

# School disciplinary decisions, judicial review and interim relief

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The decision by the Rector of St Bede's College to suspend two of its students from competing in a national sporting competition — and the successful legal action that prevented the suspension from taking effect — caused nothing short of a national outcry. Amongst all of the invective, however, was a great deal of confusion about the proper place and function of administrative law in matters such as school disciplinary decisions. If we look beyond the claims that this case represented “self-entitled parents” and “judicial arrogance” that “undermines the authority” of educators, we see instead, perhaps, a sound judgment and a system working correctly.

## THE FACTS

St Bede's College is an integrated school in Christchurch. Ten of its students were selected to compete in the Maadi Cup (the New Zealand Secondary Schools Rowing Regatta) at Lake Karapiro. Two coaches accompanied the students from Christchurch to Auckland on 20 March 2015. In the baggage collection area of Auckland airport, two students, Jack Bell and Jordan Kennedy, possibly at the instigation of other students, rode on the baggage carousel into the secure baggage area. Unauthorised entry into a security area at an airport is an offence under the Civil Aviation (Offences) Regulations 2006. Messrs Bell and Kennedy were spoken to by Police and airport security personnel, although they only received a stern warning. Another student filmed the incident, and the coaches informed the Head of Sport at St Bede's College who then informed the Rector, Justin Boyle, about the incident. At 2.00 p.m. the same day, Mr Boyle decided to suspend the students from the rowing team and required that they return to Christchurch immediately. The effect of this decision was to prevent the students from being considered for selection in trials for a national rowing team.

A lawyer for the parents contacted Mr Boyle the next day — a Saturday — asking the school to reconsider its decision on the basis that it was a disproportionate response and potentially breached principles of natural justice. On the Sunday, the Rector, the Deputy Principal and a legal adviser flew to Lake Karapiro and discussed the matter with the father of one of the students. At the conclusion of this meeting, the Rector confirmed his original suspension decision without any further investigation. An application by the students — with their parents acting as litigation guardians — to the High Court for interim relief preventing the suspension from taking effect was heard on Monday 23 March at 9.00 a.m., the first race of the day being less than three hours away. Justice Dunningham allowed the application for an interim injunction (*Kennedy and Anor v Boyle* [2015] NZHC 530) with reasons following later that day ( [2015] NZHC 536).

## THE COURT'S DECISION

The basis of the application was that the suspension was open to judicial review on two main bases. First, depending on how the suspension decision was characterised, it did not comply with various provisions of the Education Act 1989 and/or common law precedent on the reasonableness of school disciplinary decisions. Second, Mr Boyle breached the principles of natural justice by, *inter alia*, failing to investigate the incident properly; not giving the students the opportunity to respond; and failing to take into account relevant considerations, including their contrition, the consequences of the decision, and the involvement of third parties in the incident. Moreover, the meeting with one of the parents on Sunday 22 March was insufficient to cure any flaws in the initial process since it simply confirmed the original decision of Mr Boyle.

The application for interim orders was made under the High Court Rules rather than the Judicature Amendment Act 1972. Accordingly, applying the orthodox test for such applications, the Court had to consider whether the proceedings indicated there was a serious question to be tried, and if so, where the balance of convenience lay. Justice Dunningham approached the first threshold question by assuming that regardless of whether and how the parents could challenge the validity of the decision (the parents' first basis of review) they would nevertheless have the ability to challenge the decision to suspend the students on the basis that Mr Boyle failed to adhere to the principles of natural justice (their second basis). Disciplinary decisions with serious consequences are amenable to judicial review if they were made in “breach of natural justice, or without regard to relevant considerations” which include “the proportionality of the punishment to the misconduct ... or by having regard to irrelevant considerations” (at [24]).

The response by the Rector and the St Bede's College Board of Trustees (the respondents) to the applicants' natural justice allegations was straightforward. The students and their parents had signed a code of conduct prior to the trip, and were on notice that a breach of this code could lead to the students being sent home. The school classified the students' illegal actions as serious misconduct that justified the invocation of that threat — that the students might not be able to compete was simply a foreseeable consequence of their behaviour. In order for the disciplinary action to be effective — to send a message to the students and their peers — Mr Boyle had to make the decision quickly, and thus his enquiry was justifiably truncated.

