Judgment 22 of 1972

(22)

IN THE PRIVY COUNCIL No. 7 of 1972

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

PAUL WALLIS FURNELL Appellant (Plaintiff)

- and -

THE WHANGAREI HIGH SCHOOLS BOARD Respondent (Defendant)

RECORD OF PROCEEDINGS

SLAUGHTER AND MAY,
35 Basinghall Street,
London, EC2V 5DB.

Solicitors for the
Appellant.

ALLEN & OVERY,
9 Cheapside,
London, EC2V 6AD.

Solicitors for the
Respondents.

IN THE PRIVY COUNCIL No. 7 of 1972

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

PAUL WALLIS FURNELL Appellant (Plaintiff)

- and -

THE WHANGAREI HIGH SCHOOLS BOARD Respondent (Defendant)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS OMITTED FROM THE RECORD

No.	Description of Document
	IN THE COURT OF APPEAL OF NEW ZEALAND
1.	Notice of Motion that security for costs in Court of Appeal be fixed
2.	Motion for Conditional Leave to Appeal to Privy Council
3.	Motion for Final Leave
4.	Declaration of Authority to Act
5.	Praecipe for Writ of Certiorari

DOCUMENT TRANSMITTED TO PRIVY COUNCIL
BUT NOT REPRODUCED

No.	Description of Document
1.	Headnote to New Zealand Law Report, Whangarei High Schools Board v. Furnell and Others - Court of Appeal, Wellington, New Zealand; pages 782 and 783.

IN THE PRIVY COUNCIL No. 7 of 1972

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

PAUL WALLIS FURNELL Appellant (Plaintiff)

- and -

THE WHANGAREI HIGH SCHOOLS BOARD Respondent (Defendant)

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RECORD OF PROCEEDINGS

No. 1

NOTICE OF MOTION FOR WRIT OF CERTIORARI

In the Supreme Court of New Zealand

No. 1

Notice of Motion for Writ of Certiorari

2nd September 1970

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
WHANGAREI REGISTRY A. NO. 58/70

BETWEEN PAUL WALLIS FURNELL
Plaintiff

A N D THE WHANGAREI HIGH SCHOOLS BOARD
Defendant

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TAKE NOTICE that on Tuesday the 15th day of September 1970 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard Counsel for the abovenamed plaintiff will move this Honourable Court at Auckland FOR AN ORDER that a Writ of Certiorari directed to the abovenamed defendant do issue removing the proceedings instituted by the defendant pursuant to regulations 4 and 5 of the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969 and the decisions made thereunder by the defendant into the Supreme

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In the Supreme Court of New Zealand

No. 1

Notice of Motion for Writ of Certiorari

2nd September 1970 (continued)

Court at Auckland for the purpose of quashing the said decisions AND FOR A FURTHER ORDER that the costs of the plaintiff of and incidental to this application and any order thereon be fixed and paid by the defendant UPON THE GROUNDS that the defendant has acted in breach of the rules of natural justice and in breach of the provisions of the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969 AND UPON THE FURTHER GROUNDS set forth in the affidavit of the plaintiff filed herein.

DATED this 2nd day of September 1970

'J.D. Golightly'
Solicitor for the
abovenamed Plaintiff

No. 2

Statement of Claim

2nd September 1970

No. 2

STATEMENT OF CLAIM

Wednesday the 2nd day of September 1970

The plaintiff by his solicitor says:

1. THAT at all material times the plaintiff was a teacher at Kamo High School near Whangarei. He is thirty six years of age and has the qualification of Master of Arts from Cambridge University.

2. THAT the defendant was at all material times a body corporate pursuant to the Education Act 1964 having control of the said Kamo High School.

3. THAT on the 20th day of March 1970 the plaintiff was advised by letter from the Chairman of the defendant that he had been suspended as a teacher at the said Kamo High School.

4. THAT the said letter advised as follows:-

"Dear Mr. Furnell,

A complaint has been made about your conduct at Kamo High School and has been investigated by a committee set up under the

Secondary and Technical Institute Teachers' Disciplinary Regulations 1969.

You are charged with various offences under Section 158 of the Education Act 1964 in that:-

1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:-

   (a) Failed consistently to maintain reasonable order and discipline in your classroom.

   (b) Struck children on several occasions.

   (c) Allowed a state of uproar to rise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:-

   (a) In that your class attendance register was not marked from December 1st to 11th 1969.

   (b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

In the Supreme Court of New Zealand

No. 2

Statement of Claim

2nd September 1970 (continued)

You are accordingly suspended from your duties at Kamo High School as from today's date March 20th 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8th to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any statement you must advise the Board Secretary by not later than 4 p.m. on April 8th of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter."

5. THAT until receipt of the said letter the plaintiff had no knowledge of any complaints or that any such complaints were under investigation pursuant to Regulation 4 of the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969.

6. THAT he was not advised of the complaints by the investigating committee nor was he interviewed by such committee or given any opportunity to make any explanation to such committee before such committee reported to the defendant. That the plaintiff has never seen or had the opportunity to reply to or comment on such report. This conduct by the committee of the defendant amounted to a denial of natural justice to the plaintiff.

7. THAT in so acting in reliance on such report and without allowing the plaintiff to see and comment on or reply to the findings in such report the defendant acted in contravention of the principles of natural justice. Consequently the decisions of the defendant to formulate charges under Section 158 of the Education Act 1964 and to suspend the plaintiff were void and of no legal effect.

In the Supreme Court of New Zealand

No. 2

Statement of Claim

2nd September 1970 (continued)

8. THAT furthermore the plaintiff was not advised in writing by the defendant of the full details of the alleged offences before he was suspended as prescribed by Regulation 5(1) of the said Regulations and the defendant has thereby acted in breach of such Regulations.

9. THAT in fact the defendant did not until after demand by the plaintiff supply full details of the alleged offences until the 6th day of April 1970.

10. THAT as a result of the decision to formulate charges under Section 158 of the Education Act 1964 the plaintiff was suspended. He faces a lengthy legal process if he is to clear himself of the charges.

11. THAT as a result of the aforesaid suspension by the defendant the plaintiff has received no salary and his loss of net earnings to the present time amounts to some Twelve hundred dollars (Ø1200). He has been brought into disrepute in his teaching profession.

WHEREFORE THE PLAINTIFF PRAYS FOR AN ORDER:-

(a) That a Writ of Certiorari do issue removing the proceedings instituted by the defendant pursuant to Regulations 4 and 5 of the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969 and the decisions made thereunder by the defendant into the Supreme Court at Auckland for the purpose of quashing the said decisions.

(b) Directing that the said defendant do pay to the plaintiff the costs of and incidental to the application herein and any order thereon.

No. 3

No. 3

Affidavit of P.W. Furnell

2nd September 1970

AFFIDAVIT OF P.W. FURNELL

I, PAUL WALLIS FURNELL of Whangarei, School Teacher, MAKE OATH AND SAY:

1. THAT I am a school teacher at Kamo High School

In the Supreme Court of New Zealand

No. 3

Affidavit of P.W. Furnell

2nd September 1970 (continued)

near Whangarei.

2. THAT I have been employed as a teacher at the said school since August 1968. I am thirty six years of age and hold the qualification of Master of Arts from Cambridge University of United Kingdom.

3. THAT after graduating in 1957 I was engaged as a teacher in the United Kingdom for a period of two years.

4. THAT in the year 1960 I was engaged by the New Zealand Government to teach in New Zealand and accordingly came to New Zealand.

5. THAT from the years 1960 to 1963 I taught at Gisborne Boys High School and advanced in my teacher gradings from Grade I to Grade II.

6. THAT between the years 1964 and 1968 I taught at Waikohu College at Te Karaka near Gisborne and advanced in grading to Grade III. I was then engaged by the defendant to teach at Kamo High School as aforesaid.

7. THAT my grading at Kamo High School is now Grade B12 which would enable me to apply for a teaching position of responsibility.

8. THAT since November 1969 at the request of the Headmaster of the said Kamo High School Mr. H.W. Spragg, I have been applying for teaching positions elsewhere.

9. THAT on the 20th day of March 1970 I was handed a letter by the said Mr. Spragg advising that my conduct had been investigated by a committee set up under the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969 (hereinafter called the "said regulations") and in this letter I was also advised that I had been suspended as from the aforesaid 20th day of March 1970. A photo copy of the said letter is hereunto annexed and marked "A".

10. THAT until receipt of the said letter I had no knowledge that my conduct was under investigation by a committee or anyone else.

11. THAT I was not advised of any complaint by such investigating committee nor was I interviewed by such committee or any member of it. I was not given any opportunity to make any representations to such committee before such committee reported to the defendant. I have not seen such report and have had no opportunity of replying to or commenting on the findings in such report.

12. THAT on the 25th day of March 1970, on my instructions my solicitors wrote to the Chairman of the defendant requesting particulars and details of the charges which I was called upon to answer. A photo copy of this letter is hereunto attached and marked "B".

13. THAT I was given details and particulars of the said charges by letter dated 6th April 1970 addressed to my solicitors. A photo copy of this letter is hereunto attached and marked "C".

14. THAT since my suspension on the 20th day of March 1970, down to the present time I have been unemployed and have suffered to date a loss after taxation and all deductions of some Twelve hundred dollars ($1200). My reputation as a teacher has also suffered by reason of the aforesaid suspension.

15. THAT since my suspension I have applied for five teaching posts and I have had only two replies to such applications. The Headmaster of the Penrose High School communicated with me by telephone but I was not appointed to that school. The Headmaster of the Manurewa school advised that the position there was wrongly advertised.

16. THAT as a result of my suspension I have been advised that I have forfeited membership of the Education Benevolent Society.

SWORN at Whangarei this 2nd day of September, 1970, before me:) P.W. Furnell

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

In the Supreme Court of New Zealand

No. 3

Exhibit "A" to Affidavit of P.W. Furnell dated the 2nd September 1970

"A"

WHANGAREI HIGH SCHOOLS BOARD
35 Bank Street, WHANGAREI
20th March 1970.

Mr. P.W. Furnell,
Kamo High School,
Box 4137,
KAMO.

Dear Mr. Furnell,

A complaint has been made about your conduct at Kamo High School and has been investigated by a Committee set up under the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969.

You are charged with various offences under Section 158 of the Education Act 1964 in that:-

1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:-

   (a) Failed consistently to maintain reasonable order and discipline in your classroom.

   (b) Struck children on several occasions.

   (c) Allowed a state of uproar to arise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:-

   (a) In that your class attendance register was not marked from December 1st to 11th 1969.

(b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

You are accordingly suspended from your duties at Kamo High School as from today's date March 20th 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8th to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you so wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any such statement you must advise the Board Secretary by not later than 4 p.m. on April 8th of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter.

Yours faithfully,

C.A. REED
CHAIRMAN

This is the letter marked "A" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 2nd day of Septmber 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

In the Supreme Court of New Zealand

No. 3

Exhibit "B" to Affidavit of P.W. Furnell dated the 2nd September 1970

"B"

CONNELL TRIMMER LAMB & GERARD
Barristers & Solicitors

Rathbone Building,
Rathbone Street,
WHANGAREI, N.Z.

25th March 1970.

The Chairman,
Whangarei High Schools Board,
35 Bank Street,
WHANGAREI.

Dear Sir,

re: Paul Wallace Furnell

We have been handed your letter of the 20th instant addressed to the abovenamed. We have been instructed to act on behalf of Mr. Furnell. Our client had received no indication whatsoever from anyone of any investigation or that he was to be charged with the alleged offences set out in your letter. We cannot see how an investigation by a committee, set up by your Board, could properly take place without that committee at least obtaining some explanation from our client.

Please take notice that our client denies the truth of the charges which your Board purports to set out in the letter of the 20th instant. Our client further denies that he is guilty of any offence under Section 158 of the Education Act 1964.

However, it is impossible for our client to make an explanation regarding the charges which your Board purports to set out in its letter, other than charge numbered 3(a), without further particulars of the allegations.

We would be obliged therefore if you would provide us with the following information concerning the respective charges:-

1(a) Details of the dates and classes to which this charge refers.

1(b) Names of the children alleged to have been struck, their classes, and the dates upon which the children are alleged to have been struck.

1(c) The dates that relate to this charge and details of the class or classes involved.

2. Details of the furniture and cupboards alleged to have been defaced including identification of the class rooms and the dates of the alleged offences. Is it alleged that our client defaced the furniture and cupboards?

3(b) Details of the times and dates of the instructions given to the staff and the time and dates upon which our client is alleged to have contravened these instructions.

We consider that as set out in your letter, the charges are null and void in so far as they fail to fairly advise our client of the allegations made against him. They are in general simply not offences under Section 158. Until we obtain the details of the allegations that we are requesting, we are unable to formulate our client's explanation relating to such charges.

