

Attention is drawn to orders prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 155  
3170683

BETWEEN	YEVETTE WILLIAMS Applicant
AND	ST PETERS SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority:	Nicola Craig
Representatives:	Erin Burke, counsel for the applicant Sam Hood and Moira Gray, counsel for the respondent
Investigation Meeting:	16 February, 15 and 16 March 2023 in Hamilton
Submissions received:	At the investigation meeting and 6 and 28 April and 16 and 17 November 2023 for the applicant At the investigation meeting and 28 April and 17 November 2023 for the respondent
Date of determination:	18 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Yevette Williams worked as a Deputy Principal at St Peters School in Cambridge, which was governed by the school's Board of Trustees (the Board).

[2] A settlement agreement between the parties provided for the continuation of an investigation Graeme Colgan had started into Ms Williams' conduct at the school. Ms Williams argues that the investigation and resulting report were extensively delayed, with

the Board breaching its express obligations under the settlement agreement, making it liable to a penalty.

[3] The Board accepts that Mr Colgan's investigation took much longer than anyone expected but that delays were caused by factors outside its control, such as Covid-19 and Mr Colgan's health and capacity issues.

[4] The Board does not accept that it was in breach and lays some emphasis on Ms Williams showing little or no interest in completion of the report for a period. The Board also argues that Ms Williams, through her representative, breached the agreement and should be penalised.

### **Non-publication orders**

[5] The Authority granted interim non-publication orders regarding certain aspects of the evidence in this matter.

[6] The Board now seeks to have those orders made permanent with a slight extension to cover Ms Williams' immediate family.

[7] The main basis for the application is the importance of upholding the statutory confidentiality of the record of settlement and the privacy of people associated with the Authority's investigation. Ms Williams generally accepted the need for a non-publication order but was opposed on one point. That point has, I consider, been dealt with in this determination, which is of course a public document.

[8] The Authority has the power to prohibit publication under clause 12(1) of Schedule 2 of the Employment Relations Act 2000 (the Act). The principle of open justice must be the starting point with sufficient grounds established to justify the displacement of that presumption.

[9] The settlement agreement specifies in clause 1 that the terms of the agreement are to be kept strictly confidential and must not be disclosed to any third party except as required by the Education and Training Act 2020 or any other law.

[10] Confidentiality is an important part of the mediation process and confidentiality clauses a very common feature in settlement agreements. The resolution of employment relationship problems through mediation is a significant part of our system and there is

merit to ensuring what can reasonably be kept confidential should be.<sup>1</sup> There are however many Authority determinations about records of settlement where some details are public.

[11] In assessing the appropriate width of any order, it is noteworthy there is already information in the public domain, including published in the media, regarding the parties' situation prior to the settlement agreement being concluded. Also, the settlement agreement itself required certain disclosures.

[12] A fair balance is struck by granting an order regarding those parts of the settlement agreement which are not relevant to the breaches alleged by the applicant, along with the names of people identified in the investigation's Supplementary Terms of Reference (TOR) and other staff, with the exclusion of those who gave evidence in this proceeding.

[13] In addition, the contents of Mr Colgan's draft and final reports should also be the subject of a non-publication order. This reflects the absence of alleged breaches regarding the contents of those documents and the contents concerning the situation of others who play no part in this proceeding.

[14] It is accepted that an order should be made regarding the details of Mr Colgan's health situation and details of Ms Williams' immediate family.

[15] I note that confidentiality obligations under the settlement agreement continue to apply, except as necessary for the Authority's proceeding. In addition disclosures that were permitted by the settlement agreement remain permissible.

[16] In conclusion, a permanent non-publication order is made regarding:

- (a) The terms of the settlement agreement in paragraphs A, C, D, 1 to 7 (inclusive), and 10 to 16 (inclusive);
- (b) Excluding those giving evidence, the names of those referred to in the supplementary terms of reference attached to the settlement agreement and any other staff members;
- (c) The contents of the draft and final reports of Mr Colgan and references thereto; and

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<sup>1</sup> The Act, s 3(a) (v).

- (d) Details regarding Mr Colgan's health situation and regarding Ms Williams' immediate family.

### **The Authority's investigation**

[17] This matter has a lengthy history. At the time the application was lodged in April 2022 urgency was sought, along with a compliance order that the Board take all necessary steps to ensure a draft report be provided to Ms Williams. About 10 days later a draft report was provided. Over time, multiple memoranda were provided by both parties, covering issues such as whether one or both counsel may need to appear as witnesses, broad non-publication orders should be made, whether there had been abuses of process and which witness could or should not give evidence.

[18] The arguments for Ms Williams' were refined through three successive statements of problem.

[19] The Authority's investigation meeting begun in Hamilton on 16 February 2023 with the evidence of Mr Colgan heard under affirmation. It continued on 15 and 16 March 2023 with evidence heard under oath or affirmation from Ms Williams, the School's Head of Commercial Rob Campbell and current Chair of the Board John Macaskill-Smith. Written witness statements had also been provided.

[20] Towards the close of the meeting I raised a question about whether there might be a relevant implied term in the settlement agreement. Some discussion occurred on that point. Submissions on that point were later sought from the parties and provided.

[21] In November 2023 Ms Williams' representative contacted the Authority, providing a copy of an Authority decision with comments – *Terina Moke v Raukura Hauora O Tainui Trust*.<sup>2</sup> The Board then commented with a reply following for Ms Williams.

[22] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Act was applicable.

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<sup>2</sup> *Terina Moke v Raukura Hauora O Tainui Trust* [2023] NZERA 603.

