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***Battison v Melloy: An Aberration in the Judicial Review
of School Discipline Decisions***

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Abstract

This paper analyses the decision of Battison v Melloy. Lucan Battison was suspended from St John's College after he failed to comply with a request from principal to cut his hair in accordance with school rules. Lucan sought to have this decision judicially reviewed.

Justice Collins made two significant rulings: first, the suspension was quashed as it did not comply with s 14(1)(a) of the Education Act 1989; and secondly, the school's hair rule was ultra vires because it breached the common law requirement of certainty, and was therefore contrary to s 72 of the Education Act.

This paper argues that while the judge's reasoning on the hair rule was underdeveloped, the ruling has net benefits with regards to vague school uniform rules. The judge's reasoning on the school discipline issue was more troubling. It is argued that Collins J's expansive, rights-based approach is contrary to authority. Stronger arguments for the judge's conclusion are suggested.

This paper closes by addressing the perception that courts are now more willing to review school discipline decisions on their merits. After comparing the approach in Battison to other recent decisions, it is suggested that this perception is not well founded.

Key Words: *School discipline, school rules, judicial review, proportionality*

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I Introduction

School discipline has always been controversial. Corporal punishment is an obvious example of this. Recently, there has been a wide ranging discussion as to the extent to which school discipline decisions should be reviewable in court. This issue came to a head in the 2014 case of *Battison v Melloy*.¹ Lucan Battison was suspended from St John's College in the Hawkes Bay after he refused to cut his hair when asked to do so by the school's new principal, Paul Melloy.² The case was widely reported in the media.³ When reviewed by the High Court, Collins J ruled that the school's hair rule was ultra vires and that the suspension was invalid. The decision was polarising and many were disappointed with the result. It was feared that the decision would prompt an upsurge in litigation against schools.⁴ Surprisingly, the decision has not been the subject of much academic attention.

The decision in *Battison* raises two issues: the legality of school rules and the legal requirements for suspension. There is also a question as to the relationship between these two issues. In this paper, it is argued that Collins J should have first considered the validity of the rule regulating students' hair, because a finding that the rule was ultra vires makes the suspension issue moot.

The school rule was held to be invalid because it breached the common law requirement of certainty, and was therefore in conflict with the "general law of New Zealand".⁵ Although this conclusion is not supported by any clear authority, it is argued that this finding is in line with broader theoretical conception of ruling-making. The ruling also had the net benefit of requiring schools to rethink unclear or ambiguous rules.

¹ *Battison v Melloy* [2014] NZHC1462, [2014] NZAR 927.

² At [1].

³ See: Jo Moir "Lucan Battison wins long-hair court battle" *Dominion Post* (online ed, Wellington, 27 June 2014). Even reported as far away as Australia (Dominique Schwartz "New Zealand student Lucan Battison wins High Court battle to keep long hair" *ABC News* (online ed, Australia, 28 June 2014)) and the United Kingdom ("Student who was suspended because his HAIR was too long wins high court battle to return to class... as lawyer dubs him a 'modern Martin Luther King'" *Daily Mail* (online ed, United Kingdom, 27 June 2014)).

⁴ Anusha Bradley "Schools brace for parents' legal threats" *Radio New Zealand* (online ed, Wellington, 5 July 2015).

⁵ *Battison v Melloy*, above n 1, at [83].

Justice Collins quashed the principal's decision to suspend Lucan.⁶ While this result was open on the facts, the reasoning on which the result was based lacked clarity. It is argued that in advocating for a rights-based approach to school discipline, the judge fails to engage with contrary authority. It is pointed out that the judge's holistic analysis does not consider the particular statutory criteria in detail. Instead, an argument for improper purpose should have formed the basis for the judge's decision.

After the consideration of the two broader issues, I assess the perception that judges are now more likely to grant a review of the merits of a school discipline decision than they have in the past. The result of this analysis will show that the expansive approach in *Battison* is not representative of case law generally. *Battison* represents an aberration in this respect.

II Battison v Melloy: Summary of Findings

As noted above, Lucan was suspended from St John's College in Hastings for failing to cut his hair in accordance with the school rules when asked by the principal, Paul Melloy.⁷ The rule stated that school uniform was to include:⁸

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 was subsequently told by the school board that he could return to school on the condition that he cut his hair to the satisfaction of Mr Melloy.⁹

Lucan, suing by his father as legal guardian, issued proceedings in the High Court seeking to quash the principal and school board's respective suspension decisions. Justice Collins saw that the facts raised three distinct questions:¹⁰ first, the lawfulness of the disciplinary action taken by the school; secondly, the lawfulness of the hair rule itself; and thirdly, the lawfulness of the school's rule that attempted to regulate a student's hair. Lucan argued that Mr Melloy's suspension decision failed to comply with natural justice because he

⁶ At [4].

⁷ At [1].

⁸ At [1].

⁹ At [1].

¹⁰ At [2].

determined that unless Lucan cut his hair, Lucan would be suspended.¹¹ Lucan also argued that the decision was unlawful because the suspension decision did not satisfy the criteria set out in s 14(1)(a) of the Education Act 1989.¹² Mr Melloy for his part maintained that he approached the suspension meeting with an open mind.¹³ Mr Melloy posited that Lucan's refusal to cut his hair and comply with the school rule amounted to "continual disobedience" that was a "harmful or dangerous example" to other students, satisfying the statutory criteria.¹⁴

Justice Collins agreed that the principal's decision to suspend Lucan was unlawful because it did not comply with s 14(1)(a) of the Act.¹⁵ The judge provided three reasons for this decision: first, the degree of seriousness of Lucan's behaviour was not serious enough to warrant suspension;¹⁶ secondly, Mr Melloy did not appreciate the need to minimise the disruption to Lucan's attendance at school, as was required by the legislation;¹⁷ and thirdly, there was a lack of objective evidence that the suspension was necessary to protect other students from behaviour that was a harmful or dangerous example.¹⁸ The judge also made a finding that the board's decision to allow Lucan to return to school on the condition that he cut his hair was not valid because it was essentially repeating the same mistake made by the principal.¹⁹ Further, the judge held that the board's condition was not reasonable in the circumstances because it required Lucan's hair to be cut to Mr Melloy's satisfaction, which went beyond the requirements of the hair rule.²⁰

With regards to the second question, Collins J held that the hair rule did not comply with the common law requirement that rules must be certain.²¹ This meant that the rule was not consistent with the "general law of New Zealand"; as such, the rule making power of the

¹¹ At [32].

¹² At [32].

¹³ At [19].

¹⁴ At [21].

¹⁵ At [4].

