was decreasing. For example, Mr Roy wrote:

> For me personally, Christian religious practices have during my lifetime represented the reinforcement of ideological cultural and social constructs that have continued the subjugation and disempowerment of women in our society. Although, I understand that Polynesian culture is very male orientated, I can not accept the somewhat autocratic perspective of Mrs Pamaka. I find it incomprehensible that any Christian in any employment context would insist upon anyone with strong viewpoints on these issues to not have the freedom to exercise their right to be eligible to decide for themselves as to whether they wish to participate in the Christian religious gathering which is held in the auditorium each Friday i.e. the school's assemblies.
>
> This issue needs to be debated in intellectual environments with people or persons who are in a position to influence changes in our legal, employment and educational systems. I wish to advise the members of the Board of [Trustees], that I'll be informing other professional bodies and individual persons about this matter. My intention is not to challenge either personally or professionally any individual's perspective on this issue amongst BOT members. Such an attempt, I believe would be futile. My hope is to enlighten other people or persons as to the issues faced by individuals like myself with the hope of effecting change to the Human Rights Act 1993.

Investigation of complaints against the plaintiff

[92] The minutes of the Board's meeting of 27 July 2010 record that at this first meeting of the Board following the HRC mediation, the Principal read out letters of complaint from four teachers about Mr Roy's behaviour at a recent staff meeting, and some emails from Mr Roy to the Board's staff representative. The minutes record that it was decided that Messrs Ngaro and Bull would "carry out a Board investigation of this matter".

[93] The psychologist's report to which Mr Roy referred was addressed to the Board and dated 29 July 2010. It was a lengthy and comprehensive report but, turning to "Mr Roy's dispute with the school's religious policy", it stated:

> Mr Roy has a keen sense of natural justice. This has been forged both in his formative years and in his challenging years at university. He has a passion for the rights and responsibilities of others and is willing to stand beside them to see those rights observed and protected.
>
> Mr Roy is also protective of his own rights and responsibilities as these have been hard won over many years. The school will be only too aware, that Mr Roy takes his responsibilities within the life of the school very seriously. His extra curricular [school] activities stand up well to scrutiny.
>
> When the school instituted a programme of 'religious services' as part of the School Assembly, Mr Roy saw this as an affront to his philosophical and religious freedom. More importantly, he saw it as an affront to the religious beliefs of non-Christian pupils. He was concerned as he noticed that they would sit in Assembly somewhat confused and bemused. Given the regard and dedication that these pupils hold for their particular religion, an individual of Mr Roy's morality, integrity and compassion would be driven to stand up for the rights of these students and in so doing would be put under severe psychological distress.

[94] The psychologist's conclusion was:

> It is my opinion that Mr Roy would be placed under psychological distress if he was required by school officials to attend assemblies which contain religious content for which he has philosophical objections.
>
> Having someone on staff with such a keen sense of integrity and justice, I believe would be of benefit to any institution. He stands as a fine example for your students.

[95] By an email dated 26 July 2010 under the subject line "Legal Issue", Mr Roy wrote to the Principal about the complaints recorded in her letter to him of the same date. He said:

> I am legally entitled to know not only who made a complaint(s) against me, but I'm also entitled to know what the nature of the complaints was about. I am also legally entitled to a copy of the complaint(s).
>
> Could you please photocopy the correspondence for me so that I can address the complaints in a professional manner? Incidentally, everything that I said was factual during Friday's staff briefing was factual.
>
> Mr. Matthew Griffiths already has a three page letter from me, which he'll present to the next BOT meeting, scheduled to be held tomorrow night. It informs the BOT what has eventuated since the meeting mediated by the Human Rights Commission on Tuesday 29th June.

[96] By a brief email to the Principal sent on the same date, 26 July 2010, Mr Roy enclosed a copy of a draft email addressed to all staff members and materially as follows:

> To all staff members, I wish to apologise for causing any offence as a consequence of an email that I released to all staff and for a statement that I made during a staff briefing on the 23rd of July 2010.
>
> The inappropriate and offensive language that I resorted to using during the staff briefing was both unprofessional and unnecessary. I also made inappropriate comments about the Principal at that time, which were misleading and unfounded.
>
> The contents of the email that was sent to all staff members contained statements that were inappropriate, offensive and amounted to a personal attack upon our Principal. I would also like to acknowledge that I should not have released via our [school's] email system any material that should not have been placed into the public arena. For my actions, I wish [to] convey to everyone that I am most remorseful and apologetic.
>
> Our school community is characterized by a predominantly Pasifika culture that is a (sic) reflected in cultural practices influenced by their milieu. Please be assured that I will be working hard to demonstrate a greater tolerance and understanding of those practices in the future.
>
> Finally, I sincerely regret and am remorseful for my part in the escalation of issues that have affected the interpersonal relationships of various staff members. I also regret that my personal perspectives on cultural issues have become so public. In the future, I promise to demonstrate more sensitivity and respectfulness to the cultural perspectives of others within our school's community.

[97] The Principal Mr Pamaka wrote to the Chair of the Board by an undated letter but which refers to Mr Roy's email to all staff of 27 July 2010 which I conclude must have been sent to the Board between 27 and 30 July 2010 when it responded.

[98] Mrs Pamaka complained to the Board of Mr Roy's behaviour in revealing contents of the mediation process which she said the parties to it had been assured would be confidential. She described this as "shocking behaviour" that was "very disrespectful of the Human Rights Commission's request for this to be confidential." Nevertheless, Mrs Pamaka herself then went on to make further disclosures about the contents of the mediation, saying that Mr Roy had not raised the issue of attending school assemblies until he did so in the mediation, as he claimed had been the subject of some resolution with the HRC.

[99] Mrs Pamaka advised the Board that Mr Roy had been permitted by her to arrive late for assembly so that he would miss the opening karakia. She disagreed that the school's assembly was a "religious activity" and said that Mr Roy had not

asked permission to absent himself for the whole of the assembly. Mrs Pamaka denied that the school had ever been involved in any discussion with Mr Roy about having to obtain or obtaining a registered psychologist's report: she said that Mr Roy had himself chosen to do so.

[100] Mrs Pamaka complained about what she described as the offensive public and personal attack on her in Mr Roy's letter which had been published to all staff. In particular, she objected to what she said was the unprofessional conduct of Mr Roy describing her as "autocratic" in his letter to all staff. She said that Mr Roy was publicly undermining her leadership and that this was offensive and unprofessional. Mrs Pamaka also questioned whether Mr Roy was dealing with the Board in good faith, saying that he was trying to provoke:

> … some sort of outcome to enable him to take this to a hearing at an official level. I am also unsure whether he is trying to find a solution or create a problem. These matters are a serious concern to me and I feel it is necessary for me to bring these matters to your attention.

The Board's investigation

[101] Mr Ngaro, as a member of the Board, wrote to Mr Roy by letter of 30 July 2010. Mr Ngaro's letter summarised briefly the various complaints he said the Board had received, attributing each to a staff member's surname. The letter advised Mr Roy that the Board had formed a subcommittee of two (himself and Mr Bull) who were delegated by the Board to investigate those complaints and "take any action to resolve them".

[102] The first step in that investigation was to seek Mr Roy's written response to the allegations which Mr Ngaro required be given by Tuesday 3 August at 9 am. Mr Ngaro's letter was addressed to Mr Roy at his home address which could only have given him between two and three days to respond to what were numerous serious allegations of misconduct against him of which he had not previously been aware. Mr Ngaro's letter continued that the subcommittee would then wish to meet with him to hear further submissions and to ask him further questions. That was to be on Wednesday 4 August at 9 am. Mr Ngaro's advice was that the Board would have the professional assistance and advice of Gary Reading from the NZSTA. Mr Ngaro's

letter advised Mr Roy that the complaints against him were serious and that, if upheld, he faced the possibility of disciplinary action for serious misconduct which might lead to the termination of his employment at the school.

[103] Mr Roy was urged to seek advice from his union (he was in fact not a member of a union) or other authorised representative. He was instructed not to speak to students, staff or members of the community about those matters until they were concluded. In particular, Mr Ngaro directed Mr Roy not to speak or write to any of the complainants "or people who are potential witnesses in this matter". He was advised: "If there are witnesses you would like us to interview please name them in your written response." Mr Ngaro was to be the Board's point of contact about these matters.

[104] Despite the shortness of time, Mr Roy did respond to Mr Ngaro by letter dated 2 August 2010. His letter occupies eight A4 pages of 1.5-spaced print and did not seek any further clarification or indicate that he considered that he had insufficient time or resource to address these complaints. The tone of Mr Roy's reply was professional and factual. He expressed his regret that two staff members in particular categorised his wish not to attend the powhiri for religious reasons, as being culturally insensitive and offensive. He complained about their intemperate and insulting response to him. He expressed both his respect of Maori cultural events and his wish not to participate in religious ceremonies including if the former involved the latter. He said that the Principal had supported unwaveringly the personal perspectives of those two staff members and so had "… clearly demonstrated an extremely biased one-sided viewpoint and a lack of people skills in dealing with this matter."

