IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2014-441-000061
[2014] NZHC 1462

UNDER	the Judicature Amendment Act 1972 and the Bylaws Act 1910
IN THE MATTER	of a Judicial Review of a decision to suspend a student of St John's College, Hastings and a challenge to a school bylaw
BETWEEN	LUCAN WESLEY BATTISON suing by his Litigation Guardian TROY PATRICK BATTISON Plaintiff
AND	PAUL MELLOY First Defendant
	THE BOARD OF TRUSTEES OF ST JOHN'S COLLEGE Second Defendant

Hearing:	23 June 2014 (at Wellington)
Counsel:	J L Bates and N E H Logan for Plaintiff R M Harrison for Defendants
Judgment:	27 June 2014

JUDGMENT OF COLLINS J

Introduction

[1] Lucan Battison (Lucan)[1] was suspended from St John's College, Hastings (the School) for failing to comply with requests from the School's principal (Mr Melloy) that Lucan cut his hair. Lucan has been told by the School's Board that

[1] Because Lucan is 16 he needs a litigation guardian. I have appointed his father, Mr Battison, Lucan's litigation guardian pursuant to the High Court Rules, r 4.27(c).

he can return to the School if he cuts his hair to comply with the School's hair rule, which provides that the students' uniform is to include:

> hair that is short, tidy and of natural colour. Hair must be off the collar and out of the eyes. (Extremes, including plaits, dreads and mohawks are not acceptable).

Lucan has also been told by the Board that his hair must be cut to the satisfaction of Mr Melloy as a condition to him returning to the School.

[2] Three general issues arise from this proceeding:

(1) the lawfulness of the disciplinary action the School took against Lucan;

(2) the lawfulness of the School's hair rule; and

(3) the lawfulness of schools' rules that attempt to regulate a student's hair.

[3] In this judgment I only need reach conclusions in relation to the first two general issues.

[4] I have concluded that the decisions suspending Lucan were unlawful because they did not comply with s 14(1)(a) of the Education Act 1989 (the Act) which provides that a student can be suspended by a principal if he or she is satisfied on reasonable grounds that the student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school. I have also concluded that the conditions imposed on Lucan's return to the School by the Board were unreasonable in the circumstances of this case.

[5] Because the lawfulness of the hair rule may prove to be a contentious issue for the School and Lucan, I have also concluded the School's hair rule is unlawful because it breaches the common law requirement that rules, such as the hair rule, be certain.

[6] I am therefore granting Lucan's application for judicial review and I am issuing declarations that reflect the conclusions I have summarised in paragraphs [4]-[5] of this judgment.

[7] To assist in understanding my reasons I have divided this judgment into three parts:

Part I – Background

Part II – The suspension decisions

Part III – The hair rule

Part I – Background

The key facts

[8] Lucan is in Year 12 at the School. He is currently studying NCEA Level 2.[2] Lucan believes he is a typical teenager.[3] The School does not dispute Lucan's assessment of himself, and describes Lucan as "being a nice young man".[4] Aside from this challenge to what he perceives to be an injustice over the way he has been treated, Lucan loves attending the School, in part because it is a Catholic school and his faith is important to him.[5] Lucan represents the School in rugby as a member of its First XV. An insight into Lucan's character can be gleaned from the fact that in March this year he received a civil bravery award for participating in the rescue of two young women, who nearly drowned in dangerous swimming conditions at a Hawke's Bay beach in early 2013.

[9] The School was founded in Hastings in 1941 by Marist Brothers. It is now a state-integrated Catholic school for boys with a well-established reputation for scholastic and sporting success.

---

2 National Certificate of Education Achievement.
3 Affidavit of L W Battison, 10 June 2014 at [7].
4 Affidavit of E K Breen, 13 June 2014 at [8].
5 Affidavit of L W Battison, 10 June 2014 at [10].

[10] The School is subject to the Act.[6] It has a charter and a set of rules for students. Those rules include a section on the School's uniform which prescribes the way students are to present themselves. The relevant portion of that rule contains the "hair rule" which I have set out in paragraph [1] of this judgment.

[11] It has not been possible to determine when the hair rule was first adopted by the School. Mr Battison has annexed to his second affidavit photographs of students at the School in the mid-1970s. The photographs show many boys with hair considerably longer than Lucan's. A number of the students in these photographs have become successful members of society, including one who has recently been appointed a District Court Judge. If the hair rule existed in the mid-1970s it was not enforced.