Our client is desirous of making a statement in person to your Board under the provisions of Regulation 5(3), but we note that this regulation states that "he may make a statement in person." If your Board does not agree to our client being represented by legal Counsel in making such a statement, then our client will rely on the explanation which we will prepare pursuant to Regulation 5(2) after you have given us the further particulars requested above.

We wish it to be clearly understood that in writing this letter, our client is not in any way waiving his rights to question the validity of your Board proceeding against him pursuant to the Secondary and Technical Institute Teachers Disciplinary Regulations 1969. We consider that on the face of it, these regulations are completely ultra vires. Furthermore, we consider that there has been a complete denial of natural justice to our client due to the manner in which your Board has investigated

In the Supreme Court of New Zealand

No. 3

Exhibit "B" to Affidavit of P.W. Furnell dated the 2nd September 1970 (continued)

the complaint (whatever it may be) and in the general handling of this matter by your Board. Our client further reserves the right to take such legal action as may be open to him against your Board and individual members of it arising from the action taken. We are giving consideration to this aspect of the matter.

Yours faithfully,
CONNELL TRIMMER LAMB & GERARD:

Per: G.D. Golightly

This is the letter marked "B" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 2nd day of September 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

Exhibit "C" to Affidavit of P.W. Furnell dated the 2nd September 1970

"C"

WHANGAREI HIGH SCHOOLS BOARD
35 Bank Street, WHANGAREI

6th April, 1970.

Messrs. Connell Trimmer Lamb & Gerard,
Box 242,
WHANGAREI.

FOR ATTENTION MR. GOLIGHTLY

Dear Sir,

MR. P.W. FURNELL

In reply to your letter of March 25th I set out further particulars of the offences we claim were committed by Mr. Furnell.

In that he was grossly inefficient or incompetent in the discharge of his professional duties having failed consistently to maintain reasonable order and discipline in his classroom.

On March 17th 1969 Mr. Dickie took Mr.Furnell's classes (Junior) while Mr. Furnell was away and found classes ill disciplined; the room showed signs of disrespect and lack of order.

In April 1969 a petition was made to the fifth form tutor by a group of fifth formers complaining about Mr. Furnell's teaching methods and classroom problems.

On May 8th 1969 two fifth form geography pupils complained to the Principal. They were sympathetic to Mr. Furnell but complained that the majority of the class was playing up with him i.e. insolent or ignoring him, including some of the previous petitioners.

During the second term various complaints were made to the Deputy Principal and other teachers by senior pupils. Lack of control was emphasised by pupils having little respect for Mr. Furnell, playing of pranks, open insolence, writing on desks and walls, eating in class and leaving room at will.

On 3.10.69 the Principal interviewed Mr.Furnell and gave his opinion that he was not teaching effectively and in fairness to himself and students, he should resign. Mr. Furnell thought things were not so bad as the Principal believed but agreed to apply for positions elsewhere.

On 16.10.69 the Principal entered 4G2 class to restore order.

On 20.10.69 the Principal entered 4G2 again to restore order.

On 5.11.69 two girls from 3G2 complained to Principal that they could not get on with their work because of the deterioration in class behaviour.

On 18.11.69 Principal spoke to 4G2 after a complaint about noises from Mr. Denne, teacher in the room below.

On 24.11.69 Principal got 4G2 clean desks. Further complaint from Mr. Denne about noise. Principal offered Mr. Furnell assistance in getting a job in Correspondence School - not accepted.

In the Supreme Court of New Zealand

No. 3

Exhibit "C" to Affidavit of P.W. Furnell dated the 2nd September 1970 (continued)

Mr. Furnell had been advised that he would get no "examination" classes in 1970. An attempt was made to give him a light programme with scope for observation and work with Mr. Dickie's classes but lack of staffing precluded this. He teaches third and fourth form English (2 classes) and Social Studies (4 classes).

On 20.2.70 when the Principal was standing with Mr. Dickie outside Mr. Furnell's room, Mr. Furnell screamed at a boy to "get out". 10

On 6.3.70 Mr. and Mrs. Rankin saw Principal and expressed concern about the circumstances under which Mr. Furnell caned their son i.e. that teacher had lost control of class (4G5).

On 11.3.70 the Senior Assistant Mistress was called to the Library by a prefect because of disorder of 4G5 and lack of control by Mr.Furnell.

The Librarian altered her lunch hour in order to be present during Mr. Furnell's library classes to ensure books are properly checked out. 20

STRIKING CHILDREN.

On 4.11.68, struck Mabel Waipouri (3G6) on the head.

On 7.11.68 letter of complaint was received from Mr. Waipouri re impairment of Mabel's hearing. However, medical advice showed this impairment was not due to blow.

Mr. Furnell warned not to strike children and he would be reported to Board if he did so again.

On 13.11.68 struck three 3G6 girls. Mr.Furnell 30 was warned of the consequence if this happened again. The matter was reported to the Chairman and Dr. Greenhill (Specialist treating Mr. Furnell).

On 2.12.69 Irene Barnett 3G2 reported being struck by Mr. Furnell. Investigation showed Mr. Furnell had cuffed the girl but no harder than others having received the same treatment.

Mr. Furnell admitted hitting the girl but regarded the matter as trivial.

The charge that Mr. Furnell allowed a state of uproar to arise and continue in his classroom to such an extent that work in neighbouring rooms had been disrupted has been detailed above.

By the end of 1969 Mr. Furnell's room had writing on the walls, desks and teacher's desk, shelves in the cupboards had been broken and ink spilt copiously in one cupboard. The desks were cleaned periodically under the Deputy Principal's instructions.

Over the last three weeks of the 1969 School Year Mr. Furnell cut himself off from the staffroom and spent non-teaching time in the grounds, the corridors, the English set store-room or away from the school. He did not attend any meetings or activities outside his classes and sometimes left before the bell.

He was not at Prize Giving and his register was unmarked from 1st December on. He did not appear at the Staff Meeting on Monday 2nd February 1970 and appeared for the first time on Tuesday February 3rd.

May I point out that if Mr. Furnell wishes to interview the Board concerning these charges he must himself advise me of his wish.

Dealing with the validity of the Disciplinary Regulations, I would like to point out that these are under the authority of the Education Amendment Act 1969.

Yours faithfully,

C.A. REED
CHAIRMAN

This is the letter marked "C" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 2nd day of September 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

In the Supreme Court of New Zealand

No. 4

Affidavit of P.W. Furnell

30th July 1970

No. 4

AFFIDAVIT OF P.W. FURNELL

A. No. 34/70

I, PAUL WALLIS FURNELL of Whangarei, School Teacher MAKE OATH AND SAY as follows:-

1. THAT I am a school teacher at Kamo High School near Whangarei.

2. THAT I have been employed as a teacher at the said school since August 1968. I am thirty six years of age and hold the qualification of Master of Arts from Cambridge University of United Kingdom.

3. THAT after graduating in 1957 I was engaged as a teacher in the United Kingdom for a period of two years.

4. THAT in the year 1960 I was engaged by the New Zealand Government to teach in New Zealand and accordingly came to New Zealand.

5. THAT from the years 1960 to 1963 I taught at Gisborne Boys High School and advanced in my teacher gradings from Grade I to Grade II.

6. THAT between the years 1964 and 1968 I taught at Waikohu College at Te Karaka near Gisborne and advanced in grading to Grade III. I was then engaged by the First Defendant to teach at Kamo High School as aforesaid.

7. THAT my grading at Kamo High School is now Grade B1 2 which would enable me to apply for a teaching position of responsibility.

8. THAT since November 1969 at the request of the Headmaster of the said Kamo High School, Mr. H.W. Spragg, I have been applying for teaching positions elsewhere.

9. THAT on the 20th day of March 1970, I was handed a letter by the said Mr. Spragg advising that my conduct had been investigated by a committee set up under the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969 (hereinafter called "the said Regulations") and in this letter I

was also advised that I had been suspended as from the aforesaid 20th day of March 1970. The said letter is hereunto annexed and marked "A".

10. THAT until receipt of the said letter I had no knowledge that my conduct was under investigation by a committee or anyone else.

11. THAT I was not advised of any complaint by such investigating committee nor was I interviewed by such committee or any member of it. I was not given any opportunity to make any explanation to such committee before such committee reported to the First Defendant.

12. THAT on the 25th day of March 1970, on my instructions my solicitors wrote to the Chairman of the First Defendant requesting particulars and details of the charges which I was being called upon to answer. A copy of this letter is hereunto attached and marked "B".

13. THAT I was given details and particulars of the said charges by letter dated 6th April 1970 addressed to my solicitors. This letter is hereunto attached and marked "C".

14. THAT on the 20th day of April 1970 by letter of that date, my explanation pursuant to Regulation 5(2) of the said regulations was forwarded to the First Defendant by my solicitors. A copy of the said letter and explanation is hereunto attached and marked "D".

15. THAT on the 18th day of May 1970, my solicitors were advised that the charges had been referred to the Director-General of Education for his consideration.

16. THAT by letter dated 29th day of May 1970, the said Director-General advised that the charges had been referred to the Second Defendants for hearing and determination and advised of a date of hearing. This letter is hereunto attached and marked "E".

17. THAT since my suspension on the 20th day of March 1970 down to the present time I have been unemployed and have suffered to date a loss after taxation and all deductions of some Nine hundred dollars ($900). My reputation as a teacher has

In the Supreme Court of New Zealand

No. 4

Affidavit of P.W. Furnell

30th July 1970 (continued)

also suffered by reason of the aforesaid suspension.

SWORN at Whangarei this 30th day of July, 1970
before me: "P.W. Furnell"

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

Exhibit "A" to Affidavit of P.W. Furnell dated the 30th July 1970

"A"

WHANGAREI HIGH SCHOOLS BOARD
35 Bank Street, WHANGAREI
20th March 1970

Mr. P.W. Furnell,
Kamo High School,
Box 4137,
KAMO.

Dear Mr. Furnell,

A complaint has been made about your conduct at Kamo High School and has been investigated by a Committee set up under the Secondary and Technical Institute Teachers' Disciplinary Regulations 1969.

You are charged with various offences under Section 158 of the Education Act 1964 in that:-

1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:-

   (a) Failed consistently to maintain reasonable order and discipline in your classroom.

   (b) Struck children on several occasions.

   (c) Allowed a state of uproar to arise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:-

(a) In that your class attendance register was not marked from December 1st to 11th 1969.

(b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

You are accordingly suspended from your duties at Kamo High School as from today's date March 20th 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8th to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you so wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any such statement you must advise the Board Secretary by not later than 4 p.m. on April 8th of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter.

Yours faithfully,

C.A. REED
CHAIRMAN

In the Supreme Court of New Zealand

No. 4

Exhibit "A" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

This is the letter marked "A" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

Exhibit "B" to Affidavit of P.W. Furnell dated the 30th July 1970

"B"

CONNELL TRIMMER LAMB & GERARD

Barristers & Solicitors

Rathbone Building,
Rathbone Street,
WHANGAREI, N.Z.

25th March 1970.

The Chairman,
Whangarei High Schools Board,
35 Bank Street,
WHANGAREI.

Dear Sir,

re: Paul Wallace Furnell

We have been handed your letter of the 20th instant addressed to the abovenamed. We have been instructed to act on behalf of Mr. Furnell. Our client had received no indication whatsoever from anyone of any investigation or that he was to be charged with the alleged offences set out in your letter. We cannot see how an investigation by a committee, set up by your Board, could properly take place without that committee at least obtaining some explanation from our client.

Please take notice that our client denies the truth of the charges which your Board purports to set out in the letter of the 20th instant. Our client further denies that he is guilty of any

offence under Section 158 of the Education Act 1964.

However, it is impossible for our client to make an explanation regarding the charges which your Board purports to set out in its letter, other than charge numbered 3(a), without further particulars of the allegations.

We would be obliged therefore if you would provide us with the following information concerning the respective charges:

1(a) Details of the dates and classes to which this charge refers.

1(b) Names of the children alleged to have been struck, their classes, and the dates upon which the children are alleged to have been struck.

1(c) The dates that relate to this charge and details of the class or classes involved.

2. Details of the furniture and cupboards alleged to have been defaced including identification of the class rooms and the dates of the alleged offences. Is it alleged that our client defaced the furniture and cupboards?

3(b) Details of the times and dates of the instructions given to the staff and the time and dates upon which our client is alleged to have contravened these instructions.

We consider that as set out in your letter, the charges are null and void in so far as they fail to fairly advise our client of the allegations made against him. They are in general simply not offences under Section 158. Until we obtain the details of the allegations that we are requesting, we are unable to formulate our client's explanation relating to such charges.

