

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 43
3015405

BETWEEN WARWICK TAKAHI
Applicant

A N D THE BOARD OF TRUSTEES
FOR ROTORUA GIRLS'
HIGH SCHOOL
Respondent

Member of Authority: T G Tetitaha

Representatives: G Stone, Counsel for the Applicant
W Lawson/ K Kelly, Counsel for the Respondent

Investigation Meeting: 24 – 25 October 2017 at Rotorua

Submissions Received: 10 November 2017 from Applicant
17 November 2017 from Respondent

Date of Determination: 12 February 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The failure by Rotorua Girls High School to return Mr Takahi's property was a breach of the settlement agreement.**
- B. The failure by Rotorua Girls High School to pay the agreed wages by 29 March was a breach of the settlement agreement.**
- C. Rotorua Girls High School applications for penalties are dismissed.**
- D. I order the Board of Trustees of Rotorua Girls High School to pay Warrick Takahi a penalty of \$4,000.**
- E. Mr Takahi's application for penalties for breaches of the duty of good faith is dismissed.**
- F. Given the late production of evidence, the wage arrears are to be adjourned to allow the parties to consider the evidence. Mr Takahi is to**

advise within 14 days if a further hearing is required otherwise the application shall be dismissed. He has leave to seek orders for disclosure if required.

G. Costs are reserved.

Employment Relationship Problem

[1] Warwick Takahi was formerly employed by the Board of Trustees of Rotorua Girls High School (RGHS). The parties entered into a record of settlement dated 14 March 2017 (the settlement agreement). Both parties now allege the other has not complied with settlement agreement and seeks penalties. Mr Takahi also alleges there has been actionable breaches of the duty of good faith.

Relevant Facts

[2] Mr Takahi was employed in July 2014 as a caretaker at Rotorua Girls High School. As part of his employment he had the use of a caretaker's office. He was also granted tenancy of a house located upon the school's property which included the use of two garages.

[3] For various reasons, the relationship between the parties deteriorated through 2016. Mr Takahi became unwell and did not return to work until after December 2016.

[4] The relationship between the parties did not improve. On 6 March 2017 Mr Takahi raised a personal grievance of unjustified disadvantage through bullying.

Settlement Agreement

[5] The parties attended mediation on 14 March 2017. They resolved the employment dispute between the parties by way of a settlement agreement. The settlement agreement resolved the personal grievance, wage arrears and ended the parties' employment relationship. Mr Takahi's last paid day of work was 31 March 2017.

[6] For the purposes of this dispute, the relevant parts of the settlement agreement are clauses 5, 7 and 11 set out below:

5. Chris Nairn shall carry out a property inspection on 23 March 2017 and a final inspection on termination of the tenancy.
7. RGHS shall pay arrears of wages as set out in Appendix A as soon as is practicably possible.
11. Warrick shall not except as a bona fide member of the public access the school property and to return school property and collect his personal property. This can be arranged by contacting the Executive Officer Ph xxx xxxx ext xxx.

Breaches?

[7] Chris Nairn, RGHS Chairperson, contacted Mr Takahi for the purposes of inspecting the property on 23 March. Mr Takahi advised he did not have a key to one of the garages. Mr Nairn agreed to inspect the garage by looking through the windows instead. RGHS now alleges Mr Takahi breached the settlement agreement by not providing access to the garage.

[8] It is accepted differences had arisen between Mr Takahi and Barbara Leckie, RGHS Executive Officer. It was agreed Mr Nairn would be involved with the retrieval of Mr Takahi's personal property from the caretakers shed.

[9] Mr Nairn arranged to meet Mr Takahi at the caretaker's shed on 27 March 2017. Upon opening the shed they discovered all of his property had been removed. Mr Nairn contacted Ms Leckie and Heidi Symons, RGHS assistant executive officer. He was advised they had removed any property and placed it in a blue plastic bin and banana boxes kept at the office.

