

Board of Trustees fails to follow principles of natural justice at disciplinary hearing for expelled student

Legislation	Ombudsmen Act 1975, Education Act 1989
Ombudsman	Sir Brian Elwood
Case number(s)	A9546
Date	2003

Student excluded after initially caught hiding stolen property—at the disciplinary hearing the exclusion decision not based on this incident due to lack of evidence but on history of misdemeanours—parents complained that due process had not been followed in disciplinary process—Ombudsman found that at the disciplinary hearing by school the student had no reasonable indication that the student would be answering to an allegation of continual disobedience—complaint about Board of Trustees’ process sustained and Ombudsman recommended apology, reinstatement of student, and removal of exclusion from student’s records—the Board refused to act on recommendations although the student reinstated for other reasons

A 16 year old high school student was allegedly involved in a theft of property from fellow students at the school by agreeing to hide the stolen property. The student was subsequently questioned about the property. He first denied its whereabouts but later admitted to knowing where it was. The property was then recovered. At all times the student denied knowing that the property had originally been stolen when he was asked to hide it.

The Principal suspended the student and gave his parents a Suspension Notice which referred to the student having knowingly received stolen property and also, in a general way, to his continued disobedience. The report of the Deputy Principal that accompanied the Suspension Notice referred principally to the theft and his belief of the student’s knowledge of it. The report also referred to a witness statement alleging that the student understood exactly what was being asked of him and that the items had to be hidden to avoid being found when the school was searched for the stolen property. However, the witness statement was never

provided to the parents or student nor were they informed that the witness had withdrawn his statement prior to the disciplinary hearing.

The parents and student later arrived at the hearing expecting to face a charge of knowingly having received stolen property. However, the hearing actually proceeded on the basis of the student's continual disobedience and the Board made the decision to exclude him on that basis.

The student's parents then wrote to the Board expressing concern that the original basis of the suspension, for receiving stolen property, differed from that which formed the subject of the hearing (i.e. continual disobedience). They considered this to be a breach of natural justice on the basis that, if they had known that the issues to be considered by the Disciplinary Committee involved general disobedience and the student's past school record, the parents would have been able to prepare themselves to address those issues.

The Board responded that it was satisfied due process had been followed and it endorsed the Committee's decision. However, the parents were dissatisfied with the Board's response and requested that the Ombudsman investigate the disciplinary process and the resulting punishment which they felt was unduly harsh.

The Ombudsman investigated whether there had been a breach of natural justice and that there was insufficient foundation for excluding him. The Ombudsman advised it was the parents' view that it was unreasonable for the Board not to have lifted the suspension when it became clear that the student did not have any knowledge that the property was stolen, as evidenced by: his denial that he knew the items he had hidden were stolen; statements of the other student involved in the theft, who denied the student had any knowledge that the property was stolen; and the witness statement which had been withdrawn. It was argued that the disciplinary process should have been halted due to lack of evidence linking the student to the theft.

The Ombudsman also advised that a further aspect of the complaint was that the Suspension Notice sent to the parents related to the student's alleged involvement with the theft. However, despite the Disciplinary Committee accepting that there was no evidence of the student's involvement in the theft, they then continued to question the student on past misdemeanours for which he had already received punishment. The complainants considered this breached the principles of natural justice by failing to notify the student of the charges against him.

The Ombudsman then explained that the second ground of complaint he was investigating related to the Committee's decision to exclude the student from the school for "continual disobedience which is a harmful and dangerous example to other students in the school". In particular he advised that the parents were of the view that there was no discussion about what the student had done that could qualify under this category, particularly when:

- there had been no finding of fault in the matter for which he was originally suspended;
- the student had already received punishment for previous misdemeanours; and

- there had been no additional conduct by the student that could reasonably fall within the criteria of being 'dangerous to other students'.

As a result, the Ombudsman advised that the parents were concerned the student's exclusion had been both unreasonable and unlawful. The Ombudsman asked the Board to provide him with a report addressing these matters and forward any relevant correspondence for his perusal.

In response, the Board agreed that the principal event relevant to the student's suspension no longer applied after the withdrawal of the witness statement, nevertheless considered that it was justified in proceeding with the hearing on the basis of the student's past record and his lying associated with concealing the stolen property. It said his action of concealing the property was in keeping with many past misdemeanours that the school had to deal with and it was therefore determined to be one further instance of the student's continual disobedience. The Board advised the Ombudsman that it was not convinced the student would change his attitude and behaviour and therefore excluded him on the basis that his continual disobedience was a harmful and dangerous example to other students in the school.