[12] Lucan was enrolled at the School in July 2010. At the time he was enrolled Lucan and his parents signed an agreement to abide by the School's rules. Lucan and his parents were provided with the "Rules for Students", which included a statement of the hair rule.[7]

[13] Lucan has naturally curly hair. Although his forehead is clear, the side strands of Lucan's hair cover his ears and the back strands of his hair touch his collar. There is no issue about the cleanliness of Lucan's hair. Nor is it suggested his hair endangers Lucan or others. The sole issue is the length of Lucan's hair. Lucan is willing to wear his hair tied back in a neat bun. When he does this his hair is above his ears, off his collar and out of his eyes.

[14] There is evidence Lucan has worn his hair at its current length for most of the time he has been at the School.[8] However, earlier this year Lucan began having

---

6 Private Schools Conditional Integration Act 1975, s 4.
4. Integrated schools subject to certain enactments
(1) Subject to subsection (2) of this section,—
(a) On integration, an integrated school becomes part of the State system of education in New Zealand; and
(b) An integrated school is subject to all the provisions for the time being in force of the Education Act 1964, the School Trustees Act 1989, the Education Act 1989, and of all regulations made under any of those Acts or under any enactment repealed by any of those Acts…

7 Affidavit of P G C Melloy, 23 June 2014, exhibit PGCM4.

8 Affidavit of T P Battison, 23 June 2014, exhibit A.

some issues with teachers at the School about the length of his hair. In March of this year he had it cut twice, against his wishes, in order to comply with the hair rule.

[15] Mr Melloy started in his role as principal of the School on 5 May 2014. Soon after he started as principal, Mr Melloy attended a First XV game and was concerned that a number of players in the School team had untidy and long hair. On 14 May 2014 Mr Melloy spoke to the school assembly about the school's rules and dress standards. He read out the hair rule.

[16] On 15 May 2014 Mr Melloy met with Lucan and spoke to him about the length of his hair. Mr Melloy told Lucan that he needed to cut his hair. Lucan responded by saying that if he had to cut his hair then he would leave the School. Mr Melloy warned Lucan that if he defied the School's rules he could be suspended.

[17] On 21 May 2014 one of Lucan's teachers summarily dismissed him from the classroom because of the length of his hair. Lucan was very distressed by the teacher's behaviour. The School now accepts that the teacher concerned overreacted, however it would appear this unfortunate incident became the catalyst for the events which unfolded.

[18] Arrangements were made for Lucan, Mr Battison and Lucan's mother (Ms Doidge) to meet with Mr Melloy on 22 May 2014.

[19] There are issues about what exactly was said at the 22 May 2014 meeting. Mr Battison maintains Mr Melloy had effectively predetermined Lucan's fate and made it clear at the meeting he would not tolerate Lucan breaching the hair rule. Mr Melloy says he approached the meeting with an open mind and only resolved to suspend Lucan after considering Lucan's explanation and the views of his parents.

[20] I cannot resolve the differences in the evidence solely on the basis of the affidavits. What is clear is that Lucan maintained his view that he should not have to cut his hair but that he was willing to have his hair tied back while he was at school. Mr Melloy, on the other hand, was adamant Lucan should cut his hair. At the end of the meeting Lucan was told he was suspended from the School and that there would

be a hearing of the Board within seven days at which time a decision would be made on whether or not Lucan could continue to attend the School.

[21] Mr Melloy concluded he needed to suspend Lucan, because in his assessment Lucan's "continual refusal to cut his hair and comply with the school rule that hair is to be short and tidy was continual disobedience [that]… was a harmful or dangerous example to other students".[9] Mr Melloy has also explained Lucan had been given opportunities to cut his hair and that his refusal to do so was open defiance and that the issue was starting to become a problem in the School as evidenced by the difficulties experienced by the teacher who summarily excluded Lucan from one of his classes.[10]

[22] On 23 May 2014 Mr Melloy wrote to Lucan's parents and confirmed Lucan had been suspended from the School pursuant to s 14(1)(a) of the Act, which I have summarised in paragraph [4] and set out in full in paragraph [38].

[23] A hearing of the Board's Disciplinary Subcommittee (the Disciplinary Committee) was conducted on 30 May 2014. Present at that meeting were three members of the Board, who it is accepted had delegated authority from the Board to make disciplinary decisions on behalf of the Board.[11] Also present at that meeting were Mr Melloy, Lucan, Mr Battison, Ms Doidge and Mr Bates, a solicitor who had been retained by Lucan's parents to represent Lucan. The meeting lasted approximately one and a half hours, during which the by now entrenched respective positions of the parties were fully presented. Mr Bates endeavoured to provide the Disciplinary Committee with statements from two hairdressers, one of whom explained that in her opinion Lucan's hair was already short and that his hair would look like "an untidy afro" if it was cut shorter. Apparently the Disciplinary Committee did not wish to receive the statements from the hairstylists.

