Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 49
5612598

	BETWEEN	SARAH JANE EVANS Applicant
	A N D	BOARD OF TRUSTEES JOHN PAUL II HIGH SCHOOL Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Anthony Whitcombe, Chairman of Board for Respondent
Investigation Meeting:	Determined on the papers by consent
Submissions Received:	6 April 2016 from Respondent 8 April 2016 from Applicant
Date of Determination:	18 April 2016

DETERMINATION OF THE AUTHORITY

A. I order the respondent to send to Ms Evans a confidential exit interview form within seven days of the date of this determination.

B. I further order the respondent to reimburse Ms Evans the cost of the Authority lodgement fee in the sum of $71.56.

Employment relationship problem

[1] Ms Evans seeks a compliance order in relation to a record of settlement entered into between the parties pursuant to s.149 of the Employment Relations Act

2000 (the Act). The respondent denies that it has breached the record of settlement and that, in any event, Ms Evans has now foregone the opportunity to seek enforcement by reason of delay.

Prohibition of publication order

[2] The record of settlement that the Authority saw was stated to be confidential to the parties and I therefore prohibit from publication the details of the record of settlement save as otherwise stated in this determination.

Background

[3] The record of settlement provided that Ms Evans' employment would terminate by reason of an agreed resignation with effect from 27 January 2016. Ms Evans was to provide a letter of resignation to the Board of Trustees within five days of the record of settlement being signed by Mediation Services. A mediator employed by the Ministry of Business Innovation and Employment signed the record of settlement on 29 October 2015 giving the usual certification.

[4] The Board of Trustees was to make a payment to Ms Evans, the amount of which is to remain confidential, within five days of receipt of Ms Evans' letter of resignation.

[5] Clause 7 of the record of settlement stated:

> *The Board of Trustees agrees to provide Sarah with the opportunity to complete a written confidential exit interview form if she wishes to do so.*

[6] Ms Evans asserts that the respondent has not given her the opportunity to complete a written confidential exit interview form as specified in the record of settlement. She states that she has not been contacted by the respondent regarding the interview form and that she would like to complete the form, as agreed. Ms Evans says that she would like to be sent the exit interview form and seeks the cost of her lodgement fee.

[7] Ms Evans lodged her statement of problem on 29 February 2016. The respondent's response to this claim is, effectively, that there was a positive duty on Ms Evans to request an exit interview form if she required one and that, with six

months (at that point) having nearly elapsed she has *foregone the opportunity to […] request the opportunity to complete a written confidential exit interview form*.

[8] The respondent also suggests that Ms Evans is now seeking to re-litigate issues that have been properly dealt with by the record of settlement.

Submissions

[9] Mr Whitcombe submits that Ms Evans is out of time in attempting to enforce a term of the record of settlement that was for her benefit and that she has not exercised her entitlement *within a proper period of time*. Mr Whitcombe further submits that a *proper period of time* meant *as soon as practicable*.

[10] In justifying this position, Mr Whitcombe draws the Authority's attention to clause 5, which required payment to be within five days of receipt of Ms Evans' letter of resignation. He also refers to clause 6 which refers to Ms Evans having to make arrangements to remove her property and to return all School property *as soon as practicable*. He also refers to clause 8 which sets out that a statement concerning Ms Evans' resignation would be made *as soon as practicable at the beginning of Term 4 2015*.

[11] Mr Whitcombe also refers to clause 10 of the record of settlement which provides a timeframe of 12 months after Ms Evans' resignation for either party to report to the Education Council any matters that are required by law to be reported to it.

[12] Mr Whitcombe concludes by saying that it would be prejudicial and oppressive to the respondent for the Authority to enforce clause 7 of the record of settlement as it regarded the matter to be at an end. He also submits that, as Ms Evans is now in employment in a local high school *her requirement to complete a written confidential exit interview would … not be in the terms of the settlement agreement and the good faith provisions that it encompassed*.

[13] Ms Evans' response to Mr Whitcombe's submissions is that clause 5 does not determine the timeframe for the exit interview; but refers to the payment. She also states that she was employed until 27 January 2016 and that an exit interview is usually completed at the end of the employment date implying, I understand, that she has not delayed asking for the form by nearly six months.

[14] Next, Ms Evans asserts that clause 7 does not state that she needed to request an exit interview form and that, given that she inserted the clause into the settlement bargaining process herself, it should be clear that she wanted to do so. Finally, Ms Evans asserts that she cannot complete an exit interview form unless she actually has the form, and, having never been given the form, she has never had the opportunity to complete it.