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Despite this, however, Dunningham J noted (at [25]) that each case required careful consideration and the weighing of the individual circumstances at issue. Her Honour was satisfied that there was a serious question as to whether that had occurred in this case, holding that it is seriously arguable that a decision,

... based on the emailed report of a head coach who was not present when the incident took place, without interviewing the boys in question or the other participants, and without gathering information on the consequences of the decision to assess whether it was proportionate to the alleged misbehaviour...

fails to meet the requirements of natural justice (at [26]). Similarly, it was arguable that the school failed to take into account the relevant considerations of the impact upon third parties: other team members, parents and sponsors (at [26]–[27]). Accordingly, the applicants met the first threshold that there was a serious question to be tried.

Regarding the balance of convenience, Dunningham J held that that lay in favour of the applicants. The immediate impact of the decision is that the students would not be able to compete in the regatta, thus scuttling any chance they had of trialling for a New Zealand team. Whilst the applicants argued that the impact on the school was low — it could impose a substitute punishment when the students returned to Christchurch — Dunningham J disagreed. Interim orders would amount to a public restraint of the school from using a disciplinary procedure designed to show there are swift and severe consequences for students who misbehave when representing their school at a national event. The consequences of the orders would affect the potency of such disciplinary action generally, and were broader than just the case before the Court. Thus, Dunningham J was faced with the choice of whether the “the school’s ability to use swift and potent sanctions for misbehaviour”, which could be substituted if the school was eventually vindicated at trial, should prevail over the “immediate and irreparable adverse consequences” the students would face even if their application for review was successful (at [32]). It was the irreversibility of the consequences facing the students that made them more significant than those the school would face, and thus Dunningham J granted the application for interim relief, preventing the suspension from taking effect and allowing the students to compete. Dunningham J noted the importance of progressing the proceedings to a substantive hearing as soon as possible, and that it was important to the school to have the validity of its decision tested. The interim orders were “neither an endorsement of the boys’ behaviour, nor a decision that the school’s response was inappropriate” (at [38]).

### THE FALLOUT

Given the efficiency, relative comprehensiveness, and measured nature of Dunningham J’s judgment, it is surprising that the almost-universal reaction by academia, practitioners, media and the public was so vehement. The parents’ application for interim orders “stinks to high heaven of elitist self-entitlement” (Mike Yardley, *The Press*, 23 March 2015). The Dean of the University of Canterbury’s School of Law, Dr Chris Gallavin, called the “lamentable” decision a “terrible situation” that “shouldn’t have come to the courts and the court should not have upheld the application” (Kloe Palmer, *TV3 News*, 24 March 2015). The judgment was result of a legacy of “feeble” and “arrogant” judges who “forget their responsibility to the rule of law” (Stephen

Franks, *National Business Review*, 27 March 2015) and one that set a “dangerous precedent” (Nicholas Jones and Kurt Bayer, *New Zealand Herald*, 24 March 2015). These statements accompanied a large public outcry following the decision, largely in favour of the school and its authority to discipline students as it wished. Meanwhile two rowing coaches and a school trustee resigned from their positions soon afterward, stating that Mr Boyle had overridden the head coach’s initial decision not to take further action against the students.

Closer inspection of Dunningham J’s decision indicated that the furor was misplaced. Of course, there are significant access to justice issues underlying these proceedings that should not be understated or ignored: the ability to seek interim relief in this situation, given the costs involved, is restricted to very few students and parents in New Zealand. However, these issues are omnipresent in civil proceedings; they are out of reach for the majority of the population and this is an ever-worsening problem in our civil justice system. Putting those issues to one side, does the decision nevertheless represent “arrogant” judging that sets a “dangerous precedent”?