¹⁶ At [59].

¹⁷ At [62].

¹⁸ At [63].

¹⁹ At [72], [76].

²⁰ At [75].

²¹ At [5].

school board was not valid.²² His Honour did not address the rule's compliance with the New Zealand Bill of Rights Act 1990. However, he directed the school to "give very careful consideration" as to the rule's compliance with the Act.²³

III Issues and Order of Analysis

A Issues

Battison v Melloy can be divided into two general issues. The issue that Collins J first considered was whether the suspension decisions were consistent with the provisions of the Education Act that regulate the exercise of discipline in schools. Two decisions were relevant and both were the subject of the review. The first was the decision by Mr Melloy to suspend Lucan. This was followed by the decision of the board to allow Lucan to return to school on the condition that he cut his hair to Mr Melloy's satisfaction. I will argue that while this result was open on the facts, the judge's reasoning is confused and contrary to authority.

The second broader issue concerned the school rule itself. Justice Collins splits this discussion into two distinct issues: first, the lawfulness of the specific hair rule; and secondly the lawfulness of school rules that attempt to regulate a student's hair. I will argue that although the judge's reasoning is underdeveloped, the end result is consistent with a broader, theoretical conception of rule making.

B Order of Analysis

It was unusual that Collins J addressed these issues in the order that he did because his conclusion on the second issue makes the first issue a moot point. Therefore, it would have been more convenient to address the hair rule first.

School discipline decisions are naturally decisions that relate to behaviour contrary to particular school rules. In this case, it was the hair rule. If the rule is itself illegal, then a court would generally be unwilling to sanction a decision that related to the enforcement of the illegal rule.²⁴ More specifically, "continual disobedience" to a rule that is itself unlawful cannot stand.

²² At [83], [91].

²³ At [96].

²⁴ Paul Rishworth "Stand down, Suspension and Expulsion" (paper presented to New Zealand Law

This was the approach taken by the Court of Appeal in both *Edwards v Onehunga High School Board* and *Rich v Christchurch Girls' High School Board of Governors*.²⁵ In *Edwards*, the Court of Appeal noted that “[a]s it was the breach of the rule which led to the disciplinary action, it is more logical to deal first with the challenge to the rule”.²⁶

IV Critique: The Hair Rule

A Uncertainty

Justice Collins held that the hair rule was invalid because it was uncertain.²⁷ This question had the potential to open up a philosophical debate as to the conception of the law and rules. While Collins J’s reasoning is underdeveloped, the net result is desirable in the context of schools’ hair and uniform rules.

Section 75(2) of the Act provides that the school board has the authority to manage and control the school as it sees fit.²⁸ The board can make bylaws (in the form of school rules) for this purpose.²⁹ In *Edwards*, the Court of Appeal suggested that the phrase “control and management” should be interpreted widely.³⁰ The Court also said that “a reasonable governing of appearance and dress fall properly within the ambit of matters authorised to be controlled.”³¹ This apparently wide authority to make school rules has since been qualified.³² Bylaws must now be consistent with other enactments, the school’s charter and the general laws of New Zealand.³³

Justice Collins stated the hair rule was a form of delegated legislation and therefore must be sufficiently precise to enable students and parents to be able to understand and arrange their

Society Education Law Seminar, September 2008) at 69.

²⁵ *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA); and *Rich v Christchurch Girls' High School Board of Governors* [1974] 1 NZLR 1 (CA).

²⁶ *Edwards v Onehunga High School Board*, above n 25, at 241.

²⁷ *Battison v Melloy*, above n 1, at [91].

²⁸ Education Act 1989, s 75(2).

²⁹ Section 72.

³⁰ Decided under the Education Act 1964, but the language was carried forward to the 1989 Act. *Edwards v Onehunga High School Board*, above n 25, at 243.

³¹ *Edwards v Onehunga High School Board*, above n 25, at 243.

³² Education Act 1989, s 72.

³³ Section 72.

affairs in accordance with school rules.³⁴ In this case, the hair rule breached the common law requirement of certainty. It therefore breached s 72 because it did not comply with the general laws of New Zealand.³⁵ Therefore, the rule was ultra vires. Evidence for this approach was provided by the fact that there was “considerable uncertainty about whether Lucan’s hair was in fact short.” This uncertainty demonstrated that the “hair rule is prone to subjective interpretation and was therefore uncertain.”³⁶ The uncertainty would lead to a situation where the principal had an “unfettered discretion” about whether a student’s hair complied with the hair rule.³⁷

No authority for the common law requirement of certainty was provided. The judge used the example of *Myers v Arcata*,³⁸ a Californian Court of Appeal case, to show how a school rule could be struck down for want of certainty. As the case contains strong constitutional reasoning, its relevance to New Zealand law is limited. In that case it was argued a prohibition on “extreme haircuts” was a breach of the First Amendment to the US constitution because it restricted freedom of expression.³⁹ It was also argued that the rule was too vague.⁴⁰ The majority held that regulation of hair length was constitutional, despite the fact it was a prima facie breach of freedom of expression.⁴¹ But because of the prima facie breach, it needed to be carried out with “narrow specificity”.⁴² In a strong dissenting judgment, Christianson J pointed out that this requirement, taken beyond the uniform context, would have absurd consequences. He asks what is the required “frequency of baths before a teacher may require a student to be clean?”⁴³

This question addresses perennial issues about the conception of the laws and rules. In particular, what is the right balance between the certainty required to follow the law and the

³⁴ *Battison v Melloy*, above n 1, at [88].

³⁵ At [83].

³⁶ At [91].

³⁷ At [95].

³⁸ *Myers v Arcata* 269 Cal App 2d 522 (1969).

³⁹ At 557.

⁴⁰ At 555.

⁴¹ At 559.

⁴² At 559.

⁴³ At 565.

flexibility needed to avoid absurd consequences. Justice Collins' concern is encapsulated by Postema, who opined:⁴⁴

To do its ordinary work, law must be intelligible to those who are subject to it; it must make practical sense to them at least to the extent that they can, across a wide range of application, grasp what kind of behaviour the law calls for and how it's doing so might give them some reason for complying.