[24] After the hearing the Disciplinary Committee considered what it should do and concluded that Lucan:[12]

---

9 Affidavit of P G C Melloy, 13 June 2014 at [28].
10 Affidavit of P G C Melloy, 13 June 2014 at [29].
11 Affidavit of B P Fergus, 13 June 2014 at [2].
12 Affidavit of B P Fergus, 13 June 2014, exhibit BF3.

> … would be allowed to return to school … on the following conditions:
>
> (1) That his hair is to be cut short according to the School's rules and it is at an acceptable length to the Principal.
>
> (2) Report to [the] Principal at 8.40 am on Wednesday 4 June 2014.

[25] I will explain the legal status of the Disciplinary Committee's decision in paragraphs [66] to [77].

[26] The Disciplinary Committee's minutes recorded the reasons for its decision in the following way:[13]

> - The Board members felt it was continual disobedience [for Lucan] to not cut his hair to meet the School rules when requested by the Principal on more than one occasion.
>
> - It is the Principal['s] role to action the School rules according to his management. The Principal asked the student individually and with his parents present to have his hair cut, which he refused to do.
>
> - The Boards (sic) members considered that if other students were to see that a student could return to School after being suspended for continual disobedience for refusing to cut his hair to meet School rules, then this could undermine discipline for that behaviour to go unpunished. Therefore the Board members felt this could set a harmful example to other students at the School.
>
> - The Board members decided that the student could return to School on the condition that his hair is to be cut short according to the Schools (sic) rules and it is at an acceptable length to the principal.

[27] Mr Battison made inquiries to see if Lucan could enrol at Napier Boys' High School, which has similar scholastic and sporting standards as the School. Apparently Napier Boys' High School would have no issue with Lucan wearing his hair tied back, but unfortunately no vacancy currently exists for Lucan at Napier Boys' High School.

[28] Mr Melloy also made inquiries about Lucan attending another school and the hair policies of other Hawke's Bay secondary schools. Mr Melloy explained in his first affidavit that Napier Boys' High School, Taradale High School and Tamatea High School allow their male students to wear their hair in a ponytail.[14]

---

13 Affidavit of B P Fergus, 13 June 2014, exhibit BF3.

14 Affidavt of P G C Melloy, 13 June 2014 at [5].

[29] Efforts were also made by Mr Battison to have an independent barrister mediate a resolution to the dispute. It appears the School was not willing to explore this option.

[30] Ultimately Lucan, acting through his father as litigation guardian, commenced this proceeding. At the time of the hearing Lucan had been out of school for four weeks. During the hearing I asked the School to allow Lucan to return to the School and not take further action against him until I could deliver this judgment.[15] Mr Melloy agreed to this course of action and as a consequence Lucan returned to the School on 25 June 2014.

The proceeding

[31] Lucan seeks judicial review of the decisions made by Mr Melloy and the Board. He also challenges the lawfulness of the School's hair rule.

[32] The challenges to the decisions made by Mr Melloy can be distilled to the following claims:

(1) Mr Melloy failed to comply with the principles of natural justice when he suspended Lucan on 20 May 2014 because he determined that unless Lucan cut his hair he would be suspended.

(2) That Mr Melloy's decision was unlawful because Lucan's conduct did not satisfy the criteria set out in s 14(1)(a) of the Act.

[33] The challenges to the decisions made by the Disciplinary Committee are essentially the same as the challenges to the lawfulness of Mr Melloy's decision to suspend Lucan but with the additional ground that the Disciplinary Committee gave no reasons for suspending Lucan on the conditions that were imposed.

---

[15] Lucan undertook that if he returned to the school he would tie his hair in a bun so it was off his collar, above his ears and out of his eyes.

[34] The challenges to the hair rule include a pleading that the rule is:

(1) contrary to s 72 of the Act, which enables school boards to make rules for a school that "the Board thinks necessary or desirable for the control and management of the school", but such rules are "subject to any enactment, the general law of New Zealand, and the school's charter";[16]

(2) vague and uncertain;

(3) in breach of the general law concerning protection of personal liberty and/or dignity;

(4) in breach of s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA);

(5) unreasonable; and

(6) incompatible with the charter of St John's College, which provides amongst other things that "every student is unique, is made in the image of God and is treated with reverence".

