

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2019] NZERA 155
3047932

BETWEEN

IAN CHARLES RUSS
Applicant

AND

THE BOARD OF TRUSTEES
TAIHAPE AREA SCHOOL
Respondent

Member of Authority: TG Tetitaha

Representatives: D Balfour, for the Applicant
C Murray-Brown, A Canaivuna, for the Respondent

Investigation Meeting: 14 March 2019 at Palmerston North

Submissions Received: 14 March 2019 from the Applicant
14 March 2019 from the Respondent

Record of Oral
Determination: 14 March 2019

ORAL DETERMINATION OF THE AUTHORITY

A. The application for compliance and penalties is dismissed.

B. The parties are each to meet their own costs of this hearing.

Employment Relationship Problem

[1] Ian Charles Russ alleges his former employer, the Board of Trustees for Taihape Area School has breached two settlement agreements they reached with him. He seeks compliance orders and penalties. The Board of Trustees denies this to be the case.

Relevant Facts

[2] Mr Russ was employed in January 2015 to teach technology at Taihape Area School. During the year the principal, Richard McMillan raised several issues about Mr Russ'

conduct and competency. These issues were set out in a letter to Mr Russ dated 23 September 2015. Shortly thereafter Mr Russ raised a personal grievance. The parties attended mediation at Mr Russ' instigation.

Settlement Agreements

[3] The parties came to an interim settlement agreement dated 28 October 2015 (settlement agreement). It was stated to be an agreement as an outcome of mediation and was signed by a mediator but not certified as required by s149 of the Employment Relations Act 2000 (Act).

[4] The settlement agreement contained the below clauses that are material to the dispute between the parties:

- (1) Except for clause 9, these terms of agreement and all matters discussed in mediation shall remain, as far as the law allows, confidential to the parties.
- (7) Each party agrees that no disparaging comments will be made about the other.
- (9) The principal will make an announcement that Mr Russ will be on leave for the remainder of the school year. No other comment will be made.

[5] The settlement agreement also provided for Mr Russ to apply for voluntary severance subject to Ministry approval:

- (3) The employee has applied for voluntary severance through surplus staffing pursuant to clause 5.2 of Appendix 5 of the Area Teachers Collective Agreement. The employer provisionally accepts this offer, however the parties acknowledge that confirmation is required from the Ministry of Education. If this is granted, the parties will enter into an agreement pursuant to s 149 of the Employment Relations Act 2000. If it is not granted, either party may request further mediation assistance.

[6] That same day, Mr Russ signed a letter addressed to the Board Chair of the Taihape Area School. The letter stated amongst other things:

I understand that the school has not managed to solve its surplus staffing problems through attrition. The board has indicated that it is making the voluntary options available to employees. I wish to avail myself of that choice. This letter is a formal offer to be considered for the voluntary long service option as per clause 5.2 of appendix 5 of the Area Teachers Collective Agreement. I would be grateful if the Board would grant my request.

[7] On 8 December 2015 Mr Russ' voluntary severance was approved and he was subsequently paid. The parties then signed a s 149 record of settlement (ROS) terminating

their employment relationship on or about 16 December 2015. The ROS contained several material clauses to this dispute

1. These terms of settlement shall remain, so far as the law allows, confidential to the parties ...
6. The applicant and the respondent agree not to make any statement about the other which is disparaging or likely to damage the reputation of the other, including in any digital communication and social media sites...
7. The applicant understands that notwithstanding the terms of this settlement the school has a statutory duty under ss 139 AK to 139 AP of the Education Act 1989 to undertake a mandatory report to the Education Council of New Zealand.
8. The parties' signatures on these terms of settlement will constitute acceptance of this offer on the terms set out. Once signed by both parties this offer will then become a binding agreement between the parties and the without prejudice heading will cease to apply.
11. Notwithstanding any claim that may arise from any overpayment or underpayment, that is or has been made, to either party, due to an administrative error in relation to the employment relationship, this is the full and final settlement of all matters between the applicant and respondent arising out of their employment relationship.