In Joseph Raz's view, the avoidance of "ambiguous, vague, obscure or imprecise law" is so fundamental that it is an integral principle of the rule of law.⁴⁵ The requirement for certainty lies in the idea of personal autonomy.⁴⁶ Without legal certainty, individuals are unable to plan their lives in accordance with rules. In the context of St John's College's rules, in contrast to other uniform rules, the hair rule did not allow for parents and students to plan their affairs in accordance with the rule.⁴⁷

Striking down a rule for want of certainty is not as common in New Zealand as the United States, where the law of legal certainty is well developed and a culture of striking down legislation prevails. However, it is not without precedent in New Zealand. District planning rules have been struck down for want of certainty.⁴⁸

Christianson J's desire to maintain some flexibility undoubtedly holds some weight in a broader legal context. Ordinarily, a balance must be struck between vagueness and certainty.⁴⁹ In relation to *Battison* and school hair rules, the consequence would simply be a higher degree of uniformity, which was presumably the goal of the hair rule. In relation to a

⁴⁴ Gerald Postema "Law's System: the Necessity of System in Common Law" (paper presented at the Legal Research Foundation Conference on Mapping the Common Law, Auckland, 29 June 2012) at 13.

⁴⁵ Joseph Raz "The rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) 210 at 214.

⁴⁶ James Maxeiner "Some realism about legal certainty in the globalization of the rule of law" (2008) 31 *Houston Journal of International Law* 27.

⁴⁷ *Battison v Melloy*, above n 1, at [88].

⁴⁸ *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); and *McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362 (HC).

⁴⁹ RI Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 136.

hair rule, there is little chance that an overly specific rule would have absurd outcomes. Therefore, certainty trumps flexibility.

The argument that this aspect of the decision has net benefits is supported by educational practice. Case law is incorporated into Ministry guidelines and schools' policies.⁵⁰ There is already evidence that as a consequence of this decision, schools were forced to check whether they had clearly defined and understandable rules.⁵¹

B Bill of Rights Dimension and the School's Response

Justice Collins considered it unnecessary to address the issue of whether or not a rule regulating students' hair would be a breach of freedom of expression.⁵² However, the judge did instruct the school to give "very careful consideration" to the hair rule's continued existence.⁵³ His decision "provide[d] 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."⁵⁴

Section 14 of the New Zealand Bill of Rights Act states that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." It is generally accepted that "expression" is wider than speech alone and incorporates conduct that imparts meaning.⁵⁵ It would include wearing particular clothing.⁵⁶

School rules, in the same way as council bylaws, are not "enactments" that can be saved by virtue of s 4 of the Act.⁵⁷ A school rule that was in breach of the Act could be struck down

⁵⁰ *Bovaird v J* [2008] NZCA325, [2008] NZAR 667 at [39].

⁵¹ Sam Hurley and Steve Deane "Schools scramble to check rules after student's legal victory" *The New Zealand Herald* (online ed, Auckland, 28 June 2014).

⁵² NZ Bill of Rights Act 1990, s 14.

⁵³ *Battison v Melloy*, above n 1, at [96].

⁵⁴ At [96].

⁵⁵ For example, see: *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 where disorderly conduct was considered in light of NZ Bill of Rights Act, s 14; Paul Rishworth "Freedom of Expression by Students" (paper presented to Legal Research Foundation Seminar, Auckland, March 1993) at 40.

⁵⁶ Rishworth, "Freedom of Expression by Students", above n 55, at 40.

⁵⁷ "Enactments" are defined as Acts and regulations: Interpretation Act 1999, s 29.

by a court.⁵⁸ However, a school rule will not be inconsistent with the Act unless it fails the s 5 test.⁵⁹ Therefore, a school rule that reasonably breaches freedom of expression will only be struck down if the breach is not “demonstrably justified in a free and democratic society.”⁶⁰

In light of the decision in *Battison*, St John’s College sought to amend the hair rule such that more specific requirements were introduced. The new rule reads:⁶¹

Hair that is short, tidy and of natural colour. Short - means hair has to be 1cm off the collar at the back, not further than half way down the ear at the side and off the eyebrows at the front. Sideburns must not extend beyond the ear lobe. Tidy - means hair has to be combed and groomed. Extremes, including plaits, dreads and mohawks are not acceptable. Hair cannot be tied back in any manner.

In this way the new rule responded to the apparent uncertainty in the initial hair rule. The amendments to the hair rule were supported by 93 per cent of the parents.⁶²

The new rule did not abide by the judge’s warnings with regards to the rule’s compliance with s 14 of the NZ Bill of Rights Act. Though, what this does suggest is that the vast majority of parents think that such a restriction of freedom of expression is “demonstrably justified in a free and democratic society”. It would follow that the new rule would not be contrary to the Act by virtue of s 5. This factual interpretation also accords with the current, albeit increasingly controversial system of education whereby the local school is accountable to the community through the school board. Acceptance of this approach can be found in *Maddever v Umawera School Board of Trustees* where Williams J held:⁶³

⁵⁸ Susan Glazebrook “The New Zealand Bill of Rights Act 1990: its operation and effectiveness” (South Australian State Legal Convention, 22-23 July 2004) at [20].

⁵⁹ Glazebrook, above n 58, at [29].

⁶⁰ New Zealand Bill of Rights Act 1990, s 5.

⁶¹ Sam Hurley “College rule on students’ hair changes after court challenge” *Hawkes Bay Today* (online ed, New Zealand, 4 January, 2015).

⁶² Hurley, above n 61.

⁶³ *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 508.

The [Education Act 1989] is informed by the democratic belief that responsibility is the great developer of the citizenry and that issues of local educational administration be best left for resolution through the individuality of local communities.

It would be a controversial step for a judge to strike down a rule supported by the overwhelming majority of the school community.

V *Critique: Suspension Decisions*

Mr Melloy suspended Lucan because he considered that Lucan's refusal to cut his hair constituted "continual disobedience" and that it was a "harmful or dangerous example" to other students.⁶⁴ As a result of the suspension, the board of trustees' disciplinary subcommittee met to consider the circumstances. The committee decided that Lucan would be allowed to return to school if his hair was cut short, in accordance with the school rules, to a length that was acceptable to the principal.⁶⁵ In seeking to have the suspension decisions quashed, Lucan made two claims:⁶⁶ first, Mr Melloy failed to act in accordance with the principles of natural justice because he had determined that unless Lucan cut his hair, he would be suspended; and secondly, Mr Melloy's decision was not lawful because it did not meet the criteria that are set out in s 14(1)(a) of the Education Act.

A *Statutory Overlay*

School discipline decisions (specifically, those referred to in the Act as stand-downs, suspensions, exclusions and expulsions) are governed by pt 2 of the Act and the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999. Part 2 of the Act was added through the Education Amendment Act 1998.

Analysis usually starts with a recognition that every person in New Zealand between the ages of five and 18 years is entitled to a free education.⁶⁷ However, this right is not absolute and school disciplinary actions represent an example of a limitation on this right.⁶⁸

⁶⁴ *Battison v Melloy*, above n 1, at [21].

