

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 34
ARC 44/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN SUZETTE MARTIN
Plaintiff

AND NORTHLAND EDUCATION TRUST
INCORPORATED
Defendant

Hearing: 28 February and 1 and 2 March 2011
(Heard at Whangarei)

Appearances: Richard Harrison, counsel for plaintiff
Stephen Langton and Ronelle Tomkinson, counsel for defendant

Judgment: 14 April 2011

- 1. The plaintiff's challenge to the Employment Relations Authority's determination is allowed and the determination is set aside.**
- 2. The plaintiff was dismissed unjustifiably by the defendant.**
- 3. The plaintiff is entitled to \$12,710 as compensation for lost remuneration and \$15,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- 4. The plaintiff is entitled to costs in both this Court and in the Employment Relations Authority.**

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The question for decision in this challenge from a determination¹ of the Employment Relations Authority is whether Suzette Martin was dismissed justifiably from her employment as a teacher and, if so, the remedies to which she may be entitled.

Relevant facts

[2] The Northland Education Trust Incorporated (the Trust) operates schools in the Northland region for children of families who are members of the religious group known as Exclusive Brethren. Although all students at these schools are members of that religious group, none of their teachers is. Ms Martin (although a practising Christian of another denomination and sharing many of the same moral and ethical values as the Brethren) was among those non-Exclusive Brethren teachers at the Trust's Westmount School campus in Kerikeri. The Trust's 15 Westmount schools throughout New Zealand and their teaching programmes adhere to the Exclusive Brethren principles and to a literal interpretation and application of the Christian Holy Bible.

[3] Ms Martin's written employment agreement made this clear under the heading "Ethos And Guiding Principles of the School Community" as follows:

1. The trustees are committed to a way of life which is governed at all times and in every detail by the Holy Bible. It is the duty of the trustees to ensure that all aspects of school life are in accord with the Holy Bible. The conduct of the students, staff and parents must reflect Bible values. The trustees have absolute discretion in determining what conduct or activity is in accord with the Bible.

[4] Ms Martin's employment agreement required her to seek and obtain the approval of the defendant for her use of teaching materials. This was dealt with in her employment agreement as follows:

¹ AA176/10, 19 April 2010.

4. Only literature approved by the trustees may be brought onto the school premises. ...
- ...
7. Only teaching programmes approved by the Northland Education Trust will be implemented at Kerikeri. The trustees reserve the right to review the teaching practice at Kerikeri. The trustees desire that students be educated to tertiary education entrance level. Any activity that would promote interest by students in higher education (university or college) would be viewed very unfavourably.
- ...
13. ... All teachers employed by the Trust are employed on the basis that they will in all ways respect the deeply held feelings and conscience [of] the trustees and members of the community whilst engaged in employment for the trustees.

[5] The disfavour with which university or other tertiary education of students is regarded by the trustees explains the need to engage outsiders as teachers and, therefore, the pains to which the trustees went in approving and controlling the teaching material and curriculum evidenced in Ms Martin's employment agreement.

[6] Although having been engaged at the school temporarily beforehand, Ms Martin began as a permanent teacher with the Trust in February 2007. In addition to professional teaching qualifications, she has tertiary educational qualifications in English literature. At all relevant times Ms Martin was a registered teacher pursuant to Part 10 of the Education Act 1989.

[7] For the first time in 2007 a year 13 class was made available at the school. In 2008 the Shakespearean play King Lear was included in the English programme as one of a specified set of plays in the curriculum for year 13 students of English. There are several published versions of the play, the distinguishing features of which are not the literal text but the accompanying glossaries, annotations, and footnotes which explain it and assist its analysis by students. The Trust approved not only the teaching of King Lear but also the Longman publication of the play which consisted of the original text, a glossary and limited additional commentary on it. The Trust's educational managers had ensured that the contents of the Longman version of King Lear were suitable in terms of church principles.

[8] Shakespeare's King Lear is not a genteel depiction of 17th century polite and restrained English society, well ordered and well mannered, a Constable painting put

to words.² Rather, to continue the artistic analogy, it is a Bruegel picture³ brought to life, written to entertain proletarian urban classes with bawdy, violent, profane, and sexual elements aplenty. If one reads or certainly studies Shakespeare, and King Lear in particular, these elements come with the territory. If one were to redact or excise even individual words that were objectionable to the defendant, let alone the subject matter or themes of the play, it would inevitably lose the attributes for which it is still studied by students more than 400 years later. It is therefore logical that the defendant did not seek to emasculate the Shakespearean text by what would necessarily have to be extensive censorship. Although it is perhaps surprising, in retrospect, that the school chose to include a Shakespearean play within the NCEA choices that it had and, especially, to study King Lear among the five Shakespearean plays permitted by the NCEA curriculum in 2009, the fact is that it did so and approved not only the original text but the Longman's interpretive notes as a teaching aid.

