IN THE EMPLOYMENT COURT
AUCKLAND

AC 2A/09
ARC 82/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for directions
BETWEEN	RAYMOND CLENDON LEWIS Plaintiff
AND	HOWICK COLLEGE BOARD OF TRUSTEES Defendant

Hearing: by written submissions dated 2 and 9 April 2009

Judgment: 20 April 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] These are my reasons for declining the plaintiff's request for an adjournment of the fixture set down for 20 April 2009, and other associated directions. My bare decisions were sent to the parties in a minute dated 9 April issued during the Court vacation but necessarily because the 6-day hearing is scheduled to begin on the first day after the Court reopens.

[2] Very shortly before I issued the minute on 9 April the Registrar gave me a further lengthy email from Mr Lewis, only one aspect of which has affected my decision about the fixture. The email refers to the possibility of the receipt by the Court of a letter or letters from Mr Lewis's general practitioner and/or psychiatrist. Such communications may deal with Mr Lewis's ability to prepare for and prosecute his case. I therefore left open for reconsideration this ground for an adjournment of

the proceeding. The medical certificate has been received subsequently. It does not support an adjournment of the fixture on medical grounds.

[3] The following are my reasons for refusing the adjournment and other directions sought by Mr Lewis.

[4] First, Mr Lewis asserted that matters referred to in paragraph 3 of my Minute of 25 March made it impossible for all necessary issues to be considered. I then pointed out that it was unsatisfactory, shortly before the hearing management meeting, that the briefs of evidence of two of the defendant's principal witnesses had not been provided. I was critical of the defendant and its counsel for not having done so and required Mr Harrison to file and serve the briefs of evidence of those witnesses in the best condition that he was able to even though he had said that his witnesses were overseas. At the hearing management meeting Mr Harrison satisfied me that he had complied with this direction or that he would do so very shortly and Mr Lewis did not complain in these circumstances about being unprepared for the hearing. By the time Mr Lewis is called upon to open his case, several weeks will have gone by since he became aware of the intended evidence of the defendant's witnesses and, although the position was unsatisfactory on 25 March, I do not consider that is now grounds for a postponement of the fixture.

[5] Next, Mr Lewis claimed that *"instructions"* given to him for the filing of documents contradict earlier ones given to him by Judge Travis. These *"instructions"* were that documents that Mr Lewis wished to be filed as a result of disclosure were to be assembled by the defendant. Mr Lewis said it was contradictory that I directed him to assemble these documents. It is correct that in his interim judgment of 9 February 2009, Judge Travis directed that Mr Harrison was to list and produce for inspection all relevant documents, unless subject to legal and professional privilege. However, developments in the disclosure process between then and the hearing management meeting caused me to put in place another process that was intended to avoid a repetition of the unseemly events that occurred when Mr Lewis attended at Mr Harrison's office. That was referred to at paragraph 18 of the Hearing Management Minute of 30 March.

[6] Next, Mr Lewis complained that the timeframe for document disclosure set by me was *"unreasonable"*. The timeframe was dictated largely by the fixture date that was imminent and the failures of the parties to conclude disclosure and inspection. The timetable was not objected to by Mr Lewis at the hearing management meeting. I am aware that Mr Lewis attended at the Court's premises and inspected the documents brought there by Mr Harrison. Although document disclosure and inspection can be time consuming, this is serious litigation and may require intensive, even full-time, preparation. The date of hearing has been known to the parties for a long time and if, by the time of hearing management, document disclosure issues had not been concluded, then it was inevitable that these would have to be concluded in a short timeframe.

[7] Next, in support of his request for a rehearing of the hearing management meeting conducted on 27 March, Mr Lewis complains that my summary of the issues in the case (set out at paragraph 5 of the Minute of 30 March), is inaccurate. Mr Lewis says that his claims are in the form of alternatives.

[8] This, too, was the subject of discussion at the hearing management meeting and I noted that Mr Lewis had agreed to my summary of the causes of action from the statement of claim which are, in turn, recorded in the Hearing Management Minute. In any event, if the causes of action are alternatives, then it is difficult to understand how Mr Lewis may be at a disadvantage if the hearing covers the field.

