**IN THE COURT OF APPEAL OF NEW ZEALAND** **CA 175/96**

| | |
|---|---|
| **BETWEEN** | **TERTIARY INSTITUTES ALLIED STAFF ASSOCIATION INCORPORATED**<br>**Appellant** |
| **A N D** | **ARAPETA TAHANA**<br>**First Respondent** |
| **A N D** | **ASSOCIATION OF STAFF IN TERTIARY EDUCATION INCORPORATED**<br>**Second Respondent** |
| **A N D** | **LORRAINE WEBBER**<br>**Third Respondent** |

**CA 183/96**

| | |
|---|---|
| **BETWEEN** | **ASSOCIATION OF STAFF IN TERTIARY EDUCATION INCORPORATED**<br>**First Appellant** |
| **A N D** | **LORRAINE WEBBER**<br>**Second Appellant** |
| **A N D** | **ARAPETA TAHANA**<br>**First Respondent** |
| **A N D** | **TERTIARY INSTITUTES ALLIED STAFF ASSOCIATION INCORPORATED**<br>**Second Respondent** |

**Coram:** Keith J
Blanchard J
Cartwright J

**Hearing:** 19 June 1997

**Counsel:** H B Rennie QC and P Ryder-Lewis for Tertiary Institutes Allied Staff Association Incorporated
M P Reed QC and G J Adams for Association of Staff in Tertiary Education Incorporated and Lorraine Webber
D Chisholm for Arapeta Tahana

**Judgment:** 14 August 1997

---

JUDGMENT OF THE COURT DELIVERED BY KEITH J

---

TABLE OF CONTENTS

The issue ..... 2

The facts ..... 3

The common law of absolute privilege ..... 5

*(1) Tertiary educational institutions and the governing body* ..... 7
*(2) Functions* ..... 9
*(3) The process* ..... 11
*(4) The consequences of the exercise of the power* ..... 13

The Defamation Act 1992 ..... 14

*A body with a duty "to act judicially"?* ..... 15
*Was the letter written in proceedings before a tribunal or body by a party or representative?* ..... 21

Result ..... 22

**The issue**

The three defendants in a defamation action applied to have the action struck out on the ground that the statement in issue was absolutely privileged. Gallen J dismissed the application. The defendants appeal.

The action arises from a letter of complaint concerning the plaintiff as Chief Executive of the Waiariki Polytechnic sent to the Council of that Polytechnic on behalf of two unions representing staff in tertiary educational institutions by the secretary of one of them. The two unions and the secretary are the defendants.

As in other claims of absolute privilege, two competing public interests or policies are pitted against one another: on the one side, the protection and vindication of the good reputation of the Chief Executive sought by way of a defamation action, and, on the other, the importance of the unimpeded supply of information and opinion to the governing bodies of tertiary educational institutions by those with a genuine interest in their proper functioning.

**The facts**

The plaintiff was the sole employee of the Council of the Polytechnic, appointed by it for a fixed term of not more than five years under s77IB of the State Sector Act 1988. He in turn was the employer of all other members of the staff of the Polytechnic. Under s77IE the Council, for just cause or excuse, may remove the Chief Executive from office. A power in those terms is also available to the employers of the chief executive of a department of state, persons employed in the senior executive service of a department of state and various other public officials, State Sector Act ss39 and 53; Fire Services Act 1975 ss17J, 17T and 17ZB; Parliamentary Services Act 1985 ss36B and 36D; and Children and Young Persons and Their Families Act 1989 s418. All these provisions were enacted in 1988 or later. The provisions in issue in this case were added to the State Sector Act in 1989 as part of the reform of tertiary education.

The eight page letter on which the defamation action is based, dated 26 September 1994 and addressed to the Chairman of the Waiariki Polytechnic Council, was headed COMPLAINT AGAINST CHIEF EXECUTIVE. Under the first subheading, Formal Complaint, the two unions lodged a “formal complaint”

against the Chief Executive as particularised in the letter. It purported to "require" the Council to commence an investigation in accordance with normal disciplinary procedures into the complaint and to undertake appropriate action in accordance with its statutory powers and duties under the State Sector Act and the Education Amendment Act 1990. It also advised the Council that the complaint was supported by a motion of no confidence in the Chief Executive, carried and supported by 180 members of the combined staff of Waiariki Polytechnic 12 days before. Later parts of the letter set out general grounds for complaint, alleged failures by the Chief Executive to discharge certain responsibilities, consequent breaches by the Council of its own duties, and particular grounds of complaint (referring back to a joint report submitted to the Council on 30 August 1994) which included programmes and courses, financial considerations, strategic planning, provision of advice, management issues, changes proposed by the Chief Executive, public relations, overseas students, charter and overall. The six statements which the statement of claim identifies as defamatory are taken from the five pages of particular complaints.

