IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 102
5352448

	BETWEEN	ROTORUA GIRLS' HIGH SCHOOL BOARD OF TRUSTEES Applicant
	A N D	CONRAD SIMONS Respondent

Member of Authority:	K J Anderson
Representatives:	K Lethbridge, Advocate for Applicant K Bunker, Advocate for Respondent
Investigation:	On the papers
Date of Determination:	21 March 2012

DETERMINATION OF THE AUTHORITY

Background

[1] This matter comes before the Authority having followed a somewhat tortuous path. The evidence shows that there was a history of conflict between Mr Simons and his employer, the Rotorua Girls' High School Board of Trustees (the Board).

[2] However, the Authority is not required to revisit all of the events that have now brought the parties to it on this occasion. Nonetheless, there are some background matters that are relevant to the issues that currently require the determination of the Authority.

[3] The parties have agreed that this matter should be determined on the papers and accordingly sworn affidavits have been received from Mr Gavin Kay and Mr Simons. The Authority also has available to it evidence and submissions presented for

the Authority's investigation pertaining to an earlier determination, some of which is relevant to this matter.[1]

[4] Mr Simons was employed at the Rotorua Girl's High School (the School) as Assistant Head of Technology. Some time later in 2009, because of a fall in the school roll, the School was required to reduce its staffing numbers for the 2010 school year. At some time in November 2009, Mr Simons volunteered for redundancy and his offer was accepted by the School, with the effect that Mr Simons became a supernumerary teacher for the 2010 school year. Mr Simons was expected to inform the School by 1 December 2009 as to his preferred option in regard to the choice of supernumerary employment, retraining, or a long service payment (redundancy). Mr Simons informed the School that he was intending to undertake retraining which allowed him to participate in a course of study (with Massey University) on full pay, for one year.

Cessation of salary payments

[5] Mr Simons did not inform the School of his nomination to retrain until 30 December 2009, albeit this timing was within the terms of the collective employment agreement in regard to the notification period. However, the effect of informing the School of his preferred option so late in the year was that the School was unable to notify the Ministry of Education (MoE) within the necessary timeframe to ensure that Mr Simons would be paid as normal in early 2010.

[6] It appears that the MoE (who have the responsibility for teachers' salaries) were under the impression that Mr Simons had taken the redundancy option and Payserve (who pays the teachers' salaries) were informed accordingly.

[7] Presumably acting on the instructions received from the MoE, Payserve paid Mr Simons a lump sum in December 2009 which covered the pay period December 2009 up to and including 27 January 2010. It appears to have been understood by the MoE and Payserve that the sum paid would effectively be Mr Simons' final pay, premised on the understanding (albeit mistaken) that Mr Simons' employment was redundant. The total effect being that Mr Simons did not have his salary payments recommenced until March 2010 when the mistake was corrected, and therefore he was not paid for the month of February 2010.

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[1] [2011] NZERA Auckland 237

Payment by the School

[8] In order to redress the situation for Mr Simons, the School paid him salary advances in the total sum of $4,097.22 to provide for him until Payserve reactivated his salary payments in March 2010. The sum of $4,097.22 was paid from the School's operational grant with the expectation that Mr Simons would repay the money when he received his due entitlements from Payserve.

[9] Mr Simons was duly paid by Payserve for the period 29 January to the end of February 2010 in addition to the normal fortnightly salary for March 2010.

A personal grievance – record of settlement

[10] Unassociated with Mr Simons' redundancy situation and the subsequent salary payment issues, Mr Simons had raised a personal grievance with the School on 22 November 2010, relating to other matters, the details of which are not relevant to this determination.

[11] The parties attended mediation on 24 February 2010. Mr Simons was represented by Mr Gavin Kay, a Field Officer employed by the New Zealand Post Primary Teachers' Association. The School was represented by Ms Kate Lethbridge, an Industrial Adviser employed by the New Zealand School Trustees' Association.

[12] The outcome of the mediation was that a draft proposed record of settlement was arrived at whereby it was accepted (apparently) in principle, that among other things, the School agreed to pay to Mr Simons a sum of money as compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. It seems that mediation concluded on the understanding that the advocates, Ms Lethbridge and Mr Kay, would continue to discuss and attempt to agree upon the amount of compensation to be paid to Mr Simons by the School. There was also an issue to be resolved regarding the School providing a reference for Mr Simons.