[9] Finally, in respect of this direction, Mr Lewis complains that my Hearing Management Minute did not take into account s189 of the Employment Relations Act 2000 that allows the Court to decide cases in equity and good conscience although not contrary to any relevant employment agreement. Mr Lewis uses paragraph 6 of the Hearing Management Minute of 30 March as an example. There, I commented on his claim for orders to return specified property to him, saying that these are not within the Court's statutory jurisdiction to grant. Equity and good conscience under s189 cannot permit the Court to make orders that it is otherwise not empowered to make. Remedies for personal grievances are specified in s123 of the Act and do not include orders for the return of property of a former employee by a former employer.

[10] The next direction that Mr Lewis sought was that I disqualify myself from hearing this case as trial Judge. The first ground in support of this application is said to be that Mr Lewis told me at the start of the hearing management meeting on 27 March that he had *"filed"* as evidence a letter that I wrote indicating possible bias against him.

[11] As I said during the hearing management meeting, it is correct that I have had another involvement with Mr Lewis's case in the Employment Relations Authority. I will explain the circumstances again. There is no formal system to deal with complaints against Members of the Employment Relations Authority. The Chief of the Authority has put in place an informal system that such complaints about other Authority Members are made to him. The Chief of the Authority requested my predecessor as Chief Judge to consider any complaints that may be made against the Chief of the Authority. My predecessor agreed, and I agreed, to continue this informal practice upon assuming office in 2005. As I have indicated, the process is informal in the sense that it has no statutory basis and any decisions or recommendations on a complaint are not enforceable in law.

[12] After the Authority had determined Mr Lewis's personal grievance but before I had any other involvement with the challenge that Mr Lewis has brought to that determination, he complained to me about the propriety of the conduct of the Chief of the Authority who investigated and dismissed his claims. I received Mr Lewis's written complaint which deals with the manner of his treatment by the Employment Relations Authority during its investigation. I forwarded a copy of the complaint to the Chief of the Authority and invited his written response. This was received and passed on to Mr Lewis. Then, conscious of Mr Lewis's challenge in this Court, I invited the plaintiff and the Chief of the Authority to agree that my inquiries would be put on hold until after the merits of Mr Lewis's claim had been determined on the challenge to this Court. That was because I apprehended that I might have to have some involvement with the case as a Judge. Both the Chief of the Authority and Mr Lewis agreed to this course that I had recommended. The only further step I took was the following. Because Mr Lewis's complaint had alleged improper collusion between the Authority Member and counsel for the Board, Mr Harrison, I wrote to Mr Harrison asking for his account of events upon which Mr Lewis relied and which

were referred to in his complaint. I did so then because I considered that there was a risk that these events may have been recalled less clearly by Mr Harrison many months after their occurrence if he was not asked to provide his recollection of relevant interactions with the Authority Member until after the challenge had been disposed of. Any reply that I might have received from Mr Harrison would likewise have awaited consideration until after disposal of this challenge. In the event, I have received no response from counsel.

[13] I have reconsidered the letters that I wrote in the matter of this informal complaint and do not consider that they indicate *"possible bias"* against Mr Lewis. He has not identified the nature of that *"possible bias"*.

[14] The other Auckland resident Judge of the Employment Court has chaired a judicial settlement conference between these parties in an attempt to resolve this litigation and is thus disqualified from being the trial Judge.

[15] I am not persuaded on the grounds put forward by Mr Lewis that I should disqualify myself from hearing and determining this case.

[16] The second ground relied on by Mr Lewis in support of recusal is that the Hearing Management Minute of 30 March indicates that I have not considered the statutory equity and good conscience considerations in s189 of the Act. I was not asked to do so and, indeed, it would not normally be appropriate to invoke this section in managing a case to trial under the statutory hearing management regime. Mr Lewis's submissions do not explain how I should have invoked the equity and good conscience jurisdiction or how my failure to do so should cause me to be disqualified.