[9] Ms Martin had such considerable professional difficulties with both the Shakespearean text and its modern translation, that in 2008 she abandoned teaching King Lear. She attempted to do so again in the second term of 2009 when the play was again included in the year 13 English programme. It was this second attempt to teach King Lear that led to Ms Martin's dismissal.

[10] In early May 2009 Ms Martin approached Daryl Maden, one of the trustees of the Trust and its Chief Executive Officer, expressing her concern about the lack of approved supporting material for the study of that play. Mr Maden authorised Ms Martin to obtain such material as she considered necessary, but to obtain his approval before showing this to students.

[11] Ms Martin was not alone in her belief that there was insufficient supporting material for teaching the play. Susan Corbett, the co-ordinator of the Northland campus, also expressed her concerns about a lack of unit planners for year 13 students with the Education Manager at the Westmount Education Trust (WET), Margaret Lees, in late May 2009. WET's role was to co-ordinate and manage the

² Constable lived and painted and lived almost 200 years after Shakespeare wrote King Lear.

³ Perhaps "The Dutch Proverbs" (1559).

several Westmount school campuses around the country and Ms Lees, in association with others, managed curriculum leaders who developed courses and teaching materials with individual schools, including how such materials would be applied locally. There was disagreement among the Trust's educationalists about unit planners: the Head of English at the school's Kaipara campus was said to have considered that teachers did not want unit planners. This and associated difficulties meant that Ms Martin was not able to be assisted to go beyond the by now almost foreign language Elizabethan text of the play to understand its themes and characters, essential elements in the teaching and examination of the subject. At the year 13 level such materials generally include academic writings on the text and suggested activities to enhance understandings of theme and character. Although there was a Ministry of Education website which provided access to such assistance, Ms Martin did not have the necessary access code to this.

[12] In these circumstances Ms Martin, after inquiry, accessed a website known as Sparknotes.com. Its contents are approved by the Ministry of Education to provide curriculum support in schools. Ms Martin located both a complete text of King Lear and a full and detailed modern English (American) translation which, during May 2009, she downloaded episodically. She subsequently distributed and used this material in her year 13 class. Its contents, however, were said to have made students embarrassed and uncomfortable. One element of the curriculum's study requirement was for students to make oral presentations of passages to their class and although recitation of offending words and phrases made students (and Ms Martin herself) more uncomfortable and embarrassed, she considered that she had no alternative but to persist with this to fulfil the requirements of the curriculum which she was required to teach. One student's father raised his concern with Mr Maden in June 2009.

[13] Mr Maden requested an explanation through Ms Corbett who, in turn, asked Ms Martin whether she had taught King Lear to the students and had approval to do so. It was then that Ms Martin realised that she had not obtained the necessary approval to use the modern translation although she said that she did not consider its language would be unacceptable when compared to the original Shakespearean text.

[14] On 30 June 2009 Mr Maden spoke to Ms Martin at the school about the translation and she acknowledged downloading and using it without his approval. She explained that she needed to compare the original text with the modern version so that the students could understand the language. As directed by Mr Maden, Ms Martin ceased using the modern translation with her class and had the students return their copies. She also edited part of it which she considered might have caused discomfort to the students.

[15] On 14 July 2009 Ms Martin was asked to attend a disciplinary meeting. The letter to her pointed out that she had not obtained approval for making the modern translation available to the class and that it was considered embarrassing, corrupt and morally defiling to the development of the students. The meeting, at which Ms Martin had a support person, went ahead on 16 July 2009 with Mr Maden and another of the trustees, Donald Cottle. Ms Martin acknowledged that Mr Maden had instructed her to obtain his approval before presenting material to students. She said that when she looked at the modern translation she did not consider it very different from the original text but that she had overlooked seeking its approval because she was too busy at the time. When Mr Maden pointed out that he and Ms Martin had spoken on at least three occasions about other matters during the relevant period, she explained that her focus was on unrelated matters during those meetings.

[16] Messrs Maden and Cottle considered Ms Martin's response. They concluded that parts of the modern King Lear translation were offensive and repulsive, that the use by Ms Martin of the material was inexcusable and her failure to obtain approval for the material was a clear breach of her employment agreement. The trustees concluded that this amounted to serious misconduct and, when the meeting resumed later on the same day, Messrs Maden and Cottle advised Ms Martin that her explanation was not accepted and she was dismissed summarily.