[35] In his statement of claim Lucan seeks declarations that the School has acted unlawfully and that the School's hair rule is unlawful.

Legislation and international instruments

[36] Section 3 of the Act confers a right on New Zealand students to a free state education until the first day of January following his or her 19th birthday. While there are limitations on the scope of this right,[17] it nevertheless emphasises the importance of education in New Zealand society.

---

16 See paragraphs [45] and [81].

17 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

[37] Section 13 of the Act was introduced with effect from 12 July 1999[18] and explains the purposes of decisions to stand-down, suspend, exclude or expel a student. Those purposes include:

> (1) the need to provide for a range of responses for cases of varying degrees of seriousness;
>
> (2) the minimisation of disruption to a student's attendance at school; and
>
> (3) the need to adhere to the principles of natural justice in individual cases.

[38] Section 14(1)(a) of the Act is pivotal to this case. It provides:

> (1) The principal of a state school may stand-down or suspend a student if satisfied on reasonable grounds that—
>
> (a) The student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school …

[39] Section 14 of the Act was amended with effect from 12 July 1999.[19] The significant change made by Parliament was the introduction of a requirement that a principal's decision to stand-down or suspend a student had to be based on "reasonable grounds". This introduced an objective assessment into the decision to stand-down or suspend a student. As one commentator has noted, when Parliament amended s 14 of the Act it, "at the stroke of the legislative pen", increased the prospects of judicial intervention into school disciplinary proceedings.[20]

[40] Section 17 of the Act regulates the powers of school boards when a student who is 16 or older is suspended by a principal. Section 17(1), (2) and (3) of the Act provides:

> (1) If a student who is 16 or older has been suspended from a state school, the Board may—

---

18 Education Amendment Act (No 2) 1998, s 7.
19 Education Amendment Act (No 2) 1998, s 7.
20 John Caldwell "Judicial Review of School Discipline" (2006) NZULR 240 at 244.

(a) Lift the suspension at any time before it expires, either unconditionally or subject to any reasonable conditions it wants to make; or

(b) Extend the suspension conditionally for a reasonable period determined by the Board when extending the suspension, in which case subsection (2) applies; or

(c) Expel the student.

(2) If the Board extends a suspension conditionally, the Board must impose reasonable conditions aimed at facilitating the return of the student to school, and must take steps to facilitate the return of the student to school.

(3) If a student fails to comply with any condition imposed under this section in respect of the lifting or extension of his or her suspension, the principal may request the Board to reconsider the action it took under this section in that case and the Board may confirm or reverse its earlier decisions or may modify its earlier decisions by taking any action specified in any of paragraphs (a) to (c) of subsection (1).

[41] Although not specifically stated in s 17, I interpret the legislation to mean that before a board could expel a student or endorse a decision of a principal to stand-down or suspend a student, the board would need to be satisfied that the criteria in s 14(1) of the Act continued to exist.[21] In enacting s 17(1)(b) and (2) of the Act, Parliament gave boards the power to extend a suspension with reasonable conditions and to facilitate the return of the student to school.

[42] Under s 18AA of the Act, the Secretary of Education may make rules regulating the practice and procedure to be followed by boards, principals, students and parents of students when dealing with disciplinary proceedings under ss 14 to 18 of the Act. The Secretary of Education promulgated the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999. Rule 7(e) of those rules recognises that boards have a responsibility to make a safe and effective learning environment.

[43] Section 61 of the Act requires school boards to prepare and maintain a school charter. A school's charter must include a statement of the board's aims, objectives, directions, priorities and targets as specified in s 61(4) of the Act. A school board is

[21] *M v S* [2003] NZAR 705 (HC) at 721.

also a Crown Entity within the meaning of the Crown Entities Act 2004,[22] and as such school boards have many of the objectives to prepare reports required under the Crown Entities Act 2004.

[44] A school's board must perform its functions and exercise its powers so as to ensure that every student at the school is able to attain his or her highest possible standard of educational achievement.[23] A school board is, however, given "complete discretion to control the management of the school as it thinks fit" provided it does so in compliance with "any enactment or the general law of New Zealand".[24]

[45] Section 72 of the Act enables boards to make rules for a school that "the Board thinks necessary or desirable for the control and management of the school". Such rules are "subject to any enactment, the general law of New Zealand, and the school's charter".