[10] Shane Bell, a RGHS caretaker met Mr Nairn and Mr Takahi and told them he had been involved in clearing out the caretakers shed. He confirmed Mr Takahi's property had been removed and dumped.

[11] When Mr Nairn and Mr Takahi attended the office, none of the property could be located. No record of the property was kept. Mr Takahi alleges this was a breach of the settlement agreement.

[12] Ms Leckie was responsible for arranging payment of Mr Takahi's wages. It was agreed his final pay including the wage arrears under the settlement agreement would be paid into his bank account through payroll on 29 March 2017.

[13] Mr Takahi received a final pay on 29 March 2017 of \$1,150.56. This was \$61.28 less than the agreed amounts under the settlement agreement. He raised this

with Ms Leckie. She advised she had miscalculated his wage arrears in the settlement agreement and Novopay had determined that he was overpaid by \$61.28. She told him she could not do anything about this implying he had to accept the underpayment. Mr Takahi did not accept this. He sought legal advice and his lawyer sent a letter to RGHS. A cheque for \$61.28 was then forwarded to Mr Takahi on or about 28 April 2017.

[14] During his employment Mr Takahi removed and replaced two amplifiers located in the schools Arena, a space available for rental by the public for events. The two old amplifiers were taken away by Mr Takahi. He later sought advice from DD whom worked at a local electronics business about their value and whether he was interested in purchasing or repairing them for sale.

[15] DD later contacted Ms Symons in May 2017 advising they had received two amplifiers that appeared to be school property. RGHS complained to the Police. Mr Takahi was convicted and is seeking a sentence of discharge without conviction.

[16] Mr Takahi filed a statement of problem on 13 July 2017 alleging RGHS had breached the settlement agreement by failing to pay the agreed wage arrears and destruction of his property. He also alleged these actions breached the duty of good faith. RGHS denied any breach and counterclaimed alleging Mr Takahi breached the settlement agreement by preventing a property inspection and retaining amplifiers belonging to the school.

Issues

[17] The issues for determination are:

- a) Does the respondent owe any wage arrears?
- b) Is there jurisdiction to consider a breach of good faith post-employment? If so, has the respondent breached its duty of good faith?
- c) Has the respondent breached clauses 7 and 11 of the record of settlement?
- d) Has the applicant breached clauses 5 and 11 of the record of settlement.

Penalties

[18] A person who breaches a settlement agreement is liable to pay a penalty.¹ Section 133A sets out the matters I must have regard to in determining the amount of penalty:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.]

Has the respondent breached the settlement agreement?

Personal property

[19] The parties had agreed Mr Nairn was to facilitate the retrieval of Mr Takahi's property under the settlement agreement. No property has been returned to him.

[20] Given the failure to keep records and to secure the property removed, I do not accept RGHS's submission there was little or no personal property of Mr Takahi's in the caretaker's shed. There was evidence some of the property removed appeared to be personal and not school related. There was also evidence the same property was given or taken by other staff or dumped.

[21] The failure by Rotorua Girls High School to return Mr Takahi's property was a breach of the settlement agreement.

¹ Section 149(4) Employment Relations Act 2000.

Non-payment of Wages

[22] The settlement agreement provided for partial settlement of Mr Takahi's wage arrears claim by payment of \$1,211.84 "as soon as is practicably possible". There was an agreement he would the settlement agreement wages with his final pay on 29 March. This did not occur.

[23] The failure by Rotorua Girls High School to pay the agreed wages by 29 March was a breach of the settlement agreement.

Has the applicant breached the settlement agreement?

Property Inspection

[24] The settlement agreement did not expressly require Mr Takahi to provide his keys for access to the garages. RGHS had a master key that could open the garage at issue. The fact Mr Nairn may not have known about the other key is not a basis to penalise Mr Takahi. There has been no breach by Mr Takahi.

Return of school property

[25] The settlement agreement does not identify the school property to be returned and/or the date and time for its return by Mr Takahi. It only provides a person to contact to make arrangements.