[17] Despite having applied for numerous teaching positions throughout Northland and even in Auckland, Ms Martin has been unable to obtain further work as a teacher within her field of competence and expertise. It is unclear whether that inability to obtain other work was a direct consequence of her dismissal and/or the publicity surrounding it. However, there is no doubt that having applied assiduously

for other positions, Ms Martin has not been appointed to any. In these circumstances, in mid February 2010, Ms Martin began work as a part time hotel receptionist and cleaner for 12 to 15 hours per week earning \$15 per hour. The significant drop in her income has required her to move in with her mother. Despite these circumstances, although understandably, she does not seek to be reinstated in her former position. Nor does she claim compensation for her significantly reduced income since she obtained this work. Her principal concern is for vindication of her good name as a teacher.

The Employment Relations Authority's determination

[18] The Employment Relations Authority's decision that summary dismissal was justified was a close run thing. It is clear from the determination that it was only the special nature of the school, its ethos and the importance of trustee approval of any material affecting that ethos, which converted in the Authority's determination what might otherwise have been an unjustified dismissal in the Authority's view to a justified one. This case is, however, a challenge by hearing de novo so that I simply note the Authority's determination but do not need to analyse it as would an appellate court.

Grounds of challenge

[19] These are four which the plaintiff says the Authority determined wrongly and which also mirror the plaintiff's challenges to the justification of her dismissal which she says was not in accordance with s 103A of the Employment Relations Act 2000 (the Act).

[20] First, the plaintiff says that the defendant did not undertake a proper or fair inquiry into serious allegations of misconduct as a teacher and, in particular, into her explanation for not seeking consent to use what are known as the Sparknotes teaching materials.

[21] Second, the plaintiff says that the defendant did not take sufficient account of the under-resourcing of the year 13 English curriculum and therefore of the plaintiff,

who was responsible for this and, in particular, in view of her previous requests for assistance that had gone unanswered.

[22] Penultimately, the plaintiff asserts that the defendant did not make any assessment of the objectionable content of the Sparknotes teaching materials in comparison to the original King Lear text and in comparison to the approved resource materials known as the Longman's notes.

[23] Finally, Ms Martin says that the defendant unfairly predetermined the outcome of both its inquiry into the serious allegations of misconduct against her and of the consequence of summary dismissal and did not decide these issues in a fair and open minded way after a fair consideration of all reasonable circumstances.

[24] Either together or in combination, the plaintiff says that these flaws meant that the defendant did not meet the s 103A test of which it is required to satisfy the Court, namely that what it did and how it did it were what a fair and reasonable employer would have done at the time in all the circumstances.

Tests for justification of dismissal

[25] As just noted, these are set out in s 103A of the Act. Although the defendant introduced into evidence a number of letters and other written material about Ms Martin and her teaching, these were documents created after her dismissal and in many instances only after it had become known that she was challenging the Employment Relations Authority's determination finding it justified. Their contents were not available to, and could not have been taken into account by, the defendant at the time it dismissed Ms Martin. The statute makes clear by reference to the phrase in s 103A ("in all the circumstances at the time the dismissal or action occurred") that these are irrelevant to the matter of justification. They may, however, have been relevant to the remedy of reinstatement but this is not sought by Ms Martin. They may also be relevant to the question in relation to remedies of the contribution, if any, that Ms Martin made to the circumstances that led to her dismissal.

[26] Although expressed at length and by many witnesses, the essential justification advanced for Ms Martin's dismissal was that she, albeit mistakenly and innocently, failed to obtain the defendant's consent to use the King Lear Sparknotes materials and that, in the defendant's words, she embarrassed, corrupted, and morally defiled her students by using those materials in class.

Decision

[27] I find Ms Martin was neither cavalier nor careless about her obligation to obtain consent for the use of teaching materials. She did so, pertinently for the facts of this case, in respect of a King Lear DVD that she obtained and wished to show to her students as one part of the intended presentation of material relating to the play and closely associated with her proposed use of the Sparknotes material. Ms Martin appreciated that she could not use the King Lear DVD until she had obtained Mr Maden's permission to do so. At the same time as referring the DVD to Mr Maden, Ms Martin told him that she had found materials (the Sparknotes) to assist with teaching this component of the course and sought Mr Maden's consent both to download this material from the internet and to use it with her students. Mr Maden authorised the downloading of the material but told Ms Martin that she should submit it to him for approval before it was used with students.

[28] It was her failure to obtain this consent that led to her dismissal but those steps she had taken in relation to the DVD and the Sparknotes confirms that she was both conscious of, and conscientious about, her obligation to obtain Mr Maden's consent before using these materials that were new to the school. This, in turn, confirms her explanation that her failure was inadvertent and that she was not careless, in all the circumstances, in forgetting to obtain that consent.