### THE AMENABILITY OF SCHOOL DISCIPLINARY DECISIONS TO JUDICIAL REVIEW

At least some of the outrage is attributable to another High Court decision granting an application for review of a school’s disciplinary decision: *Battison v Melloy* [2014] NZAR 927. This case generated headlines because it involved a student reviewing the decision of his school — St John’s College in Hastings — to suspend him after he refused to comply with the Principal’s request that he cut his hair. Collins J held that, inter alia, the decision by the Principal to suspend the student was unlawful because it did not meet the criteria set by s 14(1)(a) of the Education Act: the student’s disobedience did not meet the required threshold and there was no objective evidence that the disobedience set a dangerous or harmful example to other students. As with *Kennedy v Boyle*, the reaction to this decision was significant, as was the concern about the precedent it would set. In this light, *Kennedy* is perhaps simply the continuation of a worrying trend that allows and encourages students (and their parents) unhappy with disciplinary decisions to pursue legal action in order to prevent their enforcement.

The jurisprudence on school disciplinary decisions, however, suggests that this concern is misplaced. In 2013 alone — the year for which statistics are readily available from the Ministry of Education — there were 15,509 cases where a student was stood down, 3,082 suspensions, 1064 exclusions and 137 expulsions. However, there have been fewer than ten instances of students successfully seeking judicial review of these and other disciplinary decisions in the past decade. Each decision might have marked a new era of litigiousness, just as *Battison* and *Kennedy* supposedly represent, but each failed to catalyse. Thus, judicial review of disciplinary action by schools is a rare occurrence, and this will likely continue to be the case, as an analysis of the legal framework surrounding such decisions will make clear.

The provisions in the Education Act regulating serious disciplinary action against students (for example, suspensions) are supplemented by explanatory rules (the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999) and guidelines from the Ministry of Education “designed to assist boards of trustees, principals, and teachers with their

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legal options and duties and meet their obligations under relevant statutory requirements” (Ministry of Education, 2009). As the Court of Appeal in *Bovaird v J* [2008] NZAR 667 noted, this statutory framework, the result of the Education Amendment Act 1999, was a response to concerns about the unfairness and high volume of such serious disciplinary action. The Court of Appeal in *Bovaird* refused to add any further specificity or impose any additional requirements on educators, instead focusing on the underlying purpose of this framework as expressed in s 13 of the Act: individualised assessment of each case to ensure the particular requirements of natural justice are met.

Educator compliance with their statutory obligations — including the fulfilment of the particular duties of natural justice warranted by the situation — is a reasonable expectation, and one that draws little controversy when applied to other decision-makers exercising public power. That more deference and discretion is popularly afforded to educators is perhaps a reflection of an outdated jurisprudential approach. As Collins J in *Battison* noted, the Court was traditionally “hesitant to enter the fray of school disciplinary proceedings preferring ‘practical efficiency’ over ‘abstract justice’” but in recent years, it has “been more willing to ensure the rights of a student are given proper weight when revisiting school disciplinary decisions” (at [49]–[50]). This shift in approach represents a correction of a traditional, but unjustified reticence to apply the orthodox requirements of administrative decision-making to schools. As McGechan J noted in the 1990 decision of *M v S* [2003] NZAR 705 (HC) at 723, referred to by Dunningham J in *Kennedy*, the Court:

... must be conscious not only of a public interest in orderly education, but also of a need to protect the individual child, and that child's confidence it can receive justice from authority.

The parallels between *Kennedy* and *M v S* are strong. First, *Kennedy*, *M v S* involved disciplinary action by a Rector against two students caught breaching a rigid code of conduct whilst they were representing their school at a national competition. Second, *Kennedy*, McGechan J in *M v S* felt it necessary to include a postscript that emphasised that the decision did not represent a complete curtailment of a school's disciplinary powers, but instead that the statutory obligations on educators must not be “sacrificed to administrative or disciplinary efficiency, or some supposed need for absolute certainty. Results must not be fixed: they must instead be fair” (at 725). Third, *Kennedy*, *M v S* represented an aberration: educators make literally thousands of disciplinary decisions each year, and the overwhelming majority of those decisions comply with the relevant requirements of natural justice. We should not fear the few aberrations that represent cases where public decision-makers do not comply with their statutory power. To do so would undermine the faith that students, parents, and other educators can have in their education system and in administrative law. These aberrations present a chance to remind educators that they exercise significant public power, and as with anyone else who does so, they exercise that power subject to the constraints of administrative law. We ought to applaud — not vilify — decisions such as *Kennedy*.

