

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

**CIV-2009-412-000629**

UNDER the Judicature Amendment Act 1972  
IN THE MATTER OF an application for judicial review  
BETWEEN THE OTAGO UNIVERSITY STUDENTS'  
ASSOCIATION (INCORPORATED), TE  
ROOPU TAUIRA O TE WHARE  
WAANANGA O OTAACKOU  
Plaintiff  
AND THE UNIVERSITY OF OTAGO  
Defendant

Hearing: 23 October 2009

Counsel: B E Ross for Plaintiff  
R J M Sim and E F Tait for Defendant

Judgment: 5 November 2009

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 2.00pm on the 5th day of November 2009.

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**RESERVED JUDGMENT OF GENDALL J**

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[1] University students throughout the world, in particular in residential universities, are known to sometimes engage in some form of boisterous behaviour. They enjoy their freedom as young adults, in most instances away from their parents or families with whom they live during high school years. They participate in stunts, events, extra-curricular activities, small and large social groups, so as to have high-spirited fun. Sometimes the fun and the behaviour surrounding it can get out of hand and turn into disorderly or even criminal behaviour, which is viewed with disdain

and disapproval by the governing bodies of the universities, the local authorities, the police and the public community which hosts the University.

[2] These proceedings arise out of what has come to be known as the “toga parade” in Dunedin. That activity occurs during orientation week when students, enrolled for their first year at Otago University, congregate into a group on or near the dental school in North Dunedin, dressed in sheets akin to those in the days of Ancient Rome. They then walk or parade from North Dunedin, along George Street towards the Octagon, that being the major commercial retail area in that city. Whilst the freshman students parade in that way, it has become customary for onlookers, usually, but perhaps not always, students in their second, third and subsequent years, to throw eggs and water bombs at the participants in the parade.

[3] The toga parade for this year took place on 24 February 2009. It involved between 1,500 and 2,000 participants, and regrettably degenerated into disorderly riotous mayhem by some of those students. This resulted in three students, identified as participating, being subject to disciplinary action by the University. Two were disciplined. The precise nature of the disorderly, and even criminal, behaviour is not directly relevant to the issue to be decided but there was extensive media coverage in New Zealand and internationally of what degenerated into disreputable and disorderly conduct by a number, but of course not all, of participants. But the University’s reputation suffered and there is ample evidence of widespread public, media and community criticism of the University and its students, because of the behaviour of some of its members.

[4] One of the students who faced disciplinary action, was Nathan Stewart. He was formerly the first plaintiff in these proceedings. The Vice-Chancellor determined that he had breached rules of the University’s Code of Student Conduct as follows:

- Engaging in actions that were unreasonably disruptive to the local community;

- Engaging in actions that resulted in, or could be reasonably be expected to result in, damage to property of any person;
- Engaging in actions that were otherwise unlawful, being actions complained of which could amount to disorderly behaviour or wilful damage.

[5] The sanctions imposed were that he was excluded from enrolment at the University until the second semester of 2009 (fees for the first semester to be refunded), and he was required to pay \$200 towards the clean-up costs incurred by the Dunedin City Council.

[6] Both students sought review of the Vice-Chancellor's decision on appeal to the Appeals Board ("the Board") - a Board appointed by the University Council ("the Council") for the purpose of hearing appeals by University members (and prospective members) against decisions of University bodies. The appeals were dismissed.

[7] Consequently Mr Stewart brought, as first plaintiff, these High Court proceedings. He alleges that the University:

- acted ultra vires of its statutory power in amending the Disciplinary Proceedings Regulations ("the Disciplinary Regulations") to include the Code of Conduct, being outside the powers given to it by the Education Act 1989;
- the Board's decision in imposing the penalty of exclusion for one semester was disproportionate to the conduct involved;
- the Board's decision was ultra vires the Student Appeals Regulations.

[8] Mr Stewart was joined in these proceedings by the Otago University Students' Association. He sought interim relief under s 8 of the Judicature Amendment Act 1972 which was declined by Panckhurst J in a decision dated 7

August 2009. Thereafter, Mr Stewart has abandoned his proceedings and no longer pursues the application or seeks relief.