The statement of defence claimed that the words were not defamatory, were the subject of absolute privilege, were the subject of qualified privilege, were an expression of honest and genuine opinion and were in substance true. Only the defence of absolute privilege is relevant in this appeal.

The Chairperson of the Council, in a letter of 11 October 1994 headed COMPLAINT AGAINST CHIEF EXECUTIVE, recorded that the letter of 26 September was received by the Council at its meeting held on that day. The Council thanked the unions for the time and effort they had put into the submissions. "The matter has now been referred to the Review Committee for action and communication." According to the Chief Executive, the Council then sought advice on a procedure for dealing with criticisms of the Chief Executive Officer and as a result recommendations were adopted establishing such a process by the Council on 19 December 1994. The Chief Executive, in his affidavit, said

that "the recommendations were adopted in recognition not of any duty to act judicially but of the Polytechnic's obligation to act toward me as a good employer in determining what action if any to take in response to any criticism of my performance of my duties."

To complete the story to date, we were informed from the bar that no final action was taken against the Chief Executive Officer under the State Sector Act or the procedure adopted. Rather, a few weeks before the hearing the Council had decided not to renew his contract.

**The common law of absolute privilege**

Absolute privilege as a defence to defamation actions has long been recognised by the common law. In broad terms, the privilege protects statements made in the course of proceedings before any court or tribunal recognised by law. It has also in more recent years taken general statutory form in the Defamation Act 1992 which protects things written, said or done in proceedings before a tribunal or authority that has a duty to act judicially (s14(1)(b); para (a) is not directly relevant).

The adjective "judicial" or the adverb "judicially" recur in the case law relating to absolute privilege as well as in the new Act. The words can be related to the person or body exercising the power, the power or function itself, or the procedure the body follows in exercising the power or function. As the cases to which we were referred indicate, the characterisation of one or other of those three matters as "judicial" or as something else can also arise in other areas including

- the constitutional allocation of authority, eg ***Shell Co of Australia Ltd v Federal Commissioner of Taxation*** [1931] AC 275, 295
- the lawfulness of the delegation of power, eg ***Vine v National Dock Labour Board*** [1957] AC 488

- the procedure to be followed; as discussed later, "natural justice" or procedural "fairness" have supplanted acting "judicially" since 1963 when ***Ridge v Baldwin*** [1964] AC 40 was decided; see eg ***Lower Hutt City v Bank*** [1974] 1 NZLR 545, 548 CA.

- the meaning of terms such as "judicial authority" which appear in different contexts in the statute book.

That list of different contexts quickly leads to the conclusion that the meaning of the word "judicial" may well vary according to the context. Obviously it is not only those bodies which are courts in a constitutional sense that have to follow the principles of natural justice; nor is that procedural obligation limited to bodies which are protected from defamation proceedings by absolute privilege, eg Lord Atkin in ***O'Connor v Waldron*** [1935] AC 76, 82, JC, and Devlin LJ in ***Lincoln v Daniels*** [1962] 1 QB 237, 253 lines 4-7, CA. Accordingly, it is necessary to be cautious in taking decisions from one area and applying them in another.

