

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 74
3038971

BETWEEN ALLEN CLIVE PERROTT
Applicant

AND ROTORUA BOYS HIGH
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Anna Fitzgibbon
Representatives: Applicant in person
Gretchen Stone, counsel for the Respondent
Investigation Meeting: On the papers
Submissions Received: 14 December 2018 from the Applicant
21 December 2018 from the Respondent
Date of Determination: 13 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Allen Perrott, claims the Board of Trustees of Rotorua Boys High School (the Board) breached a confidential settlement agreement (the settlement agreement) signed by a mediator pursuant to s 149(3) of the Employment Relations Act 2000 (the Act). Mr Perrott claims that in breach of the settlement agreement, Mr Chris Grinter, Principal of Rotorua Boys High School (the School), provided the Education Council with a “mandatory report regarding concerns about my performance”.¹

¹ Perrott Statement of problem, para [2]

[2] Mr Perrott says that he and the Board attended mediation to resolve a personal grievance raised by him. A settlement agreement was concluded which included a provision that the Board confirmed it had not commenced a formal competency or advice and guidance programme in respect to Mr Perrott. Following conclusion of the settlement agreement, Mr Grinter provided a mandatory report to the Education Council regarding Mr Perrott and his resignation, in breach of the settlement agreement.

[3] Mr Perrott further says the settlement agreement was concluded in circumstances in which he was not aware that prior to the mediation Mr Grinter had made contact with the Education Council about his performance.

[4] Mr Perrott seeks a penalty for what he says was a breach by the Board of the terms of the settlement agreement concerning confidentiality. Mr Perrott also seeks compensation for what appears to be a claim of unjustified disadvantage relating to alleged bullying.

[5] The Board in response says it has complied with the settlement agreement. The Board accepts the parties agreed that the settlement agreement was in full and final settlement of all matters between them. However, the settlement agreement did not resolve matters between Mr Perrott and the Education Council. The Board says the Education Council instructed it to provide a mandatory report as to the reasons for Mr Perrott's resignation. Accordingly, the Board says it did not breach the settlement agreement, rather it complied with a legal obligation to the Education Council.

Investigation meeting

[6] Both parties agreed for the employment relationship problem to be investigated by the Authority on the papers. Mr Perrott filed an affidavit dated 1 November 2018 as did Mr Neal Perrott who attended the mediation meeting.

[7] For the Board, Mr Chris Grinter, Principal of the School, filed an affidavit. Both parties filed legal submissions in support of their respective positions.

Relevant facts

[8] Mr Perrott was employed by the School in January 2001 in the role of Director of Awhina. Awhina supports disengaged students to reintegrate back into mainstream schools or on to further training programmes.²

[9] On 31 January 2017, the Board received a report from Māori and Pasifika Support Services following its review of the performance of Awhina (the report).

[10] Following a review of the report, Mr Grinter wrote to Mr Perrott on 2 March 2017. The letter commenced as follows:

As you will be well aware there have been a series of reviews and programmes of advice and support relative to Awhina and your role as Director over recent years.

[11] The letter highlighted some of the areas of concern in relation to Awhina and Mr Perrott's role as Director. Mr Grinter's letter requested that Mr Perrott consider the report and provide a written response. Mr Grinter stated:

I need to emphasise that these concerns have been raised with you previously and have been captured in the previous reviews that have taken place over the last three years. These concerns raise questions about your competency as Director of Awhina and around your ability to provide the appropriate leadership for the centre.

[12] A request was made to meet with Mr Perrott to discuss the report. On 6 March 2017 Mr Perrott went on sick leave and never returned to Awhina. On 31 May 2017, Mr Perrott raised a personal grievance claim. The Board and Mr Perrott agreed to attend mediation to attempt to resolve the claim. Mediation was scheduled to take place on 19 September 2017.