⁶⁵ At [24].

⁶⁶ At [32].

⁶⁷ Education Act 1989, s 3; see *J v Bovaird* [2007] NZAR 660 (HC) at 23; *Battison v Melloy*, above n 1, at [36].

⁶⁸ Rishworth, "Stand down, Suspension and Expulsion", above n 24, at 53.

Section 13 provides the purposes of the provisions that govern school discipline decisions. These are: (i) to provide a range of responses for cases of varying degrees of seriousness; (ii) to minimise the disruption to a student's attendance at school and facilitate the return of a student when appropriate; and (iii) to ensure that individual cases are dealt with in accordance with the principles of natural justice.

Section 14 is the operative provision. It provides that the principal may stand-down or suspend a student if satisfied on reasonable grounds that: (i) a student's gross misconduct *or* continual disobedience is a harmful or dangerous example to other students at the school;⁶⁹ or (ii) because of the student's behaviour, it is likely that the student or other students at the school, will be seriously harmed if the student is not stood-down or suspended.

If a student is suspended, the school's board of trustees will decide on the appropriate course of action. In this way the board acts as a check on the principal's power under s 14.⁷⁰ Sections 15 and 17 provide a range of options for the board to take, depending on whether the student is over the age of 16 or not. The board may lift the suspension conditionally or unconditionally, or the board may extend the suspension for a reasonable period of time, imposing conditions aimed at facilitating the student's return to the school.⁷¹ If the student is above the age of 16, the board has the option to expel the student.⁷² If the student is under the age of 16, the board may exclude the student, subject to the requirements in ss 15 and 16. Section 17B provides that the student and their parents are entitled to a meeting with the board before this decision is made, and at that meeting they are entitled to have their views considered.

⁶⁹ Emphasis added.

⁷⁰ See *D v M and the Board of Trustees of Auckland Grammar School* [2003] NZAR 727 (HC) (*Auckland Grammar*) at 740; and *Bovaird v J*, above n 50, at [69].

⁷¹ Education Act 1989, ss 15(2) and 17(2).

⁷² Section 17.

B Suspension Decisions Quashed

1 Rights-based approach

Justice Collins prefaces his analysis of the suspension decisions by advocating for a more rights-friendly approach to assessing school discipline decisions.⁷³ This approach would allow for a more critical analysis of the merits of a decision. This approach is contrary to authority and not well founded.

The judge suggested that New Zealand courts “have been more willing to ensure the rights of a student are given proper weight when revisiting school discipline decisions.”⁷⁴ As authority for this proposition, Collins J cites a case concerning artificial insemination decided under the Guardianship Act 1968.⁷⁵ The judge then said that:

the legislative developments since the Court of Appeal decided *Edwards*, combined with the obligations New Zealand has under the [United Nations Convention on the Rights of the Child (UNCRC)] and the effects of the NZBORA, mean that it is no longer appropriate for the High Court to take an approach in school disciplinary cases which fails to give appropriate weight to the rights and interests of a student.

The judge set out various provisions of the UNCRC,⁷⁶ before suggesting that the convention is a mandatory consideration that “need[s] to be taken into account when assessing the exercise of statutory disciplinary provisions that affect a student under the age of 18.”⁷⁷ The judge bases this on the approach in *Tavita v Minister of Immigration*, which famously held that Ministers were required to consider relevant international conventions when exercising statutory discretion.⁷⁸ Of course, this approach fails to take into account the difference in competencies between Ministers of the Crown and a principals or a laypeople sitting on a school boards.⁷⁹

⁷³ *Battison v Melloy*, above n 1, at [49]-[54].

⁷⁴ *Battison v Melloy*, above n 1, at [50].

⁷⁵ *P v K* [2003] 2 NZLR 787 (HC).

⁷⁶ New Zealand ratified the United Nations Convention on the Rights of the Child in 1993: Ministry of Justice “Constitutional Issues & Human Rights: UN Convention on the Rights of the Child” (21 June 2016) <<http://www.justice.govt.nz>>.

⁷⁷ *Battison v Melloy*, above n 1, at [48].

⁷⁸ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.

⁷⁹ Rishworth “Stand down, Suspension and Expulsion”, above n 24, at 55.

As authority for the importance of the New Zealand Bill of Rights Act and UNCRC the judge cites an article by Professor Rishworth. In a more recent seminar, Rishworth has thoroughly considered the importance of the UNCRC in the education context. He suggests that if the relevant provisions of the Convention are widely construed, its influence on the Act could be significant.⁸⁰ However, he concludes that placing too much emphasis on the UNCRC is a red herring. Of particular relevance is art 3 which states that the “best interests of the child shall be a primary consideration”. Rishworth qualified this right by suggesting that it applies to children collectively, and not just about the child facing disciplinary action.⁸¹ As such, it may be that it is in the interests of children collectively that the child be disciplined pursuant to the Act. Furthermore, “best” does not mean “primary”, the UNCRC allows for a multi-faceted analysis.⁸² Rishworth suggests that the relevant sections of the Act are clear and reflect a policy decision to balance individual and community interests. In any event, he forcefully argues that if the Act is applied correctly (with due regard to the purposes in s 13), the result will be a decision consistent with the UNCRC.⁸³ This approach is supported by the fact that the Education Amendment Act 1998 was, in part, a response to New Zealand ratifying the UNCRC.⁸⁴

The argument for a more interventionist approach to school discipline that is more willing to assess the merits of a decision is contrary to authority. In *M v Syms*, McGechan J said “the Court will give appropriate weight to the advantages a principal has from expertise and close acquaintance with the school and matter concerned.”⁸⁵ Justice McGechan went on to say:⁸⁶

Invalidation [in this case] could be popularly misunderstood as establishing that a student who does not like the view taken by a principal or board as to his conduct has some right to come to this Court to have the question reconsidered on its merits, as if this Court were some final educational disciplinary authority. Nothing, of course, is further from the truth.

⁸⁰ At 54.

⁸¹ At 54.

⁸² At 54.

⁸³ At 55.

⁸⁴ Ken Rae “Stand Down, Suspensions and Exclusions: Potential Impacts of the 1998 Education Amendment Act (No 2)” (1999) 8 New Zealand Annual Review of Education 27 at 28.

⁸⁵ *M and R v S and the Board of Trustees of Palmerston North Boys’ High School* [2003] NZAR 705 (HC) (*Syms*) at 718.

⁸⁶ At 723.

This aligns with the often emphasised point that a “Court does not substitute its view on the merits of the case”.⁸⁷ In a similar vein, the Court of Appeal recently said:⁸⁸

[t]he special competence of a principal and the existence of [the] internal protections [of the Act] means that a court will rarely intervene in a principal’s decision to stand down or suspend a student under s 14.