[9] However, the Otago University Students' Association ("the Association") has remained as a plaintiff. It filed an amended statement of claim in which it pursues only the first and third causes of actions listed above. That is, firstly, that the University acted ultra vires its powers and authority in adopting the Code of Conduct, and secondly, that the Board acted ultra vires the regulations relating to student appeals to the University Council ("the Student Appeals Regulations") because the Board was invalidly constituted when it heard Mr Stewart's appeal.

[10] The Association pleaded that student conduct which:

- does not occur on University "campus" or other property owned by the University;
- does not occur during an event organised or sanctioned by the University;  
and
- occurs prior to the commencement of the University academic year

lacks any, or any sufficient nexus to the good governance and discipline of the University and therefore does not entitle the University to exercise powers under its Disciplinary Regulations and the Code of Conduct. So, the Association contended that, for those reasons the provisions of the Code of Conduct were ultra vires the Education Act and invalid.

[11] A further declaration is sought that, in so far as the Disciplinary Regulations and Code of Conduct "purport to extend to the conduct of the students during the 2009 toga parade", they are ultra vires and invalid. Orders are sought quashing the decisions of the Board and of the Vice-Chancellor.

[12] The second cause of action concerns the composition of the Board, which heard the appeal. It is pleaded that because student members of the Council were not

included on the Board for the purpose of hearing Mr Stewart's appeal when such was possible, the Board's decision was ultra vires the Student Appeals Regulations. They provide that "whenever possible", one of the three person panel of the Board constituted to hear an appeal shall be a student member of the Council.

## **Statutory provisions and regulations**

### ***Education Act 1989***

[13] Part 14 of the Education Act 1989 concerns the establishment of tertiary institutions. It emphasises the academic freedom and autonomy of such institutions and in s 160 describes its object as:

"The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability."

The ability for such institutions to self-govern, within the ambit of the powers given to them by the Education Act, is recognised.

[14] University institutions are governed by a Council, which may from time to time delegate to the Chief Executive or a Committee any of its functions and powers under the Education or any other Act.

[15] The Council may make statutes under s 194 of the Education Act which provides:

#### **"194 Statutes**

- (1) The Council of an institution may make statutes, not inconsistent with this Act or the State Sector Act 1988, with respect to any of the following matters:
  - (a) The good government and discipline of the institution:
  - (b) The imposition, by or on behalf of the Council, of penalties upon staff or students of the institution for contravention of or failure to comply with a statute with respect to a matter referred to in paragraph (a) of this subsection:

....

- (2) If the Council of an institution makes a statute under subsection (1)(b) of this section providing for the imposition of penalties upon staff or students of the institution, the statute shall provide for the Council, if so requested by a member of the staff or a student upon whom a penalty is imposed, to review, or arrange for the review of, the amount of the penalty, the imposition of the penalty, or both.”

[16] The Council promulgated the Disciplinary Regulations. In 2005 a working party was created to investigate, consult and receive submissions in the area of student behaviour in Dunedin. As a result of its work it reported to the effect that the University develop a Code of Student Conduct:

“to clearly state, and to provide all who enrol with guidance on, the standards of behaviour expected of all students starting at the University of Otago.”

A member of the working party was the then President of the Otago University Students’ Association.

[17] Further consultations and investigations were undertaken and the Council resolved to approve the Code of Student Conduct, in its current form despite the Students’ Association’s objection. Largely, that resistance was to the contents of Preamble 2 which provided:

“Students are expected to conform to the standards contained in this Code of Student Conduct off-campus as well as on-campus.”

[18] The Students’ Association wanted that to be amended to provide that the Code of Conduct applied:

“...only...to circumstances which affect the good government and discipline of the University. In such circumstances, students are expected to conform to the standards contained in this Code of Conduct off-campus as well as on-campus.”

[19] The University generally agreed with that formulation but for various reasons did not regard it as necessary to amend the Preamble. The University accepts that before the disciplinary provisions and the Code of Conduct apply there must be misconduct which has some nexus or connection with the University. However, because the University is authorised to make statutes for “the good government and

discipline of the institution” that may involve matters of conduct and misconduct which affects, in a broad way, the many aspects of the institution.