[13] On 12 September 2017, Mr Grinter sent a letter to the Education Council of New Zealand (the Education Council) informing it that there had been a review of Awhina by Māori and Pasifika Support Services and that Mr Perrott had been asked to respond to its report. The letter went on to inform the Education Council that the parties were attending mediation following the raising of a personal grievance by Mr Perrott. The letter concluded:

I therefore take this opportunity to bring this matter to your attention and will once the outcome is known after mediation complete the appropriate

² Grinter affidavit.

documentation and advice. Please advise if you would like further documentation completed at this point.

[14] Mediation took place on 19 September 2017 and a settlement agreement pursuant to s 149 of the Act was concluded.

Record of settlement

[15] Relevant provisions of the settlement agreement are as follows:

1. This agreement is made on a without admission to liability basis.
2. The Employee has decided to resign from his employment and the Employee's last day of employment will be 28 January 2018 ("the resignation date").
- ...
6. The Employer confirms that it has not commenced a formal competency or advice and guidance programme in respect to the Employee.
7. On receipt from the Employee of his teacher registration form the Employer will sign off the Employee's teacher registration, as all requirements in this regard has been met.
- ...
10. The existence of this agreement and the terms of settlement, and all matters discussed in reaching agreement shall remain, so far as the law allows, confidential to the parties.
- ...
12. This is the full and final settlement of all matters between the parties arising out of their employment relationship.

[16] The settlement was certified under s 149 of the Act by the mediator. That certification confirmed that before signing the agreement, the parties were advised and accepted they understood the effect of s 148A in respect of entitlement to minimum entitlements, s 149(1) in respect of the authority of the mediator to sign the settlement and s 149(3) of the Act which states that the agreed terms of settlement:

- (a) were final, binding and enforceable; and
- (b) could not be cancelled; and
- (c) could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

Mr Perrott's claim

[17] Mr Perrott says that “Chris Grinter has broken the Record of Settlement”.³ This was because he provided the Education Council with a mandatory report which included comments about his competency, in direct breach of the terms of the settlement agreement.

[18] Mr Perrott says there was no disclosure by or on behalf of the Board at the mediation meeting that a letter had been sent to the Education Council, prior to the mediation and prior to the conclusion of the settlement agreement. Mr Perrott says that the settlement agreement was concluded on the basis that there was no incompetence, no disclosure of a competence issue and a fair set of conditions was agreed to.

[19] Mr Perrott says he believed Mr Grinter knew at the mediation that he would have to complete a mandatory report for the Education council. He says the settlement agreement was entered into by him on a false basis and as a result he has been the subject of an investigation by the Education Council which is ongoing. Mr Perrott seeks \$35,000 in compensation for “the stress, hurt and humiliation” that he has experienced.

Board's response

[20] The Board denies that Mr Perrott has made out a claim that the Board breached the record of settlement and states that he is not entitled to penalties for “stress, humiliation and workplace bullying” as alleged in his statement of problem. Counsel for the Board submits that Mr Perrott was legally represented at the mediation and at the time the settlement agreement was signed and “was aware, or should have been aware, that the terms of the Record of Settlement could not prevent a Mandatory Report, which contained accurate information reflecting clauses 6 and 7 of the Record of Settlement”.⁴

Is the settlement agreement valid?

[21] Mr Perrott seems to be saying he was misled by Mr Grinter into signing the settlement agreement or that he signed it under false pretences, namely that no issues about his competency had been or were going to be raised with the Education Council.

³ Statement of Problem, para 1
⁴ Submissions for the Board.

[22] The Employment Court in *TUV v WXY*⁵ considered the issue of whether a settlement agreement signed by a mediator pursuant to s 149 of the Act can be set aside by the Court. In that particular case the ground advanced for setting aside the settlement agreement was that of mental incapacity. Judge Inglis states at paragraph [27]: “The issue of whether the employment institutions can disturb a record of settlement entered into under s 149 has been touched on in a number of cases but has not been conclusively determined.”⁶