[29] A fair and reasonable employer, so acting in all the circumstances at the time, would not have concluded otherwise but that this was an innocent mistake, albeit an omission that lasted more than briefly, and in respect of which there were several occasions on which further episodes of the King Lear Sparknotes were downloaded by Ms Martin before being distributed to her students.

[30] It is necessary to consider carefully and objectively what it was about Ms Martin's conduct to which the trustees took exception. It could not have been the plaintiff's presentation to her students of King Lear including its content and vocabulary which offended the school's ethos. That is because the trustees, through their professional educational managers, elected both to teach a Shakespearean play for year 13 NCEA English in 2009 and, more particularly, King Lear out of a choice of five Shakespearean plays. The evidence establishes that although probably none of the five Shakespearean plays available that year would have conformed with the school's ethos, King Lear was the least in conformity with the school's desired curriculum content.

[31] Nor could Ms Martin have been culpable for the presentation to her students of the original text of the play together with a modern explanation of some of the words and phrases used that have not survived in modern English or at least with their original Shakespearean meanings. That is because the school's approved teaching materials included the Longman text of King Lear which contained both the original text including objectionable words, phrases and content, and an explanation of the meaning of some of these.

[32] So it must follow logically that the trustees' concerns were with Ms Martin's failure to obtain consent to her use of the Sparknotes and their objections to the contents of the Sparknotes given to the students and read aloud by them in class. That these were the trustees' concerns is illustrated by the letters sent to Ms Martin on 14 and 27 July 2009. The first letter set out for Ms Martin the allegations against her that the trustees wished to investigate. The third paragraph of this letter reads:

It appears that you have not sought [Mr Maden's] approval, as requested, and instead presented a version to your class that the school considers embarrassing, corruptive and morally defiling to the development of our students.

[33] The second letter confirmed Ms Martin's dismissal that had taken place about 10 days previously and included the following:

The disciplinary meeting was held in relation to you teaching an unapproved version of Shakespeare's King Lear to your Year 13 Class.

...

You did not provide me with a copy and instead you presented an unapproved version to your class that the school considers both embarrassing to and corruptive in the development of our students.

...

After adjourning the meeting to consider your submissions we informed you that we did not accept your reasons as to why you did not provide me with a copy for approval.

...

Based on the above we found that your actions amounted to serious misconduct through breach of the School Ethos and consequently it was our decision to summarily terminate your employment effective from 16th July 2009.

[34] Section 4(1A) of the Act imposed statutory requirements upon the defendant in the way in which it decided to dismiss Ms Martin summarily. That subsection provides:

- (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 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.

[35] There were two relevant pieces of information that the defendant's decision makers had, but of which they failed to inform Ms Martin, which were relevant to the serious allegations she faced. Although in cross-examination Mr Maden denied that these affected in any way his determination of the allegations against Ms Martin and the consequences of these, I regret to conclude that I do not accept his evidence in this regard. In any event, even if Mr Maden had been able to perform the very difficult, if not impossible, task of isolating and ignoring relevant evidence in making his decision (along with Mr Cottle), that did not absolve him from compliance with s 4(1A).

[36] The two relevant events which were not disclosed to the plaintiff and which, when they emerged for the first time in evidence she disputed, were as follows. On the afternoon of Saturday 27 June 2009, after being alerted to concerns about Ms Martin's teaching practices by another parent, Ross Boon, Mr Maden spoke to his daughter, Jessica Maden, who was also in Ms Martin's year 13 English class. Mr Maden asked his daughter whether Ms Martin had been using a modern version of King Lear in class and when Miss Maden confirmed this, Mr Maden asked her whether she had a copy of that material so that he could see it. Her response was that she did but that this was in her locker at school and temporarily inaccessible. Although I accept that Mr Maden did not wish then to involve his daughter or any other students any more than necessary, Miss Maden nevertheless imparted to her father three relevant and significant items of information the existence of which was never made known to Ms Martin or to which she was ever given an opportunity to respond.

[37] Jessica Maden's first piece of advice was that Ms Martin had required the students to read aloud to the rest of the class what was later to be known as the Sparknotes version of King Lear. Second, Miss Maden advised her father that this caused distress, discomfort and embarrassment to her and other students because of what she described as the "gross language" used in the modern version. Third, Mr Maden was told by his daughter that she had overheard Ms Martin telling another student that the modern version had been approved by the Trust and the CEO (her father).

[38] Whilst the first and second pieces of advice had not been verified independently, Mr Maden knew that he and the Trust had not approved the modern version teaching aid which his daughter told him she had overheard Ms Martin tell another student. There is no suggestion that at any time Mr Maden doubted his daughter's word and indeed it would be surprising in all the circumstances if he had. In respect of the third piece of advice, therefore, there was not simply an allegation of misconduct but one which, if it proved to be true, would have led to a conclusion that Ms Martin had lied deliberately to students and most probably that her failure to obtain consent to use the Sparknotes was not inadvertent but was deliberate and deceitful.