Parliament has often given particular answers to the question whether absolute privilege or qualified privilege applies to the proceedings of tribunals and other statutory bodies, often by the application of the Commissions of Inquiry Act 1908. That Act in effect gives qualified privilege to the members of the bodies (unless one of them is or has been a Judge of the High Court in which event the privilege is absolute), but absolute privilege to every witness giving evidence, and every counsel or agent or other person appearing before the Commission or body. In the current situation, too, Parliament has made it clear that the members of the council, along with many others involved in the administration of education, are entitled to the equivalent of qualified privilege when they are carrying out their responsibilities, Education Amendment Act 1989 s183. (There is a question whether the provisions of s14(1)(b) of the Defamation Act might apply notwithstanding that provision if this were a situation of absolute privilege, but since no question arises about position of the members of the Waiariki Polytechnic Council we do not have to reach that question.) The broad

application of the Commissions of Inquiry Act to well over 100 bodies and the inclusion of many similar provisions in other statutes demonstrate a parliamentary and perhaps a judicial reluctance extending back to at least 1902 to recognise or to confer absolute privilege, see ***Jellicoe v Haselden*** (1902) 22 NZLR 343 and the Commissions of Inquiry Amendment Act 1903. That reluctance however has not been consistently applied to those involved in commission or tribunal processes other than as members of the tribunal since the other participants frequently receive the equivalent of absolute privilege. We come back to that inconsistency of treatment later in the judgment.

The present case however falls to be decided under the general law, as found in the common law and the Defamation Act 1992. Like counsel we begin with the common law and with the proposition that no clear line can be drawn between those court-like bodies or situations that are protected by absolute privilege and those that are not. Rather attention is to be given to (1) the law setting up the body, (2) the particular responsibility, function, power or duty in issue, (3) the processes to be followed and (4) the possible consequences of the exercise of the power and the following of the process, see especially ***Trapp v Mackie*** [1979] 1 All ER 489, 492a-b, HL. We consider those four matters in turn. As the cases make clear, no one matter is decisive. An overall assessment is to be made, weighing the competing policies.

*(1) Tertiary educational institutions and the governing body*

Part XIV of the Education Act 1989 provides for the establishment (or the deemed establishment) and disestablishment of tertiary institutions and Part XV for their administration. Later parts of the Act regulate other aspects of the operation of tertiary institutions, including courses and students, private training establishments, the Vice-Chancellors' Committee, the New Zealand Qualifications Authority, the Education and Training Support Agency, the Career Service, the Tertiary Research Board and Student Allowances. The object of the

provisions of the Act relating to tertiary 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 service they provide, the efficient use of national resources, the national interest and the demands of accountability, s160. Also prominent in the statute is a definition of academic freedom which along with institutional autonomy is "to be preserved and enhanced", s161. The councils, their chief executives, ministers and crown authorities and agencies are to act in all respects so as to give effect to that freedom and autonomy. Parliament also indicates in the Act what it considers to be the characteristics of the categories of tertiary institutions. Polytechnics are characterised by "a wide diversity of continuing education, including vocational training, that contributes to the maintenance, advancement, and dissemination of knowledge and expertise and promotes community learning, and by research, particularly applied and technological research, that aids development", s162(4)(b)(ii).

The institutions are governed by councils constituted in accordance with Part XV of the Act, s165. Councils are to have between 12 and 20 members, s171. In 1990 the Minister of Education decided that the Waiariki Polytechnic was to have 20 members. Its composition, reflecting its statutory characteristics, includes 12 members resident in the region serviced by the Polytechnic and appointed or elected by various interests including employers, unions, the Maori Women's Welfare League, Te Mana Matauranga, local authorities, Federated Farmers, the tourism industry, the forestry industry, and local secondary schools, as well as four members appointed by the minister, the chief executive, an academic member elected by academic staff, a general staff member elected by general staff, and a student representative appointed by the Students' Association, 1990 New Zealand Gazette 4502-03. The size and composition of the Council immediately distinguishes it from judicial bodies carrying out judicial functions.

*(2) Functions*

That impression is reinforced when account is taken of the statutory functions and duties of the councils, read in the context of the characteristics of the institutions and the declared importance of academic freedom and institutional autonomy. The first listed function is to appoint a chief executive in accordance with the provisions already mentioned, that is at least every five years. The other functions are of a more general character, including preparing and negotiating with the Director-General of Education the charter of the institution in accordance with Part XV; approving statements of objectives in terms of the Public Finance Act 1989; ensuring that the institution is managed in accordance with the charter and statement of objectives; and determining the policies of the institution in relation to implementing the charter, carrying out the objectives and managing its affairs (subject to the State Sector Act), s180. The duties of tertiary councils are to strive to ensure that the institution attains the highest standards of excellence in education, training and research; to acknowledge the principles of the Treaty of Waitangi; to encourage the greatest possible participation by the community served by the institution to maximise the education potential of all members of those communities; to ensure that the institution does not unfairly discriminate against any person; to ensure that public resources are used responsibly by setting up coordination and accountability systems, and to ensure that proper standards of integrity, conduct and concern for the public interest and the wellbeing of students are maintained, s181. Those functions and duties are supported by broadly stated powers, ss192 and 193.