[105] Mr Roy said that the Principal's decision, sanctioning the behaviour of one other staff member, had left the whole staff "… under no illusion, as to what happens to any staff member who does not side with her perspective on an issue." He reiterated his view that the Principal had acted autocratically and that any other staff would be cowed in future from expressing a contrary view.

[106] Mr Roy said that Mrs Pamaka had consistently refused to engage in personal discussion with him about these issues, saying that she was the only one of nine school principals, under whom he had worked, not to demonstrate a willingness to discuss issues with staff members directly. He complained that this had prevented any discussion of these matters for a period of up to six months before, at his request, the HRC mediation was arranged.

[107] Mr Roy said that following the mediation, he spoke only to close associates on the staff about that and did so with a view to putting those issues behind him and moving on. He said, however, that he received indirect information that could only have originated from someone who was present at the mediation and that erroneous comments arising from that information had begun to be circulated around staff. He said that those rumours were misleading, inaccurate and erroneous: for example, he said that there was an untrue rumour that he had been "required" by the HRC to write a letter of apology to those staff he had offended.

[108] Addressing the complaint against him that he had described Mrs Pamaka as autocratic, Mr Roy attempted to persuade the Board that this was the true position. First, he referred to an email which had been sent on 5 September 2009 addressed to him and other staff members concerning the school's reggae band. He said he had been asked to transport the band to a competition and, following their success at this event, to continue to drive them to various destinations including a national competition final which they won. Mr Roy said he passed on the significant disappointment of one band member by what he said was the school's failure to acknowledge its success. Whilst that pupil had expressed his view about the college in colourful language, Mr Roy said this had not been directed at the Principal but had led her unjustifiably to type in bold in an email to staff: "DO NOT TELL ME TO GET FUCKED". Mr Roy said that this, and the Principal's following words, demonstrated her autocratic nature: "because I have the power to screw their lives up had I chosen to give up on them a long time ago" and "Grow up grow some balls … If they can't do this… then the exit gate is wide open". Finally, Mr Roy said that the Principal's autocracy was confirmed by her concluding statement: "so piss off to Selwyn". This referred to a neighbouring secondary school.

[109] Mr Roy said that such remarks made publicly by the Principal reflected a "domineering person" and an "absolute ruler". He defended his use of the adjective "autocratic" in relation to the Principal as reflected by those events (which he said the Principal acknowledged had occurred) and others like them.

[110] The second example of what he categorised as autocratic behaviour was said by Mr Roy to have been the Principal's opinion that attendance at powhiri was compulsory. He said that, despite purporting to have a general invitation that her door was always open, she had never been prepared to discuss their differences about attendance at powhiri.

[111] Third, Mr Roy drew to the Board's attention that during the HRC mediation about full format assemblies, the Principal:

> … refused to acknowledge my perspective, repeatedly reinforcing her own by claiming that in her nineteen years at Tamaki College, everyone including a previous Principal, who she claimed was apparently an atheist, all attended the full format of assemblies regardless of whether they were Christian or not. Is this not the mindset of someone who is truly autocratic? Therefore I refuse to accept that I was undermining her authority as Principal, by claiming that she is autocratic. It is a claim that has a strong foundation.

[112] Further, Mr Roy was critical that despite the undisputed nature of Mrs Anderson's conduct towards him, the Principal never sanctioned or took any other steps in relation to that staff member. He said that this amounted effectively to sanctioning unprofessional behaviour which had contributed to the build-up of negative inter-personal relationships. After noting that he had been encouraged (informally) by one of the three Education Review Office reviewers reporting on the school in early 2010 to try to find a way of working with the Principal to continue his positive contribution to the students, Mr Roy concluded his letter to the Board:

> During the past three and a half years, I've demonstrated my passion for my chosen career and in particular I've given my absolute 100% effort in assisting students academically, culturally and in both sporting and cultural activities.

A meeting with the Board and a resolution

[113] There was a meeting between the Board's representatives and Mr Roy on 4 August 2010. Mr Roy was accompanied and represented by a legal executive (but not a lawyer or, so far as the Court is aware, an employment or education law specialist) at that meeting with the Board. The legal executive's subsequent email to Mr Roy is in evidence and confirms both the commonsense and wise advice that he was given by her and provides an independent account of what was said at that meeting, albeit by a brief summary.

[114] The email (any privilege in which was waived) confirmed the meeting's outcome that, subject to Mr Roy doing a number of things, the Board would issue him with a "[v]erbal" warning for inappropriate language (albeit recorded in writing); a final written warning for undermining the Principal and in relation to email issues but which warning would nevertheless be the subject of discussion with Mr Roy; and instructions about confidentiality and how the Board's trust might be earned by him. There was also reference to a discussion between Mr Roy and the Principal about professional development. Mr Roy was advised by his legal executive to take care with the expression of his personal views so as not to be confrontational. The advice from Mr Roy's legal executive also confirms that the resolutions reached by the parties were confidential. The letter recorded the suggestion that Mr Roy's written apology be tendered and that he meet with the Principal sooner rather than later. The legal executive expressed her willingness to assist Mr Roy with the drafting of an apology letter. She was to receive copies of the minute of the meeting and would be able to have an opportunity to correct these and would have input into the form of words used to constitute the draft written warning that would be received by Mr Roy. That letter from Mr Roy's representative to him tends to confirm the Board's account of what was agreed to by him, even if not completely.

[115] On 10 August 2010 Mr Ngaro wrote to Mr Roy on behalf of the Board. Mr Ngaro's letter recorded the outcome of the meeting that the parties had attended on Wednesday 4 August 2010 at which they were both represented by advisers. Mr Ngaro's letter observed that Mr Roy's submissions to the Board had focused

primarily on the factors that motivated him to do what he did rather than on contradicting the accounts of the complaints against him which are recorded as not having been denied. Mr Ngaro's letter of 10 August 2010 recorded five conclusions that the Board had reached:

[116] First, the Board concluded that Mr Roy had spoken inappropriately to staff about the apparent theft of his breakfast from the staff room on one occasion.

[117] Second, it concluded that Mr Roy attacked the Principal "personally" in making statements to staff at a briefing, including his assertion that held the Principal responsible for his physical and mental state of health and the costs that he said he had incurred (I assume for the preparation of a psychological report). The Board had concluded that this caused staff to feel uncomfortable, offended and embarrassed, and undermined the authority of the Principal.

[118] Third, the Board concluded that Mr Roy breached the agreed confidentiality of the HRC mediation by publishing an account of things said and his views about those. The Board rejected Mr Roy's account that some of these matters were already in the public domain and so justified the plaintiff in engaging in further discussion about them.

[119] Penultimately, the Board concluded that Mr Roy further attacked the Principal "personally" in an email to staff which dealt with his account of the HRC mediation. The Board concluded that this undermined the Principal's position as leader of the school, was inappropriate, offensive and upsetting to both the Principal and other staff.

[120] Finally, the Board reiterated that Mr Roy also attacked the Principal "personally" in his account of the HRC mediation which contained inappropriate and unprofessional material. It concluded that the content of the email misrepresented the flexibility that the Principal had already offered Mr Roy in the HRC mediation and in other discussions. The Board did not accept Mr Roy's contention that the matter of flexibility around singing religious songs during school assembly had not

been addressed. It concluded that this email, also, undermined the Principal's leadership.

[121] Mr Ngaro's letter recorded that Mr Roy had considered his actions and was prepared to reconcile with offended staff and the Principal. The Board's record refers to Mr Roy's preparedness to engage in "professional development" to remedy its concerns whilst a six-month written warning would be put on his file. Despite the Board considering that Mr Roy had misconducted himself seriously, it proposed that there be a two-stage process of reconciliation and sanction. The first was that he would reconcile his relationship with offended parties including the Principal and staff who had received his email. This would include making a "meaningful apology in writing to the Principal" and, by email, to other staff. That email would have to identify the inappropriateness of his previous conduct and give an assurance about how he would act in future. The Board specified that the email could not be "a platform for your personal views of religion but a genuine effort to reconcile with staff about your behaviour towards them."

[122] The second part of the process would be a meeting between Mr Roy, on the one hand, and the Principal and a member of the Board, on the other, to personally assure the Principal that he would support her leadership and would desist from "the personal attacks on her". Mr Roy was advised to consider the Board's letter carefully and to obtain advice and assistance before agreeing to the process.