[39] The second relevant information received by and known to Mr Maden, but not disclosed at any time to Ms Martin before her dismissal, was as follows. In response to putting his concerns initially to Ms Martin and her advice that she considered it necessary to compare the original King Lear text with the modern Sparknotes version so that students could understand the Shakespearean language, Mr Maden contacted Westmount's English Liaison Officer, Audrey Clist. Mrs Clist's advice to Mr Maden was that, having liaised with Westmount's English Department Head (Bruce Berry), English teachers did not need the modern version of King Lear for year 13 students. That question remained an important feature of Ms Martin's response including also through her professional support person on 16 July 2009.

[40] Again I regret to have to conclude that I do not accept Mr Maden's assertion in cross-examination that he did not take account of this advice that it was unnecessary for Westmount teachers to have a modern translation of King Lear for year 13 students to teach this play effectively and to the highest of standards expected by the school of its teachers. On the contrary, I do not think that Mr Maden could have avoided being affected by this advice when he came to consider the truth and/or adequacy of Ms Martin's explanation.

[41] As in the case of the advice provided by his daughter, however, the obligation to convey this relevant information to Ms Martin pursuant to s 4(1A) would not have been negated even if he could have performed what I assess what for him would have been the impossible task in practice of isolating and ignoring this advice that he had sought specifically for the purpose of his inquiry.

[42] The defendant's reasons for concluding serious misconduct by Ms Martin were expressed economically and somewhat enigmatically in the letter sent to her confirming her dismissal. That letter recorded:

After adjourning the meeting to consider your submissions we informed you that we did not accept your reasons as to why you did not provide me with a copy for approval.

[43] In evidence Mr Maden clarified what was meant by the phrase "did not accept". He said it did not mean that the trustees disbelieved Ms Martin's explanation or found that it was untrue. Rather, he said that the non-acceptance of

the explanation was because it was not sufficient to explain adequately or to excuse Ms Martin's failure to obtain consent and her presentation of offensive material to students. So it would seem to follow from that concession by Mr Maden in evidence that the trustees accepted Ms Martin's explanation that she simply forgot in stressful and difficult work circumstances to obtain the trustees' consent to use the Sparknotes material that she had downloaded, that she was apologetic and regretful for doing so, and that she believed that the material to which both she and the trustees took exception was not much, if any, more objectionable than the original text of the play.

[44] That concession by Mr Maden in evidence is, however, apparently at odds with other evidence presented by the Trust including by Mr Maden. He said, for example, that he did not believe Ms Martin's explanation that this was a one-off inadvertence because she continued to use the material for several weeks and, during that time, had several opportunities to present it to him for his approval but failed or refused to do so. That assessment would seem to have led to a conclusion that Ms Martin's explanation of forgetfulness in unusual and difficult circumstances was not to be believed. I regret to conclude that such ambivalence and logical inconsistency characterised much of Mr Maden's evidence and cross-examination or otherwise when he was not reading from his prepared brief of evidence-in-chief. I accept that Ms Martin's errors were inadvertent and note that, eventually, Mr Maden accepted this also.

[45] This case involves another play by Mr Shakespeare, Macbeth. This plays a part, albeit a more minor part, in the case. Shakespeare's Macbeth was taught by Ms Martin to year 12 students at the school. There was no complaint about that and it did not form any part of the decision to dismiss her. Following that event, however, the defendant found some Sparknotes about Macbeth in a year 12 student's English materials. Although there is no suggestion that the Macbeth Sparknotes contained objectionable words in the same way as did its King Lear equivalent (because the original Shakespearean Macbeth text is unobjectionable), the defendant was concerned that the Macbeth Sparknotes had been provided by Ms Martin to her students without the school's consent. This, in turn, it says, illustrates a propensity by Ms Martin to use unauthorised teaching materials and thereby throws into doubt the veracity of, or explanation for, her inadvertent use of the King Lear Sparknotes.

[46] Within a few weeks at the most of Ms Martin's dismissal, its fact and the reasons for it became known to other staff at the school. The Macbeth Sparknotes did not, however, become an issue until many months later when they were raised for the first time during the Employment Relations Authority's investigation meeting. Ms Martin's explanation to the Authority about the Macbeth Sparknotes was that she had discovered them in a teachers' resource cupboard at the school. She said that in reliance upon what she had been told to the effect that all resources provided by the school had been approved for use with students, she assumed that the Macbeth Sparknotes had been approved and both downloaded further copies of them from the internet and used them with students.