Our client is desirous of making a statement in person to your Board under the provisions of Regulation 5(3), but we note that this regulation states that "he may make a statement in person." If your Board does not agree to our client being represented by legal Counsel in making such a statement, then our client will rely on the explanation which we will prepare pursuant to Regulation 5(2)

In the Supreme Court of New Zealand

No. 4

Exhibit "B" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

In the Supreme Court of New Zealand

No. 4

Exhibit "B" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

after you have given us the further particulars requested above.

We wish it to be clearly understood that in writing this letter, our client is not in any way waiving his rights to question the validity of your Board proceeding against him pursuant to the Secondary and Technical Institute Teachers Disciplinary Regulations 1969. We consider that on the face of it, these regulations are completely ultra vires. Furthermore, we consider that there has been a complete denial of natural justice to our client due to the manner in which your Board has investigated the complaint (whatever it may be) and in the general handling of this matter by your Board. Our client further reserves the right to take such legal action as may be open to him against your Board and individual members of it arising from the action taken. We are giving consideration to this aspect of the matter.

Yours faithfully,
CONNELL TRIMMER LAMB & GERARD

Per: G.D. Golightly

This is the letter marked "B" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

Exhibit "C" to Affidavit of P.W. Furnell dated the 30th July 1970

"C"

WHANGAREI HIGH SCHOOLS BOARD
35 Bank Street, WHANGAREI
6th April 1970.

Messrs. Connell, Trimmer, Lamb & Gerard,
Box 242,
WHANGAREI.

FOR ATTENTION MR. GOLIGHTLY.

Dear Sir,

MR. P.W. FURNELL

In reply to your letter of March 25th I set out further particulars of the offences we claim

were committed by Mr. Furnell.

In that he was grossly inefficient or incompetent in the discharge of his professional duties having failed consistently to maintain reasonable order and discipline in his classroom.

On March 17th 1969 Mr. Dickie took Mr.Furnell's classes (Junior) while Mr. Furnell was away and found classes ill-disciplined; the room showed signs of disrespect and lack of order.

In April 1969 a petition was made to the fifth form tutor by a group of fifth formers complaining about Mr. Furnell's teaching methods and classroom problems.

On May 8th 1969 two fifth form geography pupils complained to the Principal. They were sympathetic to Mr. Furnell but complained that the majority of the class was playing up with him i.e. insolent or ignoring him, including some of the previous petitioners.

During the second term various complaints were made to the Deputy Principal and other teachers by senior pupils. Lack of control was emphasised by pupils having little respect for Mr. Furnell, playing of pranks, open insolence, writing on desks and walls, eating in class and leaving room at will.

On 3.10.69 the Principal interviewed Mr. Furnell and gave his opinion that he was not teaching effectively and in fairness to himself and students, he should resign. Mr. Furnell thought things were not so bad as the Principal believed but agreed to apply for positions elsewhere.

On 16.10.69 the Principal entered 4G2 class to restore order.

On 20.10.69 the Principal entered 4G2 again to restore order.

On 5.11.69 two girls from 3G2 complained to Principal that they could not get on with their work because of the deterioration in class behaviour.

On 18.11.69 Principal spoke to 4G2 after a complaint about noise from Mr. Denne, teacher in the room below.

In the Supreme Court of New Zealand

No. 4

Exhibit "C" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

On 24.11.69 Principal got 4G2 clean desks. Further complaint from Mr. Denne about noise. Principal offered Mr. Furnell assistance in getting a job in Correspondence School - not accepted.

Mr. Furnell had been advised that he would get no "examination" classes in 1970. An attempt was made to give him a light programme with scope for observation and work with Mr. Dickie's classes but lack of staffing precluded this. He teaches third and fourth form English (2 classes) and Social Studies (4 classes).

On 20.2.70 when the Principal was standing with Mr. Dickie outside Mr. Furnell's room, Mr. Furnell screamed at a boy to "get out".

On 6.3.70 Mr. and Mrs. Rankin saw Principal and expressed concern about the circumstances under which Mr. Furnell caned their son i.e. that teacher had lost control of class (4G5).

On 11.3.70 the Senior Assistant Mistress was called to the Library by a prefect because of disorder of 4G5 and lack of control by Mr. Furnell.

The Librarian altered her lunch hour in order to be present during Mr. Furnell's library classes to ensure books are properly checked out.

STRIKING CHILDREN

On 4.11.68 struck Mabel Waipouri (3G6) on the head.

On 7.11.68 letter of complaint was received from Mr. Waipouri re impairment of Mabel's hearing. However, medical advice showed this impairment was not due to blow.

Mr. Furnell warned not to strike children and he would be reported to Board if he did so again.

On 13.11.68 struck three 3G6 girls. Mr. Furnell was warned of the consequence if this happened again. The matter was reported to the Chairman and Dr. Greenhill (Specialist treating Mr. Furnell).

On 2.12.69 Irene Barnett 3G2 reported being

struck by Mr. Furnell. Investigation showed Mr. Furnell had cuffed the girl but no harder than others having received the same treatment.

Mr. Furnell admitted hitting the girl, but regarded the matter as trivial.

The charge that Mr. Furnell allowed a state of uproar to arise and continue in his classroom to such an extent that work in neighbouring rooms had been disrupted has been detailed above.

By the end of 1969 Mr. Furnell's room had writing on the walls, desks and teacher's desk, shelves in the cupboards had been broken and ink spilt copiously in one cupboard. The desks were cleaned periodically under the Deputy Principal's instructions.

Over the last three weeks of the 1969 School Year Mr. Furnell cut himself off from the staffroom and spent non-teaching time in the grounds, the corridors, the English set store-room or away from the school. He did not attend any meetings or activities outside his classes and sometimes left before the bell.

He was not at Prize Giving and his register was unmarked from 1st December on. He did not appear at the Staff Meeting on Monday 2nd February 1970 and appeared for the first time on Tuesday February 3rd.

May I point out that if Mr. Furnell wishes to interview the Board concerning these charges he must himself advise me of his wish.

Dealing with the validity of the Disciplinary Regulations, I would like to point out that these are under the authority of the Education Amendment Act 1969.

Yours faithfully,

C.A. REED
CHAIRMAN

This is the letter marked "C" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

In the Supreme Court of New Zealand

No. 4

"D"

Mr. Golightly

20th April 1970

Exhibit "D" to Affidavit of P.W. Furnell dated the 30th July 1970

The Chairman,
Whangarei High Schools Board,
P.O. Box 185,
WHANGAREI.

Dear Sir,

re: P.W. Furnell

Further to our letter of the 14th instant, we enclose herewith explanation. Since you apparently will not allow our client to make a statement through his solicitor before your Board, we are accordingly obliged to rely on the explanation which we now forward to you.

In forwarding this explanation, we do so entirely without prejudice to our right to attack at law the validity of the action taken by your Board.

Yours faithfully,
CONNELL TRIMMER LAMB & GERARD:

Per: J.D. Golightly

This is the letter marked "D" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

Exhibit "D" to Affidavit of P.W. Furnell dated the 30th July 1970

"D"

EXPLANATION BY PAUL WALLIS FURNELL PURSUANT TO SECTION 5(2) SECONDARY AND TECHNICAL INSTITUTION TEACHERS DISCIPLINARY REGULATIONS 1969

1. Whangarei High Schools Board is respectfully referred to the letter of the 6th April 1970 from the Chairman to Messrs. Connell, Trimmer, Lamb &

Gerard, and our client's comments refer to the allegations and dates as set out in that letter.

2. All charges are completely denied.

3. Our client comments on specific allegations as follows:

March 17, 1969 - Our client does not know the ill discipline and the signs of disrespect and lack of order that are complained of by Mr. Dickie. If Mr. Dickie could not keep order, this would appear to substantiate our client's problems with this class.

April, 1969 - Our client has no knowledge of the details of this petition.

May 8, 1969 - Our client has no direct information concerning this complaint. In any case all complaints are hearsay.

October 3, 1969 - Our client has in fact and is applying for a position elsewhere, and will take the first suitable position that is offering.

October 16, 1969 and October 20, 1969 - We point out that there were 37 children in this class. It is submitted that fourth formers are perhaps the most difficult to control.

November 5, 1969 - Our client has no knowledge of this complaint nor the complaint mentioned under the heading 18/11/69.

November 24, 1969 - We would comment that examination of the school would show that there is writing on desks other than in our client's class room. We point out that according to our instructions, children are in the class rooms before school and at lunch times when teachers are not present.

February 20, 1970 - Our client denies that he screamed at a pupil. He takes exception to this term. He did tell the boy, who was being cheeky to him in 4G5, to get out of the room.

March 6, 1970 - Our client strongly denies that

In the Supreme Court of New Zealand

No. 4

Exhibit "D" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

In the Supreme Court of New Zealand

No. 4

Exhibit "D" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

he lost control of the class. In point of fact he was maintaining control of the class in caning the boy Rankin. We point out that during this day in question, boys outside 4G5 were making a noise on the playing fields. The boy Rankin was sitting half way down the class. He stood up and looked out the window. Our client told him to sit down and if he did it again he would get the cane. A couple of minutes later, the boy Rankin again jumped up and looked out the window and accordingly at the end of the period our client took him to the caning room and gave him one stroke of the cane. The boy Rankin was also flicking pellets around the class room. We point out that our client has only caned two boys since he has been at the Kamo High School.

March 11, 1970 - We point out that 4G5 is one of the lowest fourth form classes. These pupils tend not to settle down during library periods. Our client has no knowledge of any report by the Prefect. With reference to the Librarian altering her lunch hour, it appears to us that possibly it is the job of the Librarian to check the books out.

We now refer to the specific allegation to striking children. Any misconduct in the striking of children is completely denied. Our client has never injured a child, nor has there been any question of injury.

December 2, 1969 - Our client merely touched the girl Waipouri on the head. Our client instructs us that Mr. Spragg agreed that the girl had tried to produce a dramatic effect to her complaints. As a result of Mr. Spragg's suggestion, our client saw the Chairman, Mr. Reed. It was then that Mr. Reed said "I do not want to talk about the girl incident which was exaggerated." Mr. Reed told our client that he (Mr. Reed) had struck children himself while teaching and Mr. Reed also told our client that he didn't know of any teachers who didn't strike children at some stage of their teaching period. Mr. Reed also suggested that our client take a year's leave of absence, but our client said he would rather continue teaching. Mr. Reed told our client that if he

came back to Kamo, he took the risk of being dismissed. Mr. Reed said the Inspectors would have to come up and a lot of bother would be caused. Mr. Reed said our client would have to take the chance if he came back to Kamo.

November 13, 1968 and December 2, 1969 - These appear trifling matters.

5. Our client completely denies any offence relating to allowing a state of uproar to rise and continue in his class room so as to be guilty of any alleged offence.

6. We now refer to allegations concerning damage to class room property. Our client can recall no writing on the wall of room C12. Damage to desks happens everywhere. As far as the broken shelves are concerned, we are instructed that these shelves are held by pegs which are removable, and if the pegs are removed the shelf will fall out of position. We are informed that children are allowed to go to the cupboard to get ink and to put cases and tennis rackets and other items there. If a child removes one of the above mentioned pegs from under a shelf, then the shelf could fall and ink be spilt. If ink was spilt it could have happened while our client was not in the class room; for example at lunch time or before school.

7. With reference to the complaint concerning committee meetings, our client was not notified of the staff meeting on the 2nd February 1970.

8. We point out that our client's classes have been working well this year. Their lessons have been well prepared and interesting and all children's books have been marked. Our client is confident of passing any independent departmental inspection and we invite your Board to arrange such inspection.

9. To summarise, our client completely denies each and every offence mentioned in the letter of the 20th March 1970 from the Chairman of the Board. The incidents set out in the letter of the 6th April 1970, are in our submission of a comparatively trivial nature and they certainly do not warrant the drastic action taken by your Board.

10. We point out that our client has a qualification

In the Supreme Court of New Zealand

No. 4

Exhibit "D" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

of Master of Arts from Cambridge University. He was brought out to New Zealand in 1960 as a teacher, and we submit that the action taken by your Board is unfair, unjust and unreasonable, if indeed it be lawful.

11. We respectfully suggest that our client be immediately reinstated. He is as we have stated, applying for a position elsewhere and will take such position. He appreciates that having regard to these proceedings, his position at Kamo would be somehwat difficult.

DATED at Whangarei this day of April, 1970.

Messrs. Connell Trimmer Lamb & Gerard, Solicitors

Per: J.D. Golightly

This is the explanation marked "D" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970 before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand.

Exhibit "E" to Affidavit of P.W. Furnell dated the 30th July 1970

"E"

Ref. E. 38/1/56/1

NEW ZEALAND
DEPARTMENT OF EDUCATION

Private Bag, Government Buildings,
WELLINGTON

29th May 1970

Mr. P.W. Furnell,
C/- Mr. J.D. Golightly,
Connell, Trimmer, Lamb & Gerard,
P.O. Box 242,
WHANGAREI.