[123] Importantly for decision of this case, the Board also confirmed its agreement that Mr Roy would be entitled to absent himself for those parts of assemblies or powhiri "which involve matters you deem to be religious." It confirmed Mr Roy's proposals as to how this would be achieved in practice, suggesting that he be discreet in doing so. The Board required Mr Roy to seek the consent of the Principal to be absent from the whole of any such meetings. The Board advised Mr Roy that if these terms were not acceptable to him, it would reconvene to consider whether dismissal should be the appropriate sanction for what he considered was his serious misconduct.

The resolution of the dispute in practice

[124] Mr Roy's apology to the Principal was in a letter dated 5 August 2010. It said:

> I wish to make a formal apology to you as the Principal of Tamaki College. I have acted in a manner which has been unjustified, unprofessional and disrespectful to you both personally and professionally. I am deeply remorseful for all of the events that have occurred during the past six months and I sincerely regret the escalation of both my personal and professional inappropriate behaviour towards you.
>
> I have caused unjustifiable distress to you which has affected you both physically and emotionally by challenging your authority and position as Principal at Tamaki College as a result of issuing verbal and written statements into the public arena that were misleading and/or unfounded.
>
> I regret acting in an unacceptable professional manner which has undermined your leadership by making statements that I can not justify about you, as the Principal for which I am truly embarrassed, ashamed and repentant.
>
> I also wish to acknowledge that I have acted in an inappropriate and unprofessional manner with regards to my professional conduct towards you. For all these inappropriate actions, for (sic) which I acknowledge, I ask for your forgiveness and for the opportunity to demonstrate professionalism as a teacher at Tamaki College.
>
> In the future, I will make every effort to endeavour to rebuild our professional relationship and to earn your trust, respect, loyalty and friendship. It is my most sincere hope that we can again move forward and act in the best interests of both our school and the wider multicultural community that it represents.

[125] The Board's minutes of its 24 August 2010 meeting record that in the absence of Messrs Ngaro and Bull from that meeting, the remaining member of the subcommittee, Mr Griffiths, reported that Mr Roy had received a final written warning and was to write letters of apology to the staff members concerned and to the Principal.

[126] On 30 August 2010 Mr Roy wrote to the Principal in an email under the subject line "cause of continued concern". After recording his view that he and the Principal had "moved forward", Mr Roy wrote:

> … However, there seems to be an opinion amongst a very poorly informed minority of staff members that are unaware of any of the actual details of events that have eventuated, and apparently belief that I am the sole person

> responsible for the breakdown of interpersonal relationships between myself and a few others including yourself.

[127] He continued:

> … a significant percentage of staff members appear to want to put everything that has eventuated behind us. But, several staff members apparently see things differently. Some apparently consider my apology as a huge victory for Christianity, whilst others see it as an endorsement of religious values in a state and therefore 'secular' school institution. Nothing could be further from the truth. We both know that I have complete and absolute rights to be absent from any religious event at Tamaki College. The BOT officially [has] endorsed this position. …
>
> Soana, I should not have to remind you that you were the person who initially caused the disagreements between us, by stating in an email that *'I will not have any support either personally or my department if I did not attend the Powhiri'*. The Powhiri as we now both now (sic) know is a religious event and therefore, attendance will always be optional for every New Zealander.

[128] Mr Roy recorded that his options included taking "this matter through the courts" and advised the Principal that she had "never apologized or offered me anything for all the hurtful things that have occurred."

[129] Mr Roy concluded his email by recounting a particular incident attributing to one staff member the statement that he was "the most hated person at Tamaki College". This was said by Mr Roy to have been stated in front of students, another teacher and two external guests at the school. Mr Roy described those remarks by the other teacher as "unprofessional and unacceptable". He asked the Principal:

> Could you please advise [the other teacher], that she does not know the details of issues that have divided us, nor does she know what options I still have available to me. Secondly, could you ask that she refrain from making unprofessional comments to others?

[130] Next, on 8 September 2010 Mr Roy wrote an email to the Principal under the subject line "Notification of clarification of an issue". He advised the Principal that he had sought to clarify his rights in relation to assemblies with the Ministry of Justice and, in particular, what he described as "legal issues" under the Education Act 1989. This was in relation to "my situation of still having to be present at assemblies, but being allowed to exit from any religious aspect." Mr Roy said that this had "proven to be humiliating and degrading having to enter and leave the assembly for anything

up to three times during any one of the 50 minute scheduled assemblies", particularly in inclement weather and: "So, I am concerned as to whether or not it's legal."

[131] Next, on 13 September 2010 Mr Roy copied to the Principal a detailed letter he had written on the previous day to an official in the Ministry of Education about "religion in a state secondary school". The letter referred to Mr Roy's particular situation and named his school and the Principal. In his covering email to Mrs Pamaka, Mr Roy said that he was simply keeping her informed of developments that were occurring and invited her to read attached correspondence from the Ministry of Education. Mr Roy asserted that:

> … the BOT [is] **NOT** above the law. My year of teaching at Tamaki College, I think that all the whole staff would agree upon, has been a disaster for me both personally and [professionally], all because **YOU** failed to acknowledge aspects of the Education Act 1989. In particular, you should have known section (2) of the Secondary and composite schools … section of the Act.

[132] The Principal's response to this correspondence was by a letter sent to Mr Roy on 16 September 2010. In relation to Mr Roy's allegations that he was said by another teacher to have been "the most hated person at Tamaki College", Mrs Pamaka recorded that she had investigated this allegation and had been provided with statements from some of the persons concerned "which do not appear to support your initial contentions." The Principal advised Mr Roy that she had referred these matters again to the Board because it appeared to her that the plaintiff was attempting to resuscitate the debate about his "religious dispositions"; that he was again accusing her of not meeting his expectations; that he was interpreting incorrectly what had occurred; and that he appeared to have made a false complaint about another staff member.

[133] By letter dated 22 September 2010 the Board wrote to Mr Roy initiating "formal disciplinary procedures". This included:

> The board is deeply disturbed that despite the fact that you received a final written warning a little over a month ago you appear to have completely disregarded it.

> In summary you appear to have continued undermining the role of the principal and failed to support her. You were advised that the trust and confidence necessary in the employment relationship had been damaged. Your latest actions appear to have damaged this to the extent that it may be unable to be recovered.
>
> We are concerned by the sequence of events. Trust and confidence are fundamental to any employment relationship. We deem conduct in his/her capacity as an employee or otherwise which is unbecoming to a member of the teaching service to be an example of a matter that may warrant disciplinary action. Serious misconduct, if substantiated can carry a penalty of termination of employment without notice.

[134] The Board's Mr Ngaro required Mr Roy to meet with "a duly authorised committee of the Board" on 24 September 2010 and he was invited to make submissions in writing and in person. Mr Roy was advised that this process was intended to be in accordance with the procedures set out in cl 3.4.3 of the Secondary Teachers Collective Agreement. He was encouraged to take independent advice and to be represented or supported at the meeting. He was asked to keep those matters confidential, especially from other staff. The Board indicated its intention to be represented by Mr Reading, an adviser with the NZSTA, advising Mr Roy: "Please consider this letter carefully. The seriousness of our concerns could put your continued employment at the school at risk."

[135] On 24 September 2010 the Principal, Mrs Pamaka, prepared and signed a "Statement of Service" addressed "TO WHOM IT MAY CONCERN". This certified that Mr Roy had been employed at Tamaki College from 19 March 2007 until 24 September 2010. This may have indicated the Principal's wish that the 24 September 2010 meeting (later re-scheduled to 27 September 2010) would result in the termination of Mr Roy's employment.

[136] For reasons which are not entirely clear but which, in any event, do not prejudice Mr Roy's case, the meeting called by the Board for 24 September 2010 did not take place until 27 September 2010. What was said at that meeting, which is disputed between the parties, affects significantly Mr Roy's application to set aside the written settlement agreement that was entered into subsequently.

[137] The meeting was attended by Messrs Ngaro and Reading for the Board on the one side, and Mr Roy himself on the other. Because of Mr Reading's subsequent

death, the only evidence about what happened came from Messrs Ngaro and Roy. No contemporaneous record was kept of what was said and done at the meeting. What is sure, however, is that by its conclusion Mr Roy had agreed in principle to resign on terms to be settled and proposed by the Board and sent to him subsequently.

[138] Mr Roy's account of the meeting is that he was there subjected to what he described as "the adverse consequences if I were to institute legal action challenging my termination". Mr Roy's evidence was that, even before the meeting, he was expecting the Board to seek to bring his employment to an end.