2 Application of Section 14(1)(a)

Mr Melloy’s decision was held to be invalid for three reasons: first, principals must ensure that serious disciplinary consequences are reserved for truly serious cases;⁸⁹ secondly, in school disciplinary cases, principals must ensure that penalties are such that the student’s absence from school is minimised;⁹⁰ and thirdly, the Act requires some objective evidence that the suspension was necessary to protect other students from a harmful or dangerous example.⁹¹ It will be argued that the first reason is not well founded because the judge erroneously relied on *Syms* which considered the “gross misconduct” ground. An unfortunate consequence of this is that the judge did not clarify the meaning of the term “continual disobedience”. Instead, it will be argued that his Honour’s conclusion should have been founded on an improper purpose argument. The potential complications of the judge’s third reason will also be pointed out.

It must be said from the outset that it is not helpful to an analysis of the case that Collins J’s judgement does not make reference to any case that has been decided under the current legislative scheme. Previous case law has emphasised the different requirements for the three grounds⁹² on which a suspension or stand-down can be based.⁹³ From his analysis, the judge appears to blur the “gross misconduct” and “continual disobedience” grounds, indicating he may not have appreciated the importance of this distinction.

⁸⁷ *Auckland Grammar*, above n 70, at 740; recently affirmed in *D v Havill* HC Auckland CIV 2009-404-004947, 30 September 2009 at [56]; and *X v Bovey* [2014] NZHC 1103 at [4].

⁸⁸ *Bovaird v J*, above n 50, at [49].

⁸⁹ *Battison v Melloy*, above n 1, at [58].

⁹⁰ At [62].

⁹¹ At [63].

⁹² See discussion above at V, A.

⁹³ For example, not specifying which ground the suspension was based on was fatal in *D v Havill*, above n 87, at [69]; and *Bovaird v J*, above n 50, at [68].

(a) Disproportionality, *Syms*, and an alternative approach

Justice Collins states that s 14(1)(a) may only be used where the student's behaviour is "so egregious that it seriously impacts on the welfare and attitude of other students in the school" and that the principal is "left with no alternative other than to suspend or stand-down the student in question."⁹⁴ It was held that the correlation between offending and the punishment was not satisfied in this case;⁹⁵ and Mr Melloy did not explore disciplinary sanctions less serious, such as prohibiting Lucan from representing the school until he complied with the principal's request.⁹⁶ The judge stated that "even if Lucan's continued disobedience was continued disobedience that was a harmful or dangerous example to others, Mr Melloy was still obliged to use suspension as a last resort."⁹⁷ This analysis was said to be based on *Syms*.⁹⁸ Using *Syms* as authority for this approach is confusing for two reasons.

First, the interpretation that suspension can only be used as a measure of last resort where the student's conduct will seriously impact on the welfare and safety of other students suggests that there is no discretion and that where grounds to suspend exist, the principal must suspend the student in question. *Syms* makes clear that the use of the word "may" in s 14 confers a discretion on principals. The exercise of this discretion is an indispensable step in the process of standing down or suspending a student.⁹⁹ This was at the heart of McGechan J's reasoning.

Secondly, *Syms* specifically addressed fixed rules in the context of the "gross misconduct" ground. In the case, M and R had been caught drinking a small quantity of alcohol on a school skiing trip, contrary to school rules.¹⁰⁰ Both were suspended for an unspecified time by the rector.¹⁰¹ The judgment contains extensive discussion of the "gross misconduct" ground.¹⁰² On the facts, McGechan J found that the rector and the board had not considered the circumstances of the case, but had simply applied a "fixed rule and reached an inevitable

⁹⁴ *Battison v Melloy*, above n 1, at [55].

⁹⁵ At [59].

⁹⁶ At [58].

⁹⁷ At [55].

⁹⁸ At [60].

⁹⁹ *Syms*, above n 85, at 715-719.

¹⁰⁰ At 705.

¹⁰¹ At 705.

¹⁰² At 711-715.

conclusion.”¹⁰³ Justice McGechan emphasised that “gross misconduct” would require a serious behavioural breach, but in the end it would be a decision for the rector.¹⁰⁴ Justice McGechan did recognise that “[t]here may be cases where the severe consequences for a child of suspension for an unspecified period, and removal or potential removal, would be disproportionate.” However, he does so in the context of pointing out the consequences of failing to exercise discretion when applying a fixed rule. Earlier, the judge said:

the Court must see the discretion whether or not to discipline is exercised, and in accordance with law; but is not itself to become a substitute disciplinarian. Decisions on the merits, provided such are reached by lawful process, are for principals.

The high bar for suspension also conflicts with the Court of Appeal’s analysis in *Bovaird v J*. The Court in that case held that as long as reasonable grounds to suspend exist, principals are entitled to make prompt decisions based on incomplete information.¹⁰⁵ This suggests that once grounds to suspend arise, as long as principals pay due regard to the purposes in s 13, they are entitled to exercise their discretion and suspend students.

Clearly then, authority for a proportionality between “offending and punishment” does not lie in the school discipline case law.¹⁰⁶ It would have been open for the judge to argue that the standard for the unreasonableness ground of judicial review should be lowered in this case beyond the traditional *Wednesbury* standard.¹⁰⁷ This reasoning would be supported by the developing understanding of the importance of education.¹⁰⁸ And, as McGechan J stated in *Syms*, “no one should underrate a school child’s capacity to perceive and feel personal injustice.”¹⁰⁹ That said, the unreasonableness standard in school discipline disputes has previously been held to be that of *Wednesbury* unreasonableness.¹¹⁰ Perhaps the strongest argument Collins J could have made in support of his approach was along the lines of the Court of Appeal in *Institute of Chartered Accountants of New Zealand v Bevan*. Much like

¹⁰³ At 716 and 722.

¹⁰⁴ At 715.

¹⁰⁵ *Bovaird v J*, above n 50, at [49].

¹⁰⁶ *Battison v Melloy*, above n 1, at [58].

¹⁰⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

¹⁰⁸ See generally: Fred McElrea “Education, discipline and restorative justice” (1996) 2 BFLJ 91.

¹⁰⁹ *Syms*, above n 85, at 723.