[46] Section 76 of the Act explains the role of principals. It provides:

> (1) A school's principal is the Board's chief executive in relation to the school's control and management.
>
> (2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal—
>
> (a) Shall comply with the Board's general policy directions; and
>
> (b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration.

[47] The 1989 United Nations Convention on the Rights of the Child (the Convention) adopted by New Zealand on 6 April 1993 applies to all persons under 18 years of age. Article 3 of the Convention provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, the administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

---

22 Education Act 1989, s 65H.
23 Section 75(1).
24 Section 75(2).

[48] Article 28(1) of the Convention affirms the "right of the child to education" and art 28(2) provides that appropriate measures must be taken to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the Convention. The rights of a child in the Convention need to be taken into account when assessing the exercise of the statutory disciplinary provisions that affect a student under the age of 18.[25]

Part II – The suspension decisions

Threshold for judicial review in the context of this case

[49] Traditionally the High Court has been hesitant to enter the fray of school disciplinary proceedings preferring "practical efficiency" over "abstract justice".[26] This approach was illustrated in the only reported New Zealand case concerning the suspension of a student who refused to get his hair cut after being asked to do so on five occasions by his school principal. In *Edwards v Onehunga High School*,[27] the Court of Appeal had to consider s 130 of the Education Act 1964 which contained language similar to but not identical to s 14 of the Act. The Court of Appeal held that the expression "may be considered an injurious or dangerous example" placed power to suspend a student in the hands of a principal. The Court of Appeal said it would not interfere with the principal's decision that the student's behaviour was "an injurious or dangerous example to other pupils" unless the principal could not reasonably have reached that view.[28]

[50] More recently, however, courts in New Zealand and cognate jurisdictions have been more willing to ensure the rights of a student are given proper weight when revisiting school disciplinary decisions. One reason for this change in approach has been to recognise the rights of children contained in the Convention.[29]

---

25 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); Claudia Geiringer "Tavita and All That: Confronting the Confusing Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

26 *Rich v Christchurch Schools' High School Board of Governors (No 1)* [1974] 1 NZLR 1 (CA).

27 *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA).

28 "Reasonableness" in this context means "reasonableness" in the sense referred to in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), namely that a decision-maker's decision is unreasonable if it is absurd, beyond the limits of reason, capricious, defies logic or is irrational.

29 *P v K* [2003] 2 NZLR 787 (HC) where Priestley J said at [72]:

In addition, it is necessary to uphold the rights of a person guaranteed by the NZBORA.

[51] In *M v S* McGechan J recognised the severity of the consequences of expulsion or suspension on a student.[30] McGechan J observed that no one should underestimate the capacity of a student to perceive and feel injustice, and therefore the Court had to be concerned not only with "a public interest in orderly education, but also [with] a need to protect the individual child, and that child's confidence [he or she] can receive justice from authority".[31] McGechan J recognised the need to ensure the consequences for a student of suspension or expulsion would not be "disproportionate".[32]

[52] In my assessment, the legislative developments since the Court of Appeal decided *Edwards*, combined with the obligations New Zealand has under the Convention and the effects of the NZBORA,[33] mean that it is no longer appropriate for the High Court to take an approach in student disciplinary cases which fails to give appropriate weight to the rights and interests of a student.

[53] In particular, the changes to the Act introduced in 1999 require that:

(1) student disciplinary proceedings ensure penalties match offending;

(2) disciplinary penalties minimise disruption to a student's attendance at school;

(3) the principles of natural justice are adhered to in each case; and

---

This important convention establishes international law norms relating to children and their rights. Where possible New Zealand's domestic law should be interpreted in such a way as to accord with the Convention ... Furthermore, Courts should strive to uphold the norms of the Convention when possible.

30 *M v S*, above n 21.

31 *M v S*, above n 21, at 723. See also *R (on the application of B) v Head Teacher of Alperton Community School* [2001] EWHC Admin 229 in which Newman J commented on the reputational damaged caused to a student by expulsion; *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 All ER 457 (HL) at [21] where Lord Bingham referred to the well known "immense damage done to vulnerable children by indefinite … exclusions from state schools …".

32 *M v S*, above n 21, at 718.

33 Paul Rishworth "Freedom of Expression by Students in Schools" in *School Discipline and Students' Rights* (Legal Research Foundation, March 1996).

(4) principals and boards make decisions that are objectively reasonable.

