IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2015-409-000145
[2015] NZHC 536

BETWEEN	JORDAN TERRENCE KENNEDY by his litigation guardian SHANE JOSEPH KENNEDY First Applicant
AND	JACK MCGOWAN BELL by his litigation guardian ANTONY MCGOWAN BELL Second Applicant
AND	JUSTIN BOYLE First Respondent
AND	THE BOARD OF TRUSTEES OF ST BEDE'S COLLEGE Second Respondent

Hearing: 23 March 2015

Appearances: A D Marsh for Applicants
A M McCormick for Respondents

Judgment: 23 March 2015

JUDGMENT OF DUNNINGHAM J

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[1] This morning I granted an interim injunction restraining the Rector of St Bede's College and the College's Board of Trustees from the implementing the schools decision to prevent the applicants from rowing at the 2015 Maadi Cup at Lake Karapiro near Hamilton.

[2] Because the first rowing race was scheduled for 11.28 am this morning, my decision was issued without reasons. I undertook to give reasons as soon as practicable and this decision sets those reasons out.

[3] The applicants are 17 year old Jordan Kennedy (Jordan) and 16 year old Jack Bell (Jack). They are students of St Bede's College in Christchurch and are members of the St Bede's College rowing team. In this litigation their respective fathers are appointed as their litigation guardians.

[4] On Friday 20 March 2015 Jordan and Jack flew north from Christchurch to attend the 2015 Maadi Cup regatta at Lake Karapiro. The boys were part of a group of 10 St Bede's boys who were accompanied by two coaches. They completed the first leg of their journey early on Friday morning, flying from Christchurch to Auckland. When they arrived in Auckland Airport, the boys were left unsupervised at the baggage carousel area, while the coaches went away to pick up a rental van. It appears as though some of the group of boys suggested that Jordan and Jack get on to the baggage carousel at the airport, and ride on it so they were conveyed out into the secure baggage area, while this was filmed by one of the other boys. The explanation the Court has is that Jordan and Jack intended it as a prank and they did not turn their mind to the potential consequences of this.

[5] As a result, they were interviewed by both airport security staff and by the police. Although the seriousness of what they had done was made clear to them, it was decided to take no further official action other than to give them a warning.

[6] However, the school, understandably, took a dim view of this behaviour. The head coach of the rowing team made contact with the Head of Sport by email, outlining what the boys had done. The matter was referred to the Rector of the school who decided, given the seriousness of the incident, that both boys would be suspended from the rowing team, and should make their way back home to Christchurch. This decision was conveyed to Jordan's father at around 2.00 pm on Friday.

[7] The boys' parents were concerned with the decision. Mr Kennedy explained those concerns included that:

(a) the other boys who had encouraged them to undertake the prank and who had filmed the incident, were not punished;

(b) the school had not investigated the matter fully by interviewing the boys, their parents or the coaches about the incident, or by contacting the police or airport security;

(c) they had not taken into account the serious and disproportionate implications for both boys, in terms of their possible representative selection, nor of the effects on the other members of their team;

(d) they had not considered that the decision would prevent the boys from being considered for selection for the New Zealand trials, and would therefore be an excessive and disproportionate punishment for what was intended to simply be a prank.

[8] On Saturday the school was contacted by a lawyer for the families. In an email to the school's Rector he asked the school to reconsider its decision and expressed concerns about whether the principles of natural justice had been followed in making the decision including by considering the severe consequences of standing down the two boys. In particular, the school was advised that Jordan had been an under 18 South Island rower for the last two years and participating in the 2015 Maadi Cup was "his best opportunity to gain a New Zealand under 19 trial later this year'. If he was not able to participate in the Cup, he would not be able to attend trials for the New Zealand under 19 team and would miss his opportunity to push for national representative honours. It went on to say that Jack was also an outstanding rower for his age and would likely be an under 18 South Island rower this year.

[9] The email also pointed out that both the boys and their wider rowing crew had put in countless hours and months of hard work to get to this point and removing two boys from a crew of eight at such a late stage would have a material adverse effect on the rest of the crew and would also penalise the families and the rowing club who had incurred significant expense to get the boys to the regatta. The email advised that if the decision was not reversed, then an interim injunction would be sought.