Dear Sir,

I have received from the Whangarei High Schools' Board particulars of charges made against you under

In the Supreme Court of New Zealand

No. 4

Exhibit "E" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

Regulation 5 of the Secondary and Technical Institute Teachers Disciplinary Regulations 1969 as follows -

1. You have been grossly inefficient or incompetent in the discharge of your duties, having:

   (a) Failed consistently to maintain reasonable order and discipline in your classroom;

   (b) Struck children on several occasions.

   (c) Allowed a state of uproar to arise and continue in your class room to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:

   (a) In that your class attendance register was not marked from 1 December to 11 December 1969;

   (b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty in your capacity as a teacher which shows your unfitness to remain in your present position.

After consideration of the matter, I have decided under paragraph (c) of subclause (5) of Regulation 5 of these Regulations to refer the charges to the Teachers' Disciplinary Board for hearing and determination.

The hearing will commence at 10 a.m. on Tuesday 30 June, 1970, in accordance with Regulation 8

In the Supreme Court of New Zealand

No. 4

Exhibit "E" to Affidavit of P.W. Furnell dated the 30th July 1970 (continued)

at a place in Whangarei which will be notified at a later date.

You should therefore make the necessary arrangements to present your case or to be represented at the hearing by counsel or agent as provided in subclause (2) of Regulation 8.

Yours faithfully,

K.J. Sheen

Director-General of Education

This is the letter marked "E" mentioned and referred to in the annexed Affidavit of PAUL WALLIS FURNELL sworn at Whangarei this 30th day of July 1970, before me:

J.G. Adams

A Solicitor of the Supreme Court of New Zealand

No. 5

Further Affidavit of P.W. Furnell

21st August 1970

No. 5

FURTHER AFFIDAVIT OF P.W. FURNELL

A. No. 34/70

I, PAUL WALLIS FURNELL of Whangarei, School teacher make oath and say as follows:-

1. THAT I crave leave to refer to my affidavit dated 30th day of July 1970 and filed herein.

2. THAT since my said suspension I have applied for five teaching posts and I have had only two replies to such applications. The Headmaster of the Penrose High School communicated with me by telephone but I was not appointed to that school. The Headmaster of the Manurewa School advised that the position there was wrongly advertised.

3. THAT as a result of my said suspension I have forfeited membership of the Education Benevolent Society and I refer to the letter from that Society hereunto attached and marked with the letter "A".

SWORN at Whangarei this 21st day of August, 1970 before me: "P.W. Furnell"

M.A. Armstrong

A Solicitor of the Supreme Court of New Zealand

In the Supreme Court of New Zealand

No. 5

Further Affidavit of P.W. Furnell

21st August 1970 (continued)

"A"

Exhibit "A" to Further Affidavit of P.W. Furnell dated the 21st August 1970

EDUCATION BENEVOLENT SOCIETY
C/O AUCKLAND EDUCATION BOARD
PRIVATE BAG
AUCKLAND.

5 August 1970

Messrs. Connell, Trimmer,
Lamb & Gerard,
P.O. Box 242,
WHANGAREI.

Attention Mr. Golightly

Dear Sirs,

P.W. FURNELL

Your letter of 31 July has been received. At no time has Mr. Furnell made a formal application on the prescribed form, for assistance from the Society. We are aware that Mr. Furnell is under suspension and that as a consequence he is not receiving salary. Because of this he ceased making membership contributions to the Society at the time until which he was last paid viz. 31 March. His membership of course, has lapsed.

Retrospective membership cannot be bought and in the event of Mr. Furnell's reinstatement back payments could not be made. Every person, on ceasing to be a member, forfeits all right to or claims upon the Society or its property and fund.

Yours faithfully,

S.J. Healy

for REGIONAL SECRETARY

In the Supreme Court of New Zealand

No. 6

Statement of Defence

10th September 1970

No. 6

STATEMENT OF DEFENCE

Thursday the 10th day of September 1970

THE DEFENDANT by its solicitor says:

1. THAT it admits the allegations contained in paragraphs 1 - 4 inclusive of the Statement of Claim dated the 2nd day of September 1970.

2. THAT it denies the allegations contained in paragraph 5 of the said Statement of Claim.

3. THAT it admits the allegations contained in paragraph 6 of the said Statement of Claim except insofar that it denies that in the circumstances there has been any denial of natural justice to the plaintiff, and the defendant says that the Committee referred to in the said paragraph 6 of the Statement of Claim was not obliged to observe any or all of the requirements of natural justice towards the plaintiff.

4. THAT it denies the allegations contained in paragraphs 7 - 10 inclusive of the said Statement of Claim.

5. THAT it has insufficient knowledge of and therefore denies each and all the allegations contained in paragraph 11 of the said Statement of Claim.

No. 7

Reasons for Judgment of Speight J.

22nd October 1970

No. 7

REASONS FOR JUDGMENT OF SPEIGHT J.

(No. A.58/70 No. A.34/70)

The Plaintiff is a schoolteacher and at the relevant times was employed by the Kamo High School which is an institution under the control of the Defendant Board. The relationship between the Plaintiff and the Defendant Board is governed by the Education Act 1964 and in particular in matters of discipline, by Part III. Section 158 of the Act

provides:

"Every teacher commits an offence against this Section who .....

(d) Is grossly inefficient or incompetent in the discharge of his professional duties".

Section 159 as originally enacted provides a detailed procedure whereby allegations against a teacher may be brought against him in the form of charges. The Section provides methods of notification of details, for hearings by investigation committees appointed by the Board and subsequent powers of discipline including transfer, demotion or dismissal. Section 159, however, does not apply to the present case because by the Education Amendment Act, 1969, Section 7, an additional Section 161 (a) was inserted providing that in certain cases, as a result of negotiations with teachers' organisations, Regulations could be made by Order in Council prescribing the procedure for investigation, hearing and determination of cases where persons were alleged to have committed an offence against Section 158.

As a result of this empowering Section and as a result presumably of negotiations between the interested parties, Regulations have been enacted which govern the present situation. They are the Secondary & Technical Institute Teachers Disciplinary Regulations 1969, and we are concerned with Regulations 4 and 5.

"Regulation 4. Preliminary investigation of complaint -

(1) Where a Board receives a complaint against a teacher, it shall, before taking any action in accordance with Regulation 5 of these Regulations, either appoint a person (who may be a member of the Board or any other person except an employee of the Board) to investigate the complaint or set up a sub-committee (which shall include a representative of the teachers' organisation) for that purpose

(2) The person so appointed or the sub-committee set up for the purpose shall undertake the

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment of Speight J.

22nd October 1970 (continued)

investigation of the complaint at such time and place as the Board may determine, and shall, on completing the investigation, forward a report in writing to the Board which shall include any recommendation which the person or the subcommittee, as the case may be, thinks fit to make."

"Regulation 5. Procedure for alleged offences -

(1) Where a Board, after receiving a report on a complaint against a teacher in accordance with Regulation 4 of these Regulations, has reason to believe that the teacher may have committed an offence to which Section 158 of the Act applies, the Board shall forthwith advise the teacher in writing of the full details of the alleged offence, and may then suspend the teacher pending the determination of the matter in accordance with the following provisions of these Regulations

(2) The teacher concerned shall, by notice in writing given by the Board and delivered to the teacher or sent to him by post in a registered letter addressed to him at his usual or last known place of residence, be required, within a reasonable time to be specified in the notice, to state in writing whether he admits or denies the truth of the charge, and to forward any explanation which he wishes to give relating to the charge."

Regulations 5 (3), 5(4) and 5(5) provide for consequential matters whereby the charge which has been brought against the teacher is heard by the Board with rights of hearing given to the teacher. Thereupon the power of the Board is three-fold. First to decide that no further action shall be required, or, secondly to deal with the matter under Regulation 6 which provides for minor disciplinary actions or thirdly, in the graver cases, to decide that the charge be referred to the Director General. The Director General in turn may himself decide that no further action is required or refer the matter back to the Board for action under Regulation 6, or refer the matter to the Teachers' Disciplinary Board for a full hearing, the procedures which are set out in Regulation 7.

The Second Defendants in the second action above intituled are the members of the Teachers' Disciplinary Board.

The history of this matter as can be ascertained from the affidavits, is as follows. In 1969 the Head Master of the Kamo High School formed the opinion that Mr. Furnell was not performing his duties satisfactorily. Some discussions took place between the Head Master and Mr. Furnell and in October, 1969, although not conceding the correctness of the Head Master's views, Mr. Furnell agreed with a suggestion that it would be better if he could leave Kamo High School and for this purpose, agreed to apply for various positions elsewhere. This he has since done without success, and in the meantime until late March, 1970, continued as a master at the School. In the meantime, subsequent to the discussion between himself and the Head Master in October, 1969, and unknown to the Plaintiff, there were apparently some further complaints and allegations of unsatisfactory behaviour on his part. Apparently, although the dates are not recorded, the Defendant Board set up a committee under the Secondary & Technical Institutes Teachers Disciplinary Regulations as provided for in Regulation 4. This committee did not interview or make its activities known to the Plaintiff but reported to the Board. In consequence of such report, the Plaintiff received the following letter from the Defendant Board:

> "A complaint has been made about your conduct at Kamo High School and has been investigated by a Committee set up under the Secondary and Technical Institute Teachers Disciplinary Regulations 1969.
>
> You are charged with various offences under Section 158 of the Education Act, 1964 in that:-
>
> 1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:-
> (a) Failed consistently to maintain reasonable order and discipline in your classroom
> (b) Struck children on several occasions
> (c) Allowed a state of uproar to arise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment of Speight J.

22nd October 1970 (continued)

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:-

(a) In that your class attendance register was not marked from December 1st to 11th 1969

(b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

You are accordingly suspended from your duties at Kamo High School as from today's date March 20th 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8th to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you so wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any such statement you must advise the Board Secretary by not later than 4 p.m. on April 8th of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter."

It is claimed by the Plaintiff in his affidavits, and not denied, that this was the first indication given to him that this action had been

taken. Consequent upon the receipt of this letter he consulted a solicitor, the solicitor by correspondence called for further particulars of the alleged offences, particulars were supplied and a request was made that the solicitor be allowed to represent the Plaintiff at the hearings. Whether or not there was a formal hearing by the Board is not disclosed, but the Board determined, having considered the written matter put forward by the solicitor on behalf of the Plaintiff, to refer the matter to the Director General and the Director General, on 29th May, advised the Defendant through his solicitor, that there would be a hearing of the Teachers' Disciplinary Board. A time and place were fixed for 16th June in Whangarei and the Plaintiff was advised that he could be present together with his counsel to represent him at the hearing.

This sitting of the Disciplinary Board has not taken place for, in the meantime, the Plaintiff has issued the present proceedings. In the first action he asks for the issue of a writ of certiorari to remove into this Court the decision of the Board referred to in their letter of 20th March, whereby he was suspended pending the further determination of the charges, and it is asked that that suspension be quashed on the ground that the procedures leading up to it have been in breach of natural justice. In the second action, in which the Teachers' Disciplinary Board is also a defendant, writs of injunction are sought against the First Defendant revoking his suspension and reinstating him to duty, and prohibition is sought against the Second Defendants from hearing and determining the charges.

It is convenient to deal primarily with the first action claiming certiorari and quashing of the suspension. It is argued by the Plaintiff and not contested by the Defendant, that if the original procedure leading up to the decision to suspend has been in breach of natural justice, then all subsequent proceedings which arose from the initial investigation and decision would also be a nullity. There would have been non-compliance with the consequential procedures in Regulation 5 as a result of which there could be no authority in the Board to consider the charges or in the Director General to refer the matter to the Disciplinary Board. I am in agreement with this submission and Mr. Mathieson does not dispute that if the Plaintiff is successful in the first action, then he must also have the remedies sought in the second.

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment of Speight J.

22nd October 1970 (continued)

Mr. Golightly for the Plaintiff has, as can be imagined, based his argument upon a submission that throughout every stage of the proceedings against the Plaintiff the matter is of a judicial or quasi-judicial nature. That being so, the rules of natural justice require that before the Plaintiff can be deprived of his office or even have his appointment temporarily suspended, he is entitled to be heard and that in suspending him, even pending the hearing, without having given him an opportunity to put forward his point of view, he has been deprived of his just rights. In particular, of course, considerable stress has been placed upom many passages from the case of Ridge v. Baldwin (1964) A.C., 40, which are familiar to people who are required to examine this field and which need not be referred to in detail at the moment.

On the other hand, Mr. Mathieson says that the investigation under Regulation 4, is merely to determine whether or not there is a prima facie case. He submits that full protection is provided for the rights of the Plaintiff in the subsequent hearings under Regulation 5 and he submits that in so far as the legislation has expressly in the Regulations made quite detailed provisions as to notices and rights of hearings for the purposes of the inquiry by the Board, but no procedural requirement has been provided for the earlier matters that the doctrine of "expressio unius" applies. He invites the Court to rule that the preliminary inquiry by the investigating committee is not quasi-judicial but is an administrative determination as to whether or not there is a prima facie case and is but an additional safeguard for the benefit of the teacher and that the rules of natural justice do not apply to that preliminary inquiry.