### INTERIM RELIEF IN JUDICIAL REVIEW

The analysis above may not assuage those who criticised *Kennedy*, not on the basis that the Court has no place

reviewing decisions of educators, but instead on the appropriateness of interim orders in this situation. The critique is that it is too easy in this context for students to meet the relevant thresholds for interim orders and then use those orders to undermine disciplinary action. The potency of the punishment in the present instance was the immediacy of the decision and the significance of its consequences; an alternative punishment imposed at a later date lacked the same effectiveness. However, the same immediacy and significance of the decision that made it effective also made it vulnerable to challenge by the interim relief procedure used by the applicants. The immediacy of such decisions naturally gives rise to natural justice concerns, making it likely that the students would meet the first threshold of a serious case to be tried. The significance of the decision similarly naturally tilts the balance of convenience in favour of the students. Accordingly, *Kennedy* sets a poor precedent, allowing students to manipulate the interim relief procedure to prevent any immediate and significant disciplinary action by educators.

There are two responses to this critique. The first is that the circumstances of this case justified the granting of interim relief, but this does not mean that all disciplinary decisions of this kind will be vulnerable — it does not set a poor precedent. Close analysis of Dunningham J's decision shows that on the evidence before her, it is no great surprise that she granted the students' application for interim orders. Regarding the first threshold — whether there was a serious question to be tried — even allowing for the necessity of an immediate decision, there were substantial deficiencies in the process adopted by Mr Boyle. Basing his decision solely on the report of the head coach, who was not a witness to the incident, and not talking to the students themselves represents a denial of natural justice to those students at its most basic: one cannot expect to have her side of the case heard if she was afforded no opportunity to express it. At trial, and after cross-examination, the meeting between Mr Kennedy and Mr Boyle might have cured these natural justice deficiencies, despite Mr Kennedy's evidence to the contrary. That, however, is precisely the point: Mr Boyle's failure to talk to the students represents a serious question that needs to be tried in order to determine whether it was a deficiency that was left uncured. Adding the fact that New Zealand has long recognised the validity of proportionality as a ground of judicial review with regards to penalties (*Institute of Chartered Accountants v Bevan* [2003] 1 NZLR 154 (CA)), one is left with the impression that there was more than enough to meet this first threshold. In that regard, this decision does not set a poor precedent: it is imperative that educators follow the basic tenets of natural justice. In terms of the balance of convenience, while it was clear that the students had a good case, one can easily envisage situations where the balance lies in favour of a school, for example where granting of the orders would put other students at risk for example. Once again, *Kennedy v Boyle* stands on its own facts.

The second response to the critique that the interim relief procedure adopted was inappropriate is to question the acquiescence of the respondents to this procedure. The application was brought without notice, on a *Pickwick* basis, and so the respondents were without the benefit of time to consider the appropriateness of applying the orthodox framework to such applications as set down by *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL). There were at least two alternative options to that approach that the respondents might have argued were more appropriate.

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The first was the more stringent standard of requiring the student applicants to show that there was a prima facie case for the respondents to meet. Where, for example, interim decisions are likely to amount to final decisions, the Court has been willing to give closer scrutiny to an applicant's case. As McGechan J observed in *NZ Olympic and Commonwealth Games Association Inc v Telecom New Zealand Ltd* (1996) 7 TCLR 167 (HC) at 170:

If the decision in reality will be definitive, justice can require something more than a marginal serious question to be tried. One does not make final decisions on shadowy contentions.

There was no time to conduct a substantive trial to determine whether Mr Boyle's decision was valid, since the punishment was to take effect less than three hours after the hearing of interim application. That interim application, therefore, amounted in substance to the final decision, a point reinforced by the fact that the applicant students withdrew their proceedings on 1 April 2015.