[54] The school's disciplinary decision-makers must achieve these objectives in the context of their broader responsibilities to create a safe and effective learning environment for the entire school.[34]

Mr Melloy's decision

[55] Section 14(1)(a) of the Act sets a high threshold for suspension. The section empowers a principal to suspend a student whose conduct is so egregious that it seriously impacts on the welfare and attitude of other students in the school to the point where the principal is left with no alternative other than to suspend or stand-down the student in question. The powers contained in s 14(1)(a) of the Act are measures of last resort for a principal.

[56] Mr Melloy suspended Lucan because Lucan refused to comply with Mr Melloy's request that he cut his hair. I am willing to accept that Lucan's conduct constituted disobedience and that Lucan had probably committed himself to a course of action that could reasonably be construed as continued disobedience.

[57] There are, however, three reasons why I have concluded in this case Mr Melloy failed to comply with the requirements of s 14(1)(a) of the Act.

[58] First, principals must ensure that serious disciplinary consequences are reserved for truly serious cases. There must be a correlation between the offending and the punishment. Mr Melloy did not appreciate the need to explore disciplinary sanctions less drastic than suspension in this case. Assuming for present purposes that the hair rule is lawful, a number of options were available to Mr Melloy. For example, Lucan may have been prohibited from representing the School until he cut his hair.

[59] The degree of seriousness of Lucan's continued disobedience was not great enough to warrant a suspension. Even if Lucan's continued disobedience was

[34] *R (on the application of L) v Governors of J School* [2003] 1 All ER 1012 (HL), where it was stated that school education is a collective activity in which students need to react effectively and teachers owe responsibilities to the entire school community.

continued disobedience that was a harmful or dangerous example to others, Mr Melloy was still obliged to use suspension as a last resort.

[60] My analysis is based on McGechan J's in *M v S*:[35]

> … even where gross misconduct and harmful or dangerous example have been found to exist, principals must not suspend automatically. Principals must pause and consider whether, in all the circumstances of the particular case, suspension for an unspecified period is warranted as a matter of discretion … special circumstances and considerations of humanity and mercy may be brought into account.
>
> These statutory approaches [in the Act] are designed for the protection of children. They are not to be sacrificed to administrative or disciplinary efficiency, or some supposed need for absolute certainty. Results must not be fixed: they must instead be fair.

[61] The correct approach requires both flexibility and fairness on all occasions.

[62] Second, it is also necessary for those deciding school disciplinary cases to ensure penalties that are imposed minimise the disruption to a student's attendance at school.[36] This factor was overlooked by Mr Melloy in this case.

[63] Third, s 14(1)(a) of the Act requires the existence of sound objective evidence that suspension is necessary to protect other students from behaviour which really does constitute a harmful or dangerous example to other students. The evidence before Mr Melloy did not satisfy this criterion. The fact one teacher was apparently unable to cope with the length of Lucan's hair, and that other students may have been watching what happened to Lucan are not facts which satisfied the high threshold of Lucan being a harmful or dangerous example to other students.

[64] For these reasons, I am satisfied that when Lucan was suspended by Mr Melloy the criteria set out in s 14(1)(a) of the Act had not been satisfied. Lucan was therefore not lawfully suspended.[37]

---

35 *M v S*, above n 21, at 725.

36 Education Act 1989, s 13(b).

37 There is also an issue concerning the reasonableness of Mr Melloy's decision in light of Lucan's offer to wear his hair tied in a bun. I will consider this question when examining the reasonableness of the conditions imposed by the Disciplinary Committee.

[65] In reaching this conclusion I fully appreciate that the role of a school principal can be very challenging and that principals need to be able to enforce appropriate levels of behaviour and standards. However, it is also important for principals to exercise their disciplinary powers in accordance with the way Parliament has prescribed.

The Disciplinary Committee's decision

[66] In his submissions for Mr Melloy and the Board, Mr Harrison endeavoured to persuade me that the Disciplinary Committee had not suspended Lucan but had in fact lifted his suspension, and that provided Lucan cut his hair in accordance with the hair rule and to the satisfaction of Mr Melloy, Lucan could return to the School.

[67] In a contradictory submission Mr Harrison also said the Disciplinary Committee was not disagreeing with Mr Melloy's decision to suspend Lucan. If, however, the Disciplinary Committee had really lifted Lucan's suspension then it could only have done so because it disagreed with Mr Melloy's decision to suspend Lucan.

[68] Mr Harrison said that if Lucan had returned to the School after the Disciplinary Committee hearing without having cut his hair then Mr Melloy could have asked the Disciplinary Committee to revisit its decision pursuant to s 17(3) of the Act. It is to be noted that the Disciplinary Committee said Lucan was to report to Mr Melloy on 4 June 2014. I interpret this to mean that in its decision the Board was suspending Lucan at least until 4 June 2014.