[139] Again by Mr Roy's account, the Board's representatives were surprised when the meeting convened, that he was unrepresented and advised him to obtain representation if he wished to do so. Mr Roy declined, said that his conduct did not justify terminating his employment and that he had been advised that he should take the Board to court so that matters could be dealt with "at a higher level and a more professional level". Mr Roy says that Mr Reading's response to that threat of litigation was that the Board would engage "the finest, best lawyers in the country" and that if Mr Roy lost, he would face an award of costs of up to $13,000 per day. By Mr Roy's account there followed some discussion about the most recent incident (what might be described as the 'most-hated-teacher' incident). He claims that this meeting lasted for four hours and 17 minutes, that being precisely the period from its commencement to precisely the moment at which he sent an email later that afternoon.

[140] By Mr Roy's account there was lengthy discussion about the reputations of Mrs Pamaka, Mr Ngaro and, at his own insistence, Mr Roy himself. Mr Roy acknowledges at one point "absolutely shouting" but claims also that Mr Reading was doing likewise. Mr Roy claims that such was the level of shouting between him and Mr Reading that one of his students in an adjacent room, and other staff members in the vicinity, must have been able to hear them. He claims that Messrs Ngaro and Reading went out to ascertain whether the participants' shouting had been heard and returned to confirm that it had been, but that what was said was indecipherable.

[141] Mr Roy claims that at the end of more than four hours, the Board's representatives proposed to confer between themselves and told him that he could go to the staff room, which he did, albeit briefly. He says that he was then summoned back into the meeting by Mr Reading where the latter told him that he had been found guilty of gross professional misconduct and that he then faced the choice of being dismissed or resigning with payment of a sum of money. Mr Roy claims that he refused to take the resignation offer and repeated his insistence that he would take the Board to court. He says that the Board representatives reiterated their threat of costs being awarded against him and emphasised the benefits of a resignation which would allow him to move on with his life. Mr Roy also alleges that Mr Ngaro made an enigmatic threat to him that if he did not resign he (Mr Ngaro) would "get the students to do things to me and things like that".

[142] Mr Ngaro's account of that meeting differs significantly from Mr Roy's. He says that it was held during a school term break so that there were few, if any, staff or students around although there were some staff in the school's office area and also the Principal. Mr Ngaro denies that any shouting or yelling took place. He says that Mr Roy did not contest the facts of the complaints that had been made to the Board and indeed accepted their accuracy. Mr Ngaro says that the discussion focussed on what had and had not happened previously to remedy that situation, and what would occur in the future. He confirms that at one stage there was talk by Mr Roy of taking a personal grievance but that Mr Reading did not seek to dissuade from doing so, saying that was his choice. According to Mr Ngaro, this led to a discussion of where the parties would go next, including a range of options. Mr Ngaro confirms that Mr Reading said that if Mr Roy was dismissed, this would have an impact on his career which might not be so significant if he resigned. Mr Ngaro also confirms that Mr Reading discussed an ex-gratia payment to Mr Roy whose response was to refuse peremptorily that or any like payment and to say that he would go to court. Mr Ngaro denies, however, that Mr Reading (or he) ever made any comments about expensive lawyers or costs of $13,000 per day. He concedes that Mr Reading had told Mr Roy that taking a personal grievance could be an expensive exercise but says that he did not go further and refer either to daily costs or any requirement that Mr Roy might have to pay these. Mr Ngaro confirms that Mr Reading then proposed to

assemble an agreement providing for Mr Roy's resignation. He denies, however, that any ex gratia figure, let alone $6,500, was ever discussed at that meeting.

[143] By Mr Ngaro's account, the meeting lasted between an hour and an hour-and-a-half but certainly did not go on for four hours and 17 minutes.

[144] In addition to the general disbelief of Mr Roy's evidence where it conflicts with that of the defendant, for reasons that I have set out previously there are several further factors in relation to this meeting in particular, which have caused me to prefer Mr Ngaro's account of it to Mr Roy's.

[145] The first is its duration. I consider that Mr Roy has grossly over-estimated the length of the meeting and has arrived at his very precise figure of four hours and 17 minutes by, in effect, saying that he typed and sent his email to all staff immediately the meeting was concluded. I do not accept that corroboration of its claimed four-hour-and-17-minute duration. I think it is significantly more probable that it was a shorter meeting, of about one to one-and-a-half hours at the most, as Mr Ngaro said.

[146] Nor do I accept that there were others, including at least one student and staff members, in the vicinity of the meeting. It is more likely, in my conclusion that there were very few, if any, others about during the school holidays when it was held. Nor do I accept Mr Roy's account of the lengthy shouting and yelling by him and Mr Reading. Although there may have been tense moments in the meeting and, at times, raised voices, it was not the shouting match lasting two hours of a four-and-a-quarter-hour meeting that Mr Roy contends.

[147] Finally, I do not accept Mr Roy's evidence that he was told that he had been found guilty of serious professional misconduct by the Board. I think Mr Ngaro's evidence is more probable that after discussion of the complaints and the expression of the Board's view that this constituted serious misconduct in employment. Mr Roy was told that there were serious concerns as a result of which his employment was at risk and that the parties should consider the options available to him at that point before irrevocable decisions were made. I accept, also, that although compensation,

combined with a resignation, emanated as one of several possible scenarios provided by Mr Reading, no specific figure of compensation was mentioned at that stage. However, it is common ground that Mr Roy was then adamant that he did not accept the option of resignation with compensation because he was convinced of the righteousness of his case.

[148] I simply comment here that it is both extraordinary and unfortunate that no written record whatsoever appears to have been made by any of the participants, either at the time of the meeting or immediately afterwards, which might have assisted the Court in determining the probabilities of what said and done at a significant stage of Mr Roy's position coming to an end.

[149] After the meeting on 27 September 2010, Mr Roy emailed all staff at the school saying:

> I have made a decision to resign from my position as a teacher from Tamaki College to pursue other opportunities. I will not be returning next term, so I would like to say that I've thoroughly enjoyed working alongside the staff and I will certainly miss most of the students. I wish you all the very best for the future and hopefully we'll bump into one another again sometime.

[150] In similar vein, on 29 September 2010 Mr Roy wrote to Mrs Pamaka under the email subject line "Best wishes from Chris Roy". This advice included:

> This will probably be the last correspondence that the two of us will enter into. I would just like to say that despite everything that has eventuated this year. You'll always be the Principal that I'd had the strongest personal connection [to] in all my years of teaching. We had warmth, humour, love and heaps of generosity for one another. Let's celebrate these positive things that we had between us and not dwell upon any negatives.
>
> I think that both of us in retrospect probably would not have chosen the paths that we entered into this year. Let us both learn from our mistakes. I'll certainly miss all the jovial behaviour, laughter and banter that I've grown to associate with both the students and the staff at Tamaki College. I gave my absolute 100% because I had a real connection to the school and its people.

[151] Mr Roy's email then dealt with the disposition of some personal property that he left at the school and his advice that he would not attend its sports dinner "to avoid anyone any sense of uneasiness". The email concluded by wishing Mrs Pamaka and her family all the best in health and happiness. It is noteworthy that

these communications, initiated by Mr Roy, were sent during the period that he was considering the Board's proposals that he resign.

[152] On 30 September 2010 the Board's Mr Ngaro sent Mr Roy a handwritten note asking him to contact Mr Ngaro or Mr Reading (giving their mobile phone numbers) "by 4 pm Friday 1st October to confirm that you accept the conditions of the settlement". These terms were contained in a document that Mr Reading had drawn up on behalf of the Board immediately following the meeting with Mr Roy which had taken place on 27 September 2010, postponed from its original 24 September date specified by the school.

[153] In essence, this draft settlement agreement was said to be "final and binding on, and enforceable by the parties" and, except for enforcement purposes, would not be brought "before the Employment [Relations] Authority or Employment Court". Essentially the terms of settlement provided that the school would pay Mr Roy the sum of $6,500 pursuant to s 123(1)(c)(i) of the Act within seven days of the parties signing the agreement. Next, the agreement provided that Mr Roy would resign in writing with effect from Monday 11 October 2010. The agreement was to remain confidential to the parties except to the extent that the Board was required to make a statutory report on the termination of Mr Roy's employment.

[154] The draft agreement included the provision by the school of an afternoon tea for staff and friends in the week beginning Monday 11 October 2010 on an agreed date. The draft agreement said that when announcing Mr Roy's resignation, the school would state that he had resigned "to pursue other opportunities".

[155] The draft agreement presented to Mr Roy for his approval also included that the Board would make a mandatory report to the New Zealand Teachers Council (NZTC) about Mr Roy's resignation "in the face of disciplinary action". The final term of the draft agreement was that its terms would be "full and final" and both parties agreed that "no further action will be taken by either party in regard of the employment relationship between Chris Roy and the Tamaki College Board of Trustees".