[23] At paragraph [41] of *TUV v WXY*, Judge Inglis referred to two judgments of the Employment Appeals Tribunal (UK) which dealt with the issue of the extent to which the “restrictive statutory scheme for challenging employment settlement agreements prevented the Court from intervening”. The first judgment was *Glasgow City Council v Dahhan*⁷ in which the Tribunal held that it had jurisdiction to set aside an agreement said to have been entered into where one party to the agreement lacked mental capacity. The second was *Industrious Ltd v Horizon Recruitment Ltd*⁸ in which the Employment Tribunal considered whether it could set aside an agreement on the basis of misrepresentation. In both cases, the Tribunal held that the applicable legislation permits parties to enter into settlement agreements, but the agreement reached must be a valid agreement. At [45], Judge Inglis states that s.149(3) is

[45] ... “directed at limiting the circumstances in which parties can revisit their agreements by seeking to bring the terms of settlement before the Court (including, for example, in instances of settlor remorse). It is not directed at deeming validity of the agreement itself.

[46] If that is correct, and if the plaintiff can establish that she did not have the requisite mental capacity to enter into the settlement agreement in this case, then s 149(3) would not be engaged. That is because the fundamentals of contractual formation would not have been made out and there would be no agreement for s 149(3) to leverage off. Such cases are likely to be rare because of the hurdles that must be overcome in establishing, for example, lack of mental capacity, knowledge and unconscionability.⁹

[24] Judge Inglis found that the applicant had lacked mental capacity. However, because the respondent had not been aware and could not reasonably have known about the lack of

⁵ [2018] NZEmpC 154

⁶ (Footnote 1 in original text) *Lumsden v Sky City Management Limited* [2015] NZEmpC 225, [2015] ERNZ 389 at [42]. See too *Lumsden v Sky City Management Limited* [2017] NZEmpC 30 at [21] – [22]; *Sawyer v the Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 71 at [21] – [37]; *AFT v BCM* [2015] NZEmpC 234 at [58].

⁷ *Glasgow City Council v Dahhan* UKEATS/0024/15/JW

⁸ *Industrious Ltd v Horizon Recruitment Ltd* (in liq) [2009] UKEAT 0478_09_1112

⁹ (Footnote 14 in original text) *Gustav & Co. Limited v Macfield Limited* [2008] NZSC 47

capacity, the settlement agreement was not set aside. The facts in *TUV v WXY* were specific, and are distinguishable from those in the current case.

[25] Areas of concern in relation to Awhina and Mr Perrott's role as Director had been raised with Mr Perrott prior to the report by Māori and Pasifika Support Services in January 2017. Mr Perrott was asked to comment on the report but did not do so. Mr Perrott went on sick leave in March 2017 and did not return to Awhina. No formal competency or advice and guidance programme was commenced by the Board in respect of Mr Perrott. However, Mr Perrott had been made aware of issues about his performance as Director of Awhina, he had the requisite knowledge.

[26] On 31 May 2017 Mr Perrott raised a personal grievance claim with the Board. The parties agreed to attend mediation to resolve Mr Perrott's personal grievance claim. A date for mediation was scheduled. Prior to mediation, Mr Grinter informed the Education Council of the report by Māori and Pasifika Support Services and of the impending mediation.

[27] At mediation the parties agreed to a settlement. The relevant terms of the settlement agreement are at para 15 above. Clause 6 of the settlement agreement stated that "the Employer confirms it has not commenced a formal competency or advice and guidance programme in respect to the Employee."

[28] This was accurate. Mr Perrott was made aware of the report from Māori and Pasifika Support Services and the concerns raised, had been asked to comment, did not do so and did not return to work. No formal competency or advice and guidance programme in respect to Mr Perrott was commenced. The Board did not mislead Mr Perrott, in my view. In those circumstances it is my view the settlement agreement reached was a valid one.

[29] Following mediation, Mr Grinter wrote to the Education Council advising that Mr Perrott had resigned from his employment. He also advised that "No formal process around advice and guidance or competency was commenced". This statement reflected the wording of the settlement agreement.