It is important to observe the two distinct processes which take place under Regulation 4 and under Regulation 5. It will be noted in passing that the function of the investigating committee under these Regulations is quite different from its function under Section 159 of the main Act. Under that section the committee is set up for the purpose of investigating and determining the complaint and has the powers of a Commission of Enquiry. There could be no doubt, therefore, that under Section 159 the committee is a judicial body. Under subsection 7 of Section 159, the Board has

the power to suspend a teacher pending such a hearing so that the suspension there (as here) is done by the Board but is done before the hearing by the committee and without any procedure for investigation for a prima facie case. Under the 1969 Regulations the situation is quite different. Presumably to provide additional protection for the teachers, the committee or the individual is required only to investigate the complaint and not to determine it. Presumably the purpose of such an investigation is to ensure that the complaint is not trivial, malicious or, in some other way, demonstrably ill founded. Having made such an investigation, the committee reports to the Board and it is the Board, under Regulation 5, which (as before) may then suspend the teacher and it is the Board which (unlike the previous procedure) conducts the hearing.

I have given some thought as to whether or not the function of the initial investigating committee is a quasi-judicial one under Regulation 4. I do not think it is necessary for any label-fixing to be indulged in on this question, for the matter which is the subject of complaint here, namely the interim suspension, is not the act of the investigating committee, but of the Board after a preliminary report has been received. No rules are laid down in Regulation 4 as to what steps should be taken by the committee and there is no power, as I have just mentioned, in it of its own volition to do anything adverse to the interests of the teacher. But if the Board, before proceeding with the charges, elects to suspend the teacher, that certainly is adverse to his interests. Under later provisions of the Regulations there are appropriate procedures whereby his pay, which is withheld if suspended, is paid to him should he be cleared of the charges so that apart from the embarrassment of being without his salary in the meantime, his position in that respect is eventually preserved. However, there can be no argument, particularly in such a closely-knit profession as schoolteaching, that interim suspension of a teacher is a substantial penalty, even if he is eventually not penalised by the Board or the Teachers' Disciplinary Board.

I have no doubt that the fact that a teacher had been under suspension and not in receipt of his salary for a period of some months, is not only a financial detriment to him but is a damage to his reputation and could impair his future career. If

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22nd October 1970 (continued)

there had been no provision in Regulation 5(2), 5(3) and 5(4), for the teacher to put forward his point of view to the Board in its substantive hearing, then there could be no argument but that he had been denied natural justice. The question is whether or not in the facts of this case, the omission by the Board to obtain any comment which he wished to make to the initial complaint makes the Board's decision to suspend him a similar breach.

At the risk of repeating myself, I re-emphasise two points. First, the Plaintiff is not merely an employee of the Board. Because of the structure of the Act and the Regulations he has rights preserved to him which makes his appointment akin to persons in the third class mentioned by Lord Reid in Ridge v. Baldwin (supra) at page 66, and unlike the teacher in Vidvodaya University Council v. Silva (1965) 1 W.L.R., 77. Secondly, it is crucial to remember that it was the Board which decided, not the Committee - thus differing from the class of cases discussed by Professor de Smith in the second edition of Judicial Review of Administrative Action at pages 217 - 221 and at 394 and 395.

I think it important to make the following comment. In many cases, and particularly as will be seen from the letter of 20th March, the allegations against the teacher may be of many minor items. It is also apparent that these items are the result of the earlier investigation. It is not necessarily the case that the matters which were originally complained of would all come to be charges. Similarly at a later stage, where there are a multiplicity of charges, as here, it may turn out that some of them are ill-founded and some of them are justified, and that those which are justified lead to some form of penalty. Now some of the original allegations may be capable of being demonstrated quite easily as false, others may require further investigation for which purpose a charge is a proper thing. Whether a suspension in the interim is considered necessary may well depend upon the gravamen of the initial finding of the investigator or the investigating committee. Consequently the decision of the Board to suspend does not stand or fall by its decision that there is a prima facie case requiring disciplinary action. There may be some circumstances where the Board thinks that

investigation and therefore charges are required but suspension is not necessary. In others urgency may require the removal of the teacher from the scene in the interim. It is to be borne in mind in considering the question, therefore, that the Board, when acting under Regulation 5(1), is in fact making two determinations. One, that there are sufficient complaints to justify charges being brought and, secondly, and not necessarily coincidentally, that the gravity of the situation is such that the teacher should not continue in employment in the meantime. The eventual decision may be different on these two aspects. The question therefore is not whether the teacher is entitled to be represented at the hearing and the final determination of the charges against him. This is axiomatic and is preserved for him in the Regulations. The question is whether in addition to this he is entitled to have his point of view considered on the other and, from his point of view, quite serious question as to whether or not suspension in the interim is required.

It is, of course, trite and has been often said that in endeavouring to decide whether or not such a right of hearing is intended in any given case must depend upon the language of the legislation and the surrounding circumstances. In particular in this case, one observes the very careful procedures which are provided for the subsequent proceedings once the charge has been laid. The question is whether or not the absence of such procedures in relation to questions of suspension, are an indication that the legislature has laid down a comprehensive code designed to cover the whole field and therefore the omission of an early right is intentional or whether it is as the result of inadvertence or accident. The question has been aptly applied elsewhere in the following terms:

> "The question is where no provision has been made for a hearing whether there is a sufficient indication in the intention of the legislature that the ordinary rule of fair play has been excluded by an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment."

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22nd October 1970 (continued)

Of course, although no procedure has been laid down for giving a right of hearing under Regulation 4, nothing is provided which debars the investigating committee from making known the allegations to him and inviting him to comment. What is involved here is not so much an interpretation of the Regulations as to what is required in every case, but rather a decision whether, in cases where suspension is involved, the Board which makes the suspension, has a duty to satisfy itself that it has ascertained both sides of the matter in a preliminary way so as to be properly guided whether the penal step of suspension is called for.

There appear to be two recent cases dealing with the principles of "audi alteram partem" in relation to preliminary investigations. Both of these relate to property rights but an examination of them is a useful exercise in deciding the principle involved.

One was much discussed before me and I will refer to it in more detail later. Wiseman & Anor. v. Borneman & Ors. (1969) 3 All E.R. 275. At 277 Lord Reid said:

> "My Lords, I agree with your Lordships that this appeal should be dismissed and I shall only add a few observations. Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

In the same case Lord Morris of Borth-Y-Gest said (at 278):

> "My Lords, that the conception of natural justice should at all stages guide those who

discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said is only 'fair play in action'".

Now I have said that unlike most cases, we have here a two-stage determination of separate issues. In the first place, there is a determination on evidence which the Plaintiff had not had the opportunity of commenting on, of a temporary penalty, most of the ill-effects of which might be undone should the eventual hearing be resolved in his favour, but with a residuum of damage to his reputation no matter what the outcome may be. The second stage is that there is a full scale hearing in which his rights are adequately protected. The nearest discussion in any of the writers is by de Smith at page 177 where he says:-

"In some administrative situations, remote from the typical settings of adjudication, the courts have held that failure to give any formal opportunity to be heard is immaterial if the person affected was in fact aware of what was proposed or knew or ought to have known that he could have made representations had he wished. This may occasionally be a common-sense approach; it will be appropriate, however, only in cases where there is no difficulty in making informal representations. Doubtless there are also many cases where procedures involving inspection, testing or examination can be regarded as adequate substitutes for hearings; a decision to grant or refuse a test certificate in respect of an elderly motor vehicle, for example, is given after an examination, not a hearing.

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22nd October 1970 (continued)

> Can the absence of a hearing before the decision is made be adequately compensated for by a hearing ex post facto? A prior hearing may be better than a subsequent hearing, but a subsequent hearing is better than no hearing at all; and in a number of cases the courts have held that statutory provisions for an administrative appeal or full judicial review on the merits are sufficient to negative the existence of any implied duty to hear before the original decision is made. This approach may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to afford antecedent hearings. It is not an approach which ought to be adopted as a general rule. If, of course, the initial 'decision' is only provisional and does not take effect at all until a prescribed period for lodging an appeal or objections has expired, the opportunities thus afforded to a person aggrieved may not differ in substance from a right to an antecedent hearing".

Of the cases referred to in the notes there, the most apposite is the second of the two cases referred to above, Literature Board of Review v. H.M.H. Publishing Co. Inc. (1964) Qd.R., 261. Of more recent vintage and apposite to the first sentence in the foregoing quotation, is the other case to which I have already referred, Wiseman v. Borneman (supra). Both related to property rights. Wiseman v. Borneman (supra) is a taxation case concerning initial investigations done by the Commissioners of Inland Revenue. Having called upon the tax payer for a declaration in respect of his financial affairs, the Commissioners were entitled to make a counter-statement and refer this to a Taxation Tribunal which could then, having considered these matters, determine whether there was a prima facie case for proceeding in which case it went to the Special Commissioners. The tax payer had made his declaration, the Commissioners had made a counter-statement but he had no opportunity of commenting on the counter-statement before it went to the tribunal for determination as to a prima facie case. The House of Lords rejected an appeal that the tribunal had acted in breach of natural justice for not allowing the tax payer a further right to be

heard at this preliminary stage, but the primary reason was that these were matters relating to the assessment of his tax and the state of his business records upon which that assessment had been made. In view of the fact that the assessment and its basis would relate to matters well-known to the tax payer, it was thought by Their Lordships that he had not suffered any prejudice, for any further comment he could have made would have been only by way of argument or submission upon matters which were to be determined by the eventual tribunal. It was decided on the facts that there had been no breach of natural justice and the procedures followed had not resulted in any unfairness. The case is of importance however in what I call the two-stage form of proceedings that we are interested in. The head note quotes Lord Guest, Lord Donovan and Lord Wilberforce as follows:

> "There is no difference in principal so far as observance of the rules of natural justice is concerned between decisions which are final and those which are not".

In particular, at page 285, Lord Wilberforce said:

> "My Lords, I agree that this appeal should be dismissed, but I would base the decision on rather broader grounds than those stated in the courts below, for I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decision that as to some matter there is a prima facie case for taking action. The suggestion that there is some such difference which was sought to be extracted from the decisions of the Court of Appeal (1967) 3 All E.R. 1045; (1968) Ch.429 and from the later case of Parry-Jones v. Law Society (1968) 1 All E.R. 177; (1969) 1 Ch. 1, is one that I cannot accept. Even if there were anything to be said in favour of treating one class of decision in a different manner from the other, this would be of little value, so great is the range of difference between prima facie decisions themselves. At one end, the decision may be merely that of an administrative authority that a prima facie case exists for taking some action or proceeding as

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22nd October 1970 (continued)

to which the person concerned is to be able in due course to state his case; at the other end, a decision that a prima facie case has been made out may have substantive and serious effects as regards the person affected, as by removing from him an otherwise good defence (Cozens v. North Devon Hospital Management Committee (1966) 2 All E.R. 799; 2 Q.B. 330) or by exposing him to a new hazard, or as when he is prevented, however temporarily, from taking action which he wishes to take. In the present case, the decision of the tribunal may have the effect of denying the taxpayer of the opportunity of eliminating, in limine, a claim which may otherwise have to be fought expensively through a chain of courts".

Literature Board of Review v. H.M.H. Publishing Co. Inc. (supra) dealt with the prohibition by the Board of publications of Playboy magazines in Queensland under the Objectionable Literature Act. There was, under the appropriate legislation, a right of appeal to the Full Court against the prohibition imposed by the Board. In support of the appeal, Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S., 180 a well-known authority, was cited in support of the submission that the action of the Board had constituted punishment by a quasi-judicial body without affording an adequate opportunity of being heard. It was held by the Full Court that if the Order which had been made and which affected the proprietary rights of the individuals had given no opportunity prior to making the order for the person to be heard, and if it was a final order it would be contrary to natural justice. However, that as the Act by way of its provision for appeal gave a reasonable opportunity to the effect that parties could test the order before the proprietary rights have been destroyed, then the requirements of natural justice was satisfied. Although the case is in some respects dissimilar, I take from this expression of principle and from the Wiseman case (supra) the conclusion that whether or not a preliminary investigation as to the existence of a prima facie case requires the opportunity to be heard will depend upon the circumstances including in particular

(a) whether or not the facts are already fully

within the knowledge of the interested parties;

(b) whether the question is purely an interpretation by the final judicial body as to the meaning of those facts; and (of greatest importance)

(c) whether the bringing of the proceedings without consultation and the opportunity to be heard may in themselves do irreversible damage despite the opportunity of having a verdict eventually returned in favour of the individual.