[156] Above the intended signatures were the words: "All parties to this agreement have had the opportunity to take advice from their respective representatives and sign this agreement with intent to bind the parties".

[157] Before signing the agreement on 5 October 2010, in an email sent on 2 October 2010 to a number of persons, including the Minister of Education and senior officials at both the Ministry of Education and the Ministry of Justice, Mr Roy advised, under the subject line "Human Rights Act 1993 and the reality of being an employee in that state school system":

> Six weeks ago, I was informed by our school's BOT in a written statement, not to take any queries outside of the school i.e. I was asked to discuss any issues with the school's BOT first, but due to their continued lack of understanding of the issues involved and their prejudice on this issue, I've sought the expertise of more experienced and informed individuals on these topics. Unfortunately, the school's BOT [has] considered this to be a breach of contract. My actions have also been perceived as amounting to undermining the authority and position of the Principal and the school's Board of [Trustees]. Consequently, I have been asked to resign from my position as an employee within the school or face more serious disciplinary action. I've taken the earlier option and will resign next week on the 11th October.
>
> For me this has become a personal tragedy. [Not] only have I lost my employment within an institution that I thoroughly enjoyed being [a part] of, but my future career hopes have been [seriously] placed in jeopardy.

[158] After setting out some statistical information about New Zealanders' religious affiliations, Mr Roy continued:

> To have someone of my calibre pressured into leaving the secondary school teaching profession, simply because I do not share similar perspectives on the dominant religious beliefs of a particular school is unacceptable in the [21st] Century.

[159] Mr Roy's signature on the record of settlement (described above) was dated 5 October 2010 and the signature of Mr Ngaro, on behalf of the Board, 6 October 2010. Mr Roy returned the agreement to the school. It contained his signature evidencing his agreement to its terms. For reasons set out earlier, I have concluded that Mr Roy's signature was not forged by someone else as he alleged very belatedly.

[160] The Board's minutes of its meeting of 26 October 2010 report, in relation to Mr Roy, that in addition to receiving a report from the Principal, Messrs Ngaro and

Bull had "carried out their duty regarding the Mr Roy affair" and that the result was that "Mr. Roy resigned his position at the College."

[161] By a brief letter dated 7 October to the Board, Mr Roy then tendered his resignation with effect from 11 October 2010.

[162] By letter 24 November 2010 Mrs Pamaka wrote to the NZTC reporting Mr Roy's resignation "following advice from the employer of an intention of disciplinary action over an aspect of his conduct" which was then summarised by her. The letter concluded, enigmatically: "In my opinion, an appropriate outcome for this matter would be …". However, no recommendation was made by Mrs Pamaka.

[163] Subsequent relevant events between Mr Roy and the school are the subject of this Court's first judgment allowing Mr Roy to raise and bring his personal grievance of unjustified constructive dismissal and do not need to be repeated here.[9] That concludes the account of relevant facts.

Good faith obligations in employment

[164] Although not ever referred to or relied on expressly by the parties, underpinning all employment relationships, and no less between Mr Roy and the Board, was s 4 of the Employment Relations Act. The heading to this section is "Parties to employment relationship to deal with each other in good faith". The section provides materially, for the purpose of this case:

> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a

[9] *Roy*, above n 2.

productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

(2) The employment relationships are those between—

(a) an employer and an employee employed by the employer:

…

…

(4) The duty of good faith in subsection (1) applies to the following matters:

…

(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:

…

(5) The matters specified in subsection (4) are examples and do not limit subsection (1).

…

[165] The particular emphasis of these obligations and rights is on s 4(1A)(b) which required the parties to be active and constructive in maintaining a productive employment relationship between themselves in which they were, among other things, responsive and communicative. Also important was the prohibition in s 4(1)(b) against misleading or deceiving each other or doing anything, whether directly or indirectly, that was likely to mislead or deceive the other. Those obligations must be seen in the broader light of the Act's object section (s 3) which provides materially that the object of the Act is:

> to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
>
> …
>
> (iv) by protecting the integrity of individual choice; and
>
> (v) by promoting mediation as the primary problem-solving mechanism;
>
> …

[166] Other legislative provisions which have been at the forefront of both Mr Roy's disputes with the Board, and of this case, include relevant parts of the Human

Rights Act. Neither of those Acts, nor the rights enshrined within them, are absolute in the sense that, applied literally, they give individuals such as Mr Roy unqualified rights of absolute insistence upon the defendant's compliance with them. In employment, as in most instances of exercises of human and democratic rights, where these confront the rights of others or statutory provisions that may appear to detract from an absolute application of those rights, balance and proportionality must inevitably be applied to ensure a rights-sensitive resolution of the dispute. Also at issue are some statutory principles underpinning state school education in New Zealand.

Setting aside the agreement

[167] Although not argued by the plaintiff under recognised heads of principle for doing so, there are a number of possible ways in which an agreement, such as the parties entered into in this case, can be set aside. I have discounted, for the purposes of this judgment, grounds including frustration, mental incapacity, misrepresentation and fraud. That leaves several possible heads including duress, undue influence and unconscionability. Both the facts and some of the legal tests for relief on these grounds overlap but each course of action needs to be considered separately to determine whether the agreement should be set aside so that it does not have the effect of precluding Mr Roy from bringing his personal grievance.

[168] Dealing first with duress, there are essentially three tests that an applicant needs to satisfy which have been confirmed recently by the High Court of New Zealand in *McGrath v Simpson*[10] which followed *Attorney-General for England and Wales v R.*[11]

[169] The first test is whether there was a threat against, or the exertion of illegitimate pressure on, the party claiming duress, by the other contracting party? Second, if so, did that threat or illegitimate pressure result in that party being coerced into entering the settlement agreement? Finally, has the party subsequently affirmed the agreement?

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[10] *McGrath v Simpson* [2015] NZHC 2644 at [50]. See also *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463.
[11] *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577.

[170] Next, undue influence is an equitable remedy closely related to duress. Its objective is to prevent one contracting party taking unfair advantage of the weakness or necessity of the other party. Undue influence may be actual or presumed.[12]

[171] To set aside a contract (agreement) for equitable unconscionability, several tests are applied. First, there must be one party labouring under a significant disability or disadvantage. Second, the other party must know and taken advertisement of this disability or disadvantage. Third, the Court must ask whether it is unconscionable to permit the stronger party to take the benefit of the bargain. Finally, in these circumstances, the burden shifts to that stronger party to show that the transaction was fair and reasonable. These principles have been stated authoritatively in *Gustav & Co Ltd v Macfield Ltd*.[13]

[172] Some refinement of the very broad outline of unconscionability set out above is required. Also from the *Gustav* case comes the following:[14]

> A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. … Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.

[173] The following has been said about what is sometimes described as "settler's remorse":[15]

> … The Court is not available as a means of enabling parties who say - we wish we had gone about things differently and been more careful and insistent – to get a second bite at the cherry.

[174] Whether to set aside an agreement on any of the grounds of duress, undue influence or unconscionability is inevitably a balancing exercise as it is in this case.

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[12] *Royal Bank of Scotland PLC v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. For further discussion on this distinction see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953 per Slade LJ.
[13] *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30].
[14] At [30].
[15] *Hildred v Strong* [2007] NZCA 475, [2008] 2 NZLR 629 AT [46].

[175] In favour of setting aside the agreement are the following factors. First, there was no negotiation between the parties about the sum which the Board offered to pay Mr Roy. Indeed, the particular amount ($6,500) was not mentioned at the meeting on 27 September 2010 but appeared for the first time in the employer's draft settlement agreement. Also questionable is the linking of this sum of $6,500 to s 123(1)(c)(i) of the Employment Relations Act. Although the Board may have intended that this payment would not attract income tax, it was illogical to categorise it as a remedy for a personal grievance for intangible loss because it purported to be a payment made upon a resignation freely agreed to by the employee.

[176] Next, the sum offered was an extremely low solatium for what would be the effective ending of Mr Roy's employment with the Board, if not his career in teaching. Further, in the process leading up to Mr Roy signing the settlement agreement, he was not either represented or expertly advised about it.

[177] Finally, in terms of the note left for him with the draft agreement, Mr Roy was provided with a very limited and, I conclude, inadequate opportunity to consider it before responding within the time stipulated for by the Board.

[178] As against those considerations favouring setting aside, there are the following, many of which answer the foregoing.

[179] First, the amount of any payment may have been negotiable. Mr Roy did not, however, test this but, by signing the agreement, simply accepted what he had been offered. There is simply no evidence about whether this sum may have been able to be increased by representations and negotiations.