¹¹⁰ *Skilton v Fitzgibbon* HC Auckland M142/98, 13 May 1998. This mirrors the Canadian approach, see: John Caldwell “Judicial Review of School Discipline” (2006) 22 NZULR 240 at 260.

in the school discipline context,¹¹¹ the Court in that case recognised that it was not an appellant body designed to assess the statutory discretion on its merits.¹¹² Despite this, given the relatively minor breach of the code of conduct, the harsh sanction was “altogether excessive and out of proportion to the occasion”; therefore, the decision was quashed.¹¹³ While the disproportionality in *Bevan* was probably not comparable to that *Battison*, an argument of this sort could have been made.¹¹⁴

(b) “Continual disobedience”

As a consequence of purporting to rely on *Syms*, Collins J did not fully consider the term “continual disobedience”. The term has not yet been considered in detail by the courts, and it is unfortunate that this decision provides no elucidation on what interpretation it may be given. Justice Collins simply accepted that Lucan’s conduct constituted “disobedience”, and that it was probably “continued”.¹¹⁵ It has been suggested that the notion of “entrenched behaviour” may be seen as a definition of “continual disobedience”.¹¹⁶ Linguistically, misconduct has more serious connotations than disobedience, particularly “gross misconduct”. It would be safe to assume that “continual” would suggest a pattern of behaviour that is contrary to school rules. This would suggest that when compared to “gross misconduct”, “continual disobedience” would relate to less serious behaviour that probably extends over a greater period of time.

The approach by the Court of Appeal in *Edwards* provides some insight into whether Lucan’s conduct in this case can readily be said to constitute “continual disobedience”. The cases are, on their facts, largely indistinguishable. In fact, in that case, Phillip Edwards, who had been suspended after refusing to cut his hair, also argued that the suspension was not legitimate because it was not “from incorrigible disobedience an injurious example to other pupils” (under s 130 of the Education Act 1964) and that the rule governing the length of

¹¹¹ *Auckland Grammar*, above n 70, at 740; recently affirmed in *D v Havill*, above n 87, at [56]; and *X v Bovey*, above n 87, at [4].

¹¹² *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA) at [47].

¹¹³ At [53], citing *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052 (CA) at 1057, per Lord Denning.

¹¹⁴ For example, see: Caldwell, above n 110, at 261.

¹¹⁵ *Sic. Battison v Melloy*, above n 1, at [56].

¹¹⁶ Paul Rishworth “Stand down, Suspension and Expulsion”, above n 24, at 57; citing *J v Bovaird*, above n 67, at [50], per Keane J.

the boy's hair was ultra vires of the school rules because it was an unreasonable and unjustified intrusion into the boy's personal liberty.¹¹⁷ Even in 1974, the Court of Appeal shared the scepticism of Collins J concerning a hair rule:¹¹⁸

We accept that the length of a boy's hair may not be a very serious matter for many of us and that our experiences with young people show that views vary widely about such things. However, the Court pointed out that:¹¹⁹

the case of Phillip Edwards became much more than an issue of the length of his hair. It became a test between him and the school as to whether a resolution of the board formally made was to be obeyed by him.

This interpretation of similar facts suggests that it could reasonably be considered that Lucan's continual disobedience,¹²⁰ in refusing to cut his hair, could be seen a harmful example to other students, thus satisfying the statutory criteria.

(c) Character of the school

While it does not appear to have been argued, the character of the particular school could be relevant in determining the meaning of "gross misconduct or *continual disobedience [that] is a harmful or dangerous example to other students.*"¹²¹ Clearly, the point has been established that the circumstances of the behaviour will be relevant in determining whether the behaviour constitutes "gross misconduct",¹²² and presumably "continual disobedience". The Court of Appeal in *Bovaird* affirmed that the personal circumstances of a student will be relevant in the exercise of discretion.¹²³

In *Battison*, St John's College was an integrated, state school.¹²⁴ Integrated schools are statutorily entitled to maintain a special character.¹²⁵ This special character may extend to a

¹¹⁷ *Edwards v Onehunga High School Board*, above n 25, at 241.

¹¹⁸ At 244.

¹¹⁹ At 244.

¹²⁰ *Battison v Melloy*, above n 1, at [56].

¹²¹ Emphasis added.

¹²² *Syms*, above n 85, at 713-714.

¹²³ *Bovaird v J*, above n 50, at [63].

¹²⁴ *Battison v Melloy*, above n 1, at [12].

¹²⁵ Private Schools Conditional Integration Act 1975, s 3.

more comprehensive set of school rules and stricter discipline procedures. This argument may be difficult in this case, as there is evidence that the hair rule was inconsistently applied.¹²⁶ However, such an argument has been accepted by House of Lords in *R v Headteacher and Governors of Denbigh High School*. Their Lordships held that the student had a choice of schools to attend, and that choice was a relevant consideration.¹²⁷ This approach appears to have been favoured by Mackenzie J in *X v Bovey* who emphasised the particular school's traditional approach to rules and discipline.¹²⁸ In contrast to earlier dicta, his Honour even suggested that the school's prevailing approach to discipline may lead presumptions of behaviour that will ordinarily constitute "gross misconduct".¹²⁹

3 *The strongest argument: improper purpose*

Collins J's strongest argument for quashing the principal's decision is one of improper purpose. This appears to be the thrust of his second reason for quashing the principal's decision. As his Honour points out, the application of s 14 is made in light of the purposes in s 13, which includes making a variety of responses available to schools for cases of varying degrees of seriousness¹³⁰ and minimising disruption at school.¹³¹

In *CREEDNZ Inc v Governor-General*, Richardson J stated that "anyone exercising a statutory direction... must direct themselves properly in law. They must call their attention to the matters they are bound by statute expressly or impliedly to consider".¹³² In the case of the Education Act, the purposes in s 13 are mandatory considerations in the exercise of the statutory discretion in s 14.¹³³ If it is clear that minimising Lucan's absence from school was not at the fore of Mr Melloy's decision making, then the decision to suspend would not be valid: it would be for an improper purpose. It appears this was so in this case.¹³⁴ This simple analysis provides a strong basis to quash Mr Melloy's suspension decision.

¹²⁶ *Battison v Melloy*, above n 1, at [11].

¹²⁷ *R v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [57], [87].

¹²⁸ *X v Bovey*, above n 87, at [13].

¹²⁹ *X v Bovey*, above n 87, at [14].

¹³⁰ Education Act 1989, s 13(a).

¹³¹ Section 13(b).

¹³² *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 196-197.

¹³³ *J v Bovaird*, above n 67, at [63].

¹³⁴ *Battison v Melloy*, above n 1, at [62].