[26] Unlike the return of Mr Takahi's property, RGHS did not make specific arrangements for him to return school property. This may have been because he had already returned his caretakers keys and equipment.

[27] Even though his actions gave rise to criminal liability, that is separate and distinct from his obligations under the settlement agreement. RGHS cannot seek penalties in this jurisdiction for criminal behaviour unless the same behaviour breaches a term of the settlement agreement.

[28] Mr Takahi did not breach the settlement agreement in the circumstances. Rotorua Girls High School applications for penalties are dismissed.

Quantum of penalty

[29] Given my findings there were two breaches of the settlement agreement by the respondent only, I must consider the matters under s133A in terms of quantum of any penalty.

[30] S133A(a) requires regard to the object stated in s3 of the Act. The object refers to good faith behaviour “in all aspects of the employment environment.” This environment can include breaches of settlement agreements. This must imply an expectation that parties behave in a manner that is consistent with good faith behaviour. Good faith behaviour requires parties to be responsive and communicative. The behaviour here did not meet those expectations.

[31] In terms of the nature and extent of breaches, breaches involving non-compliance with a settlement agreement are serious. They will generally warrant a penalty because it is expected those whom enter into these agreements shall adhere to their terms.

[32] The non-payment of wages may have originally been an issue of miscalculation by Ms Leckie. However the later conduct meant RGHS failed to take any steps to remedy the breach until intervention by Mr Takahi’s lawyer. This made that breach intentional.

[33] The destruction/loss of Mr Takahi’s property was also intentional. Ms Leckie again made the deliberate decision to remove the property without taking any steps to check her actions were compliant with the settlement agreement. RGHS then failed to keep the property secure resulting in its loss. It also failed to record what was removed.

[34] Mr Takahi has suffered losses in respect of the destruction of his property of \$2,247.41. He has also suffered financial losses by having to instruct a lawyer to recover the underpayment of his agreed wages.

[35] RGHS have paid the wages owed. No steps have been taken to remedy the losses of property.

[36] Mr Takahi was vulnerable. He relied upon RGHS to pay the correct wages on time and to keep his property secure. He is in receipt of legal aid for this matter. He has had to expend his own limited funds to recover wages and seek penalties.

[37] The maximum penalty that could be imposed upon RGHS would be \$20,000 per breach or \$40,000. The mitigating factors of payment of the outstanding wages would reduce the penalty for that breach to \$2,000. There are no mitigating factors in respect of the destruction of property. However the property was of a relatively low value (\$2,247.41). Another penalty of \$2,000 commensurate with the losses is appropriate.

Should Mr Takahi receive any penalty?

[38] This was a private settlement agreement. Only Mr Takahi suffered losses as a direct result of the breaches. There is little public interest to be met by payment to the Crown of the penalty that is not being met by publication of this decision.

[39] In the circumstances I order the Board of Trustees of Rotorua Girls High School to pay Warrick Takahi a penalty of \$4,000.

Is there jurisdiction to consider a breach of good faith?

[40] This matter was not pursued in any great way at hearing. Section 4 of the Act restricts the duty of good faith to an employment relationship only. Here the employment relationship had terminated. A separate cause of action for breaches of the duty of good faith cannot arise. However good faith may be relevant to quantum of penalty as discussed above.

[41] Mr Takahi's application for penalties for breaches of the duty of good faith is dismissed.

Wage Arrears

[42] At the start of this hearing several matters were clarified. RGHS accepts if wage arrears are owed they should be paid. However they have not been quantified and required some evidence. Mr Takahi produced at hearing an expert accountant's opinion that identified underpayments. Mr Takahi also stated at hearing he worked at least 1.5 hours extra each day. He may be owed a \$10 meal allowance for each day he worked longer than 9.5 hours.

[43] Given the late production of evidence, the wage arrears are to be adjourned to allow the parties to consider the evidence. Mr Takahi is to advise within 14 days if a further hearing is required. He has leave to seek orders for disclosure if required.

[44] Costs are reserved.

TG Tetitaha
Member of the Employment Relations Authority