[180] Next, although unrepresented and not professionally advised, Mr Roy was nevertheless offered by the Board the opportunity to take advice and to be represented. At each significant stage of his dispute with the Board, these opportunities had been made clear to him by it and on at least one occasion he had taken advice and been represented. It was Mr Roy's choice to forego those opportunities.

[181] Next, although the specified time for responding was unreasonably short as I have noted above, in fact this did not prejudice Mr Roy because he took longer than the Board had initially allowed him and was not prejudiced by doing so unilaterally.

[182] Further, even although Mr Roy may not have affirmed his resignation in the terms upon which it was agreed to after he signed the settlement agreement, he did so after he had agreed orally to resign (at the meeting on 27 September 2010) and before signing the agreement on 5 October 2010. This was in correspondence with colleagues and the school's Principal as set out earlier in this judgment. He both accepted that his resignation was the appropriate course and made no complaint about how this had been secured by the Board.

[183] Even if, contrary to my factual finding, pressure had been exerted on Mr Roy by the defendant's NZSTA representative about the plaintiff's prospects of failure and the significant consequences in costs to him if he did not agree, this was not "illegitimate" pressure. It was a matter on which Mr Roy had an opportunity to take advice both as to his prospects of success if he was dismissed and brought personal grievance proceedings, and as to what might be the outcome in costs if he lost. I do not consider, in all the circumstances, that even if Mr Roy's account of what was said to him is correct, this would have amounted to illegitimate pressure on him to sign the agreement.

[184] Next, the Board's statement that it would refer the matter to the NZTC was a factual statement reflecting a statutory requirement upon it, and this was acknowledged by the Board to Mr Roy during their discussions. This, too, was not illegitimate pressure on him because it was the statement of a factual consequence of his resignation and indeed would have been essentially the same if he had not resigned and had been dismissed, as was in prospect.

[185] The word "undue" in the phrase "undue influence" which may give grounds to set aside a settlement agreement such as this, allows for influence to be exerted on a contracting party but draws the line at what is "undue". I have concluded that any influence exerted on Mr Roy to agree to his resignation on the terms stipulated for by

the Board, was not undue influence. Even if his account of what was said to him had been accepted, it is doubtful that this would have amounted to undue influence.

[186] Turning to any unconscionability of the agreement, I do not think it can be said that Mr Roy laboured under a significant disability or disadvantage. He is intelligent, knowledgeable and able to stand up for what he believes in, all characteristics well illustrated by the facts in the case. Such disadvantages as he may have had in the negotiation process (set out above) were not, when considered in light of all of the relevant circumstances, significant disadvantages or disabilities. Having the status of a resigned employee is generally preferable to that of a dismissed one when it comes to the future, although this is affected significantly in this case by the outcome of the NZTC's inquiry which would have followed his employment ending in either of those ways. It is not, in all the circumstances, unconscionable for the Court to permit the Board to take the benefit of the bargain reached with Mr Roy and even if the burden has shifted to the Board to show that the transaction was fair and reasonable, I would find that it has discharged that obligation.

[187] For the foregoing reasons, I am not satisfied that the parties' settlement agreement should be set aside, whether for duress, undue influence or unconscionability. Mr Roy resigned and was not dismissed, actually or constructively.

Does the full and final settlement agreement breach s 238?

[188] This question was identified at the interlocutory stage when Mr Roy was granted leave to raise his grievance out of time. That was so because the defendant's primary defence is that Mr Roy is not entitled to continue with his grievance because it was settled, albeit long before it was raised.

[189] This question was dealt with at [48]-[59] of the Court's first judgment and I will not reiterate that exposition.[16] To understand the conclusion now reached about the question, reference should be made to those earlier paragraphs.

[16] *Roy*, above n 2.

[190] Section 238 provides:

> **238 No contracting out**
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[191] Arguing that it did not breach s 238, counsel for the defendant, Mr Harrison, accepted that in some circumstances such an agreement as the parties entered into might amount to a breach of the section. Without limiting the instances in which this might occur, Mr Harrison accepted that the following scenario might amount to a breach of s 238.

[192] An employee in an otherwise unremarkable employment relationship is upset at the way in which the employee has been reprimanded by a supervisor. The employee takes this matter up as a complaint with a representative of his or her management. At a meeting convened for the purpose of discussing this complaint, the employer says for the first time that it is symptomatic of an ongoing poor relationship between the employer and the employee. The employer then invites the employee to resign in return for the payment of a sum of money, these arrangements being manifested in a written agreement which purports to be a full and final settlement between the parties and which, expressly or implicitly, precludes any recourse by the employee to the legislation's personal grievance procedure. The employee executes the agreement immediately but, on reflection and with the benefit of advice, considers that he or she has been dismissed constructively and unjustifiably. On the facts of this case, however, that is not Mr Roy's situation.

[193] Does the foregoing hypothetical full and final settlement precluding recourse to such a personal grievance allegation breach s 238? As I have indicated, Mr Harrison accepted that it might well do so. That is an extreme example and other less clear examples (of which this case is arguably one) will depend on an intensive factual analysis of the circumstances in which the full and final settlement agreement came to be signed. This may involve questions of alleged duress; insufficiency of opportunity for reflection and to seek and act on legal advice; the reasonableness in all the circumstances of the monetary consideration for the resignation; and the like.

[194] In this case, I have concluded that the relevant background facts mean that despite a grievance capable of settlement not having been raised with the employer, the circumstances in which Mr Roy agreed to disqualify himself from access to the personal grievance procedure did not amount to an unlawful contracting out of the relevant provisions of the Act.

[195] Nevertheless, it should not be assumed that a so-called 'exit agreement' by resignation purchased for a very modest sum even before the necessary constituents of a personal grievance have arisen, let alone before one has been raised, will thereby be an effective shield against a grievance claim in all cases. As Mr Harrison conceded hypothetically, such a scenario might constitute a contracting out of personal grievance rights contrary to s 238. Mr Roy's case is, however, not in that category. That is because of the following features of it.

[196] The settlement agreement between Mr Roy and the Board resolved, fully and finally, the employment relationship problem between the two parties. Although by a payment that is remarkably modest in return for a resignation of an experienced secondary school teacher, I am satisfied that it cannot be said reasonably that Mr Roy was coerced unlawfully into agreeing to this arrangement. That is in spite of his protestations raised within a relatively short time after his employment ended and his pursuit of these to this point.

[197] First, it is clear that there was a serious employment relationship problem between the parties. That is illustrated by a number of significant events. These included Mr Roy's complaint to the HRC of unlawful discrimination against him which was the subject of a mediated settlement but which was not adhered to by Mr Roy. It is illustrated also by the two separate investigations by the Board of allegations of serious misconduct in his employment against Mr Roy and what must have clearly been at least the implication over a significant period that his continued employment was at risk.

[198] Despite some pressure of time to agree to the Board's proposal of a settlement set out in the form of an agreement, the evidence discloses that Mr Roy used more than what might otherwise have been an unfairly short period to make up

his mind on a very significant issue. He was given the opportunity to obtain independent expert advice on the Board's proposal but chose not to take up this opportunity. Indeed, even before signing the settlement agreement Mr Roy evidenced his intention to resign in correspondence sent to colleagues which contained no hint of pressure on him to do so, of inadequate time or indeed of any unwillingness to agree to the Board's proposed settlement. His correspondence with the Principal and others, sent shortly after he signed the agreement, indicated likewise, if not his enthusiasm for it, at least an absence of reluctance or objection to it.

[199] The Board allowed Mr Roy an opportunity to take professional or other advice about its proposal to settle the parties' employment relationship problem. That Mr Roy did not take this opportunity is not attributable culpably to the Board and should not be held against it in assessing whether the settlement was obtained unfairly. The evidence is that Mr Roy had, at all relevant times, relinquished his membership of the NZPPTA, the union that may have been able to have assisted him and, indeed, the Board as well, in obtaining an early and appropriate resolution of the issues. At the Board's first investigation of allegations of misconduct against Mr Roy, he obtained advice and was represented by a staff member of a law firm, albeit a legal executive and not a lawyer. The evidence of the assistance that Mr Roy received from, and the advice given to him by, that person indicates that it was appropriate, pragmatic, and sage advice. That facilitated what was then hoped by the Board to be a resolution of the parties' differences for the future. That Mr Roy did not adhere to that agreement (as it was recorded by his representative at the time) has, in my assessment of the case overall, more to do with the plaintiff's subsequent reconsideration of his strongly-held views and his resistance to any advice that did not accord with or suit those views about his entitlements as an atheist member of the school's staff.