[69] The line of reasoning advanced on behalf of the Board attempts to mask reality and to disguise the substance of the Disciplinary Committee's decision.

[70] The Disciplinary Committee did not lift Lucan's suspension subject to the condition that he cut his hair. The Board in fact continued Lucan's suspension until he cut his hair in accordance with the hair rule and to the satisfaction of Mr Melloy. As a consequence, Lucan did not return to the School until I obtained assurances that enabled him to do so on 25 June 2014.

[71] When the Disciplinary Committee effectively continued Lucan's suspension it needed to be satisfied of the criteria set out in s 14(1)(a) of the Act. Like Mr Melloy, the Disciplinary Committee failed to properly address the s 14(1)(a) criteria and made the same errors as Mr Melloy, which I have explained in paragraphs [58] to [63] of this judgment.

[72] In addition to repeating the errors of Mr Melloy when it effectively continued Lucan's suspension the Disciplinary Committee misdirected itself when it thought Lucan's behaviour "*could* undermine discipline" if his behaviour went unpunished, and that his behaviour "*could* set a harmful example to other students" (emphasis added). Those concerns fall well short of constituting objective evidence that Lucan's behaviour was in fact "a harmful or dangerous example to other students at the School".

[73] If I am wrong in my belief the Disciplinary Committee acted under s 17(1)(b) of the Act, then it is necessary to consider if the Disciplinary Committee's decision imposed "reasonable conditions" on Lucan's return to the School.

[74] In my assessment, the conditions imposed by the Disciplinary Committee were not reasonable for two reasons.

[75] First, the Disciplinary Committee acted unreasonably when it insisted that Lucan's hair would have to be cut to a length that was to Mr Melloy's satisfaction. This condition went beyond the requirements of the hair rule.

[76] Second, the conditions imposed by the Disciplinary Committee were not reasonable in the circumstances of this case because the Disciplinary Committee did not consider whether there was effective compliance by Lucan with the hair rule, which does not say a student must cut his hair short. Lucan offered to tie his hair in a bun, which meant that when he was going to be at the School his hair would appear to be short, off his collar, above his ears and out of his eyes. Instead of exercising independent judgement by considering if Lucan's offer constituted effective compliance with the hair rule, the Disciplinary Committee effectively endorsed the stance taken by Mr Melloy.

[77] I have therefore concluded that the Disciplinary Committee's decision failed to comply with the requirements of s 14(1)(a) of the Act and/or was unreasonable.

Bias and predetermination

[78] I cannot determine on the basis of the affidavit evidence if Mr Melloy had determined prior to meeting with Lucan and his father on 20 May 2014 that Lucan would be suspended if Lucan failed to agree to have his hair cut. I therefore must dismiss Lucan's claim for judicial review based upon his pleading that Mr Melloy breached Lucan's rights to natural justice.

Lack of reasons

[79] While the Board's Disciplinary Committee failed to give detailed reasons for its decision on 30 May 2014, that deficiency was remedied when the minutes of the Disciplinary Committee meeting were made available to Lucan and his parents. I am therefore dismissing the application for judicial review based upon the Disciplinary Committee's failure to give reasons for its decision.

Part III – The hair rule

[80] This part of my judgment focuses on the lawfulness of the hair rule, as opposed to the lawfulness of the decisions made by Mr Melloy and the Disciplinary Committee in this case.

[81] Lucan's challenges to the hair rule are based upon s 72 of the Act which, as I have explained in paragraph [45], provides that the School's rules are subject to "any enactment, the general law of New Zealand and the school's charter".

[82] Considerable time has been spent challenging the lawfulness of the hair rule on the grounds that it:

(1) conflicts with the School's charter;

(2) breaches Lucan's common law right to personal autonomy and integrity that is also affirmed by arts 1 and 17 of the International Convention on Civil and Political Rights (ICCPR);[38]

(3) is contrary to s 14 of the NZBORA;[39] and

(4) is uncertain.

[83] The challenge to the lawfulness of the hair rule, based on the alleged breaches of Lucan's rights to autonomy and integrity and his rights under s 14 of the NZBORA, raises a number of legal issues. I have resisted the temptation to try and resolve these issues because I am satisfied that the hair rule, as it is presently worded, does not comply with the common law requirement that it needs to be certain. As a consequence the hair rule breaches s 72 of the Act because it does not comply with the general law of New Zealand. The hair rule is therefore ultra vires.