[10] The Rector, the Deputy Principal and the school's legal adviser flew up to Lake Karapiro on Sunday 22 March 2015 and met with one of the parents, Mr Kennedy, for just over an hour that afternoon. At the meeting, the discussion focused on whether the school would reverse its decision and allow the boys to row. Mr Kennedy says that, following the meeting, the Rector confirmed he would not be reversing his decision. He had done this despite not having conducted any further investigation into the incident, including speaking to the boys themselves, the rest of the team and Jack's parents.

[11] In Mr Kennedy's affidavit he says the decision fails to take into account the "serious and disproportionate implications for both the boys in terms of their possible representative selections and those of other members of their crews". He reiterates that Jordan was supposed to row in both the under 18 Four and the under 18 Eight and that he has been a member of the South Island under 18 rowing team for the last two years. If he is able to row in the Maadi Cup there is a very good chance he would be selected to attend the trials for the New Zealand under 19 team and possibly make the team to attend the Junior World Championships. If he does not row at the Maadi Cup, he cannot be selected to attend those trials. Jack was supposed to row in the under 17 Eight and the under 18 Four and Eight. He is understood to have a good chance to be selected in the South Island under 18 team, if he is able to row at the Maadi Cup.

[12] The under 18 Eight crew had practice runs on Saturday 21 March and Sunday 22 March. Jordan and Jack did not take part in the Saturday practice, but were back in the boat for the Sunday practice. The crew were six seconds faster over 500 metres with them in it which equates to a 24 second difference over the course. Some selections for the New Zealand trials are based on finishing first or second in the relevant finals races. Mr Kennedy's evidence is that both Jordan's crews are gold medal chances with him in the boat, but without him in the boat, not only are Jordan's chances of selection hurt, but so are the chances of his crew mates.

[13] Mr Kennedy said that the boys do not have significant behavioural histories. He acknowledges his son Jordan was stood down for three days as a year 9 student for a disciplinary incident, but says that was the only time that they had ever been

called to the school to discuss a disciplinary issue. Jack has never been formally stood down or subject to any serious disciplinary issue, although he was involved in an incident at the 2014 Maadi Cup. He says Jack was not the instigator of that and the school imposed a punishment on Jack and the other boys following that event.

[14] Mr McCormick, representing the school, explained that the Rector made the decision primarily in reliance on the information obtained by Mr Meates, the head coach of the rowing team. While the coach was not present at the time of the incident, there was no dispute that the boys did ride on the conveyor belt and go into the secure area of the airport in clear breach of both airport security rules and the requirements in a Code of Conduct signed by the boys and their parents prior to going on the trip. That document required them to comply with all instructions, school rules and societal laws and warned the boys that any serious breach may lead them to being sent home. Parents also signed their consent to the school making a decision to send their child home for any serious breach of the Code of Conduct.

[15] The school took the view that the incident was a serious matter by reference to it being a breach of Civil Aviation rules which could lead to prosecution. It was aware that Aviation Security Services had decided not to charge and took this into account in making its decision. However, the school also took on board the fact that the boys did not have unblemished disciplinary records and, in terms of effects on third parties, including the other team members, their families and sponsors, it was pointed out they could bring in other boys to fill Jack and Jordan's place. This was what they would have done if the boys were prevented from participating if they were injured or unwell, so the other members of the team were not prevented from participating in the regatta.

[16] The fact that the boys would miss the opportunity for national selection, and it would potentially hinder the other team members' opportunity for success at the regatta was, from the school's perspective, simply a foreseeable consequence of the boys' behaviour and their breach of the Code of Conduct that they had agreed to.

[17] The school emphasised it had to make these decisions speedily. It was important to send the message to both other team members and to all students

entrusted to represent the school on school trips, that their behaviour had to be of a certain standard, failing which they would be sent home with all the natural consequences for other team members that that punishment might have. The school therefore stood by its decision.

Application for review of the decision

[18] The application for interim injunction was accompanied by a memorandum outlining the grounds for seeking judicial review of the decision. In summary, the allegations are as follows:

(a) The decision is effectively a "standing down" or a "suspension" under the Education Act, so before making any decision the respondents were first required to:

(i) consider whether grounds exist to suspend the applicants;

(ii) consider the range of responses available depending on the level of seriousness;

(iii) ensure that the principles of natural justice were complied with; and

(iv) ensure that the process and the sanction imposed was "tailored to the particular circumstances, rather than driven by hard and fast rules".