[30] On 28 September 2017, Mr Grinter received an email from the Education Council advising that a mandatory report was required in accordance with s 392(2) of the Education Amendment Act 2015. On 14 October 2017, Mr Grinter sent a mandatory report to the Education Council. In the report to the Education Council, Mr Grinter identified that Mr

Perrott had resigned and competence had been issue. Mr Grinter further stated that a formal competency or a formal advice and guidance programme had not been commenced with Mr Perrott. Mr Grinter stated in the report that “Following a review of the annual appraisals undertaken for Mr Perrott over the last three years, there would be no reason of which we are aware for Mr Perrott’s teacher practising certificate to not be renewed when it becomes due in January 2018”. In response to a question about what Mr Grinter believed the appropriate outcome should be for Mr Perrott, he responded with ticking the box “No further action”.

Education Act 1989

[31] Section 392(2) of the Education Act 1989 states:

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 Education Council.

[32] The Board had informed Mr Perrott on 2 March 2017 of concerns arising out of the Māori and Pasifika Support Services report relating to staff and student management and professional leadership. The issues were not new. Section 392(2) places a positive duty on an employer, to report to the Education Council immediately after resignation.

[33] Section 396 of the Education Act stipulates that failure to report matters of conduct or competence to the Education Council is an offence.

[34] The settlement agreement recorded that Mr Perrott had decided to resign. The settlement agreement also recorded that the Board had not commenced a formal competency or advice and guidance programme in respect of the employee, and that it would sign off the employee’s teacher registration. Mr Perrott says the Board breached confidentiality by informing the Education Council of his resignation.

[35] The decision of the Employment Court in *Evans-Walsh v Southern District Health Board*¹⁰ is relevant. The District Health Board (the DHB) began an investigation into bullying complaints about the employee, a nurse. The employee resigned after she and the DHB signed a settlement agreement under s149 of the Act. The settlement agreement

¹⁰ [2018] NZEmpC 46

contained a confidentiality and non-disparagement clause. The DHB subsequently notified the Nursing Council of New Zealand about the nurse's resignation. The Nursing Council began its own investigation into the nurse's conduct.

[36] The Employment Court held that the DHB's disclosure to the Nursing Council of the employee's resignation was not in breach of the settlement agreement. The agreement required confidentiality to be maintained but was qualified so that it applied only "...so far as the law allows". The law would not "allow" confidentiality to oust that statutory duty. The Court reasoned that s 149 did not have primacy over the statutory duty on the DHB under the Health Practitioners Competency Assurance Act 2003(HPCAA) to give such notice to the Nursing Council. In para [48], the Court stated that what was said and supplied by the DHB did not go any further than was necessary to satisfy the HPCAA. The terms of the settlement agreement were not divulged, basic information only was provided to the Council.

[37] Even in the absence of a statutory duty, such reporting to disciplinary bodies may not in certain circumstances breach confidentiality. In *ALA v ITE*¹¹ the Employment Court drew upon English case law and concluded that if a disciplinary board is the appropriate venue for complaints and the disciplinary board is performing a legitimate public interest (e.g. regulating health professionals) then the disclosure may be justified.

[38] I do not consider Mr Perrott has a claim that the settlement agreement was entered into by him on a false basis. He was aware of competency issues as they had been raised with him, in early March 2017, and in the 3 years prior to that.

[39] Mr Perrott decided to resign as part of a confidential settlement reached with the Board after he raised a personal grievance. He was aware, or should have been aware that the Education Council would require a mandatory report from the Board. The terms of settlement accurately recorded that no competency process had been embarked upon.

[40] There was no breach of the settlement agreement and the duty of confidentiality by the Board. The duty of confidentiality could not oust the statutory duty to report to the Education Council in the circumstances.

[41] Mr Perrott does not have an employment relationship problem.

¹¹ [2017] NZEmpC 39

Costs

[42] Costs are reserved. The Board has 14 days in which to file a memorandum as to costs.

Mr Perrott has 14 days to file a memorandum as to costs in reply.

Anna Fitzgibbon

Member of the Employment Relations Authority