Again those functions and duties, taken as a whole, could not be characterised as judicial. But as with the character of the body itself that is not conclusive. We must look at the body in relation to the particular responsibility in issue in this case. Could the Council in relation to the consideration of the complaint brought against the chief executive by unions representing the employees of the chief executive be characterised as judicial and carrying out a judicial function in terms of the common law relating to absolute privilege? The following features of the functions suggest a negative answer. These features are

to be linked as well to the next two headings of this part of the judgment - the process to be followed by the Council and the possible consequences of the exercise by the Council of its responsibilities:

1. The letter of complaint does not expressly call on the Council to dismiss the chief executive. Rather the unions refer more generally to the Council's duties under the State Sector Act and the Education Amendment Act 1990.
2. The letter is not a necessary or even permitted step in terms of the exercise of the statutory power of dismissal.
3. The statement of that power does not contemplate an initiator, complainant or applicant. The legislation does not confer a power on the Council to resolve a dispute between such a person and the chief executive.
4. The power is to be exercised by the employer and not by a third party standing apart from and independently of the employer and the chief executive it employs.
5. More generally, an exercise of the power of dismissal was just one possible response to the letter of complaint in this case: for instance a council receiving such a letter might give directions to the chief executive to deal with any problems it considered established; it might exercise its powers relating to some of the functions and duties mentioned earlier, including striving to ensure that the institution attains the highest standards of excellence in education training and research, and the management of the institution in accordance with the charter and its statement of objectives; or it might decide to take no particular action while keeping matters set out in the letter under review.

In summary, the Council, when receiving and deciding what if any action to take on the complaint, would be exercising its broad statutory functions and powers of governance and management. In all of those respects the present situation has to be distinguished from the situations in two cases principally invoked by the appellants and in which absolute privilege was established in respect of processes relating to the power of dismissal of an employee, ***Trapp v Mackie*** and ***Keenan v Auckland Harbour Board*** [1946] NZLR 97.

The processes invoked in the first case by the employee and in the second

by the employer were expressly provided for in the legislation. The powers were exercisable by an independent officer following an initial decision by the employer to dismiss the employee. The only power and indeed duty exercisable by that officer was to confirm or nullify the dismissal. And the officers in question did not have an immediate continuing general responsibility for the governance of the situation in which the employment existed.

The appellants also invoked ***Teletax Consultants Ltd v Williams*** [1989] 1 NZLR 698 in which this court held that absolute privilege defeated defamation proceedings brought in respect of a letter written to and treated by it as a complaint by the Wellington District Law Society. The Law Practitioners Act 1982 ss98, 100, 101 provides for the reference of a complaint by a member of the public about the conduct of a practitioner to a complaints committee or the District Council for inquiry. That statutory context distinguishes the present case, as do the facts that the disciplinary bodies stand apart from and independently of the complainant and the legal practitioner and that the only relevant statutory powers and duties are to determine whether the complaint should be considered in accordance with the Act, whether it was made out and, if it was, what, if any, penalties should be imposed. To anticipate the next part of this judgment, Part VII of the Act, headed Discipline within the Legal Profession, also sets out in detail the procedure, including the rules for hearings, and provides for appeals.

*(3) The process*

The discussion under the preceding heading has already covered part of this matter. In ***Trapp v Mackie*** [1979] 1 All ER at 495 Lord Diplock concluded his examination of the nature of the tribunal in issue in that case by pointing to 10 characteristics shared by the tribunal with courts of justice. While he was not suggesting that the presence of any one of the characteristics taken in isolation would suffice to attract absolute privilege for witnesses in respect of testimony given by them before the tribunal or that the absence of any one of them would be fatal to the existence of absolute privilege, the cumulative effect of the list is

formidable. Of the 10 characteristics, eight are not to be found in the law and facts of the current case : an issue in dispute between adverse parties similar to issues commonly falling to be decided by courts of justice; a public inquiry; decisions about the calling of evidence being left to the contending parties; a power to compel witnesses to appear and documents to be produced, qualified by privileges available in court; the evidence being given on oath; witnesses being subject to examination, cross-examination and re-examination in accordance with the normal court procedure; adverse parties entitled to be represented by counsel who were to have the opportunity to address the tribunal; and the possibility of a binding costs order.