[20] The President of the Students’ Association stated that if the University sought to apply the Code to students for behaviour:

“outside the campus which has no connection to the University, then the OUSA will have no option but to support that student and challenge any University’s actions.

We hope that will not be necessary, but we will continue to push for the Code to be amended to render it lawful.”

[21] No challenge to the lawfulness of the Code or any of its provisions was then made. It has not been until the disciplinary action in respect of Mr Stewart was taken that the Students’ Association has brought proceedings alleging ultra vires.

### *Code of Student Conduct*

[22] The provisions of the Code are not lengthy and it is helpful to set it out in full:

#### **“Code of Student Conduct**

##### **Preamble**

1. The purpose of the Code of Student Conduct is to promote the University’s academic aims and a sense of community through the cultivation of mutual respect, tolerance and understanding. To this end, the University expects that students will not engage in conduct that endangers their own or others’ safety and well-being.
2. Students are expected to conform to the standards contained in this Code of Student Conduct off-campus as well as on-campus.
3. The University reserves the right to pursue through its disciplinary procedures matters that are also being, or may also be, addressed by the legal system or under the University’s Ethical Behaviour Policy processes.

##### **Part 1. Student Conduct**

1. The basic rules of conduct require that no student shall
  - (a) disrupt any teaching, study or research or the administration of the University either wilfully or by engaging in conduct which ought reasonably to have been foreseen would cause disruption;

- (b) wilfully obstruct any member or employee of the University in academic work or in the performance of duties;
- (c) wilfully misuse, damage or deface, steal or wrongfully convert to the student's own use any property of the University or any member of the University;
- (d) wilfully acquire by theft or deception the benefits of any service provided by the University or any academic advantage;
- (e) engage in any dishonest practice as described in regulation 5(b) of the Examinations and Assessment Regulations in connection with an examination or other method of assessment of academic work which counts towards the attainment of a pass in any subject;
- (f) engage in actions that:
  - a. amount to assault or which result in, or can be reasonably expected to result in, harm to a person or persons; or
  - b. are unreasonably disruptive to other members of the University or the local community; or
  - c. result in, or can be reasonably expected to result in, damage to property of any person; or
  - d. are otherwise unlawful;
- (g) threaten, intimidate or harass another person or group;
- (h) fail to comply with the proper directives of a University official, including refusing to identify oneself;
- (i) lie, or misrepresent information, to the University or any University official;
- (j) fail without reasonable cause to co-operate with the University's disciplinary processes;
- (k) fail without reasonable cause to comply with any penalty imposed under the Disciplinary Proceedings Regulations;
- (l) attempt to commit an act of misconduct as set out in the foregoing rules.

2. Secondary rules of conduct are contained in the Library Regulations, the Computer Regulations, the Traffic and Parking Regulations, the Use of Premises Regulations and the Alcohol at Student Functions Regulations, and such other rules and regulations as may be promulgated from time to time and printed in the University Calendar.

The actions proscribed in clause 1(f) encompass a wide range of anti-social behaviour, including but not limited to:

1. Vandalism and behaviours that result in property damage
2. Setting fires without regard for personal safety or the security of property
3. Throwing or firing projectiles, including glass bottles
4. Generating noise that is unreasonably disruptive to others
5. Assault
6. Non-consensual physical contact of a sexual nature
7. Threats, intimidation or harassment directed towards another person or group
8. Abusive behaviour directed at others based on race, religion, gender, disability, age, economic status, ethnicity, national origin, sexual orientation or gender identity
9. Theft or attempted theft of property and/or possession of stolen property.”

### **The plaintiff’s position**

[23] Counsel for the plaintiff contended that:

- the Code cannot regulate student behaviour which takes place off-campus which is not related to or during an event organised or sanctioned by the University;
- the toga parade itself was not organised by the University but rather by the Students’ Association, which is a separate entity to the University and whose function is to represent students. As the parade was organised by the Association there was no sufficient nexus or link to the University itself so as to render participants liable to disciplinary action, especially where behaviour took place “off-campus”.