[13] It appears that running parallel with the ongoing discussions that followed the mediation on 24 February 2010, the School sought to recover from Mr Simons the sum of $4,097.22 that had been advanced to him, as by early March 2010 he had been fully paid his salary entitlement by Payserve. Unfortunately, Mr Simons did not see fit to engage with the School in regard to the expected repayment, despite the apparent best efforts of Mr Kay to remind Mr Simons of his obligations.

[14] The evidence of Mr Kay is that during the discussions between him and Ms Lethbridge, pertaining to the compensation sum to be paid to Mr Simons in order to conclude a mediated settlement, the principle of offsetting the compensation sum that had by then been agreed, against the $4,097.22 salary advance, was suggested. Mr Kay attests that he put this suggestion to Mr Simons who informed "*very firmly*" that he was not interested in an offset.

[15] Mr Kay says that he informed Mr Simons that he would have to repay the salary advance received from the School and an offset would assist this. But Mr Simons was "*uninterested*" in such a course of action.

[16] The record of settlement was subsequently signed by the parties on 22 April 2010 and certified by the Mediator on 14 May 2010.

[17] The School continued to request repayment of the $4,097.22 from Mr Simons without success. It then withheld the compensation sum agreed to in the mediated record of settlement.

[18] Mr Simons sought compliance with the record of settlement and a compliance order in favour of Mr Simons was issued by the Authority via a determination dated 3 June 2011.[2] While the Authority ordered compliance with the record of settlement, it also stated:

> [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 as 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.
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> [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.

[2] Ibid

> [30] On the other hand, the BOT[3] 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.
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> [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 $2,000 in accordance with clause (2) of the record of settlement. Payment is to be made within seven days of this determination.

[19] The Authority then, under a heading **Comments,** went on to state:

> [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 counterclaim from the BOT in relation to the outstanding debt and therefore the Authority is unable to make any orders for its repayment.

[20] The mention of a possible counterclaim appears to have now prompted the Board to attempt to have the matter re-litigated in the form of this current claim against Mr Simons for repayment of the sum of $4,097.22.

Determination

[21] While I have considerable empathy for the position of the Board in regard to attempting to recover the sum of $4,097.22 from Mr Simons, it seems to me that the appropriate time to have addressed this was before signing the record of settlement on 22 April 2010. While the matter of the payments advanced to Mr Simons by the Board do not appear to have been canvassed to any extent in the presence of the Mediator, it is clear that Mr Kay and Ms Lethbridge subsequently certainly discussed the possibility of an offset in regard to the compensation sum that was eventually paid to Mr Simons. In the event this was not agreed upon and the parties signed the record of settlement which contained the usual standard term:

> This is a full and final settlement of **all** matters arising out of the employment relationship.

[3] Board of Trustees

(my emphasis)

And:

> We request the Mediator of the Department of Labour to sign these terms because the employment problems between us have been resolved and we wish them to be final, binding and enforceable on us.

Then further in the record of settlement, under the signatures of the parties:

> We also confirm that before the Mediator signed the agreed terms of settlement that
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> (1) The Mediator explained to us that:
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> (a) those terms are final and binding on, and enforceable by us; and
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> (b) except for enforcement purposes, neither of us may seek to bring those terms before the Authority or the Court where by action, appeal, application for review or otherwise; and
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> (2) We confirmed to the Mediator that we understood that explanation and affirmed our requests.

Both parties then signed the record of settlement again and it was certified by the Mediator on 14 May 2010.

[22] The key point that now must be recognised is that the parties signed an agreement that they had reached a full and final settlement of all matters arising out of the employment relationship. And I conclude that as the discussions that took place prior to the record of settlement being signed, included the possibility of an offset in regard to the sum of $4,097.22, hence this became a matter *arising from the employment relationship*, with full and final settlement subsequently reached.

[23] While I share the view that Mr Simons obtained an unjust enrichment by refusing to repay the moneys owed, regrettably the School missed its opportunity to obtain repayment when it entered into the record of settlement. While I find that Mr Simons' stance on all of this is morally reprehensible, I have to say that the School is legally bound by the terms of the record of settlement and the matter cannot be re-litigated, or in the words of the *Record of Settlement,* the Board cannot bring the terms

of settlement before the Authority, except for enforcement purposes.[4] It follows that the Authority cannot grant the remedy sought.

Costs

[24] Given that the parties are represented by salaried advocates, costs are not a matter to be considered and accordingly shall lie where they fall.

K J Anderson
Member of the Employment Relations Authority

[4] As Mr Simons did seeking compliance in regard to receiving the agreed payment of compensation.