

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 237  
5329292

BETWEEN                      CONRAD SIMONS  
   Applicant  
  
AND                              BOARD OF TRUSTEES OF  
   ROTORUA GIRLS HIGH  
   SCHOOL  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Kevin Bunker for Applicant  
   Kate Lethbridge for Respondent  
  
Investigation Meeting:      22 March 2011  
  
Determination:              3 June 2011

---

**DETERMINATION OF THE AUTHORITY**

---

**A      The Board of Trustees of Rotorua Girls High School is ordered to comply with clause (2) the Record of Settlement dated 14 May 2010.**

**B      Costs are reserved.**

---

[1] Mr Conrad Simons was employed by the Board of Trustees of Rotorua Girls High School (BOT). As a result of an employment relationship problem being raised by Mr Simons the parties entered into a Record of Settlement (the settlement agreement) with which Mr Simons says the BOT has not complied.

[2] The Authority has a copy of the settlement agreement signed by a Mediator from the Department of Labour and endorsed to the effect that the mediator had explained to the parties that the settlement was final, binding and enforceable. The settlement agreement is dated 14 May 2010.

[3] On 17 June 2010 the school wrote to Mr Simons setting out issues with regard to his salary which had arisen prior to the settlement agreement being entered into. Mr Simons says the BOT cannot require him to refund the overpayment as clause (2) of the settlement agreement states that the agreement is in “...*full and final settlement of all matters arising out of the employment relationship.*”

[4] The school offered to offset the amount it says was owed by Mr Simons, against the amount to be paid under the settlement agreement. Mr Simons does not agree to any offset and relies on the understanding that the settlement agreement covered “all” matters arising out of the employment to support his stance. Mr Simons seeks an order from the Authority that the school comply with the terms of settlement.

[5] Mr Simons also claims the school deducted the equivalent of 10 days pay from his pay on 1 December 2010. He claims reimbursement of this 10 days on the basis that the deduction was unlawful. At the investigation meeting Mr Simons confirmed that he had received reimbursement for the deductions and withdrew this claim.

[6] Mr Simons also claims the sum of \$27,000 for humiliation, loss of dignity and injury to feelings. During a conference call on 8 February 2011 Mr Simons was advised that the claim for compensation is a remedy pursuant to section 123 of the Employment Relations Act 2000 which is only available in the settling of a personal grievance. Mr Simons has not raised a personal grievance and therefore this remedy is not available to him.

[7] The school denies Mr Simons claims.

[8] The issues for determination:

1. What did the terms of settlement cover?
2. Has the school complied with the terms of settlement?

## **Background**

[9] On 22 November 2009 Mr Simons raised a personal grievance for unjustified disadvantage which related to issues arising out of an earlier mediated settlement agreement and an allegation that the handling of a request for paid special leave had not been carried out in a manner that respected Mr Simons' mana and dignity and involved possible breaches of the Privacy Act. As a result of raising his employment relationship problem the parties entered into mediation.

[10] Also during November 2009 Mr Simons accepted voluntary redundancy, the effect of which meant that for 2010 Mr Simons would become a supernumerary teacher. As such he had further options available to him including supernumerary employment, retraining or a long service payment. Mr Simons advised the school on 30 December 2009 that he was opting for retraining through Massey University as a result of his redundancy.

[11] The responsibility for paying teacher's salaries lies with the Ministry of Education (MOE) which has contracted out the service to an organisation called Payserve. Each year Payserve requires schools to notify it of all payroll requirements for the following year by no later than 1 December. If this deadline is not met, no action will be taken until the 3<sup>rd</sup> fortnightly pay period the following year.

[12] Mr Simons was expected to notify the school by 1 December 2009 as to his preferred option for 2010. Because Mr Simons had not informed the BOT that he was opting for retraining until 30 December 2009, the school could not advise the MOE within the required timeframe to ensure Mr Simons would be paid as normal during 2010. What the MOE did know was that Mr Simons had opted for redundancy and had instructed Payserve accordingly.

[13] Based on that advice Payserve paid Mr Simons a lump sum in December to cover the period December 2009 up to and including 27 January 2010. The payment was intended to be a final pay. Mr Simons alerted the BOT to the fact that he had been paid a lump sum in error and attempted to have the problem rectified.

[14] Unfortunately nothing could be done to remedy the situation at that stage and as Payserve could not restart Mr Simons in the payroll until March 2010 he was not paid

his usual salary payments during February. The BOT were advised by Mr Simons that he had not been paid at the end of the first pay period in February, and on 14 and 28 February 2010 the school paid Mr Simons salary advances of \$2,048.61 making a total advance of \$4,097.22. This was to cover Mr Simons until Payserve could action his salary payments in March 2010. The money was taken out of the schools operational grant with the expectation that Mr Simons would refund the money once he received his payment from Payserve.

[15] When Payserve actioned Mr Simons salary payments in March 2010, it also paid Mr Simons for the period 29 January to the end of February 2010. Mr Simons had now been paid for the same period by both Payserve and the school. Mr Simons has never repaid the BOT for the salary advances it made to him in February 2010.

### **The Record of Settlement**

[16] As already stated in this determination in November 2009 Mr Simons, through his union the NZ Post Primary Teachers Association (PPTA), raised a personal grievance for unjustified disadvantage. The parties attended mediation on or about 24 February 2010 in relation to the personal grievance. The person from the PPTA representing Mr Simons in all his dealings with the BOT has been Mr Gavin Kay. The personal grievance was not resolved at mediation that day, however a skeleton settlement agreement was drafted with all but two points being agreed upon.

