

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-806
[2018] NZHC 948**

BETWEEN

REGAN DANIEL CUNLIFFE
Applicant

AND

GAVIN DAVID MARSH
First Respondent

THE PRINCIPAL, Helensville Primary
School, Helensville
Second Respondent

Hearing: On papers
Judgment: 1 May 2018
Reasons: 4 May 2018

REASONS FOR JUDGMENT OF POWELL J

*This judgment was delivered by me on
04.05.18 at 3.30 pm, pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

[1] On 1 May 2018 the applicant, Regan Cunliffe filed an “Interlocutory Application ex parte for an Interim Injunction (Under Urgency)”, accompanied by an affidavit sworn by Mr Cunliffe. Mr Cunliffe sought:

An interim order preventing the first respondent, Gavin David Marsh, from attending the Rata Camp operating from 1 May 2018 until 4 May 2018, or until such time as the New Zealand Police have completed their investigation as is detailed in event number 180404/7323, and subject to no charges being brought against Mr Marsh.

Background

[2] In his affidavit Mr Cunliffe described a road rage incident that took place on 28 February 2018 when he alleges Mr Marsh “jumped out of his car and began yelling and acting in a threatening manner at my driver’s door”. Mr Cunliffe deposed that at that time he had his children in the car and his son Eli “was, and is, badly frightened by Mr Marsh and his explosive temper”. No explanation was given as to what caused the incident but apparently it resulted in Mr Cunliffe making a Police complaint about Mr Marsh, and Mr Marsh making a complaint to Oranga Tamariki in respect of Mr Cunliffe. (subsequently dismissed according to Mr Cunliffe).

[3] It appears that at the time of the incident both Mr Cunliffe and Mr Marsh were planning to attend the Rata Camp, the school camp for Helensville Primary School, as parent helpers.

[4] Following the incident and discussions with the school on 29 March 2018 a decision appears to have been made by the principal of Helensville Primary School, Deborah Heasman, whereby Mr Cunliffe agreed not to attend the camp but Mr Marsh would still do so.

[5] When Eli was advised of this outcome he apparently became very upset. This led to further requests being made by Mr Cunliffe’s wife, Rachel, to Ms Heasman to have Mr Marsh excluded from the camp so that Eli could attend. On 13 April 2018 however Ms Heasman advised Mrs Cunliffe:

After a lot of consideration I have made the decision to stay with the current situation.

I know you may be disappointed by that however this is a personal matter between you as adults and not a school situation. I have given you and Eli my assurance that he will be safe and I stand by that. I hope you will be able to support him in making a decision to come.

[6] Mr and Mrs Cunliffe were not happy with the decision and applied to the Board of Trustees of Helensville Primary for Mr Marsh to be excluded as a parent helper at the camp. With regard to Ms Heasman's email confirming her decision, Mr Cunliffe advised the Board:

This is not a personal matter between adults, it is about the safety and wellbeing of one of her students and a parent of the school during a time where they are responsible for his care. Eli's fear of Mr Marsh is real and justified, based on his own first-hand experience and first encounter with him.

While he may indeed be kept safe on camp, he does not *feel* safe. It is disappointing that a complaint by Mr Marsh about the wellbeing of Eli was listened to and investigated, but a complaint by Eli about Mr Marsh (and his feelings) was dismissed by Principal Heasman in her decision-making as simply a "personal matter between adults".

One of the key areas of learning in the New Zealand curriculum is Outdoor Education. We want Eli to go on camp and to learn from this experience. He was very much looking forward to it.

His safety, wellbeing, and education is paramount and should come before the needs of another parent attending camp. Further, most children go to camp without their parents. We do not see why [Mr Marsh's] removal from camp is not an option.

[7] Mr Cunliffe concluded his letter to the Board by citing the United Nations Convention on the Rights of the Child as providing support for his submission.

[8] The Board considered the issue in a special meeting on the evening of 24 April and advised:

We recognise the serious nature of this complaint and the negative impact on your family.

We acknowledge the concerns of your children. As a board we are very conscious of putting the interests of the students of the school at the centre of all decisions.

We took external advice from the New Zealand Schools Trustees Association to ensure we ran an appropriate process that covered the interests of all stakeholders.

We note that as the complaint was against the decision of the Principal, she was considered to have a "conflict of interest" with regard to this matter. So,

at the meeting on 24 April the Principal presented the relevant correspondence and then an account of the two meetings that you held with her (as well as a verbal account of the meeting with Rachel and Eli). The Principal was then excluded from the Board meeting where we debated the matter at length and formed a decision.