[200] It would only be speculative to try to determine what Mr Roy might have done had he taken professional advice about his situation in late September/early October 2010. Even if he had continued to be determined to resign as he did, he may well have been able to negotiate for better financial terms on which that outcome was to be conditional, but that did not happen because of his decision not to take

advice and to agree to resigning on the terms proposed by the Board. Unfortunate though that may now be from Mr Roy's point of view, it does not mean that the settlement agreement was a prohibited contracting-out of the Act's personal grievance provisions, under s 238.

Alternative conclusion on remedies generally claimed for unjustified dismissal

[201] Because much of the evidence focused on this, I should say something about remedies had Mr Roy been dismissed constructively and unjustifiably.

[202] Mr Roy sought reinstatement to the staff at the school in his previous role as Head of the Art Department. There is now a new board of trustees in place. Some members of the former Board continue in that role, although not Mr Ngaro who was at the forefront of the Board's dismissal of Mr Roy. More significantly, the school's professional leader, the Principle Mrs Pamaka, is still in that role. The breakdown in the professional relationship between her and Mr Roy was both so profound and irreconcilable that I have concluded that it would not have been practical, under former s 125 of the Act, to direct Mr Roy's reinstatement.

[203] This is a clear case in which the Court would not have granted Mr Roy the principal remedy that he sought, his reinstatement to the teaching staff of the school. Even if this conclusion had not been sufficiently clear, as it was at the end of five days of evidence on 17 July 2015, it was reinforced by Mr Roy's subsequent correspondence with others. These included the then Chair of the defendant, a witness who was still a member of the school's staff and a variety of other staff members whose concerns about the receipt and content of such correspondence, relayed to the Court through the Principal, reveal clearly the impracticality and unreasonableness of Mr Roy's reinstatement even after five years of absence from the school's staff.

[204] Quite apart from Mr Roy's assessments of such elements as the truthfulness of witnesses' evidence (which he described both as "crap" and "perjury"), his inaccurate and, at times, fanciful accounts of what he contends I and others said during the course of the hearing about the parties' cases and his ill-advised

correspondence to others, illustrates more than amply that the school could not have the necessary trust and confidence in Mr Roy. I apprehend that his potential relationships with a significant proportion of other staff members would not be professional, constructive and collegial. I do not propose to again or further particularise the contents of that correspondence. However, I have concluded independently that not only was Mr Roy not dismissed unjustifiably but that, even if he had been, his reinstatement would not have been ordered.

Observations

[205] The foregoing are the Court's conclusions on the plaintiff's claims against the defendant. The following passages are not part of the reasoning used to reach those conclusions. Rather, they are what lawyers have traditionally called 'obiter dicta', that is observations about broader issues that the case has raised. They are provided in an attempt to assist other parties in dealing with a difficult, contentious and emotive issue about religion/atheism in state secondary schools and, in particular, affecting employment issues between boards of trustees and teachers.

Human rights law in employment

[206] As the Human Rights Review Tribunal (HRRT) demonstrated in *Meulenbroek v Vision Antenna Systems Ltd*,[17] a focus solely or even predominantly on statutory employment law in an employment case involving human rights issues, can be a fatal strategy. Even in a case where an election has been made by a grievant to go down the employment law track rather than the human rights track, application of human rights principles may, nevertheless, be determinative of, or at least highly influential in, issues such as justification for dismissal or disadvantage in employment, as well as unlawful discrimination in employment.

[207] As did the Tribunal in the *Meulenbroek* case,[18] establishing the starting point for consideration of human rights law in New Zealand begins with Article 18 of the

[17] *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51, essentially an employment case.
[18] At [103].

International Covenant on Civil and Political Rights, 1966 to which New Zealand is a signatory. This provides:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[208] As noted in another employment related case decided by the HRRT, *Nakarawa v AFFCO New Zealand Ltd*,[19] the right to freedom of religion was described by the United Nations Human Rights Committee in *General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)* (1993) as "far-reaching and profound". In that Committee's General Comment at [4] it was said:

> 4. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.

[209] The New Zealand Bill of Rights Act 1990 has implemented New Zealand's treaty obligations under the International Covenant in two sections, 13 and 15. They provide:

> **13 Freedom of thought, conscience, and religion**
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
> …

[19] *Kakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [54].

> **15 Manifestation of religion and belief**
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[210] Another important provision in the NZBORA is s 6. This provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[211] This provision, with reference to other legislation affecting freedoms of thought, conscience, religion and belief, requires an interpretation to be given to such provisions that is consistent with ss 13 and 15. Relevant parts and sections of the Employment Relations Act are encompassed in this statutory interpretative principle.

[212] These rights are, in turn, reinforced by relevant provisions of the Human Rights Act and also, more particularly in employment, by relevant sections of the Employment Relations Act.

[213] Section 22(1) of the Human Rights Act deals with human rights in employment as follows:

> **22 Employment**
> (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
> (a) to refuse or omit to employ the applicant on work of that description which is available; or
> (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
> (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
> (d) to retire the employee, or to require or cause the employee to retire or resign,—
> by reason of any of the prohibited grounds of discrimination.

[214] Also relevant in circumstances where a religious belief requires adherents to follow a particular practice, an employer must accommodate that practice provided the adjustment does not disrupt unreasonably the employer's activities. Specifically, s 28(3) of the Human Rights Act states:

> (3) Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

[215] To complete the picture for employment, ss 103(1)(c), 104 and 105(1)(c)-(d) and (2) of the Employment Relations Act state:

> **103 Personal grievance**
> (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—
> …
> (c) that the employee has been discriminated against in the employee's employment; …
>
> **104 Discrimination**
> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or involvement in the activities of a union in terms of section 107,—
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
> (c) retires that employee, or requires or causes that employee to retire or resign.
> (2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
> (3) This section is subject to the exceptions set out in section 106.

> **105 Prohibited grounds of discrimination for purposes of section 104**
> (1) The prohibited grounds of discrimination referred to in section 104 are the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993, namely—
> …
> (c) religious belief:
> (d) ethical belief:
> …
> (2) The items listed in subsection (1) have the meanings (if any) given to them by section 21(1) of the Human Rights Act 1993.

[216] Although s 106 of the Employment Relations Act sets out exceptions to discrimination in employment, none is applicable in this case relating to employment in state secondary schools.

[217] Thus it may be seen that human rights affecting religion or belief in a broad sense, are directly referable to employment and justiciable in the specialist institutions set up under the Human Rights Act and the Employment Relations Act.

Religion in state schools

[218] This is a controversial topic that generates strong views and emotions as this case has illustrated. That is especially so where religion is an inherent part of culture in different ethnic communities and, in particular, where those communities are dominant numerically. At the risk of over-generalising, there was (and is) at the school both a predominance of Maori and Pacific Island students in whose cultures, promoted and celebrated by the school, Christianity plays a significant and even essential part.

[219] One of the philosophies underpinning the Education Act was and is to permit state schools and their governance bodies (Boards of Trustees) to reflect the communities from which their pupils come. Those local cultural considerations must be balanced against certain minimum and universal national standards including human rights laws; but within the scope of, or in addition to, these, the Education Act permits and encourages schools to reflect their different communities.

[220] At the same time, state schools are to be secular institutions although the legislation provides some allowance for religious instruction, at least in primary

schools, and establishes a methodology to attempt to cater for conscientious objectors to participation in such religious instruction. The legislation in these regards is, however, aimed primarily at the relationship between schools and their pupils and there are no specific provisions addressing school staff. In this regard, however, statutes such as the Human Rights Act and, when applicable, the New Zealand Bill of Rights Act 1990 apply both to (state) schools generally and to employment relations in them in particular as does, of course, the Employment Relations Act 2000.

[221] This overview of philosophies that have been legislated for may, if taken too literally and absolutely, create tensions of the sort that arose in this case. As in most matters in life, however, such apparently conflicting rights and obligations must be the subject of reasonable balance, tolerance and accommodation in their interpretation and application and, for most schools and teachers for most of the time, that is what happens.

[222] So, for example, teachers in state schools enjoy the Human Rights Act's freedom of religion and this includes, by logical implication, also a freedom to eschew or not to practise any religion (agnosticism or atheism). Even those single-source and plainly stated rights must be interpreted and applied so that they co-exist with other rights and obligations. That means that teachers, pupils and others associated with schools are entitled both to a freedom to practise their religious beliefs and, for others, the freedom to not have to do so and indeed to practise their agnosticism or atheism.

[223] At the heart of this case is a conflict between, on the one hand, the school, which was, for the most part but not necessarily consistently, prepared to allow Mr Roy to exempt himself from any religious element or any religious ceremony of which a number are part of the school's culture. On the other hand, there was Mr Roy, who wished to be able to state publicly and forcefully within the school's staff his atheistic beliefs and criticism of Christianity without constraint and to resist absolutely any association with others' religious practices. He wished to determine, himself and unilaterally, the occasions on which he would avoid participation in

school ceremonies and rituals, rather than having to consult with the Principal about these, and to seek and be granted consent to do so on a case-by-case basis.