[24] Counsel submitted that “campus” means University property or buildings, and the Code, where it purported to regulate off-campus behaviour during an event or activity not sanctioned by the University, was ultra vires. She contended that the Code could not be applied to a behaviour during an event on a public street in central Dunedin organised by the Students’ Association, which took place prior to the commencement of the academic year.

[25] Initially, it appears to have been the stance of the Association that any student behaviour “off-campus” could not be the subject of disciplinary action or governed by the Code of Conduct, but this position was not pursued in oral argument. It is accepted that such behaviour may be the subject of the Code but only if there is a nexus or link to the University.

[26] The challenge to the validity of the decisions of the Board was based on the argument that the regulations relating to appeals to the Board required, in this case, the appointment of a student member of the Council, and this was not done.

[27] Regulation 4 of the Student Appeals Regulations provides:

“4 There shall be an Appeals Board appointed by the Council comprising a panel of lay, academic and student members of Council. A quorum of the Board shall be three of whom at least one shall be a lay member of the Council and, whenever possible, one shall be a student member of the Council...”

[28] Neither of the two student members appointed by the Students’ Association to the Council were appointed as members of the Board for the hearing of the appeals of two students who were disciplined. Counsel submitted it was certainly “possible” for student members of the Council to be appointed to the Board, they were both available and this was conveyed to the Registrar who constituted the Board.

[29] Such did not occur because of what was said to be a perceived “conflict of interest” namely, the resolution passed by the Association three years earlier at a special general meeting, which opposed the Code of Student Conduct. The two student members of the Council at the relevant time of the two appeals were

Mr Edwin Darlow, current President of the Students' Association and a former president, Mr S Wilson.

[30] So, it is contended that the appeal decision was invalid.

### **Discussion**

[31] The Students' Association's challenge, as advanced by counsel, related both to the validity and lawfulness of the Code, and to its application in this particular case. As mentioned, the argument that the Code did not apply to off-campus behaviour, was modified in oral argument to the contention that unless there is some "nexus" between the alleged behaviour of a student and the University, then no power exists for Disciplinary Regulations as formulated, to deal with that conduct, or to be implemented.

[32] Essentially, Ms Ross on behalf of the plaintiff submitted that the toga parade, occurring as it did before the commencement of the academic year and organised by the plaintiff Association as a separate entity to the University, having the function to represent students, had nothing to do with the University itself.. She said it was an independent event sanctioned or organised by the Association as a separate entity. She contended that the good government and discipline of the University could not be seen to be related in any way to the parade or events during it. The plaintiff emphasised, in counsel's argument, that it did not contest the basic rules of conduct contained in Part I of the Code, but contested the application of them to student actions which had no nexus to or were unrelated to the University.

[33] The starting point in considering the validity of any delegated or subordinate legislation or by-law is of course the empowering statute itself. It is obvious that the University's Code of Conduct and Disciplinary Regulations could be described as "subordinate or delegated legislation", which the University is empowered to make under s 194 of the Education Act. It may do so for "the good government and discipline" of that institution.

[34] What then is necessary for “the good government and discipline of the institution”? And did Parliament intend to authorise Otago University to make the Code of Conduct that it did?

[35] Initially, I dispose of any argument that the University is to be linked to its geographical location, illustrated by its buildings and properties. It is clear that a University is not a geographical place and indeed, it is described as an “institution”. The University of Otago Amendment Act 1961 (s 3(1)) provides that the University of Otago shall:

“Consist of the Council, Professors Emeriti, the professors, lecturers, assistant lecturers, Registrar, and librarian of the University for the time being in office, the graduates and undergraduates of the University, the graduates of the University of New Zealand whose names are for the time being on the Register of the Court of Convocation...and such other persons and classes of persons as the Council, after considering recommendations from the Senate, may from time to time determine.”