Discussion

[15] Although she has not articulated what she seeks in statutory terms, Ms Evans seeks a compliance order pursuant to s.137(1)(a)(iii) of the Act[1]. The record of settlement in question falls within the scope of s.151 of the Act, and so the Authority has the jurisdiction to determine the matter.

[16] In order to determine whether the respondent has failed to comply with the terms of clause 7 of the record of settlement it is necessary to interpret what its obligations in respect of clause 7 are.

[17] The principles of contractual interpretation to be applied by the Authority were set out by His Honour Judge Ford in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [2] where, at [29], he cited the five principles of contractual interpretation articulated by Lord Hoffmann in the UK House of Lords case of *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1997] UKHL 28. His Honour stated as follows:

> *There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society which were adopted in New Zealand in Boat Park Ltd v Hutchinson[3] and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.[4] As both counsel relied on the stated principles, I set them out in full:*
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> > *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.*

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[1] Namely, a compliance order in respect of *any terms of settlement or decision that section 151 provides may be enforced by compliance order*.
[2] [2012] NZEmpC 103
[3] [1999] 2 NZLR 74.
[4] [2012] NZSC 5

> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:*
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> > *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.".*

[18] The confidentiality restrictions imposed by s.148 of the Act prevent the Authority from questioning the parties as to what was said during the settlement negotiations. In any event, declarations of subjective intent are not admissible, as is clear from the passage cited above. Therefore, it is necessary to consider the plain meaning of the words of clause 7, together with the wider context of the agreement as a whole.

[19] Mr Whitcombe points out a number of clauses in the record of settlement that set out a timeframe for various actions to be carried out. However, rather than persuade me that this imports some timeframe with respect to the contents of clause 7,

the absence of a stated timeframe in clause 7 persuades me that no such timeframe can be implied. That is to say, where the parties intended a timeframe to be imposed on an action, they have stipulated one. The absence of a timeframe, therefore, strongly implies that there was no intention to impose one.

[20] As to whether the onus was on the respondent to provide an exit interview form or whether the onus was on Ms Evans to request it, is not immediately clear from the wording of clause 7. On the one hand, the Board of Trustees agreeing to provide Ms Evans with the *opportunity* to complete the exit interview form implies that, in order to provide that opportunity, they must let her have the form. As Ms Evans points out, she cannot complete the form if she does not have it. On the other hand, the words *if she wishes to do so* suggests that it is for Ms Evans to communicate that wish prior to the respondent's duty being triggered.

[21] On balance, I prefer the second interpretation on a plain reading of the words. That is to say, I believe that the onus was on Ms Evans to communicate her wish to complete the form prior to the respondent being required to provide the form itself.

[22] However, Ms Evans has now communicated that wish to complete a written confidential exit interview form by way of her application to the Authority. The communication of that wish therefore triggers the duty on the Board of Trustees to provide Ms Evans with the opportunity to complete it. This means that the Board of Trustees must send a copy of an exit interview form to Ms Evans in a form that she is able to complete.

[23] The record of settlement does not impose any further obligation on Ms Evans, but, equally, it does not prevent her from then sending the completed written confidential exit interview form back to the Board of Trustees if she wishes. Having received that completed exit interview form, whilst there is no express obligation contained in the record of settlement for it to do anything with that form, it may be that the Board of Trustees is under a separate duty pursuant to the Education Act 1989, or other legislation, to act upon information contained in the exit interview form. This possibility is referred to in clause 10 in terms of the parties' duties to report relevant issues to the Education Council. However, any such duty lies outside of the scope of the Authority's jurisdiction.

Orders

[24] Pursuant to s.137(1)(a)(iii) of the Act, I order the Board of Trustees to send to Ms Evans an exit interview form in a format that will enable her to complete the form and return it to the Board. The Board of Trustees is to comply with this order within seven days of the date of this determination.

Costs

[25] Ms Evans was unrepresented and so has incurred no legal costs. However, she seeks an order that the respondent reimburse the lodgement fee of $71.56.

[26] Whilst it appears that Ms Evans did not request a copy of the exit interview form directly from the Board of Trustees before lodging her statement of problem, it is more likely than not that, even if she had done so, the Board of Trustees would not have complied and she would have had to have lodged a claim with the Authority in any event. I have reached this conclusion on the basis of the submissions of Mr Whitcombe who argues that she had foregone her right to request the form.

[27] I therefore think it is just for Ms Evans to be reimbursed the sum of $71.56 and I therefore order the Board of Trustees to make a payment to Ms Evans in that sum within seven days of the date of this determination.

David Appleton
Member of the Employment Relations Authority