Mandatory report & adverse comments

[8] The mandatory report referred to in the ROS was completed and signed by Richard McMillan and dated 2 December 2015. There is a dispute about whether the report was signed on 2 December 2015 and when it was sent to the Education Council (the Council). A copy of the mandatory report filed with the Authority is date stamped as received by the Council on 30 October 2017 – nearly two years since the parties' relationship ended.

[9] In June 2016 Mr Russ applied for and accepted a job offer with a High School. He did not tell his employer that he may be the subject of a mandatory report to the Council.

[10] In May 2017 Mr Russ applied for a job with another High School. He was not offered the job. However he believed that this may have been due to adverse comments from Richard McMillan. Mr McMillan denied this had occurred.

[11] In October 2017 Mr McMillan received a request from Mr Russ that he certify his teacher's registration. Mr McMillan declined to do so because of "a number of issues" and a "privacy agreement to keep [the] details confidential". He set this reason out in an email that he sent to the Council on 16 October 2017. The Council replied on 30 October 2017

apologising for the delay then referred to the school's requirement in the circumstances to file a mandatory report. It stated that the school had failed to do so, it was an offence not to report and that the school may face fines of up to \$25,000.

[12] Mr McMillan emailed that same day noting that after checking his records he had "definitely filed a report after our agreement was made with Ian". He asked the Council to check their records. The Council did so and then replied they had no record of the receipt of the mandatory report and asked for another copy. This was provided by Mr McMillan on 30 October 2017.

[13] A copy was sent to Mr Russ by the Council. At the end of the hearing there was some discussion with Mr Russ about the exact date he received the mandatory report. This is because penalty applications have a time limitation of 12 months pursuant to s135(5) of the Act. I was initially told by Mr Balfour the date of receipt was 1 December 2017. The statement of problem was not filed until 5 December 2018 – outside of the 12 month time limitation for seeking penalties.

[14] When this was raised, Mr Balfour sought time to find the email confirming receipt. I stood the matter down over the lunchtime adjournment. Upon return I was told it may have been received late on 4 December. No copy of the email confirming receipt was provided. I noted to the parties the statement of problem was signed by the Authority on 6 December 2018. I will return to this issue at a later point.

Council hearing

[15] In any event, after receiving the report Mr Russ raised concerns with the Council about some of its content. This included the references to mediation and a remark that "since this issue erupted conversations with other schools have indicated that they had similar concerns and experiences." Mr Russ believed that remark referred to him and showed that Mr McMillan had been contacting other schools post record of settlement to dissuade them from supporting or offering him jobs. Mr McMillan recommended deletion of the comment without further explanation. He did not believe the references to mediation were in breach of the settlement agreement or ROS.

[16] Mr Russ attended a hearing before the Council on 4 October 2018. Following that hearing the parties were advised by letter dated 15 November 2018 that no further action was

to be taken. This was because the allegations were three years old and there was a lack of documentation supporting them. The Council noted Mr Russ had denied two of the allegations and provided an explanation in respect of one. The Council believed that in order to be satisfied on the balance of probabilities that the allegations were true, further evidence would be required and given the time elapsed since the alleged events it was unlikely they would be able to resolve the matter. Therefore they had resolved to take no further action. However, they did note that the issues arose under that the allegations raised issues under the Code of Professional Responsibility and the Standards for the teaching profession. It asked Mr Russ to take the opportunity to reflect on these documents and in particular the requirement to promote the wellbeing of students and protect them from harm.

[17] Mr Russ subsequently filed proceedings in the Authority on or about 5 December 2018 alleging breaches of the terms of the settlement agreement and the ROS.

Issues

[18] As confirmed at an earlier telephone conference the following issues are for determination:

- (a) Whether the respondent has breached paragraphs 7 and 9 of the mediated agreement dated 28 October 2015 and/or paragraph 6 and 8 of the settlement agreement dated 16 December 2015 by:
 - (i) The contents of the mandatory report to the Council dated 30 October 2017; and
 - (ii) The delays in providing the same to the Council.
- (b) Whether there has been a breach of clause 1 in the settlement agreements by the respondent's actions below:
 - (i) The respondent's comments to the Teachers Council as noted on page 5 of the mandatory report; and
 - (ii) Misrepresentation by the respondent of the outcome of mediation as noted in the same report.
- (c) Whether the agreements have been breached by allegedly disparaging comments made about the applicant and his advocate to the Council as noted in the same mandatory report;

- (d) Whether there has been a breach of the settlement agreements by including issues within the mandatory report that go beyond the applicant's competency.