[224] The two ceremonies or rituals the particular subjects of this case, were powhiri and school assemblies. Powhiri usually occurred annually to welcome new students and staff to the school at the beginning of each academic year. On some occasions, also, throughout the year, powhiri were held for similar purposes. As determined by the school's kaumatua, its powhiri contained some Christian religious elements, albeit in a Maori kawa (protocol) context.

[225] School assemblies were more frequent events and although largely secular in their content, regularly included karakia (prayers) at their commencement and, on occasions, the performance of songs and other cultural exhibitions that contained or referred to Christian religious elements.

[226] The evidence appears to show that until early February 2009, the controversial aspects of these events were dealt with by both the school and Mr Roy in a low-key, commonsense and practical way. Mr Roy assisted with the preparations for powhiri, although he did not participate in them. Just what caused this largely peaceful co-existence to disintegrate on 11 February 2009 is unclear, but that it did so on that day is incontrovertible and has played out in this case.

HRC mediation

[227] As I have already noted, it is very unfortunate that no agreed outcome of the mediation was recorded in writing agreed to by the parties, given the subsequent retreat from the elements of agreement reached between the parties with the assistance of the HRC. The practice of dispute resolution under the Human Rights Act is not a matter for judgment by this Court although I do note that the practice in employment mediations, conducted under the Employment Relations Act, is to document immediately agreements when they are reached.

An employer's lawful directions

[228] Ultimately, while the school was prepared to exempt Mr Roy from participation in powhiri, it directed him to attend school assemblies except for those parts of those evens which he considered to be 'religious', and further directed that he would need a case-by-case exemption from the Principal to avoid being present for any longer periods on the grounds of his objection to participating in events including religious elements. Although not dealt with extensively in submissions, this raised the question of whether the Board was justified in so directing Mr Roy.

[229] It is long-established employment law that an employer may give an employee, and expect compliance with, directions that are lawful and reasonable. An employee cannot be prejudiced in his or her employment by refusing to comply with directions that are either or both unreasonable and unlawful. Mr Roy's case was that human rights law entitled him to determine whether he participated in any school event which he considered to be religious or included religious elements, and it was not a lawful or reasonable direction that he should seek a case-by-case exemption at all.

[230] Mr Roy was probably entitled to object to participating in at least those parts of ceremonial events (powhiri and assemblies) which constituted or contained religious practices, and the defendant was bound to act both lawfully and reasonably in accommodating those objections by Mr Roy.

[231] Some of the Principal's and the Board's early responses to Mr Roy's demands in this regard appear to have been unlawful and/or unreasonable. That may have been a natural reaction to the stridency of Mr Roy's demands made publicly and uncompromisingly. There is no evidence that the school took expert advice about its rights and obligations in this regard, at that stage at least. The defendant's initial refusals to accommodate Mr Roy may have arisen in part, also, because of cultural and religious pressures from other staff and the school's uncertainty about what it considered to be its rights to insist upon participation in cultural ceremonial occasions. A combination of those factors got things off to a bad start between the parties.

[232] However, with the involvement of others (an adviser/representative on behalf of Mr Roy, and the HRC), it is the nature and quality of the parties' proposals, responses and commitments that are for examination. Again put shortly, did the parties' proposals, responses and resolutions constitute a workable, lawful and reasonable accommodation of Mr Roy's rights as an atheist, and of the school's managerial responsibilities?

[233] For the purpose of this discussion, I have assumed that Mr Roy's "religious or ethical belief" (atheism) required him to follow a practice of not participating in his employer's religious activities or in religious elements of the school's activities. In these circumstances, an employer must accommodate "the practice" (what I infer to be Mr Roy's religious/ethical belief requiring him not to follow a particular religious practice) so long as any adjustment of the employer's activities required to accommodate that practice does not disrupt unreasonably the employer's activities.

[234] Arranging and conducting powhiri and school assemblies fall within the activities of the employer as a secondary school. However, any accommodation of Mr Roy's beliefs would have raised at least three questions as to whether Mr Roy's demands affecting those occasions would have disrupted unreasonably those activities.

[235] First was Mr Roy's demand that he be allowed to be absent for the whole duration of any such occasions.

[236] His second demand was that he be allowed to be absent for the religious elements of those occasions and, in particular, of school assemblies which involved a mix of religious and non-religious activities.

[237] The third and more difficult question which might potentially arise is whether Mr Roy could have adhered to his ethical beliefs of atheism by being present at powhiri or at assemblies but not participating (at least actively) in the religious aspects of those. So, for example, whether Mr Roy may reasonably have been permitted not to bow his head during prayers, as may have been the school's expectation of staff participants in those ceremonies or, on the other hand, whether

his freedoms against discrimination would have extended to exempting him from being present altogether on such occasions, are not just hypothetical examples. As the relevant facts reveals, Mr Roy was present during pre-prandial prayers at an after-sport event where he declined to participate, either by the recital of any parts of those prayers, or by bowing his head. This did not appear to have been a problem for Mr Roy, at least at that time, and I do not think it would have disrupted the activity, let alone indicated disrespect for those practices, that he so acted.

[238] The school was prepared to allow Mr Roy's absence from powhiri and, on a selective basis and with the Principal's consent, its requirement that teachers be present for school assembles. Mr Roy's objection to this latter adjustment of the employer's activities included that he would be embarrassed by being seen to come and go selectively from school assemblies and that these absences in practice would mean that he would have to spend periods outside in potentially inclement weather.

[239] Although it did not happen, it seems to me that the minutiae of how and when Mr Roy would come and go from assemblies ought to have been the subject of mature and responsible discussion between the parties. Such evidence as I heard, not to mention commonsense, would also seem to dictate that Mr Roy's absence from powhiri and selective absences from aspects of assembly, would not disrupt unreasonably the school's activities. Powhiri occurred between once and thrice a year, and Mr Roy would be present at assemblies for those matters that affected him as a teacher, and his students.

[240] For these reasons, I consider that the school was not justified in requiring Mr Roy to seek the ad hoc consent of the Principal (that is before each assembly) to absences from them. Their format would have been sufficiently established, known and regular that Mr Roy's ethical belief that he was not to participate in the religious aspects of these events would have meant that he could and would have come and gone without disrupting those assemblies and without the need for specific permission to do so on each occasion.

[241] However, because these issues have not been argued and the case does not turn on them, the foregoing should be seen as observations made for the assistance of

others in the employment field in what may be a live debate. They impress the Court as being issues best decided after respectful discussion and accommodation of strongly held views, and which, I am confident, is the way that these matters are dealt with daily in both schools and other workplaces without the drastic consequences which ensued in this case.

[242] No doubt the HRC could assist schools and teachers in similar situations and, preferably, from an early stage after they arise.

The defendant's conduct

[243] The defendant is, despite succeeding in this case, not immune from criticism of some of its actions in its various disputes with Mr Roy. He is justified in his complaint that the Principal responded insufficiently and inappropriately to the actions of two other staff members against Mr Roy when he indicated to staff that he did not propose to participate in the powhiri and the reasons for that. The reactions of those other staff members to that statement as recorded in emails which were sent to Mr Roy, were vitriolic, abusive and unprofessional and however much they may have disagreed intensely with Mr Roy about his position, their responses were excessive.

[244] The defendant, of course, cannot be responsible, without more, for its staff members' actions. When, however, Mr Roy complained to the Principal about them, her reaction was to minimise both what they had written to Mr Roy and how they had done so, saying that everyone had a freedom to express their views and, by strong implication, that these responses were justified by what Mr Roy had announced previously. However strongly Mr Roy's views were expressed, they were not couched in such terms as, and did not justify, the responses of some other staff members. There was no suggestion in the evidence that anything further was done by the school about this unprofessional conduct by other members of its staff. This, in turn, further and unnecessarily alienated Mr Roy in believing that the Principal held her staff to different professional standards depending upon her view of the issues of principle on which she disagreed with Mr Roy.

Summary of judgment

A The parties settled Mr Roy's claims to relief by the Board making, and Mr Roy accepting, an ex gratia payment to him upon resignation. Mr Roy's claim of unjustified constructive dismissal is thus barred from consideration.

B If there was no such lawful settlement that precluded Mr Roy's claim, he was not dismissed constructively and unjustifiably.

C If Mr Roy had been dismissed unjustifiably, his conduct that contributed to that would have reduced significantly any monetary remedies to which he may have been entitled.

D Mr Roy's reinstatement to the teaching staff of Tamaki College would have been impracticable and would not have been ordered.

E The Board is entitled to costs against Mr Roy in respect of his case in this Court.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Monday 14 March 2016