Those characteristics are absent in the present case both in fact and in law. The unions did not in fact directly invoke a statutory process of a judicial character, one reason being the lack of law providing for such a process. The legislation as well does not provide for a hearing process with related coercive powers. Those procedural features were present in all but one of the cases in which absolute privilege was recognised. The exception is ***Lincoln v Daniels*** [1962] 1 QB 237 where the Court of Appeal indicated notwithstanding that absence the disciplinary powers of the Inns of Court were protected by absolute privilege. We do not however see that indication as significant for three reasons.

The first is that the power of the Inns is a power of the judges delegated in distant times and subject to redress by way of appeal to the judges ([1962] 1 QB at 249-250, 253, 265 referring to Lord Mansfield in ***The King v Gray's Inn*** (1780) 1 Douglas 353, 354, 355, 99 ER 227, 228). The second related point is that in that special context the absence of the powers usually associated with judicial occasions to summons witnesses and to hear evidence on oath is not as vital to the issue ([1962] 1 QB at 250). Third, we call attention to the actual ruling in the case : the letters of complaint to the Bar Council (rather than to an Inn) were not the subject of absolute privilege because the Council, a body distinct from the Benchers of an Inn, did not exercise judicial functions in relation to the

complaints. The preliminary character of those letters of complaint has parallels in the present case.

The procedural element in the recognition (or not) of absolute privilege has a functional importance: a court-like process involving the control exercised by the members of the body with their special training and experience, the pleadings, the rules relating to the hearing of witnesses including cross-examination, appeal and review, and, if necessary, the exercise of contempt powers or prosecution for perjury or corruption helps prevent, mitigate or penalise abuses of absolute privilege by those participating in the process, eg ***Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*** [1892] 1 QB 431, 447, and ***Trapp v Mackie*** [1979] 1 All ER at 494, 497, 498. Those controls are the lesser as the processes become less court like. The greater the role accordingly for other controls on malicious falsehood including legal proceedings for defamation.

*(4) The consequences of the exercise of the power*

The short point to be made under this heading, essentially by way of repetition, is that the Polytechnic Council had a very wide range of options open to it in responding to the letter of complaint. By contrast all the other bodies in the cases referred to were closely confined by the law under which they operated, and indeed also obliged by it, to make findings and decisions on particular issues of legal right and duty, involving individual responsibility and possible individual sanctions.

Bearing all the above matters in mind we have no doubt that the present situation is not one of absolute privilege in terms of the common law. A consideration of the competing public interests or public policies also supports that conclusion. The entirely appropriate public, community, professional and union interest in the proper management of the polytechnic and the proper use of

its resources does not require the blanket of absolute privilege as opposed to qualified privilege. The complaint by the unions, as formulated in their letter, cannot be separated from that wider matter.

**The Defamation Act 1992**

In 1992 Parliament enacted the Defamation Act, "An Act to amend the law relating to defamation and other malicious falsehoods". Part I sets out the Causes of Action and Part II Defences. The cross headings within that part are Truth, Honest Opinion, Absolute Privilege, Qualified Privilege and General. The substantive provisions under Absolute Privilege concern parliamentary proceedings (s13) and judicial proceedings and other legal matters (s14). The final provision in the Act (s15) makes it clear that Parliament has not attempted a complete codification:

> Nothing in section 13 or section 14 of this Act limits any other rule of law that relates to absolute privilege.

It is s14(1) that is central in this case:

> (1) Subject to any provision to the contrary in any other enactment, in any proceedings before—
>
> (a) A tribunal or authority that is established by or pursuant to any enactment and that has power to compel the attendance of witnesses; or
>
> (b) A tribunal or authority that has a duty to act judicially,—
>
> anything said, written, or done in those proceedings by a member of the tribunal or authority, or by a party, representative, or witness, is protected by absolute privilege.

(Subsection (2) concerns communications between clients and their lawyers.)