[17] Next, Mr Lewis supports his application for disqualification by enigmatic reference to my possible knowledge of a witness and what he contends was a letter from another Judge to that witness giving him *"legal advice"*. First, I reiterate that one person Mr Lewis earlier indicated that he intended to call to give evidence (Raymond Webb, a Ministry of Education official) may have been known to me more than 30 years ago when we may both have played in the same university sports

team together. As I indicated at the hearing management meeting in disclosing this very tenuous connection, I have not had any contact with this potential witness for more than 30 years. We did not then socialise together. I have certainly not had any dealings with the witness for more than 30 years and most certainly none about events surrounding this case. I am aware of the witness's occupation only as a result of newspaper publicity from time to time of his remarks as a spokesperson for the Ministry of Education. Even then, I do not understand this to be the ground for recusal and, indeed, Mr Lewis acknowledged at the hearing management meeting that there was no necessity for me to do so.

[18] The plaintiff links a letter that he claims Judge Travis wrote to Mr Webb *"giving him legal advice"* with his claim that I should disqualify myself. I do not understand the significance of any such connection. More fundamentally, however, Judge Travis did not write to the witness or give him legal advice at about the time of the judicial settlement conference on 11 March. That is an improper suggestion by Mr Lewis and one without any foundation in fact.

[19] It may be that Mr Lewis has confused a letter on the Court file from the Registrar of this Court to the witness as a result of the witness writing to the Registrar complaining about what Mr Lewis had told the Court this witness's evidence would be. That is not, however, a letter from a Judge and, indeed, it concludes with the advice that the witness should seek legal assistance from the Ministry of Education's legal advisers in his capacity as an official of that Department of State if he is uncertain about his position. There is nothing in this third ground relied on by Mr Lewis to support his application for my recusal.

[20] Finally, in this regard, Mr Lewis claims that Judge Travis wrote another letter to the witness requiring him to attend the hearing. He says that this was the giving of legal advice that contrasts with the Judge's refusal to give the plaintiff legal advice about calling witnesses.

[21] Again, Mr Lewis appears confused at best. Judge Travis did not write to a witness or a potential witness. If the Registrar did so and advised that a summons to witness must be answered by attendance at Court, then this is a self-evident and

fundamental truth, hardly legal advice. If, as Mr Lewis says, Judge Travis declined to give the plaintiff advice about what witnesses he should or should not call, that is a proper judicial position to take. There is likewise nothing in this fourth ground in support of Mr Lewis's application for my recusal.

[22] The next order for directions sought by the plaintiff is to delay the hearing until after the receipt by the parties of a report of the Education Review Office (ERO) and *"a decision on whether Mr Harrison is authorised to appear for the board of trustees"*.

[23] Mr Lewis advances one ground in support of this claim to an adjournment. He says that the ERO report was ordered as a result of a complaint that he made against the Board and an investigation by the ERO into the actions of the Board in respect of complaints made to it. In particular, Mr Lewis cites the refusal of the Board to investigate his complaint about the death of a pupil at the college.

[24] What the ERO may or may not determine about how the Board of Trustees has dealt with Mr Lewis's complaints made to it is not relevant to this Court's role of determining whether the Board's actions towards him constituted unjustified constructive dismissal in employment law and, if so, his remedies for this. This is the first occasion on which I am aware that the existence or significance of an ERO report has been said by Mr Lewis to be important to his case. I have to conclude, regrettably, that this is a belated make-weight argument put forward by the plaintiff to postpone the fixture. What the ERO may subsequently decide about Mr Lewis's complaints to the Board is not relevant to the application of the statutory test under s103A which determine justification in the circumstances at the time a dismissal or unjustified disadvantage took place.