[17] The relevant terms of the settlement agreement which were agreed on or about 24 February 2010 included:

1. That the terms of the settlement were confidential and were a full and final settlement of all matters arising out of the employment relationship;
2. That the school would pay to Mr Simons a sum of money within 7 days of the settlement agreement being signed by a mediator although the size of the payment had not yet been agreed;
3. That the school would sign off for the renewal of Mr Simons practising certificate when it becomes due in March 2011;
4. That Mr Simons was not required to attend the school after the completion of his course of study.

[18] Apart from the size of the payment the only other outstanding issue was whether the school would provide a reference.

[19] On 9 March 2010 the school sent Mr Kay a form requesting the repayment of the monies advanced to Mr Simons. Mr Kay was asked to forward the form to Mr Simons to action. Mr Kay did not pass the form onto Mr Simons immediately but held onto it because he was in discussion with the school's representative about offsetting part of the advance against the money to be paid under the settlement agreement. He wrote to Mr Simons on 19 April 2010 and advised him:

I have delayed sending this to you, because of Kate Lethbridge's suggestion [intended to be helpful but it wasn't] that your payment from the settlement should come off the repayment of salary advanced by the school. Now that it's been decided that that won't happen, I send the form on to you. It's an authorisation form for the salary advanced to you by the school to be repaid, now that the Ministry has paid you from January 28. You need to sign it and return it to the Executive Officer.

[20] The settlement agreement was signed by the parties on 22 April 2010. At the investigation meeting Mr Simons acknowledged that he had received the form from Mr Kay before he signed the settlement agreement.

[21] The Mediator signed the settlement agreement on 14 May 2010. Before signing the settlement agreement the mediator spoke to Mr Simons who questioned whether the words "...all matters arising from the employment relationship" meant what they said. The mediator confirmed they did. At the investigation meeting it became clear to me that neither the school nor Mr Simons had alerted the mediator to the fact that there was a new issue between the parties regarding the advanced salary payments.

## **Conclusions**

[22] Mr Simons received salary advances on 14 and 28 February 2010. The date of the second payment was made four days after the mediation meeting between the parties. The majority of the clauses were agreed to by the parties on 24 February 2010. At that stage Mr Simons had not failed to refund the advances made to him by the school and it was not contemplated by either party that Mr Simons would not do so.

[23] Between 28 February 2010 and 22 April 2010 Mr Simons, through his representative was asked to refund the money paid to him and when that did not eventuate he was asked by the BOT to agree to offset the sum to be paid under the

settlement agreement by some of the money Mr Simons owed on the advanced salary payments. Mr Simons would not agree to this.

[24] At the time the settlement agreement was signed on behalf of the BOT on 22 April 2010 it was clearly an issue between the parties that Mr Simons had not repaid the advanced salary payment and neither was he agreeing to have any part of the advance offset by the sum payable under the terms of the settlement agreement.

[25] At the investigation meeting Mr Kay acknowledged that as far as he was concerned the salary advance was not included in the settlement agreement and that he understood Mr Simons was still under an obligation to pay the money back to the BOT. However, in submissions Mr Kay asked the Authority to accept that the debt had been disposed of when the BOT signed the settlement agreement on 22 April 2010 agreeing that the settlement included "...all matters arising out of the employment relationship." whether expressly included or not.

[26] In its submissions the BOT says Mr Simons did not act in good faith when he failed to repay the salary advances, and that he signed the settlement agreement knowing that the BOT still intended that the money be repaid.

[27] Mr Douglas Banham, the chairman of the Board at the time the settlement agreement was signed told the Authority that the advance was not raised with the mediator as an outstanding debt and understood when signing the settlement agreement that it was in full, final and binding settlement of all matters arising out of the employment relationship.

[28] I find that the settlement agreement signed by the mediator on 14 May 2010 encompassed all matters relating to the employment relationship. That is what the parties agreed to. However, I also find that the debt of \$4,097.22 remains as an obligation Mr Simons has to the school. The salary advances were clearly not contemplated by either party when the majority of the terms were agreed on 24 February 2010 including the term that the settlement agreement resolved all matters. The second advance had not been made by that date and neither had Mr Simons received the back pay from Payserve.

[29] I find that Mr Simons jumped on an opportunity, as he saw it, to avoid the debt when he specifically asked the mediator to confirm that the words meant that "all" matters arising from the employment relationship were included in the settlement.

Rather conveniently Mr Simons chose not to enlighten the mediator (who, based on the evidence before me, had no knowledge of the issue over the outstanding advance) that there were outstanding issues not discussed at the mediation on 24 February 2010 and which were live when the settlement agreement was signed.

[30] On the other hand, the BOT were clearly aware of the issue and it failed to have the matter adequately addressed in the settlement agreement. Before signing the agreement the parties had a full opportunity to either agree on additional terms or not. The BOT, which was represented by a legally qualified representative chose to sign the agreement largely as it stood on 24 February 2010 and without getting any agreement on the repayment of the salary advances.

[31] The BOT is the author of its own misfortune. I find the BOT has failed to comply with the terms of settlement it signed off on 22 April 2010 and is ordered to pay to Mr Simons the sum of \$2000 in accordance with clause (2) of the Record of Settlement. Payment is to be made within 7 days of the date of this determination.

### **Comments**

[32] As already set out in this determination, Mr Simons has attempted to harness a situation to his benefit, unjustly. Even if he had agreed to the offsetting of the advances against the money to be paid under the settlement agreement, he would still have been under an obligation to repay the outstanding amount. However, there is no counter-claim from the BOT in relation to the outstanding debt and therefore the Authority is unable to make any orders for its repayment.

### **Costs**

[33] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Mr Simons may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The BOT will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[34] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which

case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell  
Member of Employment Relations Authority