[47] The Authority Member asked Mr Maden to undertake a search of the school's English curriculum resources in an attempt to verify Ms Martin's assertion that Macbeth Sparknotes were an existing school resource and therefore likely to have been approved. Mr Maden reported back to the Authority, however, that the only sign of Macbeth Sparknotes that he could find was in another teacher's resource folder but that these were said to have been the teacher's own resource and not one shared with students.

[48] Ms Martin maintained her explanation of her use of the Macbeth Sparknotes when this was raised again in cross-examination of her in this Court.

[49] The absence of such materials from the resource cupboard accessible by teaching staff many months after it was known that Ms Martin had lost her job because she had used unauthorised teaching resources, not only does not cast doubt upon the reliability of her account but may well explain the veracity of both it and Mr Maden's failure to find such resources there when he searched. I assessed Ms Martin to be a credible and reliable witness and have no reason to doubt her consistent explanation for her discovery and use of Macbeth Sparknotes.

[50] Therefore, it does not follow, as the defendant assumed, that Ms Martin was either careless or even deliberate in her failure to obtain consent to use the King Lear Sparknotes. That, in turn, does not cast doubt upon her assertion that the use of the King Lear Sparknotes was an isolated and inadvertent error. Nor is it significant, as

the defendant asserts, that the electronic download dates of the Macbeth Sparknotes correspond with dates when Ms Martin was teaching that play to her year 12 class. That is because Ms Martin has not denied downloading that material at that time. Rather, she did so in reliance upon a belief, honestly and reasonably held, that the Macbeth Sparknotes were an approved teaching resource because of the presence in the resource cupboard of another set of them for which she had not been responsible.

[51] The defendant has failed to establish either limb of justification for Ms Martin's dismissal under s 103A of the Act. The way in which it went about reaching its decision to dismiss her was not how a fair and reasonable employer would have done so in all the circumstances at the relevant time. Not unconnected with the first finding (because, colloquially, a flawed process will often produce a flawed result), Ms Martin's summary dismissal by the defendant was not what a fair and reasonable employer would have done as a response to her alleged misconduct in all the circumstances and at the relevant time.

[52] The defendant's representatives who investigated the alleged misconduct and made the decision to dismiss Ms Martin were preoccupied unduly with what they regarded as the offensive content of the Sparknotes modern translation of the original King Lear text. They did not compare sufficiently, or with any professional educational input as they should have, the original Shakespearean text and they did not compare those two versions with the approved Longman's teaching aid.

[53] Again regrettably but surely, I reject Mr Maden's very belated assertion in cross-examination that he did compare the Sparknotes to the Longman glossaries between the time of receiving the first complaint about Ms Martin's teaching and her dismissal. Despite intensive preparation of his evidence for both the Employment Relations Authority's investigation and for the hearing in this Court, it was only for the first time when difficult questions were put to Mr Maden about the similar content of the approved Longman's material, that he claimed to have undertaken this comparison.

[54] I consider it more probable that both Mr Maden and Mr Cottle were so concerned about what they regarded as obscene words and phrases contained in the

Sparknotes that they focused on these and what they considered would have been the serious detrimental effect on students of reading, hearing and speaking these words. This distracted them unduly from undertaking the balanced and objective exercise that the law required of them as representatives of a fair and reasonable employer to take account of relevant factors.

[55] The defendant relies significantly on the evidence of its witnesses, both direct and hearsay, that Ms Martin was asked by students on several occasions whether the Sparknotes translation had been approved and her repeated assurance that it had. Ms Martin's account of these events is that she recalls being asked by students whether all of the materials which the class was studying, and especially those her students were required to read aloud, had been approved. She understood this to be a reference to the play rather than the Sparknotes interpretation. That was because the original text, as much as the Sparknotes translation and in some instances more so, contained what were for her, too, obscene and other objectionable concepts and words. So it was the play King Lear which she considered she assured students had been approved as, in a sense, of course it had been by being an element of the course of study required by the school.

[56] Taking account of all the evidence put before me about these events, I find that the most probable explanation for them is this. Students were very surprised and concerned about the nature of the material they were studying and, especially, presenting orally to their teacher and fellow students. It was that about which they expressed their concern and sought Ms Martin's assurance and it was that to which she responded by saying, accurately, in effect that King Lear had been approved.

[57] I regret to say that I do not accept Miss Maden's prepared evidence-in-chief that when these questions and concerns were raised by students with Ms Martin that she insisted that they continue to read objectionable portions and "smirked" in doing so. Having seen and heard Ms Martin's evidence at length and accepting her as a witness of truth, I think it is extremely improbable that she would have smirked in the sense of taking intentional pleasure at the students' discomfort and insisting that they continue to be embarrassed and distressed for her own self-gratification. I think there can be little doubt that Ms Martin was herself genuinely disgusted by the

contents of some of the material she taught but struggled to do so only because this was a requirement of her and that the play had been approved.