[25] The fourth order or direction sought by Mr Lewis is to have the Court determine whether counsel for the Board, Mr Harrison, has misled the Court. In particular, Mr Lewis contends that he has discovered, after seeing documents recently disclosed, that Mr Harrison has never been authorised by the Board to make an offer of settlement in this case. Mr Lewis's submissions refer to some details of offers of settlement that I strongly suspect, if they had been made, were made

without prejudice except as to costs. Although the prohibition upon disclosing the fact or content of such offers was explained to Mr Lewis at the hearing management meeting, he has persisted in referring to them. Although offers of settlement not made "without prejudice" may be the subject of evidence at the hearing, I am not satisfied that Mr Harrison is not authorised to represent the Board of Trustees as its solicitor in these proceedings. That is the extent of my legitimate concern.

[26] Further, in support of this ground, Mr Lewis asserts that as a result of recent discovery he contends that the Board did not validly decide to dismiss him. If that is so, then that must be a matter for trial and does not support an application for the Court to adjourn the hearing so it can be diverted into an inquiry whether Mr Harrison is properly authorised to act for it.

[27] Finally, in support of his contention that Mr Harrison has misled the Court, Mr Lewis says that counsel for the defendant had notified some of his witnesses of the day on which they were required to give evidence. He says this is contrary to the instructions given that they be provided with a letter setting out this information.

[28] In the course of the hearing management meeting, Mr Harrison disclosed that many of Mr Lewis's intended witnesses are members of the staff of the college who are apprehensive about giving evidence and concerned about how long they may be required to attend Court. It was agreed, including by Mr Lewis, that his subpoenaed witnesses will not be reached until the fifth day of the hearing. Their witness summonses require them to attend on the first and subsequent days until released. It was agreed that it would be just and fair to those persons to tell them that although their summonses formally require them to be there for 4 days before needed, they could be told that they are only required on the fifth day. A method of providing this advice was suggested by me and agreed to by both parties. This consisted of a letter from the Registrar of the Court that would accompany any witness summons served on such persons or be sent by Mr Lewis to witnesses who had already been served with summonses. There was no secret about or tactical advantage to be had from providing this information. It was for the benefit of uncertain and worried school staff members. There was nothing objectionable about Mr Harrison telling such persons when they would be required to attend the Court, this information having

been agreed to (including by Mr Lewis). There is nothing in this ground of complaint.

[29] The next order or direction sought by Mr Lewis is for *"a hearing of the issues raised by evidence now filed by the defendant and the documents viewed by the plaintiff as a result of viewing the documents filed by the board at the court in response to the order for discovery made on 5 February 2008* [sic] *and the minute of Judge Travis make* [sic] *after the hearing on 11 March 2008* [sic]*"*. Although difficult to interpret, I assume that Mr Lewis now seeks a preliminary hearing of issues about or arising from recent disclosure and inspection of documents. He provides three grounds in support of such a direction. First, he says that the Teachers' Registration Board has used evidence given in the Employment Relations Authority to determine that Mr Lewis is mentally incapable of teaching. He says that the Teachers' Registration Board's letter so confirming *"has been filed but ruled to be not relevant"*. Mr Lewis claims that this *"ruling … is a serious error"*. He does not identify when or how the Court has ruled as irrelevant, and therefore inadmissible, a letter from the Teachers' Registration Board about his mental incapacity. I am not aware of having done so. At paragraph 3 of the Hearing Management Minute issued on 30 March 2009 I noted that *"post-dismissal events not connected to remedies"* will not be heard by the Court. That direction covered evidence that Mr Lewis intended to adduce including about what happened in the Employment Relations Authority's investigation meeting, complaints to the Police and the independent Police Complaints Authority about whether he had trespassed at the school after his dismissal and the like. If there is evidence of a decision by the Teachers' Registration Board affecting his career and as a consequence of his personal grievances, then this may well be relevant to his claims and, in particular, remedies for them if they are valid. The other matters referred to in the first ground in support of this fifth order are matters for cross-examination of Board witnesses at the hearing and submission to the Court and do not justify a postponement of the hearing.