[36] Whilst it may not be easy to give a definition to the word “institution” because its meaning must depend upon the context in which it is found, some assistance may be obtained from the dicta of Lord MacNaghten in *Manchester Corporation v McAdam* [1896] AC 500 at 511-512:

“It is a little difficult to define the meaning of the term ‘institution’ in the modern acceptance of the word. It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak) called into existence to translate the purpose as conceived in the minds of the founders into a living and active principle.”

The University as an institution therefore is a group or organised structure which depicts itself in a particular area of activity.

[37] Pursuant to the Education Act, the duty of the Council of the University includes, in s 181(f):

“To ensure that proper standards of integrity, conduct, and concern for –

(1) The public interests; and

(2) The wellbeing of students attending the institution –

are maintained.”

[38] So it is abundantly clear that the institution comprising the University of Otago, to which Parliament has authorised the Council to make subordinate statutes, comprises a wide group of persons who voluntarily came and have come, together whether as undergraduates, graduates, students, lecturers, staff or honorary members for the purpose of advancing learning, research, teaching. Also, in terms of s 162(4)(a)(v) of the Education Act, as an institution the University has:

“a role as critic and conscience of a Society.”

[39] The Code of Conduct is described in its preamble as applying to “off-campus as well as on-campus”. It is therefore of general application, applying to behaviour or misconduct irrespective where it occurs. As I have explained, the Association’s modified stance is that it accepts the Code can apply to “off-campus” behaviour, but it contends that “off-campus” behaviour must bear some nexus and connection with the University. That is not disputed by the University.

[40] In any event I think that it would not avail the plaintiff to have the Code or Disciplinary Regulations described as being restricted to “on-campus”, because of the inability to accurately ascertain the meaning of that word. Although counsel contended that “campus” meant the buildings or property of the University, in the context of a University/institution the word “campus” may encompass a very wide area, including areas of public space, streets or roads within or adjoining University owned buildings or halls of residence or student accommodation; and even hotels (such as exist on the campus of the Mid-West University of Oberlin, Ohio). The short point is that if a student was to be subject to the Disciplinary Regulations only for behaviour “on-campus”, he or she must know with some certainty what is meant by a “campus”. As I have explained, the ambit and meaning of “campus” is uncertain. Therefore, given that a by-law may be invalid for uncertainty, a regulation couched in those terms, even if *intra vires*, could well have been open to challenge on that ground.

[41] It is abundantly clear that University institutions have power to regulate the conduct of their members. They may do so to govern conduct which touches upon the rights and wellbeing of all members of the institution, the institution's standing in the community and its reputation. Conduct and misconduct can impact or have effects upon students, the ability to recruit and enrol students or staff, social and academic development of all members in the institution (graduates, undergraduates, staff), and the standing of the University not only in the academic world but in the community, locally, nationally and internationally.

[42] The University is an institution or community, and the body of persons who become included into that body, usually by choice and voluntarily, are subject to the discipline of that community. Parliament has empowered Universities to do so, by allowing them to control the standards of behaviour necessary for the wellbeing of the institution and those who through its activities it may touch. However, in order for a member of the institution to be the subject of those standards, and any subsequent disciplinary sanctions, there must of course be a logical nexus or connection between the behaviour, and how it impinges on the institution.

[43] The proper test for determining the validity of the Disciplinary Regulations and the Code and their application is not by determining whether a particular activity or event is organised or sanctioned by the University authorities. It may be the case, but it is not a necessary pre-requisite. Many riotous events occur, not through formal organisation or sanctioning on the part of some governing body, but simply because of the influence of peer pressure, generalised expectations and the intoxicating force of the group activity. Likewise, behaviour of students can become organised informally or in very loose ways. It may not emerge from any organised event at all. A number of people may congregate, or come together, in various ways in order to undertake or pursue group activity. It may involve two or more persons. The activity may be perfectly legitimate and harmless. But if in the course of it some members break the law or behave in reprehensible and unacceptable ways, the group itself is seen to be accountable, and it becomes tarnished.