[58] To her credit Miss Maden accepted, in reply to my questions, that what she interpreted as “smirking” by Ms Martin could well have been the latter’s expression of her own discomfort and I conclude that is more probable.

[59] In finding dismissal justified, I conclude the Authority failed to consider, or at least to consider sufficiently, the consequences to Ms Martin of a summary dismissal for serious misconduct as a registered teacher. Its determination focused principally, perhaps exclusively, on her error and its consequences to her students, their parents, and the trustees. Whilst those latter considerations are valid, so too is an assessment of Ms Martin’s role in the events that led to her dismissal and of the significant consequences of it in all the circumstances.

[60] Nor does the defendant appear to have considered such matters in a balanced way. It was very concerned about Ms Martin’s failure to obtain approval for a particular teaching material which, although approved for mainstream students, would not have been approved, at least in the form in which it was presented by Ms Martin, for presentation to her students. Nor does the defendant appear to have considered, at all or at least sufficiently, matters of the degree of Ms Martin’s culpability, her inadvertence as opposed to deliberation, the possibilities of rehabilitation and non-repetition of the breach, and the professional consequences to her of summary dismissal for serious misconduct as a teacher.

[61] The defendant’s failure to take these factors into account is illustrated by its failure to adhere to its obligations in law to report the fact and circumstances of Ms Martin’s summary dismissal to the Teacher Registration Board pursuant to the Education Act 1989. Had it considered its legal obligations in these circumstances, it would have realised that its summary dismissal for serious misconduct of Ms Martin put her at serious risk of professional censure and even of exclusion from her profession by virtue of possible deregistration. Whether those would have been the outcomes of an investigation by the Teacher Registration Board is not to the point. The monumentality of the defendant’s decision to dismiss summarily for serious

misconduct means that it ought, as a fair and reasonable employer in all the circumstances, to have taken this and associated considerations into account but failed to do so. That is especially so as her dismissal stigmatised Ms Martin as a corrupter and moral defiler of students.

[62] Nor did the defendant take any, or at least sufficient, account of Ms Martin's genuine regret for her oversight and its consequences, and her commitment to adhere in future to her employment agreement's strict requirements for approval of all teaching materials in all the circumstances. There was no element of compassion or forgiveness on the part of the defendant, even weighed in the balance. That is not to say that the Court would have expected, as a legal requirement, that the defendant as an employer would be compassionate or forgiving, although such attributes appear to be biblical principles by which the Trust conducts its operations of its schools including its employment relations with its teachers. Rather, those are relevant elements in this case for consideration applying the tests in s 103A of the Act.

[63] Nor does the defendant appear to have taken into account at all its own failures to provide the plaintiff with appropriate educational resources and support, which resulted in Ms Martin having to obtain her own teaching resources, one of which was the offending material. Again that is not to say that the defendant was so culpable in the circumstances that led to Ms Martin's breach that it should not have penalised her as it did or at least by dismissing her summarily for serious misconduct. Rather, a balanced consideration and acknowledgement of the difficulties put in her way by the defendant because of its stringent approach to the acceptability of teaching materials, ought to have been a factor considered by it in determining, first, whether Ms Martin had misconducted herself seriously in employment and, if so, in determining the consequences of that breach.

[64] Although in some rare cases a single mistake by an employee of a sufficiently important requirement may justify summary dismissal of that employee irrespective of any other circumstance, this is not such a case. That is, however, the way in which the defendant approached its consideration of Ms Martin's breach and the consequences of it. A fair and reasonable employer in the particular circumstances

of these parties would not have dismissed Ms Martin summarily for serious misconduct.

Remedies for unjustified dismissal

[65] The defendant sought to put in issue a number of items of evidence which came to its notice only after Ms Martin's dismissal and, in many cases, only after the determination of the Employment Relations Authority received some publicity as did Ms Martin's intention to bring this challenge to the Court. Some of that evidence was not objected to and supported an expanded second amended statement of defence that the defendant was granted leave to file and serve in the course of the hearing. Some of the evidence of the defendant's witness Mr Maden and documents referred to in that were objected to by Mr Harrison during the course of the trial and for reasons set out in the oral ruling delivered at the time, were determined by me to be inadmissible. I deal, therefore, with only such matters as were admissible.

[66] Mr Langton accepted that this evidence could not affect the question of justification for Ms Martin's dismissal: s 103A of the Act makes it clear that it is relevant knowledge and circumstances at the time of dismissal which will determine its justification. Ex post facto evidence may be relevant in several other circumstances, however. Although not at issue in this case, such evidence may affect the remedy of reinstatement. Here, it may be in issue both under s 124 of the Act (contributory conduct going to the nature and extent of remedies) and it may otherwise affect the extent of remedies as established in the Court of Appeal in *Salt v Fell*.⁴

[67] It is, however, necessary to analyse and make findings on that evidence because some of it is disputed by the plaintiff and, even if it is undisputed, its significance and weight requires consideration and determination.