[30] Next, Mr Lewis complains that the Court must take action about the Board's failure to comply with orders for disclosure of documents made on 5 February 2009. So far as preparation for the hearing goes, however, I understand documents to have

now been disclosed. Any wrongful refusal by the Board to disclose documents may be an issue for costs but the reality is that when Mr Lewis brought to the Court's attention his complaints about the Board's failure to make proper disclosure, arrangements were made to achieve this objective. This is not a ground on which to now postpone the hearing.

[31] Next is Mr Lewis's complaint that *"a significant proportion of Mrs Simmons' evidence is completely new"*. He claims that much of this new evidence relates to post-dismissal events and what happened in Authority hearings and all of it is *"false"*. Mr Lewis says that if he is to have a proper opportunity to counter this evidence, he will wish to call as witnesses all office staff of the college about his behaviour when he called there, he will wish to call Mrs Simmons's son *"about his ability to recognise me"*, he will wish to call *"Lana Kershaw who was with Derek Simmons in the carpark"* and *"Mr Morrison who read her resignation speech"*. Mr Lewis also seeks to obtain a copy of *"the resignation speech read by Mr Morrison, Mr Van Niekerke, the boys in the rugby team, …"*.

[32] Mr Lewis has challenged the determination of the Authority by hearing de novo. Such a process contemplates new evidence being called. There must be a sense of proportion to this case which means that not every change in the manner of its presentation requires a postponement of the fixture so that witnesses who are still unbriefed and in respect of whom it is simply unknown what they will say, can be produced.

[33] The Board will present its case first. Mr Lewis will know what he has to cover when he presents his. He can give evidence about these matters. He can cross-examine Mrs Simmons about them including putting to her the reliability of her evidence if he says that her credibility is doubtful because of its recent origin.

[34] Next, Mr Lewis says that a preliminary matter must be clarified before his substantive hearing can proceed. This appears to be the significance, if any, of his *"mental condition"*. The plaintiff says that he advised the Board that he intended to begin a claim in relation to this aspect of the case in December 2008 and also advised the ERO on 10 February. He says that he has advised the Court of his

intention to commence such a claim should his personal grievance case of victimisation go against him. I do not see how these are grounds on which to postpone the hearing.

[35] Finally, in respect of this direction sought, Mr Lewis says that the Teachers' Registration Board has concluded that he is impaired and has asked for a report from a medical practitioner about whether he is mentally capable of teaching. Mr Lewis says that "*the finding of the Teachers Registration Board is evidence of the fact that Board evidence is false*". These are matters that, if relevant to Mr Lewis's personal grievances or remedies for them, can be canvassed in evidence and submissions at the hearing and do not require adjournment.

[36] The sixth direction sought by Mr Lewis is the "*further identification of witnesses to be called by the parties including clarification of the expert evidence to be called by the defendant and the correct witnesses to be called in accordance with the judgment of Travis J in his judgment dated 9 February 2009*".

[37] An extraordinary, and certainly more than usual, length of time and expenditure of effort, including by the Court, has been taken by witness summons issues. For good reasons, Judge Travis took control of this process in February and determined who could and could not be summonsed from a list of persons provided by Mr Lewis and having heard about the relevance of their intended evidence. Because, by the time of the hearing management meeting on 27 March, not all of the summonses sought by and issued to Mr Lewis had been served and there was evidence of difficulty and antagonism in doing so, a methodology was agreed to involving the use of a process server and the co-operation of the Board Secretary and its counsel. Subsequently, Mr Lewis wrote to the Registrar saying that he did not intend to call those witnesses who had been summonsed. Because that process was under the control of the Court, the Registrar referred this correspondence to me and I directed that Mr Lewis was to advise affected persons that they would not now be required to attend Court to give evidence. I allowed Mr Harrison to participate in this process in an attempt to minimise the friction and upset that had already surrounded the issue of the summonses.