Has the respondent breached the settlement agreement dated 28 October 2015 and/or the record of settlement dated 16 December 2015?

[19] The settlement agreement sets out a possible agreed exit due to surplus staff. This required confirmation from the Ministry of Education. If permitted the parties would execute a record of settlement. The ROS was executed in December 2015. It replaced the earlier settlement agreement.

[20] The ROS contained clause 7 that specifically preserved the respondent Board of Trustees statutory duty to make a mandatory report to the Council. It was accepted at hearing the respondent was required to make a mandatory report, although Mr Russ was initially resistant to the justification for it given the outcome of the Council hearing.

[21] The ROS does not set out any date by which the mandatory report was to be sent to the Council nor does it contain any reference to what the mandatory report should contain. Given the report has already been received by the Council there is nothing to be enforced by way of compliance order.

[22] Both parties accept the statutory framework cited in the ROS are incorrect but understand what a mandatory report is and to whom it was to be made at the time of the ROS was entered into. I see nothing in this error that would undermine their settlement.

[23] The requirement to furnish the Council with a mandatory report is a statutory duty required of the respondent by operation of s 392 of the Education Act 1989.

392 Mandatory reporting of dismissals and resignations

- (1) When an employer dismisses a teacher for any reason, the employer must immediately report the dismissal to the Teaching Council.
- (2) If, within the 12 months before the resignation of a teacher from a teaching position (including a fixed-term position) or the expiry of the term of a teacher's fixed-term position, the teacher's employer had advised the teacher that it was dissatisfied with, or intended to investigate, any aspect of the teacher's conduct, or the teacher's competence, the employer must, immediately after the resignation or expiry, report it to the Teaching Council.
- (3) Every report under this section must be in writing and must include,—
 - (a) in the case of a report of dismissal, the reason for the dismissal; and
 - (b) in the case of a report of a resignation or expiry,—

- (i) a description of the conduct or competence issues that the employer was concerned about; and
- (ii) a report of what action (if any) the employer took with respect to the issues.

[24] Section 392 requires a mandatory report to the Council if within 12 months of a resignation the school advises a teacher they are dissatisfied with their conduct or competence. The mandatory report must be made “immediately after the resignation”. The content of the report “must include” a description of the conduct or competence issues and what action the employer took. Failure to report could render the school liable to a fine of up to \$25,000.

Was there a breach by the any delay in sending the report to the Council?

[25] Mr Russ believed Mr McMillan did not send the report in December 2015 because of the remark in the mandatory report that “other schools have indicated that they had similar concerns and experiences”. He believed this referred to Mr McMillan’s discussions in May 2017 with another principal of a school he had applied to for a job and therefore could not have signed or sent the report to the Council prior to October 2017. This was confirmed to him by another staff member who was not produced and was not named until hearing.

[26] Mr McMillan referenced this comment to an email dated 19 November 2015 about another application Mr Russ had made for a job and discussions another employee had had with the principal concerned. He denied strenuously that he made any comment about Mr Russ’ application to another High School in May 2017. There is evidence in the form of a letter and emails from the principal of this High School that contradicts Mr Russ’ allegations he was not offered the job due to Mr McMillan.

[27] Mr McMillan believed he sent the report earlier because that was his practice. He could not produce emails to confirm this because the school had changed its email service provider and could not recover emails from this period of time. He believed the email may have ‘bounced’ but cannot be sure.

[28] The Council has also not sought to fine the school for breaching s392 of the Education Act 1989.

[29] Considering the above evidence I am not convinced on the balance of probabilities that Mr McMillan did not send the report to the Council in December 2015.