However, the Ombudsman explained that the focus of his investigation was whether the principles of natural justice had been met. An important element of natural justice is the requirement that a person be given adequate notice of the charges against him and be given a reasonable opportunity to address those charges. The Board remained of the view that, while the charges actually considered by the Committee differed from those in the Suspension Notice, the parents had the opportunity to address those charges.

The Ombudsman considered the relevant disciplinary process. He noted:

- The statutory powers for commencing the disciplinary process are in section 14 of the Education Act 1989 which provides for a principal to suspend a student from school, providing certain criteria are met.
- The notice requirements are contained in section 18 of the Act. The procedures relating to this are contained in the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999, section 14 of which states:
- *'Report for the Board – A principal who has suspended a student must ensure that a report that contains all information relevant to the suspension is written to the Board'.*
- The Board of Trustees then has the function of considering the allegations against the student and, once it has determined the matter which was the subject of the suspension, to exercise its discretion as to the appropriate remedy. However, the Ombudsman noted that the Board's role is predicated on a valid suspension having occurred. If this were not the case, and if the Board were to reframe the misconduct which formed the basis of the suspension, then the Board would in effect be initiating the disciplinary activity. It was the Ombudsman's view that this did not appear to be a function granted to the Board by the Act.

- In addition to the statutory requirements and the applicable school policy, the disciplinary process also required that principles of natural justice be followed.

The Ombudsman then considered the circumstances of the case, paying particular attention to the wording of the Suspension Notice and the contents of the Deputy Principal's report. As a result, the Ombudsman considered that the information reasonably indicated that the student would be answering to an allegation of knowingly receiving stolen property. There was no reasonable indication that the student would be answering to an allegation of continual disobedience, which would have required the issuing of a fresh notice.

This defect in the disciplinary process naturally called into question the validity of the Board's subsequent decision to exclude the student. The Ombudsman advised that, while his role was not to substitute his judgment for that of the Disciplinary Committee to whom this function is given by statute and by the Board, he was able to investigate matters relating to the manner in which the Board's discretion was exercised.

On this basis, the Ombudsman referred to section 15(1) of the Education Act which requires that, where a decision is made to exclude a student, there must be circumstances that justify *'the most serious response'*. He also referred to Court judgments which addressed the exercise of the powers of the Board of Trustees and the Disciplinary Committee in the disciplinary context. In particular, he noted that in the High Court case of *M and R v S and the Board of Trustees for Palmerston North Boys High School* [2003] NZAR 705 (1990), McGechan J reached the following conclusion on this issue: *'... (i) the use of the word 'gross' is intended to indicate misconduct striking and reprehensible to a high degree (ii) the phrase is to be construed in the light of its purpose, namely description of conduct sufficiently serious to warrant removal of the child, notwithstanding risk of individual damage'*.

It seemed clear to the Ombudsman that the Courts have referred to the inclusion of 'gross' to indicate that the conduct must be of a striking and reprehensible nature, and even then, exclusion or expulsion must not automatically follow.

The Ombudsman formed the view that the Board acted unreasonably in the disciplinary hearing against the student because the absence of appropriate notice of the matters to be heard amounted to a breach of natural justice. The Ombudsman also considered this to be a breach of the school's own policy concerning matters of notice. Given his view, the Ombudsman considered it unnecessary to form a view on the appropriateness of the penalty of exclusion other than to make the above observation to the Board on its Committee's exercise of its discretion.

The Ombudsman advised the Board of his view and formally recommended that it apologise to the parents and student, reinstate the student to the school and amend the school record to delete reference to the student's exclusion. As provided by section 22(3) of the Ombudsmen Act, the Ombudsman also forwarded a copy of his report and recommendations to the Minister of Education.

The Board disagreed with the Ombudsman's view and refused to accept his conclusions. It advised that it was not willing to implement the remedial action recommended but did re-enrol the student for other reasons.

Comment

While the Ombudsman has no power to enforce his recommendations under the Ombudsmen Act, section 22(3) required him to report to the Minister of Education the outcome of his investigation in this case. As is customary when a recommendation is not accepted, the outcome was also reported to Parliament in the Ombudsmen's 2003 Annual Report.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.