The applicants assert that the respondents have not complied with those obligations as there has not been the required level of examination of the particular situation that arose by the principal or the school.

(b) Alternatively, the decision relied on s 76 of the Education Act, which provides a principal with "complete discretion to manage as the principal thinks fit the school's day to day administration". However,

the exercise of discretion is expressly subject to "any enactment, or the general law of New Zealand". This means a disciplinary decision has to be exercised reasonably and fairly and taking into account the rights of the applicants, which the applicants assert did not occur here.

(c) Even if this was not a decision made pursuant to these particular statutory provisions, the Court can and will review decisions which are made by a school in a disciplinary context, and where "the decision will have serious consequence for the applicant; and the consequence of the decision are clearly disproportionate to the nature of the harm alleged".[1] The applicants say the respondents did not make a reasonable or proportionate decision taking into account all relevant considerations.

(d) Finally, it was claimed that the applicants have a cause of action against the school for breach of contract, including an implied term to act reasonably in making disciplinary decision, and which the school has breached.

[19] Whatever the legal route to the challenge, the alleged flaws in the school's decision making process are as follows:

(a) the decision was made without fully and fairly considering or investigating the exact nature of the incident, or the actions of the applicants;

(b) the applicants and their parents had no opportunity to provide any response to the respondents about the incident, or the possibility of the decision being made;

(c) the decision was made without contacting airport security or the police to obtain full details of the incident, in particular their decision not to take matters any further;

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1 *Battison v Malloy* [2013] NZHC 1462.

(d) the decision failed to take into account:

(i) the personal circumstance of the applicants;

(ii) the applicants' very real remorse;

(iii) the actions of the other boys involved in the incident;

(iv) the possible contribution by this school to the incident by the school's failure to send staff for the boys to supervise them while travelling;

(v) the serious and severely disproportionate consequences of the decision on the applicants;

(vi) the serious consequences of the decision to the applicants' crew mates; and

(vii) the range of other possible punishment options available to the respondent.

[20] The applicants also claim the further meeting which took place with Jordan's father on 22 March 2014 did not amount to a full reconsideration of the decision or correct the breaches of natural justice that occurred when the first decision was made because it simply confirmed that the decision already made would not be reversed and, aside from obtaining the views of Jordan Kennedy's father, did not correct any of the shortcomings of the first decision.

Should the interim injunction be granted?

[21] The relevant considerations when granting an interim injunction are well settled. The threshold question is whether there is a serious question to be tried. If there is, then I must also consider where the balance of convenience lies, before deciding whether the interim injunction should be granted.

[22] I accept Mr McCormick's submission that where the consequence of granting an interim injunction are effectively permanent (in this case to deprive the school of utilising the disciplinary power to prevent these students from representing their school in the Maadi Cup), then one should investigate the merits of the case with more rigour. As was said in *DB Breweries Ltd v Lion Nathan Ltd*:[2]

> Where the consequences of granting an interim injunction may be permanent and extreme, the strength of the applicants' case must weigh heavily.

[23] In this case, while I do not deprive the school of its right to discipline these students by granting the interim injunction, my decision does deprive the school of the right to carry out the particular punishment proposed, being to deny the students the right to participate in the Maadi Cup.

[24] At this preliminary stage, I do not consider it is necessary to identify which of the routes to challenge the validity of the decision are the most meritorious. I simply proceed on the basis that disciplinary decisions, which have serious consequences for the affected student, will be amenable to judicial review if the decision is made in breach of natural justice, or without regard to relevant considerations (which conclude the proportionality of the punishment to the misconduct) or by having regard to irrelevant considerations.

[25] The school characterises the behaviour as serious misconduct which justified invoking the threat in the Code of Conduct signed by the students to withdraw them from participation in the Maadi Cup and sending them home. I accept that the school had to make the decision in a short timeframe, and the opportunity to conduct a full enquiry and weigh up all relevant considerations may need to be truncated in such circumstances. However, as was said in *M and R v Syms*, it is still necessary to carefully consider an individual case, on its merits, in reaching a decision, and in doing that "all the individual circumstances must be weighed".[3]

[26] I am satisfied that there is at least a serious question to be tried here as to whether that was done in the present case. I think it at least seriously arguable that to

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2 *DB Breweries Ltd v Lion Nathan Ltd* (2007) 12 TCLR 25.
3 *M and R v Syms* [2003] NZAR 705.