The second option was to use s 8 of the Judicature Amendment Act 1972 rather than pt 30 of the High Court Rules. Section 8 allows an applicant for judicial review to apply to the Court to restrain a respondent from taking action consequent to the exercise of a statutory power to preserve his or her position pending the hearing of the application. Interim relief under s 8 is not available in all applications for judicial review. *Skilton v Fitzgibbon* (1998) 12 PRNZ 58 — itself a case about reinstating a student to a school after he was suspended — indicates that s 8 cannot be used for mandatory interim relief. However, in this instance, since the students were applying to the Court for interim relief to restrain the school from implementing its decision, the students had a position to preserve and applying under s 8 was an available option. An argument by the respondents that s 8 was more appropriate was worth pursuing since this alternative approach may have given the underlying concerns of the respondents greater weight.

The leading authority on s 8 is the Court of Appeal's decision in *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423, 430 in which Cooke J held that the procedure is not constrained by the *American Cyanamid* approach, and that:

The Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weaknesses of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

Moreover, in *Osborne v Minister of Education* HC Hamilton, M198/99, 4 October 1999, Hammond J held at [44] that “[a] meritless case is not entitled to interim relief, otherwise these applications become a mere delaying tactic.” In an earlier decision, *Esekielu v Attorney-General* (1993) 6 PRNZ 309 (HC), the same judge, arguing that the approach ought to reflect the nature of the interests involved, stated that the Court must find that at the very least there is “[a] real contest between the parties, and that the applicant has a reasonable chance of succeeding in that contest” (at 313). This gives credence to the theme of the argument by the respondents in this case and concerns expressed by the wider commentariat:

the applicants' case was weak; they were simply using the interim application process to delay the effect of Mr Boyle's decision; and the consequences of interim relief had significant public repercussions.

Ultimately, the difference between the two approaches may be nothing more than semantic. The inherent flexibility of the interim relief procedure under the High Court Rules is such that it could have been adjusted to emulate the approach under the Judicature Amendment Act: *Y v Assessors (appointed by the Assembly Executive Secretary of The Presbyterian Church of Aotearoa New Zealand)* HC Auckland, CIV-2009-404-5165, 27 August 2009 at [14]. That does not diminish the point, however. If the respondents were concerned about the ease of the appellants obtaining interim relief, then it was open to them to argue that closer examination of the applicants' case was necessary and appropriate.

Had the Court applied a more stringent test, the applicants may not have met the threshold requirements, and the concerns of the many vocal critics of this decision might have been assuaged. Those critics, however, ought to note that applying such a high standard would not be without its own precedential consequences. As *McGechan on Procedure* at HR7.53.06 notes, there have been few indications that the Court is willing to apply a higher standard for interim relief simply because it involves judicial review proceedings. One such indication was *Finnigan v NZ Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 (HC), where Casey J held that the existence of real hardship on the respondents might have necessitated the application of the prima facie case standard. That *Finnigan* remains an outlier in this particular regard, is important. Controversial though it was at the time, *Finnigan* is a symbol of why interim relief in judicial review proceedings is so important. It is now lauded as an important decision concerning the constraint of private actors exercising public power. Without this mechanism, that power might have gone unchecked. At its heart, *Kennedy v Boyle* represents the same concerns. Yes, it undermined the authority of the school to exercise its disciplinary powers as it wished; but this is a far better outcome than having the abuse of those powers lie unchecked and unchallengeable.

The historically deferential approach by the Court to school discipline is anachronistic. Educators have no special claim to exception from the tenets of natural justice and the rules that govern public power generally. Accordingly, where educators breach their public law duties, the Court's constitutional role is to hold them to account. That task is vexed when it takes the form of an application for interim relief. However, where, as in this case, there is an arguable case that educators have breached their public law duties with serious consequences for the students involved, it is entirely appropriate for the Court to grant that application. Commentators are on sound ground when they question the ability of financial means acting as a threshold that allows some parents and students, but not all, to challenge such exercises of public power. But in then questioning whether such challenges should exist at all, they risk throwing the baby out with the bathwater.

In any event, Messrs Kennedy and Boyle and their coxed eight rowing team did not make the A Final in the regatta, but placed first in the B Final, which provides an apposite allegory to this case: while this case might represent a victory for the sound application of administrative law principles, overall, it represents a troubling loss for accurate commentary on judicial decisions. □