In the present field we are dealing with the terms of this man's employment which are regulated by procedures for the investigation of complaints against him. I have already made reference to the fact that the original complaints may cover a multitude of matters. If all are true, or prima facie evidence exists, then the urgency of the situation may call for the interim suspension of the teacher for the welfare of all concerned. But it may be that it only requires a brief investigation of both sides of the case to demonstrate that the matter is not as serious as initially appeared and that some of the allegations are demonstrably not worth pursuing. Such information may well be crucial in influencing the Board whether or not the grave step of suspension is called for.

That being the case, it appears to me to be abundantly clear that where it is contemplated that suspension will take place, this should not be done unless under Regulation 4, the "investigation of the complaint" has included some reference to the teacher of the nature of the allegations made against him and a statement from him giving his version of the event if he wishes. In the absence of such steps being taken here, I am of the view that the Plaintiff has not been fairly treated in the way in which our principles of justice require.

Questions may arise as to whether or not the Board is obliged to have from the investigating committee a report of the teacher's view point in every instance and I refrain from making any general ruling for that could not govern another case. But the Defendant Board will undoubtedly want to know what its present position is in relation to the existing complaints which are still undisposed of

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment of Speight J.

22nd October 1970 (continued)

and perhaps where it might stand in a different case.

With respect I do not think that the last six lines quoted from Lord Wilberforce's speech (supra) can be a generalisation applicable in every case.

The embarrassment and expense of being a defendant in any proceeding is real and doubtless this could sometimes be avoided by a preliminary hearing. But this alone does not of itself give prospective defendants a right to be heard at the investigation stage. It is a question, amongst other things, of how serious the detriment may be - and suspension is so grave a penalty as to entitle a hearing. In other cases in the words of Lord Reid:

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party".

(Wiseman v. Borneman (supra) at 277-8).

I wish to make it clear that in the present case, invalidity only attaches to such proceedings as took place in accordance with the Board's letter of the 29th March, 1970 and subsequent actions. The decision to lay charges and the decision to suspend are so interwoven in that letter and are so affected by the Board acting without hearing the Plaintiff's point of view in view of what they did to him that, as I have already said, the subsequent decision of the Board referring it to the Director General and the subsequent decision of the Director General conveyed in his letter of 29th May, 1970, are all invalidated. That, however, does not mean that the complaints as complaints, no longer exist nor that they did not require investigating. Particularly in view of the existence of the Director General and the Teachers' Disciplinary

Board, neither of whom have entered into a consideration of the merits, I do not see that the difficulties in continuing an investigation and determination exist as were described by T.A. Gresson, J. in Low v. Earthquake & War Damage Commission (1960), N.Z.L.R. 189 at 190.

Consequently there will be orders as follows:

1. In the first action an order for a writ of certiorari removing all decisions of the Board subsequent to receiving the report of the investigating committee into this Court and quashing the same;

2. An injunction to the Board removing the suspension which is the subject of the present proceedings; and

3. A writ of prohibition to the Second Defendants prohibiting the hearing of the charges on the present reference by the Director General.

It will be observed, however, that these orders only relate to the proceedings so far taken on the original complaint. This is deliberately so worded to keep alive the original complaints for such proper proceedings, if any, as the Board may desire to take. It goes without saying that the Plaintiff's suspended salary must be restored to him and he is awarded costs $300 plus disbursements.

No. 8

ORDER FOR WRIT OF CERTIORARI

Thursday the 22nd day of October 1970

Before the Honourable Mr. Justice Speight

UPON READING the Statement of Claim in these actions and the Notice of Motion of the plaintiff filed herein and the affidavit of Paul Wallis Furnell filed in support thereof AND UPON HEARING Mr. Golightly and Mr. Goldstone of Counsel on behalf of the plaintiff and Mr. Mathieson and Mr. Cathro on behalf of the defendant THIS COURT HEREBY ORDERS

In the Supreme Court of New Zealand

No. 8

Order for Writ of Certiorari

22nd October 1970 (continued)

that a Writ of Certiorari directed to the defendant the Whangarei High Schools Board do issue removing all decisions of the said Board concerning the plaintiff made pursuant to The Teachers Disciplinary Regulations 1969 subsequent to receiving the report of the investigating committee set up under the said Regulations into the Supreme Court at Auckland AND THIS COURT HEREBY FURTHER ORDERS that the said decisions be quashed on the return of the said Writ without further order AND THIS COURT HEREBY FURTHER ORDERS that the defendant pays to the plaintiff the sum of Three hundred dollars ($300) together with disbursements to be fixed by the Registrar for his costs of and incidental to the said notice of motion and this order.

By the Court

L.S. T.P. EVANS

REGISTRAR

In the Court of Appeal of New Zealand

No. 9

Notice of Motion on Appeal

16th November 1970

No. 9

NOTICE OF MOTION ON APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 66/70

BETWEEN THE WHANGAREI HIGH SCHOOLS BOARD a body corporate pursuant to the Education Act 1964

Appellant

A N D PAUL WALLIS FURNELL of Whangarei, School Teacher

Respondent

TAKE NOTICE that this Honourable Court will be moved at the first sittings thereof after the expiration of fourteen days or as soon thereafter as Counsel can be heard by Counsel for the above-named Appellant BY WAY OF APPEAL from the whole of the judgment of the Supreme Court delivered by the Honourable Mr. Justice Speight at Auckland on the 22nd day of October 1970 on Action No. 58/70 UPON THE GROUNDS that such judgment is erroneous in

fact and in law.

DATED at Wellington this 16th day of November, 1970.

"B.J. Cathro"
Solicitor for the Appellant

In the Court of Appeal of New Zealand

No. 9

Notice of Motion on Appeal

16th November 1970 (continued)

No. 10

REASONS FOR JUDGMENT OF THE COURT OF APPEAL OF NEW ZEALAND

No. 10

Reasons for Judgment of the Court of Appeal of New Zealand

Nos. C.A. 65 & 66/70

CORAM: WILD C.J.
NORTH, P.
TURNER, J.

19th March 1971

Friday, 19th March, 1971

WHANGAREI HIGH SCHOOLS BOARD v. PAUL WALLIS FURNELL and OTHERS

JUDGMENT

Wild, C.J.

WILD, C.J.: The first Respondent (whom I will call "the teacher") was employed on the staff at Kamo High School which is under the control of the Board. In 1969 the headmaster of the school considered that the teacher was not performing his duties satisfactorily. As the result of some discussions between them the teacher, while not conceding that the headmaster was right in his view, agreed that it would be better if he applied for positions elsewhere. In this he had no success, and he remained teaching at the school until late in March 1970. In the meantime, unknown to the teacher, further complaints were made about him, and the Board set up a subcommittee to investigate them under Reg. 4 of the Secondary and Technical Institute

Teachers Disciplinary Regulations 1969 (SR 1961/271). Of these regulations (the origin of which will be explained later in this judgment) Regs. 4, 5 and 6 are as follows:

"4. (1) Where a Board receives a complaint against a teacher, it shall, before taking any action in accordance with regulation 5 of these regulations, either appoint a person (who may be a member of the Board or any other person except an employee of the Board) to investigate the complaint or set up a subcommittee (which shall include a representative of the teachers' organisation) for that purpose.

"(2) The person so appointed or the subcommittee set up for the purpose shall undertake the investigation of the complaint at such time and place as the Board may determine, and shall, on completing the investigation, forward a report in writing to the Board which shall include any recommendation which the person or the subcommittee, as the case may be, thinks fit to make.

"5. (1) Where a Board, after receiving a report on a complaint against a teacher in accordance with regulation 4 of these regulations, has reason to believe that the teacher may have committed an offence to which section 158 of the Act applies, the Board shall forthwith advise the teacher in writing of the full details of the alleged offence, and may then suspend the teacher pending the determination of the matter in accordance with the following provisions of these regulations.

"(2) The teacher concerned shall, by notice in writing given by the Board and delivered to the teacher or sent to him by post in a registered letter addressed to him at his usual or last known place of residence, be required, within a reasonable time to be specified in the notice, to state in writing whether he admits or denies the truth of the charge, and to forward any explanation which he wishes to give relating to the charge.

"(3) The Board shall, in any notice

forwarded to a teacher in accordance with subclause (2) of this regulation, inform the teacher that, if he so wishes, he may make a statement in person to the Board concerning the alleged offence and that, on informing the Board accordingly, he shall be heard at a time to be specified by the Board.

"(4) The Board, after considering any statement or explanation supplied by the teacher in accordance with subclause (2) of this regulation and any statement made in person by him in accordance with subclause (3) of this regulation, shall do one of the following:

"(a) Decide that no further action is to be taken in relation to the charge, in which case the teacher shall, if he has been suspended, be reinstated in his position and receive his full salary for the period of suspension;

"(b) Decide that the offence with which the teacher is charged shall be dealt with under regulation 6 of these regulations, in which case the provisions of that regulation shall apply accordingly;

"(c) Decide that the charge should be referred to the Director-General for consideration as to whether or not it should be referred to the Teachers Disciplinary Board for hearing and determination, in which case the Board shall then forward to the Director-General all particulars relating to the charge.

"(5) The Director-General on receiving the particulars of a charge against a teacher, including the findings of any preliminary investigation undertaken in accordance with regulation 4 of these regulations, shall, after considering those particulars, do one of the following:

"(a) Direct that no further action is to be taken in relation to the charge, in which case the teacher shall, if he has been suspended, be reinstated in his

position and receive his full salary for the period of suspension:

"(b) Require that the offence with which the teacher is charged shall be dealt with under regulation 6 of these regulations, in which case the Board shall so deal with the matter and the provisions of that regulation shall apply accordingly:

"(c) Refer the matter to the Teachers' Disciplinary Board for hearing and determination.

"6. (1) In any case where the Board has decided, in accordance with paragraph (b) of subclause (4) of regulation 5 of these regulations, or the Director-General has required, in accordance with paragraph (b) of subclause (5) of that regulation, that the offence with which a teacher is charged shall be dealt with under this regulation, the Board may (if satisfied that the alleged offence has been proved) caution, reprimand, or censure the teacher. If the offence which the Board is satisfied has been proved is that the teacher has absented himself from his duties without leave or valid excuse, the Board may, in addition, direct that no salary shall be payable to the teacher for all or any part of the period in which the teacher was so absent; and in that event, the Board may, if such salary has been paid, recover the amount by deduction from the teacher's salary:

"Provided that any such deduction from a teacher's salary shall be made in instalments over such period as the Board thinks fit, but in no case shall the deduction from the salary payable for any pay period exceed one quarter of the salary normally payable for that pay period.

"(2) Where any charge against a teacher who is not appointed by the Director-General is dealt with under this regulation, notice of the decision reached and of the penalty (if any) imposed on the teacher shall, together with a full report of the circumstances of the case, be forwarded forthwith to the Director-General by the Board concerned."

The subcommittee set up by the Board under Reg. 4 did not interview the teacher but made its investigations, and duly reported to the Board which, on 20 March 1970, sent the teacher the following letter:

"Whangarei High Schools Board,
35 Bank Street, Whangarei.

20th March 1970.

Mr. P.W. Furnell,
Kamo High School,
Box 4137
KAMO

Dear Mr. Furnell,

A complaint has been made about your conduct at Kamo High School and has been investigated by a committee set up under the Secondary and Technical Institute Teachers Disciplinary Regulations 1969.

You are charged with various offences under section 158 of the Education Act 1964 in that:

1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:

(a) Failed consistently to maintain reasonable order and discipline in your classroom.

(b) Struck children on several occasions.

(c) Allowed a state of uproar to arise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Wild, C.J. (continued)

in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:

(a) In that your class attendance register wa. not marked from December 1 to 11 1969.

(b) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

You are accordingly suspended from your duties at Kamo High School as from today's date March 20 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8 to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you so wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any such statement you must advise the Board Secretary by not later than 4 p.m. on April 8 of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter.

Yours faithfully,

C.A. Reed
Chairman. "

The four charges enumerated in that letter relate respectively to paras (d), (e), (b) and (g) of s 158 (1) of the Education Act 1964 which section is as follows:

"158. (1) Every teacher commits an offence against this section who -

(a) By any act or omission fails to comply with the requirements of this Act:

(b) In the course of his duties disobeys, disregards, or makes wilful default in carrying out any lawful order or instruction given by any person or Board having authority to give such order or instruction:

(c) Is negligent, careless, or indolent in the discharge of his duties:

(d) Is grossly inefficient or incompetent in the discharge of his professional duties:

(e) Improperly uses property, stores, or equipment for the time being in his official custody or under his control or fails to take reasonable care of any such property or equipment:

(f) Absents himself from his duties without leave or valid excuse:

(g) Is guilty of conduct in his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service or shows his unfitness to remain in his present position or in the service.