[68] In early May 2010, after the Authority had issued its determination, Ms Martin was interviewed by a reporter from the New Zealand Herald newspaper. As is reportedly not uncommon, when Ms Martin expressed some hesitancy about being

⁴ [2008] ERNZ 155.

interviewed, she was told that the newspaper had the information in any event and would be publishing it and it might be in her interests to comment to ensure accuracy. However, I find there is really nothing in the comments attributed to Ms Martin that could be said to be inaccurate, provocative, or otherwise than consistent with her explanations and responses to the allegations and her dismissal.

[69] At about the same time, Ms Martin also spoke to a reporter from the Sunday News newspaper. Neither are her reported comments in this article detrimental to her claim in these proceedings.

[70] Finally, the defendant points to a contribution posted by Ms Martin on 6 June 2010 on a web log (blog) or on-line discussion forum organised by Brian Edwards Media under the heading “A Story That Beggars Belief”. There Ms Martin responded to other contributions to the on-line discussion, that were not produced in evidence, by thanking others for encouraging her “in dealing with the most shocking system that I have ever encountered”. She continued:

Looking back at my time there I now feel liberated and I feel for the many others that are in this system that are going through a difficult time with the EBS but their hands are tied and their lips are sealed because they need their jobs.

[71] When this was put to Ms Martin she responded that the criticisms of the defendant related to her treatment as a result of these events which led to her dismissal and not to the earlier aspects of her employment relationship. Her reference to the problems of others may or may not be associated with an internal e-mail that circulated around the staff of Westmount schools after her dismissal that was critical of it and which the defendant took immediate and extensive efforts to locate and eliminate but was eventually only able to deal with by the circulation of a factually accurate account of the dismissal and the general reasons for it.

[72] I conclude that this later discovered material does not affect disadvantageously Ms Martin’s claimed remedies.

[73] Those claimed by the plaintiff are modest. As already noted, Ms Martin said she was most concerned to be vindicated and to restore her good name as a

professional teacher. Although she may have been able to recover substantially more than she claimed, the Court must limit its awards to those that the defendant knew it was at risk of facing.

[74] I agree with Mr Langton that there was a remarkable paucity of evidence led from Ms Martin about what she did to mitigate her losses in the first several months immediately after her dismissal. There is a substantial amount of evidence relating to her numerous unsuccessful attempts to obtain teaching positions but this all began several months after her dismissal. Despite what must be the substantially lower rate of remuneration as a part-time hotel receptionist and cleaner, Ms Martin has not sought any reimbursement of lost remuneration from the time she took up those alternative positions in early 2010.

[75] Accordingly, the Court is constrained in awarding the plaintiff the statutory minimum of three months' lost remuneration. The evidence is that at the relevant time Ms Martin was earning \$50,840 per annum. I therefore assess the award of three months' remuneration as being \$12,710.

[76] The loss to Ms Martin of her tenured teaching position with the defendant for the very serious reasons given, and midway through a school year, had a significant debilitating effect on her. So, too, did the ongoing consequences of that summary dismissal, her inability to obtain alternative teaching positions although she applied for many of these. As already noted, also, Ms Martin went from living independently, and supporting her young daughter, to having to move in with her mother to make ends meet. Although she did not put it this way, it is not difficult to imagine that she found demeaning the move from professionally qualified secondary school teacher to part-time hotel receptionist and cleaner as a consequence of her dismissal and subsequent inability to obtain alternative teaching employment.

[77] It is not difficult to imagine the stigma, and its consequences, of the reasons for dismissal of Ms Martin as a teacher, having been that she corrupted and morally defiled her students. While I accept that this is a genuine belief held by the defendant and its witnesses, it is also important to say that Ms Martin did not do so. She has, however, suffered the consequences of an unjustified dismissal on those

grounds for the period since her dismissal and until she has, by this judgment, been able to re-establish her good name.

[78] All these consequences together warrant an award of monetary compensation under s 123(1)(c)(i) of the Act to the extent that money can compensate for these non-economic consequences and I set the award at \$15,000.

[79] Ms Martin is entitled to a contribution to her legal costs of representation in both the Authority and this Court. I invite the parties to attempt to agree on this amount but if they are unable to do so within one month of the date of this judgment, Ms Martin has leave to apply by memorandum to fix the amounts of costs with the defendant having a period of two weeks to respond by memorandum after receipt of Ms Martin's.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Thursday 14 April 2011