**ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

[2017] NZERA Christchurch 133
3009631

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| | BETWEEN | Jane Evans-Walsh<br>Applicant |
| | AND | Southern District Health Board<br>Respondent |
| Member of Authority: | Helen Doyle | |
| Representatives: | Mary-Jane Thomas, Counsel for Applicant<br>Jessica Frame, Counsel for Respondent | |
| Determined on the papers: | Two telephone conferences on 29 June 2017 and 17 July 2017, memorandum of counsel for applciant lodged on 5 July 2017, memorandum of counsel for respodnent lodged on 10 July 2017 and submissions from the respondent 26 July 2017. | |
| Determination: | 31 July 2017 | |

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## DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

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**A The matter lodged under file number 3009631 is removed to the Employment Court pursuant to section 178(2) (a) and (d) of the Employment Relations Act 2000 in its entirety for hearing and determination.**

**B Costs are reserved.**

### Record of Settlement

[1] The applicant and respondent entered into a record of settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act). A mediator employed by the Acting Chief

Executive of the Ministry of Business, Innovation & Employment to provide mediation services under the Act certified on 14 October 2016, that she had explained and was satisfied, that the parties understood the effect of sections 148, 149 (1) and 149 (3) of the Act. On that basis the mediator affirmed the parties request that she sign the agreed terms of settlement.

**Prohibition from publication**

[2] Aside from the clauses in the record of settlement referred to in this determination all other provisions in the record of settlement are prohibited from publication under s 10(1) of Schedule 2 of the Act.

**Employment relationship problem**

[3] The applicant says that the respondent breached two of the agreed terms of settlement.

[4] The first is clause 1 of the record of settlement as follows:

> These terms of settlement, so far as the law allows, shall remain confidential to the parties. The parties undertake not to make any disparaging comments about each other to any third parties.

[5] The second is clause 8 of the record of settlement as follows:

> This is the full and final settlement of all matters between the employee and the employer arising out of the employment relationship.

[6] The applicant seeks a penalty under s 149(4) of the Act and an order that the respondent comply with the record of settlement.

[7] The applicant says that the breach arose when the respondent wrote to the Nursing Council under cover of a letter dated 31 January 2017 by way of a "Notification under Section 34(4) HPCA." HPCA refers to the Health Practitioners Competence Assurance Act 2003 (referred to as the Health Practitioners CA Act). Attached to the letter from the respondent to the Nursing Council are complaints about the applicant from other employees, the letter advising the applicant of these and terms of reference for the subsequent external investigation that the respondent commissioned. There was also reference to the applicant having been off work on paid leave for the 10 months of the investigation and that she had resigned prior to a conclusion being reached by the respondent.

[8] The respondent in its statement in reply says that the Authority does not have jurisdiction to deal with the application as s 34(4) of the Health Practitioners CA Act ensures no civil proceedings lie against any person in respect of a notice given under s 34. In the alternative it denies that there has been a breach of the record of settlement and even if there was, that any breach is justified by public interest.

[9] Section 34 of the Health Practitioners CA Act 2003 provides:

> 34 Notification that practice below required standard of competence
>
> (1) If a health practitioner (**health practitioner A**) has reason to believe that another health practitioner (**health practitioner B**) may pose a risk of harm to the public by practising below the required standard of competence, health practitioner A may give the Registrar of the authority that health practitioner B is registered with written notice of the reasons on which that belief is based.
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> (2) If a person holding office as Health and Disability Commissioner or as Director of Proceedings under the Health and Disability Commissioner Act 1994 has reason to believe that a health practitioner may pose a risk of harm to the public by practising below the required standard of competence, the person must promptly give the Registrar of the responsible authority written notice of the circumstances on which that belief is based.
>
> (3) Whenever an employee employed as a health practitioner resigns or is dismissed from his or her employment for reasons relating to competence, the person who employed the employee immediately before that resignation or dismissal must promptly give the Registrar of the responsible authority written notice of the reasons for that resignation or dismissal.
>
> (4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

**Process undertaken by the Authority**

[10] The Authority held an initial telephone conference with counsel for the applicant and respondent on 28 June 2017. Ms Thomas indicated during the conference that there was information received from the Nursing Council.