4 “Objective evidence”: a point to consider

Finally, Collins J held that s 14(1)(a) required “sound objective evidence” that the action was necessary to “protect other students from behaviour which really does constitute a harmful or dangerous example to other students”.¹³⁵ His Honour continued, “the evidence before Mr Melloy did not satisfy this criteria”.¹³⁶ Again, in this statement there is a suggestion that Collins J is merging the various grounds of s 14(1) of the Act. The use of the word “protect” seems to import an element of the actual harm or danger required for s 14(1)(b), as opposed to merely a “harmful or dangerous *example*”,¹³⁷ which is the criteria for a continual disobedience under s 14(1)(a).

Justice Collins interprets s 14(1)(a) to mean that “principals and boards [must] make decisions that are objectively reasonable.”¹³⁸ At this stage it is useful to step back and consider the construction of s 14(1)(a). The construction of this section is not entirely objective, such that a decision can be overturned on its merits if it is not “objectively” correct. The section states that the principal may, “if satisfied on reasonable grounds”, stand-down or suspend a student. If reasonable grounds exist, then the decision becomes a subjective exercise of discretion on the part of the principal. Without recognition of the subjective exercise of discretion, the exercise essentially becomes an appeal on the facts. This is contrary to authority,¹³⁹ and risks compromising the “special competence” that courts have recognised that decision-makers have.¹⁴⁰

5 *The board’s decision: a brief comment*

Only brief comment is needed in relation to the judge’s analysis of the board’s decision. The disciplinary subcommittee of the board decided that Lucan could return to school on the condition that he cut his hair to the satisfaction of Mr Melloy.¹⁴¹ Justice Collins held that this condition went beyond the hair rule itself.¹⁴² This is self-evident. The judge also held

¹³⁵ At [63].

¹³⁶ At [63].

¹³⁷ Emphasis added.

¹³⁸ At [53].

¹³⁹ *Auckland Grammar*, above n 70, at 740; recently affirmed in *D v Havill*, above n 87, at [56]; and *X v Bovey*, above n 87, at [4].

¹⁴⁰ *Bovaird v J*, above n 50, at [49].

¹⁴¹ *Battison v Melloy*, above n 1, at [70].

¹⁴² At [75].

that the committee essentially committed the same mistake as the principal, because it did not assess whether there was effective compliance with the hair rule by Lucan.¹⁴³ This reasoning is supported by *Auckland Grammar*¹⁴⁴ and *Bovaird*.¹⁴⁵ For example, in *Bovaird* the Court of Appeal held:¹⁴⁶

An invalid suspension decision by a principal can be cured by a valid reconsideration by the board...in this case, the same difficulties surrounding the principal's second decision to suspend arise in relation to the board decision.

VI *Addressing a perception of substantive review*

A *Background*

The judicial review of school discipline has been high profile in recent years. *Battison* is not the only decision that has received significant media coverage. The case of *Kennedy v Boyle* was also very high profile,¹⁴⁷ despite the fact it was only an interim decision. Much of this attention was probably a continuation of frustration felt at the *Battison* decision.¹⁴⁸

Kennedy and Bell sought an urgent injunction preventing the rector of St Bede's College from implementing the school's decision to ban them from rowing in the 2015 Maadi Cup.¹⁴⁹ The school's decision was in response to an incident where the boys had breached airport security by riding on a baggage carousel into a secure baggage area.¹⁵⁰ The rector decided that because of the seriousness of the matter, both boys would be suspended from the rowing team and sent home.¹⁵¹ This was consistent with a code of conduct that had been signed by the boys and their parents prior to the trip.¹⁵² Justice Dunningham held that it was

¹⁴³ Assuming the principal's decision is unlawful.

¹⁴⁴ *Auckland Grammar*, above n 70, at 739.

¹⁴⁵ *Bovaird v J*, above n 50, at [69].

¹⁴⁶ At [69].

¹⁴⁷ *Kennedy v Boyle* [2015] NZHC 536, [2015] NZAR 585; See for example: Nicole Mathewson, Myles Hume and Brittany Mann "St Bede's College parents win interim court injunction" *The Press* (online ed, Christchurch, 23 March 2015).

¹⁴⁸ See Marcelo Rodriguez Ferrere "School Disciplinary Decisions, Judicial Review and Interim Relief" [2015] NZLJ 176.

¹⁴⁹ *Kennedy v Boyle*, above n 147, at [1].

¹⁵⁰ At [4].

¹⁵¹ At [6].

¹⁵² At [14].

reasonably arguable that the school did not have regard to all of the circumstances.¹⁵³ It was then decided that because the boys could subsequently be punished for their actions, but they only had one chance to row at the regatta, the balance of convenience lay with them so the injunction should be granted.¹⁵⁴

In light of the coverage of *Battison* and *Kennedy*, there is a perception school discipline decisions are now more likely to be reviewable on their merits.¹⁵⁵ The reasoning in *Battison* also suggests this may be the case. In particular, the judge advocating for a rights-based approach¹⁵⁶ and the requirement that any decision be objectively reasonable¹⁵⁷ suggests decisions will be subject to greater scrutiny. This contrasts strikingly with the traditional approach that courts took to school discipline disputes. The question then arises, is *Battison* reflective of modern case law generally? It will be argued that *Battison* is an aberration, and does not reflect the approach of courts generally.

B Traditional Position

In 2008, Rishworth suggested that no New Zealand school disciplinary review case has ever succeeded on the grounds of substance, i.e. no case had ever been successful purely because the suspension was “irrational”, “unreasonable” or “disproportionate”.¹⁵⁸ Traditionally, administrative decisions were only reviewable on their merits if the decision was so unreasonable that no reasonable decision maker could have ever reached that conclusion.¹⁵⁹

Caldwell reports that only four judicial challenges to school discipline decisions were reported in the 50 years prior to his 2006 article.¹⁶⁰ As Collins J points out in *Battison*, the courts were “hesitant to enter into the fray of school disciplinary proceedings”.¹⁶¹ Schools

¹⁵³ At [27].

¹⁵⁴ At [30]. This conclusion confuses the common meaning with a distinct statutory concept. There is no suggestion the boys were going to be legally stood-down upon return. Once it is recognised that the Act is not engaged on the facts, the decision should be viewed in a separate light. There is no authority for quashing a disciplinary decision short of a stand-down in New Zealand.

¹⁵⁵ “Principals dealing with more legal disputes” *Radio New Zealand* (online ed, Wellington, 6 July 2015).

¹⁵⁶ *Battison v Melloy*, above n 1, at [52].

¹⁵⁷ At [53].

¹⁵⁸ Paul Rishworth “Stand down, Suspension and Expulsion”, above n 24, at 58.

¹⁵⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, above n 107, at 299.

¹⁶⁰ Caldwell, above n 110, at 240.

