

Case Note

Procedural Fairness in Student Discipline: *DM v State of New South Wales*. Unreported Supreme Court of New South Wales, Simpson J., 16 September 1997

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Throughout the 1990's student discipline has become an issue of greater importance in New South Wales' schools. The need for school administrators to know and follow established disciplinary procedure has been highlighted. Administrators must balance a range of considerations when making disciplinary decisions. DM's case, however, shows that even where administrators endeavour to act appropriately they may not successfully meet the requirements of the law.

The Facts

The case concerned a student's legal challenge to exclusion from a New South Wales government school. DM (the student) in 1994 enrolled in a New South Wales Government school. On 19 March 1997 he was excluded from the school by the Principal. The student argued the decision to exclude him was beyond the power conferred by the relevant legislation and as in any event made contrary to the rules of procedural fairness. The basis of the decision to exclude the student was his assault on a female student (the victim) using two kitchen knives, one of which cut her uniform and her back just below the shoulder blade, drawing blood.

The student initially suggested that the incident was an accident and that the victim had 'walked into him'. He subsequently accepted that the incident had not been an accident. The matter was reported to the Head Teacher who interviewed DM and three other students. The Head Teacher challenged the student's version of events pointing out that it differed from those of the three other students. The student asserted to the Head Teacher that the incident was unintentional.

The Head Teacher reported the matter to the Deputy Principal and Principal. The student was required to report to the Deputy Principal the next morning at which time he was asked to write a statement concerning what had happened the previous day. The Head Teacher also prepared his own report. The Principal then took control of the investigation. The victim and her parents were interviewed. As well as the incident itself, the Principal was informed of various earlier incidents of harassment of the victim by the student. The harassment included derogatory remarks of a racial and sexual nature, together with unacceptable behaviour in the classroom. The Principal then interviewed the student who said he was angry with the victim and had taken the knives to threaten her but had not really meant to cut her.

Having referred to the guidelines issued by the Department of School Education relating to suspension, exclusion and expulsion of students, the Principal decided to suspend the student pending final determination of the appropriate course to follow. In accordance with this practice, the Student Counsellor at the school was informed, as were the student's parents. The following day the Counsellor prepared a report which suggested that the student should be allowed to return to school, subject to certain conditions. This report was not shown to the student or his parents. A meeting was then arranged with the student's father. Following receipt of a letter which challenged Departmental procedures, the meeting was postponed so that the Principal could take advice. When the meeting was eventually held, the student's father was considered by the participants to be obstructive and difficult. The meeting was inconclusive. The suspension was maintained.

The Principal then discussed the matter with the Counsellor and a further report was prepared by the Counsellor, in which the Counsellor recommended that the student should not return to the school until he and his father accepted responsibility for his actions. Like the earlier report, this was not shown to the student or his father. A further meeting was arranged with the father. In the interim the allegations of sexual and racial harassment were investigated by the Principal.

At the second meeting the student and his father sought his return to school and protested the student's innocence of any intentional wrongdoing. Allegations were made against other students and demands made for their punishment. The student and his father then left the office. The Principal and the others present considered the matter and, primarily on the basis of the absence of remorse and acceptance of responsibility, decided to exclude the student from the school. The student and his father were then informed of the decision. The decision was confirmed in writing, and the Principal informed the student and his father that the Department of School Education would assist in placing the student in another suitable school.

The student's father subsequently appealed to the Assistant Director-General (ADG) concerning the decision to exclude the student. The ADG requested an officer (the investigating officer) to review the documentation, investigate the decision, and report on his findings. The investigating officer did so, and supported the Principal's decision. The investigating officer attached to his report all the statements obtained by the Principal, including the two prepared by the Counsellor, and the reports by students relating to the racial and sexual harassment. Neither the report nor its attachment were disclosed to the student or his father.

In addition, the Principal wrote a letter to the ADG which expressed his personal feelings about the events, the process and the outcome. The ADG thereafter met with DM's father after which he decided to uphold the Principal's decision. Prior to doing so, he obtained a further report from the investigating officer concerning whether procedural fairness had been afforded to the student in the process. The investigating officer expressed the opinion that it had and, in addition, commented on the father's 'extremely aggressive and intimidatory' attitude at meetings with the Principal and others. This report was, once again, not shown to the student or his father.

The student challenged the Principal's decision on a number of grounds, one of which related to procedural fairness. In doing so, the student argued that in making the decision to exclude him the Principal had taken into account factual material not disclosed to him. He alleged that there were eight matters which met this criterion.

The Decision

Simpson J held that in making a decision to exclude the student, the Principal had a duty to accord him procedural fairness. Her Honour found that a good deal of the material before the Principal, or in her mind, was damaging to the student and, in part, to his father.

Her Honour held that a person whose rights might be affected by an administrative decision must be given an opportunity to comment on, explain or refute damaging material used against him. Her Honour relied on the High Court decision in *Kioa v West* (1985) 159 CLR 550 as setting out the law to be applied in such situations. The *Kioa* case concerned the review under *Administrative Decisions (Judicial Review) Act 1977* (Cth) of deportation orders made against Tongan immigrants and their daughter under the Commonwealth *Migration Act 1958* (Cth). A majority of the High Court in *Kioa* found in the circumstances of the case that the Tongan citizens were entitled, in keeping with ordinary rules of procedural fairness, to be heard before the making of the deportation orders against them so that they might deal with matters prejudicial to them that had been put to the Minister's delegate.

In the course of his decision in *Kioa*, Mason J made the following observations concerning the requirements of procedural fairness:

... The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to a clear manifestation of contrary statutory intention ... The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate ...

(1985) 159 C.L.R. 550, at 584-585.

These comments have obvious relevance to the situation of a decision-maker considering whether to exclude a student from a school. However, Mason J went further in his decision in *Kioa*. He stated in respect of an application for an entry permit that:

if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity for responding to the matter

(1985) 159 C.L.R. 550, at 587.

There are obvious parallels between the vulnerable position of an illegal immigrant seeking an entry permit to stay in Australia, and the position of a student facing exclusion under statutory procedures.

Applying the tests set out in *Kioa*, Her Honour found that the student was not given an adequate opportunity to deal with those matters which were adverse to him and which were material to the decision. The procedures that led to the Principal's decision

thus did not meet the stringent tests which *Kioa* imposed. Her Honour ordered that an appropriate Departmental officer other than the Principal should reconsider the matter, having given the student notice of all material relevant to the decision and an opportunity to be heard upon it.

Discussion

The role of a Principal in situations such as this is a difficult one. Simpson J noted that it was necessary to balance the various interests of the student, other students and the school. The student's father was a forceful, indeed, domineering person and the Principal had received no training or instruction as to the obligations imposed by the law on administrators making such decisions. Her Honour specifically did not criticise the Principal in her judgment. However, she found that the obligation to provide procedural fairness was an objective one which must be applied. Principals making decisions to exclude students or indeed to impose any disciplinary penalty must ensure that all matters which are material to their decision which are adverse to the student must be disclosed to the student and he/she given the opportunity to reply, even when doing so could create other difficulties for a Principal trying to balance the various competing interests that exist within the school.