[44] The test is not who or what organised the event, if there be an individual event, or for there be any organisation at all. It is whether the prohibited conduct,

whether occurring in an event or not, or possibly only through a group of some individuals who are students, occurs with a sufficient nexus to the legitimate concerns of the University. The behaviour always requires a case by case assessment and analysis as to whether the behaviour has a sufficient connection to the University in its broadest sense, that relates to the application of the Code or the subordinate legislation.

[45] The plaintiff seeks a declaration that the Code or Disciplinary Regulations passed are invalid and ultra vires only to the extent that they purport to be applicable in situations beyond the empowering provision. Naturally, if portions of the Code fall outside the empowering provisions, they are ultra vires. The University accepts that on a case by case basis it cannot take disciplinary action beyond that which it is empowered to do so, and an individual consideration of the particular facts or actions of a student in the circumstances of that case, must be determined to see whether they impact upon the good government and discipline of the institution.

[46] But that does not determine the validity of the regulations themselves, which must be interpreted in a way consistent with the empowering provision (see *R v Stockdale* [1995] 2 NZLR 129; *Cinnamond v British Airports' Authority* [1981] WLR 582). In the latter case the Court was dealing with a by-law for regulating the use and operation of Heathrow Airport and “the conduct of all persons while within the aerodrome”. The airport authority had issued a notice to certain cab drivers prohibiting them from entering the airport save “as a bona fide airline passenger”. Lord Denning MR said that the approach in regard to modern by-laws should be that (at 589):

“If the by-law is of such a nature that something of this kind is necessary or desirable for the operation of the airport, then the Court should endeavour to interpret the by-law so as to render it valid rather than invalid....It is better for a thing to have effect than to be made void.”

[47] So it is a question of interpreting the Disciplinary Regulations or Code in determining whether the proper application in the particular case in question falls within the empowering provision. It must be read consistent with that empowering provision, which includes ensuring the good management and government of the institution. If its application is to subject a student to discipline for behaviour quite

unrelated to the membership or institution, or have no bearing or connection with it, then obviously the application of that particular provision of the Code would not be upheld in relation to that activity.

[48] The Disciplinary Regulations and Code of Conduct are clearly envisaged by the empowering legislation as being necessary for the control, regulation, and obedience to acceptable standards of students or those who choose to become part of the institution. They cannot apply to a particular individual case which bears no relationship to the University or institution, but that is a question of fact.

[49] It will always be the case that in relation to disciplinary powers for alleged offences that relate to any professional person or member of an association, there must be some nexus or connection between the actions of that person and the membership of the body before a disciplinary regime can apply. But that nexus is a question of fact depending upon the particular circumstances on a case by case analysis. If the behaviour is such to bring the institution, association or profession into disrepute or to harm some or all of its members, or its reputation, so that it as the institution and its constituent members come to be regarded by reasonable members of the community with disdain and disapproval, then a sufficient nexus might in those circumstances exist.

[50] In my view the Code properly governs behaviour which is of such a degree that it tends to affect the good reputation and standing of the University institution generally in the eyes of reasonable and responsible members of the public. If the behaviour occurs in the capacity as a student and having some connection with the institution, whether as a member of it and relating to his/her status as a student, so as to have some nexus to that membership, it will suffice. If members of the public regard the actions as discreditable to the individual student and lead them to think or conclude that the University should not condone such behaviour or find it to be acceptable, then it could tend to lower the standing and reputation of the University in the eyes of the general public.

[51] I repeat that it is accepted by the University that the misconduct must be that of a student and have some nexus to the University and his or her relationship and

standing in it. In the context of the toga parade, a group of up to 2,000 first year University students parading through the streets of Dunedin as part of an orientation ritual, could hardly be said on a factual basis to have had no nexus or connection, in the minds of members of the public, to the University. The evidence of the widespread concern and criticism by members of the public, other students and editorial media condemnation, sufficiently illustrates how the reputation of the institution suffered.

[52] Significantly, Mr Stewart the first plaintiff, through his counsel, made the submission to the Vice-Chancellor that he himself acknowledged that a salient fact was:

“There was a vast group of students involved in behaviour that brought the University into disrepute.”