¹⁶¹ *Battison v Melloy*, above n 1, at [49].

were given a “reasonably large zone of immunity.”¹⁶² In *Rich v Christchurch Girls’ High School Board of Governors*, the Court of Appeal held that the legislature had made a choice to favour “practical efficiency” over “abstract justice”.¹⁶³ Caldwell wisely predicted that this traditional approach would be overtaken by an activist attitude to the judicial approach to school discipline decisions.¹⁶⁴

C *Response of the Modern Case Law*

While reading the decision in *Battison*, it would be possible to conclude that school discipline disputes are not common. In fact, there is a developing body of case law that maintains a strong emphasis on process over substance. I will now briefly summarise some recent case law to demonstrate the procedural nature of the school discipline judicial review decisions. While the cases are all highly fact dependent, they have all been decided under the current law and show the procedural nature of analysis.

The highest authority on school discipline is the decision of the Court of Appeal in *Bovaird v J*.¹⁶⁵ The appeal concerned the decision of Keane J in the High Court, quashing a decision by the principal of Lynnfield College to suspend, and the subsequent decision of the board to expel, J.¹⁶⁶ The decision of the Court largely concerned the requirements of natural justice during the investigation of misconduct.¹⁶⁷ The principal did not identify whether the suspension was for gross misconduct or continual disobedience, or whether the conduct was a harmful or dangerous example.¹⁶⁸ The board was held to have breached natural justice by questioning a student at a subsequent board meeting, without giving J the chance to respond.¹⁶⁹ The reasons for the decision were also seen as too inadequate to demonstrate the board had sufficiently engaged with the statutory criteria.¹⁷⁰ The Court also emphasised the procedural nature of the decision.¹⁷¹

¹⁶² Caldwell, above n 110, at 241.

¹⁶³ See: Caldwell, above n 110, at 241.

¹⁶⁴ At 24.

¹⁶⁵ *Bovaird v J*, above n 50.

¹⁶⁶ At [1].

¹⁶⁷ At [3].

¹⁶⁸ At [66].

¹⁶⁹ At [71].

¹⁷⁰ At [71]-[74].

¹⁷¹ At [68].

We stress the this finding of invalidity is borne out of the failure to identify whether the second suspension was a result of gross misconduct or continual disobedience. We make no comment as to whether the conduct complained of met the criteria set out in s 14(1).

The decision of Andrews J in *D v Havill* is the clearest example of an application of the statutory criteria to a particular set of facts. Andrews J set out applicable principles guiding his analysis:¹⁷² it is not for the court to substitute its views on the merits of the case; the court will look to apply the relevant statutory criteria; the court exercises a supervisory role to ensure nature justice is complied with; and a subsidiary of natural justice is that decisions must be made on the correct facts. Justice Andrews worked through the facts chronologically and determined each incident in accordance with the law. For example, a telephone call had been made stating that D should not return to school until a meeting had taken place. This amounted to an informal stand down and was contrary to s 14 and r 8 of the Education Rules 1999.¹⁷³ In a letter following the official stand down meeting, the principal failed to correctly identify the statutory grounds on which D was stood down.¹⁷⁴ In light of his decision to quash the board's decision to expel, his Honour noted that it was open for the board to make the same decision following the correct procedure.¹⁷⁵

In the case of *X v Bovey*, it is clear from the dicta that Mackenzie J did not share the expansive approach adopted by Collins J. From the outset, Mackenzie J emphasised that judicial review focuses on process, not substance.¹⁷⁶ While *X v Bovey* is not beyond criticism,¹⁷⁷ comments such as “a school needs to set clear boundaries, and apply those consistently”, appear to limit the general applicability of the decision in *Syms*, rather than expanding it, as in *Battison*. In addressing the claim that the rector failed to take account of the personal circumstances and mitigating factors, Mackenzie J said that the law does not prescribe, beyond the provisions in the Act, particularly ss 13 and 14, which factors must be

¹⁷² *D v Havill*, above n 87, at [56].

¹⁷³ At [63].

¹⁷⁴ At [71].

¹⁷⁵ At [110].

¹⁷⁶ *X v Bovey*, above n 87, at [4].

¹⁷⁷ His Honour suggested (at [6]) that “an allegation of predetermination is an allegation of actual bias”. In both *Syms* (at 716) and *Auckland Grammar* (at 738,742) it was emphasised that although decisions were rigidly following school rules, they were made in good faith.

taken into account by the Principal. These factors, and the weight attributed to them, are matters for the principal.¹⁷⁸

The three recent cases just described all maintain a strong focus on process rather than merits. In reading the decisions, maintaining this focus is at the forefront of the court's reasoning. In this way, it should be concluded that *Battison* merely represents an aberration in the judicial review of school discipline.

VII Conclusion

Battison v Melloy was a polarising case that played out as much in the media as it did in court. Amongst many in the public, the decision seemingly stood for the proposition that a judge knew more about running a school than a principal. Of course, the situation is much more complex than that.

In this paper, each aspect of the decision has been broken down and critiqued. The three issues that Collins J decided were amalgamated into analysis of the hair rule and the school discipline decisions. The relationship between these two general issues was also discussed.

The decision that the hair rule was ultra vires because it did not comply with the requirements set out in the Education Act was analysed. Several points were raised, including the school's response to the *Battison* decision. It was concluded that while the judge's reasoning was underdeveloped, the result was consistent with a broader, theoretical conception of rule-making.

The judge's reasoning with regards to the school discipline decision was more difficult. It is perhaps a reflection of the maxim, hard cases make bad law. The judge's legal justification for the expansive approach was not supported by authority. The application of s 14 (1)(a) of the Education Act was not clear. In erroneously relying on the decision in *Syms*, Collins J failed to engage with the meaning of the term "continual disobedience". While the judge's eventual conclusion was open on the facts, it should have been reached by applying a simple improper purpose argument.

¹⁷⁸ *X v Bovey*, above n 87, at [22].

Finally, the question was posed whether *Battison* is representative of a sea change in the judicial oversight of school discipline decisions. In the end, analysis of the case law suggested that *Battison* is a departure from earlier legal authority, and a more process driven approach is still generally favoured.

While this paper has sought to comprehensively critique the approach taken in *Battison*, that is not to say that the judge's approach is necessarily wrong with regards to policy factors. It may well be that in future, Parliament may intervene to create a mechanism whereby the special competence of principals is better balanced with an increased desire to review school discipline decisions on their merits. In this way *Battison* can be seen as a fork in the road.

Word count

The text of this paper (including substantive footnotes but excluding table of contents, bibliographic footnotes, and bibliography) comprises 7916 words.

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