The Board's Decision:

The decision made by the Board is to support the judgement made by the Principal to allow [Mr Marsh] to attend the Rata School Camp.

We hope that the following will alleviate the concerns of Eli and to encourage him to participate in this important part of the school curriculum:

- We offer the option that either one of you can attend the camp as a support person to Eli, to be on hand at all times to promote the best interests of Eli.
- We understand from the Principal that the teacher in charge will minimise the chance of direct contact between [Mr Marsh] and Eli (e.g. Eli will not be in his camp group or bunk room and every endeavour will be made to ensure that any contact is only incidental)
- We note that standard camp procedures ensure that no parent is ever alone with an individual child
- The Principal will be attending for the duration of the camp and will pay extra attention to all parties mentioned in this complaint.

This decision by the Board is a genuine endeavour to balance the rights and obligations of all parties in this situation.

If you wish to take up the offer of attending camp as a support person to your child please contact me at your earliest convenience so the school can make the required arrangements.

[9] Following the Board's decision further email correspondence ensued between Mr Cunliffe and the Board. Mr Cunliffe asked whether the Board was aware that Mr Marsh was "currently under Police investigation for his conduct during the incident?", but did not mention that he was referring to his complaint to the Police, and I note this had not been part of Mr Cunliffe's submission to the Board. The Board subsequently responded on 28 April 2018 by advising:

I acknowledge your further correspondence.

Various issues you have disclosed puts the Board in a position where we require further external and legal advice.

Until we receive that advice - and based on the information we currently have to hand - the Board feels there are no grounds or justification legally or otherwise to exclude [Mr Marsh] at this time.

Should contrary advice be received we will take appropriate action at that time.

As per our original response our primary objective is to enable Eli to attend camp and we hope in the interim you consider the options we previously proposed.

[10] There matters sat at the time Mr Cunliffe filed his application.

Discussion and Analysis

[11] Having looked carefully at the application I was satisfied that there were both procedural and substantive issues with granting the relief sought. First, although Mr Cunliffe purported to make the application for an injunction pursuant to rules 7.53 and 7.54 of the High Court Rules 2016, such an application is misconceived. In particular as is apparent from the matters outlined above, rather than seeking the order in the course of civil proceedings of this Court, he is in fact apparently attempting to judicially review the decisions made by both Ms Heasman and the Helensville School Board of Trustees. As a result it would appear that what Mr Cunliffe was in fact seeking were interim orders under the Judicial Review Procedure Act 2016. If that is the case his proceedings would have to be substantially recast so as to identify with precision the nature of the decisions made and whether they are reviewable, before moving on to the question of whether interim orders should issue. Mr Cunliffe's application is therefore gravely deficient and on that basis alone not appropriate to issue the interim orders sought.

[12] While it may be able to be argued that the decisions of Ms Heasman and the Board of Trustees were amenable to review, the evidence adduced does not disclose any obvious issues with regard to process or natural justice that makes it seriously arguable the decisions were flawed. Mr Cunliffe did suggest in the application that the Board of Trustees decision was "*ultra vires* and a *nullity* as they did not conduct their proceedings within the *audi alteram partem rule*" alleging that the Board did not listen to the other side, but that is not apparent from Mr Cunliffe's affidavit.

[13] More broadly it is apparent even from the documents filed by Mr Cunliffe, and indeed as acknowledged by both Mr and Mrs Cunliffe at different points, that Eli's safety at the camp was not and never has been at issue. On the contrary, it is clear that

initially Mrs Cunliffe accepted Ms Heasman's decision of 29 March 2018 and it was only **the reaction of Eli** that lead to Mr and Mrs Cunliffe pursuing the matter further. In all subsequent correspondence there was absolutely no suggestion that Eli was in any way put at risk through the presence of Mr Marsh, and indeed Ms Heasman had made it clear that Mr Marsh and Eli would be kept well apart at the camp.

[14] It follows that even if Mr Cunliffe's application was rectified procedurally and even if the decisions made by Ms Heasman and the Helensville School Board of Trustees were amenable to review, and/or arguably flawed, in the end there were no significant rights requiring protection and any interim orders restraining Mr Marsh would have constituted a vast and unjustified judicial intrusion into a domain for which no such intervention was warranted.

[15] As a result Mr Cunliffe's application was declined. Costs are to lie where they fall.

Powell J