(2) A teacher who is alleged to have committed an offence under this section shall be dealt with in accordance with section 159 of this Act."

In his affidavit in the proceedings that he later launched the teacher claimed, and this was nowhere denied, that until he received the letter of 20 March he had no knowledge that his conduct

In the Court of Appeal of New Zealand

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Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Wild, C.J. (continued)

was under investigation by a committee or anyone else, and that he had not been given any opportunity to make any explanation to the committee before it reported to the Board.

On receipt of the letter of 20 March the teacher consulted solicitors who, on 25 March, wrote the Board denying the charges, seeking further particulars, and asserting that on the face of it the regulations were completely ultra vires. The letter included the following sentence:

> "We cannot see how an investigation by a committee, set up by your Board, could properly take place without that committee at least obtaining some explanation from our client."

The Board replied on 6 April giving detailed further particulars of the offences alleged against the teacher, and on 20 April the teacher's solicitors sent the Board a statement of the teacher's denial of the charges and his explanation pursuant to Reg. 5(2) of the regulations. Having considered that statement and explanation, the Board decided to refer the charges to the Director-General of Education in accordance with Reg. 5(4)(c). On 29 May the Director-General wrote the teacher's solicitors saying that he had received from the Board particulars of charges made against the teacher under the regulations, reciting the charges, and adding:

> "After consideration of the matter, I have decided under para (c) of subcl (5) of Reg 5 of these regulations to refer the charges to the Teachers' Disciplinary Board for hearing and determination.
>
> "The hearing will commence at 10 a.m. on Tuesday 30 June 1970 in accordance with Reg 8 at a place in Whangarei which will be notified at a later date.
>
> "You should therefore make the necessary arrangements to present your case or to be represented at the hearing by counsel or agent as provided in subcl (2) of Reg 8."

At this point the teacher issued his first action against the Board, joining the members of

the Teachers' Disciplinary Board as second defendants. In his statement of claim he set out the facts that I have summarised; asserted a denial of natural justice on the part of the committee in consequence of which he claimed that his suspension by the Board was unlawful; alleged that the Board acted in breach of the regulations, and that the Director-General had acted without jurisdiction; and claimed also that his loss of net earnings by reason of his suspension was some $600, and that he had been brought into disrepute in the teaching profession. Against the Board he therefore claimed an injunction "removing the suspension and reinstating him to teaching duties", and against the members of the Teachers' Disciplinary Board he claimed a writ to prohibit them from hearing and determining the charges.

Some two months later the teacher filed a motion for certiorari against the Board. His statement of claim substantially repeated the material already mentioned and ended with a prayer for a writ of certiorari to remove "the proceedings instituted by the Board pursuant to the regulations and the decisions made thereunder by the Board" into the Supreme Court for the purpose of quashing those decisions.

The two sets of proceedings were heard together on 15 September and Speight J. delivered judgment on 22 October ordering:

(a) In the first action, an injunction to require the Board to remove the suspension of the teacher, and a writ to prohibit the Teachers' Disciplinary Board from hearing the charges on the reference made to it by the Director-General.

(b) In the second set of proceedings, certiorari "removing all decisions of the Board subsequent to receiving the report of the investigating committee into this Court and quashing the same."

At the outset of the hearing of this appeal the Court was informed by counsel that the teacher had in fact remained away from the school after the judgment and had resigned his post as from 1 February 1971, that he had been paid his salary for that period, but that he had not been paid for the period from the suspension on 20 March to the judgment on 20 October.

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Wild, C.J. (continued)

The crucial question, as counsel agreed, is whether the Board was obliged to give the teacher an opportunity to be heard before it exercised its powers under Reg. 5(1) to suspend him. On his examination of the regulations and surrounding circumstances Speight J. concluded that the power to suspend should not be exercised unless the investigation of the complaint under Reg. 4 had included some reference to the teacher of the nature of the allegations against him, and the opportunity for him to give his version of the matter.

The question of the circumstances in which the principle of audi alteram partem - for that is what is involved - is to be applied, was considered by the Privy Council in Durayappah v. Fernando (1967) 2 A.C. 337; (1967) 2 All E.R. 152. In their discussion of the topic their Lordships first observed (p.348; 155) that the statute under consideration in a particular case can make itself clear upon the point, in which case no question arises. Based on that dictum the Solicitor-General's first submission on this appeal was, in effect, that the regulations do make themselves clear upon the point. He contended that they provide a complete code for dealing with disciplinary matters involving teachers and that there is no room to imply rules relating to the requirements of natural justice. The Solicitor-General then founded an alternative submission on a later passage in the Privy Council's opinion in which their Lordships went on to consider the position where the statute in question is not clear on the application of audi alteram partem. The Board said that though the principle had been very closely and carefully examined in Ridge v. Baldwin (1964) A.C.40; (1963) 2 All E.R.66, no attempt had there been made to give an exhaustive classification of the cases where the principle should be applied. They said that outside the well known classes of cases no general rule could be laid down. Then followed this passage:

> "In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what

> occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

That statement was referred to by Lord Denning M.R. in the Court of Appeal in R. v. Gaming Board, ex parte Benaim (1970) 2 W.L.R. 1009; (1970) 2 All E.R. 528 in giving a judgment in which Lord Wilberforce and Phillimore L.J. agreed. The Master of the Rolls said:

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter: see what Tucker L.J. said in Russell v. Norfolk (Duke of) (1949) 1 All E.R. 109, 118 and Lord Upjohn in Durayappah v. Fernando ibid, 1016; 533)."

On the basis of these passages the Solicitor-General argued alternatively that an examination of the regulations and their subject-matter showed that in acting under the regulations a School Board was not bound to hear the teacher before suspending him.

I proceed to consider these alternative submissions in turn. To comprehend the scope and effect of the regulations it is first necessary to consider their history. The appointment and employment of teachers is provided for in ss 149 to 165 which fall within Part V of the Education Act 1964. In regard to offences by teachers there are two sets of provisions, one dealing with serious criminal offences, and the other with disciplinary offences within a defined category. The first provision is s.157 which specifies the action that may be taken against a teacher who is charged with having committed any offence for which the maximum punishment is not less than two years imprisonment. If such a charge is laid the Board may suspend the teacher or transfer him temporarily to other duties. If the teacher is convicted of such a charge he may be peremptorily dismissed or, if the Board so determines, be deemed to have committed an offence under the Act, and

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Wild, C.J. (continued)

penalised by transfer to any other position of the same or a lower salary or grading. Two points are clear from this section. First, the Board's power to suspend a teacher charged with an offence of the kind mentioned arises immediately the charge is laid and may be exercised without reference to the teacher. In the s cond place, the fact that in this section the Legislature regards suspension as something different from punishment is evident from the use in subs.(3) of the phrase "Any teacher who is dismissed or otherwise punished, or who is suspended" and from almost identical language in subs.(4).

Then follows s.158 the terms of which I have already set out. The wide range of offences falling within that section is immediately apparent. On the one hand it covers the most minor breach of discipline. On the other hand it would include all criminal offences which are not punishable by imprisonment for two years or more.

The steps to be taken where an offence under s.158 is alleged are set out in s.159. It will be necessary to refer to those presently but it should be said immediately that s.159 does not apply to the present case. The reason for this is to be found in s.161A which was inserted by s.7 of the Education Amendment Act 1969. That new provision authorises the making by Order in Council, on the advice of the Minister on the joint recommendation of the organisation of teachers representing the majority of teachers in any class of schools or specified positions and of the association representing the Boards employing the teachers in the schools or positions, of regulations (inter alia):

> "(a) Prescribing the procedure to be adopted for the investigation, hearing, and determination of the charge in any case where it is alleged that a teacher so employed has committed an offence against section 158 of this Act;
>
> ...
>
> "(d) Declaring that the provisions of section 159 of this Act shall not apply to any teacher so employed."

The Secondary and Technical Institute Teachers Disciplinary Regulations 1969, already mentioned,

did so prescribe and declare, and it was expressly agreed by counsel before us that they were duly made under the authority of s.161A and that they cover this case.

A comparison between the provisions of s.159 and the regulations reveals two main points of difference:

(1) Under s.159 (1) and (2), where an offence against s.158 was alleged against a teacher the first step was for the Board to give him full details of the charge in writing and to require him to state in writing whether he admitted or denied the truth of the charge. The charge having been made, the Board could also suspend or transfer the teacher pending the hearing and determination of the charge (subs.(7)). Under the regulations, however, where a complaint is made against a teacher the Board is required, before taking any action under Reg. 5, to appoint a person (not being an employee of the Board) or a subcommittee (which must include a representative of the teachers' organisation) to investigate the complaint and forward a written report to the Board including any recommendation thought fit. Not until it has received that report, and not unless it has reason to believe that the teacher may have committed an offence under s.158, may the Board take the next step which (comparable to but more elaborate than the procedure already noted in s.159 (1) and (2)) is forthwith to advise the teacher in writing of full details of the alleged offence and to require him to state in writing whether he admits or denies the charge and to forward any explanation he wishes to give, and to inform him that he may make a statement in person to the Board at a time to be specified. A power of suspension arises at the point where the Board has advised the teacher (as required by Reg. 5(1)), of the details of the offence alleged.

(2) The second difference relates to the Board's powers. Under s.159 (5), after considering the reports relating to the charge, the teacher's reply or explanation, and the report and notes of evidence of the committee set up under s.159 (3), the Board, if satisfied as to the truth of the charge may caution or reprimand the teacher, transfer him to an equivalent or lower salaried position, or peremptorily dismiss him or require him to resign.

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Wild, C.J. (continued)

Under the regulations, however, the powers of the Board are very much more limited. It can decide that no further action is to be taken, or it can caution, reprimand or censure the teacher, or refer the charge to the Director-General for consideration as to whether or not it should be referred to the Teachers' Disciplinary Board. But the Board can do no more. The Director-General may himself direct that no further action be taken, or that the matter be dealt with by exercise of the Board's powers of caution, reprimand or censure, or refer the matter to the Teachers' Disciplinary Board for hearing and determination. This Board, which is established under Reg. 7, comprises a barrister or solicitor as chairman, one member (not being a teacher at the school in which the teacher charged is employed) appointed by the teachers' organisation, and another member (not being a member of the Board concerned, or a teacher at the school concerned, or a departmental officer) appointed by the Boards' Association. Regulation 8 sets out an elaborate procedure for the hearing and determination of the charge by the Teachers' Disciplinary Board which, under Reg.10, has powers to impose penalties ranging from caution to peremptory dismissal.

From this summary I think it is plain that a School Board's powers of discipline over its teachers were severely pruned by the substitution of the regulations for s.159. Before the Board can take any disciplinary action at all it must now arrange a preliminary investigation in the light of the report of which, and any recommendation included, it must then consider whether it has reason to believe that the teacher may have committed an offence to which s.158 applies. Even if, after considering that report and any explanation or statement in person by the teacher, the Board then decides that the charge should proceed, its own powers to deal with it are substantially circumscribed by the provision for the reference to the Director-General, and by the fact that the imposition of heavier penalties is a function now reserved to the Teachers' Disciplinary Board. There can be no doubt that the object of the regulations was, as Speight J. said, to provide "additional protection for teachers". Moreover, it is evident that the regulations have been comprehensively drawn to provide what Speight J. described as "very careful procedures". The Solicitor-General pointed out that

they establish a five-tiered structure of inquiry from the preliminary investigation, through the Board, the Director-General, and the Teachers' Disciplinary Board to the teachers' court of appeal, and he submitted that they represent a complete code. Though Mr. Golightly submitted in answer to this that there was no provision in Reg. 6(1) for a teacher to be heard before the Board exercised the powers there given, I think that point is met by the fact that those powers do not arise until the requirements of Reg. 5 have been complied with, requiring the teacher to be advised in writing of full details of the alleged offence, entitling him to forward an explanation, and allowing him if he wishes to make a statement in person. When it is borne in mind that the regulations were brought into existence on the recommendation of representatives of the teachers and of the School Boards I think it is clear from both their history and their content that they provide a code of disciplinary procedure which is complete and exhaustive. That must be regarded as a strong indication that the regulations leave no room for any rule of natural justice to be implied.

On this question, however, counsel for the respondent cited the judgment of Kitto J. in Testro Bros. Pty. Ltd. v. Tait (1963) 109 C.L.R.353. Though that was a dissenting judgment there is nothing to show that the other members of the High Court disagreed with the passage on which Mr. Golightly relied. One of the questions in the case was whether an inspector appointed to investigate the affairs of a company was bound before making his report (which could be admitted in subsequent proceedings as evidence of the opinion of the inspector and of the facts upon which it was based) to give the company an opportunity of answering or explaining matters which might give rise to adverse findings or comment in the report. In considering whether the prejudice to the company might be such as to attract the rules of natural justice, Kitto J. said:

> "The foundation of the rule, after all, is the recognition that where a Legislature or other body is found entrusting to a person a power to alter for the worse another's legal situation in virtue of a judgment formed after inquiry, it should be credited, unless it

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Wild, C.J. (continued)

otherwise indicates, with an intention to be understood as speaking in the context of generally accepted ideas of decency in adjudication ..... The general conclusion seems justified that an inquiry may be of the character that implies a necessity to allow a person affected a fair opportunity to be heard, notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of a discretionary power by another authority. The reason is that the report itself prejudices the rights by placing them in a new jeopardy" (ibid, 368).