The situation referred to in para (a) is not relevant since the Polytechnic Council does not have the power to compel the attendance of witnesses. There is also no relevant "provision to the contrary in any other enactment". Accordingly the question we have to resolve is whether the unions' letter was written by a

party or representative in any proceedings before a tribunal or authority that has a duty to act judicially. If it was they are protected by the defence of absolute privilege.

We divide the question into two considering, first, whether the Polytechnic Council was in the circumstances "a tribunal or authority that [had] a duty to act judicially" and, second, whether the letter was written by a party or representative in proceedings before such a body.

*A body with a duty "to act judicially"?*

The answer to the questions, especially the first, is helped by a consideration of the background to s14(1). In 1977 the Committee on Defamation (the McKay Committee) identified two problems with the existing law relating to absolute privilege and tribunals, *Recommendations on the Law of Defamation* (December 1977) paras 171-183. One concerned the individuals entitled to protection. In brief, under particular statutes, especially the Commissions of Inquiry Act 1908 which applied to a great number of tribunals and similar bodies,

- members of tribunals in effect had qualified privilege, Commissions of Inquiry Act 1908 s3 (see also s13)
- witnesses who were summonsed and counsel had absolute privilege, s6
- other witnesses, parties and possibly other representatives were left to the common law

(The second and third groups were brought together by a 1980 amendment to the Commissions of Inquiry Act but that appears to have had no consequence in the preparation and enactment of the Defamation Act.)

Some particular statutory regimes differed while other bodies were completely left to the common law. The McKay Committee (para 178) quoted the recommendation of the Public and Administrative Law Reform Committee that

> Members of tribunals, the parties, representatives and witnesses should have the same immunities in respect of what they say or do as have Magistrates and those who appear before them. (*6th Report of the Public and Administrative Law Reform Committee* (1973) para 38).

The McKay Committee agreed with that recommendation. The privilege enjoyed by those involved in tribunal proceedings should be clarified and made uniform where appropriate and should not depend on the role the persons play in the proceedings:

> all persons who take part in proceedings of a tribunal, which are judicial in nature, should enjoy absolute privilege. We therefore recommend that the following provision should be enacted:
>
> > Subject to any provision to the contrary in any other enactment, in every proceeding before a tribunal or other authority that is established pursuant to any enactment and has the power to compel the attendance of witnesses, or before any other tribunal or authority having a duty to act judicially, the words of every member of the tribunal or other authority and of every person who is a party, representative or witness shall be protected by absolute privilege. (para 182)

It will be seen that Parliament enacted the recommendation in almost exactly those terms in s14(1). The provision was enacted in 1992 in the form in which it was introduced in 1988.

The second difficulty with this area of law identified in 1977 concerned the determination of the bodies to which absolute privilege applied. The test, its difficulties and uncertainties, said the Committee, were illustrated in the decision in ***Thompson v Turbott*** [1962] NZLR 298, 304-310. A possible solution which it put to the Public and Administrative Law Reform Committee was to have a statutory classification of all tribunals as “judicial” or “administrative”.

> The Public and Administrative Law Reform Committee did not favour a classification of tribunals for a number of reasons. First, the classification of tribunals is a substantial task and would require a great deal of work particularly as some tribunals do not fit neatly into either category. Secondly, the committee felt that a distinction made between "administrative" and "judicial" tribunals did not necessarily provide the correct basis for deciding whether absolute or qualified privilege should attach to the proceedings. Members thought that the nature of the privilege which should attach depends more on the nature of the issues under consideration and whether statements were made in the course of, and with reference to, the matter under consideration. Finally, as we have already noted, a number of statutes have already specified differing forms of privilege for particular tribunals. This development further complicates any classification as the distinction usually drawn by these statutes provides qualified privilege for members and absolute privilege to witnesses. Because of the uncertainty and difficulty involved the committee felt unable to undertake a classification along the lines we had suggested. (para 180)

The McKay Committee then in essence returned to the first issue already discussed - the uniform conferral of the privilege where appropriate. It first however accepted the conclusion, as stated above, of the Public and Administrative Law Reform Committee (para 181). After making the proposals for legislative uniformity set out above (para 182) it returned to the second issue:

> We do not think it is practicable to formulate a statutory test which defines "judicial proceedings" and which would also be clear in its application. Under the present law, stated above, absolute privilege attaches to tribunals which exercise a judicial function and qualified privilege applies in all other cases. The dividing line is made by the courts as particular cases arise. The courts are able to take into account, to the extent that they are appropriate, the various criteria used to decide whether a tribunal is essentially "judicial" or "administrative" in character. *We consider that the flexibility of this approach should be retained.* (para 183) (emphasis added)

To us that history indicates two clear purposes - (1) to retain the present common law about what bodies are to attract absolute privilege, and (2) to confer that privilege on all who take part in those judicial processes.