[30] Even if I am wrong about the above, Mr Russ has not shown why any term requiring the respondent to immediately file the report should be implied into the ROS. While I appreciate Mr Russ was concerned about having the spectre of a report being held over his head, he was not prejudiced by it. The delay by the respondent in filing the mandatory report was advantageous to Mr Russ. This is because the Council took no further action due to the delay. There is no need for the term to be implied due to business efficacy or by operation of law or any other lawful basis that I may do so.

[31] In the circumstances I decline to find a breach of the ROS by delay in filing the mandatory report.

Were there breaches of confidentiality or any implied term about the content of the mandatory report?

[32] There is no express term in the ROS restricting the content of the mandatory report in any way. Mr Russ suggested s392 by law restricted the content of the mandatory report to the matters outlined therein. I do not agree.

[33] Section 392 of the Education Act 1989 requires the report contain “a description of the conduct or competence issues that the employer was concerned about” and “a report of what action (if any) the employer took with respect to the issues.” This is required content. It does not prevent schools from reporting more widely than these matters. This is because the affected teacher shall be given a chance for comment upon the report prior to any action being taken. The report is only the schools view of the concerns. It does not bind the Council to act.

[34] There is no dispute the report accurately conveyed the issues of conduct or competence.

[35] Mr Russ submitted the report went beyond the requirements of s392 and breached confidentiality by the description of the mediation “conducted in separate rooms” and it being “a totally unproductive day”.

[36] Section 148 of the Act describes what is confidential for mediation purposes. These are “any statement, admission or document created or made for the purposes of mediation and any information that, for the purposes of mediation, is disclosed orally in the course of

mediation.” The two above remarks do not fall within the statutory definition of confidentiality set out therein. This is because a party’s post mediation opinion about its success or otherwise are not statements, admissions, documents or information for the purposes of mediation. Further a generic description of the conduct of mediation is not confidential.

[37] Mr Russ’ concern about the content of the report seemed to suggest it went beyond what was required by s392. Mr Russ has not shown why such a term restricting content should be implied into the ROS. There was a concern raised about the last comment that “other schools have indicated that they had similar concerns and experiences” which I have dealt with earlier.

[38] Mr Russ also seemed to suggest s392 ought to be implied into the record of settlement but confidentiality in the ROS and settlement agreement prevented the school from referring to any mediated outcome. This contradicted the terms of s392.

[39] Section 392 requires the school to report on what action if any the employer took in respect of those issues. This must include the fact of a mediated settlement. The ROS specifically preserved the respondent’s duty to file a mandatory “notwithstanding the terms of this settlement”. This infers the settlement agreement does not override the respondent’s statutory duty to make a mandatory report. Mr Russ cannot seek to imply s392 yet rely on confidentiality in the ROS to prevent the respondent undertaking its statutory duty. He seems to seek to only imply the parts of s 392 that are advantageous to him.

Breach of Statutory duty

[40] Even if there was merit to the allegations that the mandatory report was not sent to the Council in a timely way, or had commentary that it should not have, that did not form a breach of the ROS. At best, there may be a breach of statutory duty.

[41] As indicated to the parties’ breaches of statutory duty are actions in tort. Section 161(1)(r) of the Employment Relations Act prevents me from investigating an action founded in tort.

Other issues

[42] I also have some concerns about when this action was filed. There may be an issue about whether it was filed outside of the 12-month time limitation under s 135(5) of the Act. I make no final finding around that issue because there is insufficient evidence before me necessarily to dismiss the matter on that issue alone.

[43] Mr Balfour raised an issue around whether there had been a breach of the Area Teachers Collective Agreement because the mandatory report should have been provided to the affected teacher prior to it going to the Council. I don't have a copy of that part of the Collective Agreement before me so I cannot make any ruling on it. More particularly, there is also no application for breach of the Collective Agreement that is in front of me. In the circumstances I decline to deal with this issue. It would also be well outside of time for filing an application for penalties.

[44] The application for compliance and penalties is dismissed.

Costs

[45] There is no issue of costs as the school although they are successful do not seek to recover them. The parties are each to meet their own costs of this hearing.

TG Tetitaha
Member of the Employment Relations Authority