[11] After the telephone conference Ms Thomas supplied to the Authority and Ms Frame a letter from the Nursing Council dated 5 May 2017. The letter confirmed the Nursing Council did not consider the notification from the respondent to be a competence notification and that the complaint was not to do with [the applicant's] competence. It appeared the complaint

would be considered under a different section of the Health Practitioners CA Act but not one that required mandatory reporting.

[12] Ms Frame in response to the information provided said that the respondent did not agree the matter is not one of competency. She submits that the Authority does not have jurisdiction to hear the claim as the actions of the respondent are protected by s 34(4) of the Health Practitioners CA Act which ensures no civil proceedings lie against any person in respect of a notice given under s 34.

[13] A further telephone conference was held on 17 July 2017 with counsel. The Authority indicated at that conference that it was considering removing the matter on its own motion to the Employment Court. Ms Thomas, on behalf of the applicant, was not opposed to removal to the Employment Court. The respondent wanted time to make submissions which have now been provided.

[14] The Authority set out in a notice of direction to the parties that it considered there was an important question of law about the relationship between s 34(4) of the Health Practitioners CA Act and settlements entered into under s 149 of the Employment Relations Act 2000. There is an issue as to how any inquiry about "bad faith" should be dealt with under s 34(4) by the Authority. Further that this was seen as an important question for health practitioners and District Health Boards who may resolve matters under s 149 of the Act.

**Grounds for removal**

[15] The Authority may order removal to the Employment Court if it is satisfied that one of the grounds in s 178(2) of the Act has been met. In this case I find there are two main grounds for removal.

**Important question of law likely to arise other than incidentally -s 178 (2)(a)**

[16] In submissions Ms Frame does not accept that an important question of law arises out of the factual context in this matter. She submits that the fact the Nursing Council did not treat the complaint as a competence notification is not relevant and that the issue is whether or not the notification was made under s 34 and only then does the issue of bad faith arise. She submits that the bad faith issue on its own is not "likely to arise". She submits that the matter

is within the competence of the Authority and that it is unlikely to affect a large number of employers.

[17] I find that there is an important question of law likely to arise in this matter other than incidentally about the jurisdiction of the Authority to consider this claim. The important issue of law is about the relationship between s 34(4) of the Health Practitioners CA Act and non-disparaging, confidential and full and final settlement provisions in settlement agreements under s 149 of the Employment Relations Act 2000. There is also an important issue of law about how inquiries into "bad faith" should, or indeed could, be dealt with by the Authority or Court.

[18] I find that an important question of law is likely to arise in this matter other than incidentally and will be decisive of the case or some important aspects of it.

**The Authority is of the opinion that in all the circumstances the court should determine the matter**

[19] Ms Frame submits that discretionary considerations should be applied when deciding whether a matter should be removed even if there is an important question of law and that the matter should not be removed.

[20] Ms Frame refers to the need to reduce the need for judicial intervention and if removed submits this would cause delay, additional costs and the removal of a level of appeal.

[21] I find that certainty for health practitioners and district health boards who may reach agreement under s 149 of the Employment Relations Act 2000 is very important. Public interest supports the removal of this matter to obtain the view of the Employment Court on the matter.

[22] In terms of delay and expense the matters in issue are quite confined. Both parties are represented by experienced counsel who will be well placed to assist the Court in this matter.

[23] I find that the Authority should exercise its discretion and remove this matter to the Employment Court.

**Determination**

[24] The Authority orders, on its own motion, the removal of this matter under file number 3009631 in its entirety for hearing and determination by the Employment Court.

**Costs**

[25] Costs are reserved and will no doubt be dealt with by the Employment Court at the time it considers it appropriate to do so.

Helen Doyle
Member of the Employment Relations Authority