[84] Before explaining my reasons for reaching this conclusion I shall briefly address the submission that the hair rule is inconsistent with the School's charter.

The School's charter

[85] The School's charter states that "every student is unique, is made in the image of God and is treated with reverence".

[86] I interpret this provision of the charter to reflect the School's philosophy that students will be respected and treated in accordance with Christian values.

[87] I do not think the general aspirational statements in the School charter provide sufficient guidance on how I should interpret the lawfulness of the School's

---

[38] **Article 3**
The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.
Article 17
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

[39] **14 Freedom of expression**
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

hair rule and do not assist me in determining if that rule indirectly breaches s 72 of the Act.

The hair rule is uncertain

[88] The hair rule is delegated legislation and therefore must be sufficiently precise to allow students and parents to fully understand the rule's requirements and arrange their affairs without breaching its provisions.

[89] Professor P Rishworth has noted in the context of school rules that may be inconsistent with the NZBORA, that school rules need to be "fixed in advance and be capable of determination by the citizenry with reasonable certainty. A rule for example, which reposed complete discretion in a principal as to what was acceptable in a school by way of dress would tend toward the arbitrary and capricious end of the scale and not be capable of being defended as a limit 'protected by law'".[40] The same observations apply to a hair rule that is uncertain.

[90] An example of how a hair rule can be unlawful because of uncertainty can be found in the California case of *Myers v Arcata*,[41] which concerned the constitutionality of a school rule which said "extremes of hairstyle are not acceptable". The California Court of Appeal for the Second District held that the criterion "extremes of hairstyle" violated the First Amendment to the Constitution of the United States because it was "so vague and standardless that it [left] the public uncertain as to the conduct it prohibited or [left] judges and jurors free to decide, without any legally fixed standards, what [was] prohibited and what [was] not in each particular case".[42]

[91] In the present case there is scope for considerable uncertainty about whether or not Lucan's hair is in fact short. Lucan and one hairstylist believe that his hair is short. It would appear that Lucan's hair has not been an issue at the school until this year, indicating that others at the School *might* in the past have not thought his hair breached the hair rule. On the other hand, Mr Melloy and the Disciplinary

---

40 Paul Rishworth, above n 33 at 42.
41 *Myers v Arcata* 269 Cal App 2d 552 (1969).
42 At [8].

Committee believe Lucan's hair is not short. The fact that there can be diametrically opposed views on whether or not Lucan's hair actually complies with the hair rule underscores the concern that, as it is currently worded, the hair rule is prone to subjective interpretation and therefore uncertain.

[92] The hair rule can be compared with the School's uniform rule and other rules relating to dress standards, which are carefully prescribed. All students and parents know in advance the School's uniform requirements and can comply with the requirements of those rules. The same cannot be said about the hair rule, which is capable of being interpreted differently by students, parents, teachers, the principal and the Board.

[93] The discretion conferred upon Mr Melloy by s 76(2) of the Act to manage the School as he thinks fit in accordance with the Board's general policy directions does not assist the case for the School. There are two fundamental reasons why s 76(2) of the Act does not salvage the School's position.

[94] First, s 76(2) refers to the "Board's general policy directions" (made pursuant to s 61 of the Act or possibly pursuant to the Board's powers as a Crown Entity), not the school rules made under s 72 of the Act.

[95] Second, even if s 76(2)(b) applied to the school rules, the rules would still need to be certain and not confer an unfettered discretion on a school official to be the sole arbiter of whether or not a student complied with the school's hair rule.

[96] My conclusion that the School's hair rule breaches the requirements that it be certain provides the School and its wider community with an opportunity to decide whether or not it is necessary for the School to continue to have a hair rule. In considering this issue, the School will need to give very careful consideration as to whether or not any hair rule would breach a student's rights to autonomy, individual dignity and his rights to freedom of expression affirmed by s 14 of the NZBORA. I have deliberately refrained from commenting on those issues in this judgment.

Conclusion

[97] I issue declarations that the:

(1) decisions suspending Lucan from the School were unlawful because the criteria set in s 14(1)(a) of the Act were not satisfied;

(2) Disciplinary Committee's conditions on Lucan's ability to return to the School were unreasonable;

(3) School's hair rule breaches s 72 of the Act because it is uncertain.

[98] Lucan is entitled to costs on a scale 2B basis. Those costs will be paid by the School Board.

D B Collins J

Solicitors:
Gresson Grayson, Hastings for Plaintiff
Harrison Stone, Auckland for Defendants