[38] Mr Lewis's submissions seem to indicate now, however, that he does wish to summons witnesses but has had difficulty in obtaining summonses requested. Mr Lewis has gone to a great deal of trouble to obtain witness summonses and has encountered consideration trepidation and difficulty in having some served. He then advised the Registrar in writing that he does not intend to call any of the persons subject to those summonses. Measures have been taken to so advise the people affected. It is an arguable abuse of Court process to now assert that he wants those persons summonsed again and complains that he is not properly prepared for trial because he has encountered difficulties in obtaining and/or serving the summonses. I am not prepared to delay the trial in these circumstances. Mr Lewis will simply have to do his best with the evidence that he can call. Potential witnesses contacted by him and subject to undue pressure to give evidence or in respect of whom Mr Lewis simply predicts carelessly what he hopes they will say, deserve a measure of protection from the Court.

[39] Whether the Board did or did not receive confirmation of a protected disclosure made by Mr Lewis before determining to dismiss him, based on evidence of whether a letter allegedly posted to the school by the Ministry of Education was received, is a question of evidence to be determined at trial and is not grounds for postponement of it.

[40] It is not a contempt of Court for Mr Harrison to have told witnesses subpoenaed or summonsed or to be summonsed of the day on which they would be required to give evidence. I have already dealt with the circumstances of this direction and for Mr Harrison to have done so would not only have not been contrary to the Court's direction for the trial, but would have assisted in its management.

[41] Penultimately in support of this direction, Mr Lewis claims that paragraph 10 of my Hearing Management Minute has not been complied with by the Board. This dealt with Mr Lewis's proposal to call as witnesses a number of Howick College students to give evidence in support of his case. I recorded that Judge Travis directed that the evidence of these students was to be contained in affidavits sworn by them and that those affidavits should be made available to counsel for the defendant as soon as possible to enable consideration to be given about whether such

students will be required for cross-examination. Although he has not said so, I assume for his benefit that Mr Lewis has provided these affidavits to Mr Harrison. Again assuming the accuracy of what Mr Lewis tells me, if the defendant has not yet given an indication of which students it may require for cross-examination, it should do so immediately. There was, however, no direction as to when Mr Harrison was required to do so and it would not be unreasonable, in terms of a trial of this sort, that such a direction might be given less than a week before trial.

[42] Finally in support of this direction, Mr Lewis complains that I directed at the hearing management meeting that he could not cross-examine witnesses. He says that this contradicted a direction that Judge Travis had given on 5 February that a Mr Cook could be called by the Board so that Mr Lewis could cross-examine him. He says that these rulings are contradictory. He requires clarification of them and wants to listen to the digital recordings made of the hearings on 5 February and 27 March.

[43] At paragraph 13 of the Hearing Management Minute I warned Mr Lewis that he would have to exercise care in how he called the evidence-in-chief of intended witnesses who have not been properly briefed, that is whose evidence has not been reduced to writing in a form that is acceptable to them. I indicated that I would not permit Mr Lewis to cross-examine <u>his own</u> witnesses or otherwise impeach the evidence-in-chief they might give. I directed that evidence-in-chief to be led by Mr Lewis would have to be by open-ended questions. This does not contradict the advice or directions given by Judge Travis on 5 February. Mr Lewis may cross-examine witnesses but not those called by him and tendered to the Court as witnesses of truth. It is unremarkable, as in any civil trial, that Mr Lewis will be fixed with the evidence that witnesses called by him may give. That is a risk that any party runs, especially calling unbriefed evidence as I understand some of Mr Lewis's may be. Parties call witnesses, in whose evidence they invite the Court to put its confidence, in support of their cases. Parties do not, and are not permitted to, call witnesses whose evidence-in-chief they will refute or attempt to contradict. As I warned Mr Lewis at paragraph 13 of the Hearing Management Minute of 30 March, there are both risks in calling the evidence of unbriefed and/or reluctant witnesses and ways in which such evidence can and cannot be led.

[44] The next direction (the seventh) that Mr Lewis asks be made is that some of his witnesses and some of the defendant's witnesses be given independent legal advice about their rights to remain silent so that they do not incriminate themselves. Mr Lewis claims that evidence to be given by the Board will include more than 100 false statements. He says that this will amount to fabrication of evidence and a breach or breaches of s114 of the Crimes Act 1961. Mr Lewis says that he has already alerted Police to the possibility of perjury but has received advice that any complaint should be made after the hearing. In these circumstances the plaintiff says that all Board witnesses need to be properly and independently advised of their rights. He says that at the Authority investigation meeting when he warned Mrs Reyneke of her rights he was accused of *"bullying"*.

