



DOUBLE JEOPARDY

The Education Act imposes a duty on the Education Council to investigate serious misconduct. But what happens when that misconduct has also been investigated by police and they've elected not to prosecute? Paul Robertson says it's a challenging area that requires legal advice.

A RECENT DECISION CONSIDERED what should happen when a teacher is investigated by the police on criminal charges and a complaint is made to the Education Council. Who gives way?

The December 2015 decision of the High Court concerned a male teacher who had allegedly indecently assaulted a female teacher by placing his hands between her legs. The assault was alleged to have taken place in the college library before a parent teacher event.

The police investigated and elected not to prosecute. In the meantime, the board investigated, dismissed the male teacher, and notified the New Zealand Teachers Council (now renamed the Education Council).

As a result of the notification to the Education Council, the Complaints Assessment Committee of the Council brought proceedings before the Council's Disciplinary Tribunal alleging that the teacher had brought discredit to the profession. The four allegations were:

a) Assault (mirroring the complaint to the police);

b) Telling the female teacher that he would do it again in the future;

c) Commenting on the size of the teacher's breasts; and

d) Failing to immediately notify the principal or a senior manager of the incident.

The teacher applied for an order that the investigation by the Tribunal should be stayed because the investigation was inconsistent with the decision of the police not to prosecute him.

The Tribunal was relying on the same witness statement from the woman allegedly assaulted, and as the police had decided that there was insufficient evidence to prosecute him, it would be unfair if the Tribunal should be able to do so.

The three other complaints did not overlap the allegations of assault and there was no challenge; they were always complaints that the Tribunal was entitled to hear.

The Court accepted that it is unfair (an abuse of process) to allow disciplinary proceedings to go ahead where a person had already been acquitted of a

complaint of the "... same nature and scope ...". That didn't apply here as there had not been an acquittal.

Did the rule apply where there had been a complaint to the police, but no acquittal?

"No," said the Court. The Education Act 1989 imposed a duty on the Education Council to investigate serious misconduct. Serious misconduct is defined widely and would include the alleged assault. It would undermine the effectiveness of the Education Council if it was required to drop an investigation just because the police had decided not to investigate.

The Court said that if the teacher had been charged, and had been acquitted, then it would have probably been inappropriate for the Education Council to investigate an overlapping allegation of serious misconduct.

There was a complaint that the teacher would not have the same protection in the Tribunal investigation as did a person prosecuted by the police. The Court disagreed. The teacher could, for instance, refuse to

answer questions on the grounds that he might incriminate himself.

The overlap between a board's disciplinary process, an investigation by the Education Council and one by the police can be a minefield for a board. Should the board stop its investigation while the police investigate? What should happen if the board dismisses a teacher on the grounds of incompetence when the Education Council finds the same teacher to be competent?

There are many grey areas, but what this case confirms is that the Education Council has a statutory duty to investigate misconduct by teachers, and should do so unless the complaints closely match criminal complaints already resolved by the court.

Overall this is a challenging area where a board should obtain legal advice.



B v New Zealand Teachers Council [2015] NZHC 3265

PAUL ROBERTSON is a partner at Heaney & Partners in Auckland. Visit: www.heaneypartners.com

HEANEY & PARTNERS

BARRISTERS & SOLICITORS

QUALITY OUTCOMES

to School Trustee Liability & Employment Disputes

PAUL ROBERTSON | Partner: direct dial: (09) 367 7004 email: paul.robertson@heaneypartners.com www.heaneypartners.com
Phone: (09) 3030 100 Fax: (09) 3677 009 Level 13, PwC Tower, 188 Quay Street, Auckland PO BOX 105391, Auckland. 1043. DXCP18503