But the history of course does not control the words which Parliament enacts. It is to those words that meaning must be given. As this Court following Justice Frankfurter said late last year, while we are not confined to the words of the statute, we are confined by them, ***Z v Z*** [1997] NZFLR 241, 246 and "Some reflections on the reading of statutes" (1947) 47 Columb L Rev 527. What meaning is to be given in this context to the expression "a tribunal or authority that has a duty to act judicially"? Neazor and Greig JJ in a recent judgment, ***Gray v M*** (High Court Wellington AP No 260/96, Judgment of 7 July 1997), have agreed with the ruling made in the District Court in that case that

> the clear purpose of s14(1)(b) of the Defamation Act is to take the category of tribunals or authorities in respect to which absolute privilege may arise beyond the limits previously determined by the common law.

As we have already indicated we see no such clear purpose in the history. Rather the emphasis of the Defamation Committee was on the same (absolute) privilege being accorded to all involved - that being an extension of the existing statutory position in many cases - while not proposing any legislative change to the bodies that were protected by the privilege. The determination of whether a body was protected was to be left to the common law. But do the words of s14(1) themselves require that wider reading, whatever history might say? The Court in the ***Gray*** case says in that context that

> Paragraph (b), if it means anything, must mean that this applies to tribunals other than the tribunals which are provided for in Paragraph (a). It applies to tribunals which are established otherwise than by enactment and which may not have the power to call witnesses. These tribunals are defined in Paragraph (b) as those that have a duty to act judicially.

It then agreed with the District Court that

> As to the duty to act judicially, a necessary prerequisite of any such tribunal or authority if absolute privilege is to apply then those words have a generally understood meaning. That meaning may be summarised as an obligation to comply with the rules of natural justice in default of which compliance the Courts might intervene.

We do of course agree with the first of those two statements. That is exactly what the provisions do say. But it does not follow from paragraph (b) that the defence now applies to a wider group of bodies and functions than was the case under the common law. By 1992 (and 1977) the case law had established that it was not fatal to a defence of absolute privilege that the body was not set up by or under legislation - see ***Dawkins v Rokeby*** (1873) LR 8 QB 255 affirmed (1875) LR 7 HL 744 and ***Lincoln v Daniels*** [1962] 1 QB 237, 253, 269; nor that it did not have a power to summons witnesses - ***Lincoln v Daniels*** and ***Slack v Barr*** 1918 1 SLT 133, 136, referred to by Lord Fraser in ***Trapp v Mackie*** [1979] 1 All ER at 498. Had the broader wording of paragraph (b) not been included the possible range of the defence so far as it is provided by the Defamation Act would have been narrowed from what the common law allowed.

We are still however left with the meaning of the phrase "a duty to act judicially". Is that duty, as the District Court and High Court agreed in the ***Gray*** case in the passage quoted above, equivalent to the duty to comply with the rules of natural justice? For two reasons we do not think that it is. One relates to the general meaning of the terms and the second to the particular context.

The first reason relates to the scope of application of the expression "the duty to act judicially" as used both in the statute book and in the cases. In general that scope is narrower than the scope of the duty to comply with the rules of natural justice.