In considering whether the report and any recommendation of the investigating committee under the present regulations itself prejudices the teacher's rights by placing them in a new jeopardy I think it is appropriate to examine the regulations in the light of the three factors mentioned in the passage already cited from Durayappah v. Fernando (supra).

The first factor is the office held or status enjoyed, which is that of a school teacher. This is a post of standing and respect, and it is necessary to add only that any question of discipline affecting a teacher affects also the reputation of his colleagues and his school and the welfare of the pupils.

Secondly, in what circumstances and on what occasions may the Board act? When the Board receives the report of the investigation it must first decide whether it has reason to believe that the teacher may have committed an offence. If it has not, that is the end of the matter. If it has reason so to believe the Board is at that point entrusted both with a duty and a power. The duty is forthwith to advise the teacher in writing of the full details of the alleged offence. The Board has no alternative but to do that. The power, however, is permissible, and requires the Board to make a different decision, which is whether or not it should suspend the teacher. It does not follow that, because the Board has reason to believe an offence may have been committed, it will necessarily suspend the teacher. As Speight J. recognised, the Board may decide that the circumstances do not call

for suspension though the charge itself should proceed. But in my view it is evident that, in providing the power to suspend, the authors of the regulations had very much in mind the interests of the pupils and were conscious that the Board might have to act quickly. The need for this is obvious. Take the case of a master in a co-educational school who is discovered on the school premises in the act of sexual intercourse with a 16-year-old girl pupil. That is not a criminal offence at all. It can therefore be dealt with only under the regulations. But in such a case the need to remove the teacher from the scene is obvious, not only for the sake of the school but quite conceivably in the interests of the teacher's own defence. Even so, the teacher is not left without any protection at all, for the suspension cannot be effected until the preliminary investigation has been made, reported upon, and considered.

This leads to the third factor, which is the sanction the Board is entitled to impose - suspension. Mr. Golightly cited John v. Rees (1970) Ch. 353; (1969) 2 All E.R. 274, a case relating to a dispute in a political party, in which Megarry J. said:

> "In essence suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment, the rules of natural justice prima facie apply to any process of suspension in the same way that they apply to expulsion" (ibid, 397; 305).

In my opinion, however, that observation cannot be applied to the regulations here, where a clear distinction is drawn between suspension pending the determination of the matter and the penalties that may be imposed when the charge is proved. It is very important to note that the power is a power to suspend "pending the determination of the matter in accordance with the following provisions ....."

In his judgment Speight J. referred in different places to suspension as " a substantial penalty", "a grave step" and "a grave penalty". With respect I think that these were overstatements which led to an erroneous conclusion. As the word itself

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Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Wild, C.J. (continued)

connotes and the whole context makes clear, suspension is not a penalty but a temporary measure taken for the purpose of removing the teacher from his post pending a decision by the Board under Reg. 6(1), or the Teachers' Disciplinary Board under Reg. 8(4), as to whether the charge has been proved. It is only at that point of proof that a penalty can be imposed. Moreover, if the decision either by the Board or the Director-General is that no further action is to be taken in relation to the charge, then Reg. 5(4)(a) and (5)(a) require that, if the teacher has been suspended, he is to be reinstated in his position and receive his full salary for the period of suspension. If the matter goes to the Teachers' Disciplinary Board and that tribunal holds the charge not proved it must, if the teacher has been suspended, direct that he be reinstated and shall receive his full salary. Both as to his position and his salary the teacher's position is thus restored. No doubt, as Speight J. said, a residuum of damage to his reputation remains. That fact could hardly have escaped the representatives of the teachers and the Boards who recommended the regulations. In my view it must be taken to have been accepted by them as one of the hazards of the vocation of teaching, just as it is undoubtedly a hazard of other professions where standards of personal conduct bear on the public interest.

For these reasons I think Speight J. was wrong in his conclusion that there should be no suspension unless, as he put it, under Reg. 4:

> "the investigation of the complaint includes some reference to the teacher of the nature of the allegations made against him and a statement from him giving his version of the event if he wishes".

The terms of the regulations do not require such a reference or the opportunity for such a statement. Nor, having regard to the history and purpose of the regulations and to the language used, do I think the Court is at liberty to engraft on to them a provision which appears deliberately to have been omitted.

In the light of that conclusion I find it unnecessary to consider Mr. Mathieson's submission that, even if the rules of natural justice are to

be implied, the teacher was nevertheless not entitled to certain of the forms of relief he sought.

I would allow the appeal and discharge the orders made in the Supreme Court in both sets of proceedings.

That being the unanimous opinion of the Court, the appeal is allowed and the Orders made in the Supreme Court are discharged.

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Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Wild, C.J. (continued)

North, P.

NORTH, P. I have had the opportunity of reading and considering the judgment the Chief Justice has just delivered. I agree so fully with all that he has said that there is little that I can usefully add. However, as we are differing from the view expressed by Speight J. in the Court below, it is perhaps as well that I should add a few words of my own.

I think it emerges quite plainly that Speight J. was unduly impressed with the argument for the respondent that "suspension" was really a form of punishment and therefore it would be unjust for any teacher to suffer this form of punishment without first being heard in his own defence. For the reasons which have been given by the Chief Justice, in my opinion that was not the correct approach. It may be that in other circumstances to suspend someone from an office without giving him the opportunity of making any explanation for his conduct might offend the principles of natural justice. But in the present case, in my opinion, it is manifest that it was recognised by Parliament from the beginning that in some cases the public interest made it necessary purely as an administrative act that a Board should have the power to suspend a teacher pending the hearing and determination of the charge (see s.159 (7) of the Education Act 1964). No doubt a teacher who has been suspended suffers some humiliation, but the public interest must come first and the example given by the Chief

In the Court of Appeal of New Zealand

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Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

North, P. (continued)

Justice clearly demonstrates the necessity for a Board having the power to suspend a teacher immediately if it thinks it necessary to do so. The other provisions of the Act assure the teacher of a proper hearing of the complaint in due course. Suspension is merely imposed as a precautionary measure, not as a mark of guilt.

Now in the present case we are not concerned with s.159, but as I understand the argument for the respondent it is that the legal position changed when this school became subject to the Secondary and Technical Institute Teachers Disciplinary Regulations 1969. In my opinion, it may properly be inferred that when these regulations were approved, the teachers' organisation must have been of opinion that secondary school teachers were entitled to a greater measure of protection from unworthy complaints than was the case when they were subject to the procedure laid down in s.159. Thus Reg. 4 requires that first of all there shall be a preliminary investigation of any complaint. This may be undertaken by a single investigator or by a subcommittee. The results of the investigation, together with the investigating body's recommendation must then go to the Board before any action is taken. In my opinion, it is plain that this additional protection was provided solely to ensure that the teacher did not suffer the humiliation of an order of suspension in cases where the investigating body was of opinion that there was little or no substance in the charge. But I cannot accept Mr. Golightly's submission which found favour with the Judge in the Court below that because the Legislature thought it right to provide secondary and technical school teachers with this additional protection it was intended that the investigating body should be required to hear what the teacher had to say in respect of the complaint before it made its report. To hold that this was so would, in my opinion, not only be quite unjustified on a reading of the regulation, but indeed might be a cause of embarrassment to the School Board or to the Teachers' Disciplinary Board, as the case might be, when the full inquiry was undertaken later.

For these reasons, I too am of opinion that the appeal should be allowed and the orders made in the Court below should be discharged.

TURNER, J. I agree with the two judgments which have been delivered, and have nothing to add.

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Reasons for Judgment of the Court of Appeal of New Zealand

19th March 1971

Turner, J.

No. 11

Judgment of Court of Appeal

19th March 1971

No. 11

JUDGMENT OF COURT OF APPEAL

(Nos. C.A. 65 & 66/70)

Friday the 19th day of March 1971

BEFORE THE RIGHT HONOURABLE THE CHIEF JUSTICE (PRESIDING)
THE RIGHT HONOURABLE MR. JUSTICE NORTH
THE RIGHT HONOURABLE MR. JUSTICE TURNER

THIS APPEAL coming on for hearing on the 10th and 11th days of February 1971 AND UPON HEARING Mr. Savage, Q.C. Solicitor-General and Mr. Mathieson of Counsel for the Appellant and Mr. J.D. Golightly of Counsel for the First Respondent THIS COURT DOTH HEREBY ORDER that the appeal be allowed and the judgment of the Supreme Court herein be vacated AND THIS COURT DOTH FURTHER ORDER that in the appeal brought by the parties under No. C.A. 66/70 the First Respondent shall pay to the Appellant by way of costs and disbursements the sum of $628.67 as set out in the schedule annexed hereto.

BY THE COURT

L.S. "G.J. GRACE"

REGISTRAR

In the Court of Appeal of New Zealand

No. 11

Judgment of Court of Appeal

19th March 1971 (continued)

SCHEDULE

In the Supreme Court:

Costs ordered by the Court of Appeal		$300.00
Disbursements		
2 Statements of Defence	4.00	
Amended Statement of Defence	2.00	
Warrant to Defend	2.00	
Certificate as to Security for Costs	2.00	
Sealed copy of order for certiorari	2.00	
Sealed copy of order for injunction and prohibition	2.00	14.00

In the Court of Appeal:

Costs ordered by the Court of Appeal		$200.00
Printing Case on Appeal		49.67
Disbursements		
Motions on Appeal	20.00	
Praecipe to set down	6.00	
Case on Appeal	2.00	
Hearing Fee (2 days)	30.00	
Sealing judgment and duplicate	7.00	65.00
		$628.67

No. 12

Order granting Conditional Leave to Appeal to Her Majesty in Council

1st June 1971

No. 12

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

Tuesday the 1st day of June 1971

BEFORE THE RIGHT HONOURABLE MR. JUSTICE NORTH
THE RIGHT HONOURABLE MR. JUSTICE TURNER
THE HONOURABLE MR. JUSTICE HASLAM

UPON READING the Notice of Motion of the Respondent filed herein AND UPON HEARING Mr. J.G. Stevens of

Counsel on behalf of the Respondent, and Mr. P. Neazor, of Counsel on behalf of the Appellant, THIS COURT DOTH ORDER that the Respondent do have conditional leave to appeal to Her Majesty in Council from the judgment of this Court herein UPON THE CONDITIONS:

(a) That the Respondent shall within a period of three months from the date of this order enter into good and sufficient security to the satisfaction of the Court, in the sum of Five Hundred Dollars, for the due prosecution of this appeal to Her Majesty in Council and the payment of all such costs as might become payable to the Appellant in the event of the Respondent not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the Respondent to pay the Appellant's costs (as the case may be).

(b) That within the like period the Respondent shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England.

By the Court

L.S. "D.V. JENKIN"

REGISTRAR

In the Court of Appeal of New Zealand

No. 13

Order granting Final Leave to Appeal to Her Majesty in Council

21st December 1971

No. 13

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL OF NEW ZEALAND

NO. C.A. 66/70

BETWEEN: THE WHANGAREI HIGH SCHOOLS BOARD
Appellant

A N D : PAUL WALLIS FURNELL
Respondent

BEFORE THE RIGHT HONOURABLE MR. JUSTICE NORTH, PRESIDENT
BEFORE THE RIGHT HONOURABLE MR. JUSTICE TURNER
BEFORE THE RIGHT HONOURABLE MR. JUSTICE McCARTHY

Tuesday the 21st day of December, 1971

UPON READING the Notice of Motion of the Respondent filed herein AND UPON HEARING Mr. J.G. Stevens, of Counsel on behalf of the Respondent, and Mr. D.L. Mathieson, of Counsel on behalf of the Appellant THIS COURT HEREBY ORDERS that the Respondent do have final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court delivered herein on Thursday the 19th day of March, 1971.

By the Court

L.S. "D.V. JENKIN"

REGISTRAR

IN THE PRIVY COUNCIL No. 7 of 1972

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

PAUL WALLIS FURNELL Appellant (Plaintiff)

- and -

THE WHANGAREI HIGH SCHOOLS BOARD Respondent (Defendant)

RECORD OF PROCEEDINGS

SLAUGHTER AND MAY,
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Solicitors for the Appellant.

ALLEN & OVERY,
9 Cheapside,
London, EC2V 6AD.

Solicitors for the Respondents.