[45] As I have just noted, Mr Lewis should be able to be confident about the evidence to be given by his witnesses because he is calling them to persuade the Court of the truth of their evidence in support of his case. As for the defendant's witnesses, they are being called by counsel and will have been briefed in the usual way. While Mr Lewis may cross-examine the Board's witnesses within proper and accepted limits, it is simply not his concern that they should be independently advised about perjury and warned about this before or in the course of their evidence. I should make it clear, also, that it will be for the trial Judge to deal with these sorts of issues with witnesses and not Mr Lewis directly. While it is always open for a party cross-examining a witness to ask a Judge to warn or give appropriate advice to a witness about evidence to be given, it will be the Court's function to do so if it considers a case properly made out.

[46] The eighth direction the plaintiff seeks is for clarification of the process for serving witnesses and advising them of the date on which they should appear. In support of this, Mr Lewis says simply: *"In relation to paragraph 21 of the minute: I did not agree to this. I was directed to comply. This matter must be reheard"*.

[47] While this was my suggestion to get over what I was told were considerable difficulties encountered by Mr Lewis in serving proceedings, the suggested process was agreed to by him. There is nothing before me to suggest that this process (using a process server with the co-operation of the school's Secretary and counsel) has not

worked in practice. If Mr Lewis has failed to have his summonses served or elected not to do so as would be consistent with his advice to the Registrar that he did not now intend to call summonsed witnesses, then that is not grounds for a rehearing of that direction.

[48] The penultimate direction sought by Mr Lewis is: "*application for a declaration that the matters mentioned in the mediations described in the minute of Judge Colgan may be heard. The application is mentioned in paragraph* [sic]".

[49] Assuming that Mr Lewis is referring to the direction that I gave in paragraphs 3 and 11 of the Hearing Management Minute of 30 March 2009, I confirm that I am not prepared to revisit these directions. Evidence of what happens in employment mediations is covered by s148 of the Act and, as matter of longstanding principle, precludes reference in evidence to what was discussed in that forum. The rules for judicial settlement conferences agreed to by parties to them also preclude evidence being given subsequently about what happened during this process. Mr Lewis must now accept that if he agrees to engage in alternate dispute resolution methods, the rules governing these cannot be ignored as inconvenient if a settlement is not achieved. The plaintiff must be on notice that any attempt to subvert these rules will be prohibited at hearing.

[50] The final direction (the tenth) sought by Mr Lewis is unclear but deals with his employment agreement which he says does not exist.

[51] Accepting Mr Lewis's advice that he resigned from the Post Primary Teachers Association Inc before he was involved in the Board's dismissal process and was not a member when he was dismissed, the law is tolerably clear. Leading up to and at the time of his dismissal Mr Lewis was either subject to the then applicable NZPPTA collective agreement or, after his resignation, he was employed on the terms of an individual employment agreement based on that collective agreement except as to its particularly collective terms. It is not the position, as Mr Lewis asserts, that he did not have an employment agreement with the school's Board. At the hearing management meeting I simply noted that any detail of the terms and conditions of Mr Lewis's employment were apparently absent but that

experience of these sorts of cases usually indicates that they will be relevant in determining the fairness and reasonableness of the processes complained of. In these circumstances I expressed my expectation that the relevant NZPPTA collective agreement would be among the bundle of relevant documents to be referred to at trial. The matter has no greater significance than that and is not grounds for postponement of the trial.

[52] Finally, I reiterate that these directions were and remain subject to any reconsideration of the position that I might be asked to give as a result of the receipt by the Registrar of information from his general practitioner and/or psychiatrist affecting Mr Lewis's health and ability to participate in the forthcoming trial.

GL Colgan
Chief Judge

Judgment signed at 11 am on Monday 20 April 2009