When Parliament wishes to indicate that a body is to follow a fair procedure comparable to that of a court, it does not impose "a duty to act judicially" either in general statements of the law or in particular ones. So when in 1990 it enacted the New Zealand Bill of Rights Act "to affirm, protect and promote human rights and fundamental freedoms in New Zealand" it included in the general affirmation of the right to justice in s27(1) the right to observance of the principles of natural

justice in certain circumstances. Similarly when it imposes procedural obligations in particular contexts, it either directly imposes the particular obligations of such a procedure (such as notice, the right to call evidence and the right to be represented) or it uses the much more familiar expression "the rules (or principles) of natural justice". So more than 20 statutory tribunals and bodies are required to comply with natural justice while not one, according to a computer search of the statutes and regulations, is made subject to an obligation to act judicially. The legislature also commonly confers on parties before tribunals and to comparable proceedings "a reasonable opportunity to be heard," once again rather than making them the beneficiaries of the obligation to "act judicially". About 20 bodies are obliged to confer that opportunity. By contrast "the duty to act judicially" appears in the statute book, apart from the Defamation Act, only in essentially redundant provisions in the High Court Rules and the Judicature Amendment Act 1972 (relating to the writs of prohibition and *certiorari*) and in provisions in the Public Finance Act 1989 constraining Ministerial comments on the plans of crown entities. In the statute book it is not, if it ever was, an equivalent to the obligation to comply with natural justice.

This legislative unlinking of natural justice from the duty to act judicially matches the law of natural justice or procedural fairness as it has developed in the courts since 1963 when ***Ridge v Baldwin*** [1964] AC 40 was decided. That case, as Lord Denning put it in his inimitable way, scotched the heresy that the principles of natural justice apply only to judicial proceedings and not to administrative ones, ***R v Gaming Board, ex parte Benaim and Khaida*** [1970] 2 QB 417, 430.

Since that time the New Zealand Courts have similarly used the language of natural justice or of (procedural) fairness rather than that of the duty to act judicially. We refer to just one early case in the period, ***Whangarei High Schools Board v Furnell*** [1971] NZLR 782 CA, [1973] 2 NZLR 705 JC. The principal judgment in the Court of Appeal emphasised the test stated for *audi alteram*

*partem* (with no reference at all to the duty to act judicially) in ***Durayappah v Fernando*** [1967] 2 AC 337, 349, while Lord Morris in the majority judgment in the Judicial Committee emphasised that

> the conceptions which are indicated when natural justice is invoked ... are not comprised within and are not to be confined within certain hard and fast and rigid rules ... . Natural justice is but fairness write large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. ([1973] 2 NZLR at 718)

In the context of the statute book and the cases, we conclude that the general meaning of the duty to act judicially is narrower than that of the duty to comply with natural justice. The second reason for adopting that view relates to the particular context of s14(1)(b), including its legislative history and relevant policy considerations. The history shows that the common law about which judicial occasions are to be covered was being left unchanged. The policy considerations are those explicit and implicit in the common law reviewed earlier in this judgment. Beyond the bodies and functions falling within the protection of absolute privilege, the law of qualified privilege may continue to apply. We do not see Parliament as having meant to move the line between those two groups of bodies and functions or indeed even to address it.

Accordingly we conclude that the Council when considering the letter was not a tribunal or authority with a duty to act judicially in terms of s14(1) of the Defamation Act.

*Was the letter written in proceedings before a tribunal or body by a party or representative?*

The parts of s14(1) highlighted by that question emphasise the court or tribunal like context in which the question of absolute privilege arises. While the word "proceedings" is a wide one, as this Court emphasised in ***Rawlinson v Oliver***[1995] 3 NZLR 62, 67, 71, it does in the context contemplate a formal process of the kind followed by a court or tribunal. There will be parties. They

may be represented. That will happen in the proceedings before the body. The repetition of those words makes it clear that the provision cannot apply in the present situation. To recall an earlier part of this judgment, the unions are not "party" to any process under the State Sector Act or Education Act. Nor can they be said to be "representatives" within the meaning of s14(1). That word in this context is to be traced back through related tribunal and inquiry statutes. It means those who represent parties before the body and possibly witnesses as well. In the present situation there is no such party whom the unions can claim to represent.

Accordingly this question must also be answered in the negative so far as the appellants are concerned. Absolute privilege is not available as a defence.

**Result**

It follows that the appeals fail. Mr Tahana is entitled to costs of $5,000 and disbursements as fixed by the Registrar if necessary (including travel and related expenses of counsel).

**Solicitors**:
Bartlett Thompson & Partners, Wellington for Tertiary Institutes Allied Staff Association Inc
Nicola Mathers & John Harkness, Wellington for Association of Staff in Tertiary Education Inc and Lorraine Webber
Kensington Swan, Auckland &Wellington for Arapeta Tahana