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

[27] I also consider there is a serious question to be tried as to whether the school did have regard to all relevant considerations, including the consequences of the decision on other team members, parents and sponsors. Unless that was done adequately it may mean that the disciplinary action taken by the school was not proportionate to the misconduct.

[28] Having reached that conclusion, I turn now to question of where the balance of convenience lies.

[29] In this case I am also satisfied that it favours the applicants in this matter. If the decision was invalid but the interim injunction not granted, the applicants cannot be adequately compensated for the opportunities they have lost. Furthermore, the potentially affected third parties, including the applicants' team mates, their families and the sponsors, can also not be adequately compensated. The effect of the school's decision is that the applicants will not be able to row in the main event in the New Zealand School's rowing calendar. That will affect the chances of both applicants trialling for New Zealand representative rowing teams, and, for Jordan at least, would stymie his only opportunity to attend the Junior World Championships.

[30] The applicants argue that the principal and the school will not suffer significantly if the interim injunction is granted, as the school is still able to discipline the applicants appropriately after undertaking of a full and fair investigation in consideration of the matter. Indeed, Mr Kennedy advises that the parents of the applicants will support the school in any such appropriate punishment that may be imposed.

[31] However, of course, I recognise that the school too, will suffer adverse consequences if the interim injunction is granted when its decision may be

vindicated in subsequent proceedings. The grant of an interim injunction is a very public process whereby the school is restrained from implementing the potent disciplinary tool of preventing its students from participating in an activity which is important to them. The school will want to send a message that misbehaviour when students who are entrusted to represent the school on outings such as this, will have swift and severe consequences and it understandably sees an interim injunction as having consequences beyond this case for using this as a disciplinary tool.

[32] I must therefore take into account in deciding where the balance of convenience lies, whether the school's ability to use swift and potent sanctions for misbehaviour, which may be corrected afterwards if undertaken unfairly, should prevail over the immediate and irreparable adverse consequences for these two boys in this case, if the decision process is found to be unlawful.

[33] In this case, I am satisfied that the balance of convenience favours the applicants, partly because the harm that would be caused to them if the decision was unlawful cannot be compensated for in any other way, but also because the decision impacts on third parties in a way that also cannot be compensated for if the decision is found to have been unlawful.

[34] In contrast, the school is able to have its decision vindicated on review if it can satisfy the Court that the allegations of deficiencies in its decision making process cannot be sustained. Thus while the grant of the interim injunction has consequences for the school, it cannot be said these are as irreversible as the consequences for the applicants. For that reason I have concluded that the balance of convenience favours the applicants.

Name suppression

[35] Mr Marsh sought suppression of the boys' names when I heard the matter this morning. However, given the matter is already the subject of media attention and, both the school and the rowing community are already well aware of the names of the boys involved, I consider there is little practical purpose in granting name suppression now.

[36] I therefore decline to make an order suppressing the boys' names.

Costs

[37] Costs are reserved.

Further directions

[38] For the reasons set out above I made orders this morning granting the interim injunction. It must be said, however, that such orders are neither an endorsement of the boys' behaviour, nor a decision that the school's response was inappropriate. It may well be that the school's response is ultimately vindicated. The orders are intended to do no more than protect the position of the party which is most likely to suffer irremediable consequences in the interim while the underlying merits of the applicants' challenge to the decision is advanced.

[39] To that end, it is important that the applicants' claim is advanced promptly as I recognise the importance for the school of having the validity of its decision tested. Mr McCormick was hopeful that could happen this week, prior to the conclusion of the Maadi Cup. I do not see how practically that can be achieved when most of the key players are involved in the regatta and simply cannot participate in urgent legal proceedings.

[40] However, I do think the matter should be progressed quickly. The applicants, having asserted the decision is invalid, are directed to file a formal statement of claim by 5.00 pm Wednesday 25 March 2015, failing which the interim injunction will be lifted.

[41] A case management conference is to be convened as soon as the statement of defence is filed to progress the matter to hearing.

Solicitors:
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