[53] Ms Ross on behalf of the plaintiff did not place any emphasis upon the original contention that the toga parade itself took place before the classes for the academic year commenced. That was sensible given that this activity took place during orientation week and even though prior to classes commencing, the academic year is described as being rather more than simply term time, with the University having continuous operation over a 12-month period.

[54] The Code of Conduct is not ultra vires the empowering legislation, it being squarely necessary for the good government and discipline of the institution. Its application to any individual incident of challenged behaviour is to be determined on a case by case analysis.

#### **As to the second cause of action seeking to quash the Board’s decision on appeal**

[55] Mr Sim, on behalf of the University, contended the issue is moot, there being no evidence that either students involved and in particular Mr Stewart, wished to challenge the Board’s decision. However, the Association contends that the absence of a student member on the Board rendered invalid its jurisdiction to hear the appeals. As a consequence it would lead to the appeal decision relating to Mr Stewart being a nullity, being ultra vires the Student Appeals Regulations.

[56] The Student Appeals Regulations provide that a student member be appointed if that is “possible”. I do not accept the contention that it was “possible” because either or both nominees were “available” to sit as members of the Board. In the literal sense, of course it may have been possible, but in a procedural and legal sense it was not. The proposed student members were former or present officers of the Association involved in the making of the formal resolutions of the Association to oppose the Code and its application. To have one of those appointees sit as a member of the Board would have undermined its capability of hearing the appeal. Whether the position is described as having a “conflict of interest” as the University considered, or they being affected by legal bias, does not matter. The test is as described in *Muir v Commissioner of Inland Revenue* [2007] [2007] 3 NZLR 495 (CA) with the correct approach being a two-stage inquiry. At paragraph [62] the Court of Appeal said:

“First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. The factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the ‘bias’ ball in the air. The second inquiry is then to ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the Judges might not bring an impartial mind to the resolution of the instant case....”

[63] We emphasise the touchstone is the ability to bring an impartial mind to bear on the case for resolution...”

[57] Where, as here, the Association passed a resolution formalising a policy in opposition to the Code, and from time to time statements were made by members of the Association’s executive denouncing the Code, there can be no question that a reasonably informed observer could see a real risk of bias if past or present members of that executive were to sit as members of an appeal panel to determine the applicability of the Code in the particular situation. I accept the submission that the adoption of a formal position of opposition to the Code undermined the ability of the Association’s nominated appointees to be seen as unbiased Judges on the Appeal Board. In those circumstances it was simply not “possible” for the Board to be constituted with one or other of those nominees being amongst its members. This ground fails.

[58] Finally, I deal with a point initially raised but not pursued in argument. The Board included a person who was not a member of the Board. Whilst there is a list

of Board members available for appointment to hear an appeal, such is not exclusive. Once it was not possible for a third member of the Board to be appointed from the list, the Secretary appointed the third member, who had been a lay-member of the Council for 11 years and was available. This fell within the discretionary task delegated to the Secretary, it being an accepted procedure on frequent earlier occasions. It is not pursued as a challenge by the student or the Association.

### **Conclusion**

- [59] (1) The Code is not ultra vires the powers of the University provided in s 194 of the Education Act 1989.
- (2) Misconduct which breaches the provisions of the Code may properly be the subject of disciplinary action whether or not it occurs on property owned by the University or during an event organised or sanctioned by the University or the Students' Association or occurs prior to the commencement of the academic year, in the sense of during orientation week.
- (3) Such conduct, however, must have some sufficient nexus with the University and members of the institution, its standing and reputation in the community. That is a question of fact to be determined on a case by case analysis.
- (4) The established misbehaviour of some students participating in the 2009 toga parade fell within the disciplinary powers of the institution.
- (5) It was not "possible" for the membership of the Board which heard the appeal in this particular case to include the student members made available by the Association as they were affected by "legal bias". The Board's decision was not ultra vires.
- (6) The application sought by the plaintiff in its prayers for relief under both causes of action are declined.

- (7) The University having succeeded on all grounds is entitled to costs and if it seeks to pursue that they are fixed on a category 2B basis together with the usual disbursements.

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**J W Gendall J**

Solicitors:

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