[23] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **The issues**

[24] The issues for investigation are:

- (a) Did the Board breach an express term of the settlement agreement by failing to:
  - (i) Take the necessary steps to ensure the investigation report was out by 11 June 2021 or a date not far from that date;
  - (ii) Set an agreement on a variation to the date the report would be provided; or
  - (iii) Ensure the regular communications requirement regarding the investigator, in the TOR, occurred?
- (b) Did the Board breach an implied term of the settlement agreement?
- (c) If the Board breached the agreement should a penalty be imposed and if so, should it be paid wholly or in part to Ms Williams?
- (d) Did Ms Williams breach the agreement by disclosing the purpose of a report summary to Mr Colgan?
- (e) If Ms Williams did breach the agreement, should she be penalised and if so, should the penalty be paid wholly or in part to the Board?
- (f) Should either party have to contribute to the other party's costs?

### **Before settlement**

[25] While Ms Williams was still employed the Board instructed another lawyer to undertake some investigation into complaints. In mid-May 2021 it instructed Mr Colgan to complete an investigation regarding Ms Williams, adding on to a matter he was already

investigating.<sup>3</sup> The TOR were entered into between them, after consultation with Ms Williams on the terms.

[26] The TOR required “periodic” report backs from Mr Colgan - “usually weekly, if not more frequently”.<sup>4</sup> Clause 6.4 provided:

It is anticipated that the investigation and provision of the final report to the Board will be concluded by 11 June 2021, but this date may be varied by agreement between the Board and the investigator upon unforeseen circumstances arising during its course.

[27] These events were set against a backdrop of media questions to the Board, parental interest and articles being published.

[28] Extensive communications went on between the Board’s and Ms Williams’ representatives, including requests for information. On Ms Williams’ behalf, Erin Burke, counsel for Ms Williams, had sought certain documents and information on Ms Williams’ behalf on 30 April 2021. After these were not initially supplied, there was a follow up request on 17 May 2021.

[29] Mr Colgan indicated around this time that he was conscious of the need to assess this matter in terms of the Board’s obligations to report to the Teaching Council of Aotearoa New Zealand (Teaching Council). He noted he was not in a position to make an informed assessment and recommendation at that stage. Mr Colgan was involved in interviewing a number of witnesses.

[30] On 28 May 2021 Ms Burke emailed Sam Hood, lawyer for the Board, warning that delays in the provision of information were causing unnecessary delays to Mr Colgan’s investigation.

[31] The response on 4 June described the parties as being at odds about the provision of information. On the same day Mr Colgan advised Ms Williams that he had interviewed additional people she had suggested and wanted to hear her side. That was to be the final investigatory step before drafting the report.

[32] Mr Colgan informed the Board on 28 June 2021 that it may well be the end of July now before he was able to circulate a draft report. The following day, he had a

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<sup>3</sup> Graeme Colgan is a former Chief Judge of the Employment Court.

<sup>4</sup> Supplementary terms of reference, clause 6.2.

lengthy interview with Ms Williams. Comments on the draft and extensive additional documents, summarised in a spreadsheet, were provided on behalf of Ms Williams.

[33] On 29 June 2021 the parties attended mediation.

[34] On 30 July Ms Burke emailed Mr Colgan requesting an update on when the draft report would be available.

### **Settlement with investigation ongoing**

[35] The confidential settlement agreement under s 149 of the Act was signed on 2 August 2021.

[36] Under clause 8 of the agreement:

The parties agree that the Supplementary TOR and the investigation will continue. The employer will instruct the investigator to include with his Investigation Report (Report) a summary of the investigation findings related to the employee (Report Summary).

[37] Mr Macaskill-Smith acknowledged that once the employment relationship ended the investigation was no longer at the top of the Board's priority list and it had other serious concerns to deal with.

[38] On 5 August the Board, through their lawyers, instructed Mr Colgan to include in his report a summary of findings related to Ms Williams. The Board also sought advice on whether it was required to report Ms Williams' resignation and alleged conduct to the Teaching Council.

[39] On 19 August Mr Colgan emailed the Board and its lawyers apologising for his recent "radio silence" due to number of work and family issues which had pressed on his time. A nationwide Covid-19 lockdown had commenced on 17 August 2021, impacting the household arrangements of many including his.

[40] In around August and September 2021 Mr Colgan's health significantly impacted his ability to undertake any investigation. I accept there was a period when he was completely unable to undertake any work.

[41] Mr Campbell, who was the Board's main point of contact with Mr Colgan, expressed concern by email, "... don't worry about the STP reports...".<sup>5</sup> This direct contact was unusual, with most of the contact with Mr Colgan undertaken by Mr Hood or another lawyer from his firm.

[42] On 20 September the Board's lawyers checked in by email with Mr Colgan.

[43] The next day Mr Colgan replied that he was on the mend, but the recovery would involve working somewhat shortened working days and there was a backlog of work.

[44] On 22 September Ms Burke emailed the Board concerned about the delay, with three months having passed since Ms Williams had been interviewed. Ms Williams was said to be seriously disadvantaged, with the matter still outstanding and schools advertising for teaching jobs for 2022. Ms Burke asserted the agreement required the investigation to be completed in June 2021. This appears to be the only time prior to the proceedings being lodged, that this suggestion was raised. The possibility of a compliance order being sought was mentioned.

[45] The same day Mr Hood replied, accepting the investigation was protracted, with mention of there being a private matter affecting Mr Colgan. The possibility of there being a specified date for completion in the settlement agreement was rejected.

[46] Mr Colgan emailed Ms Burke the following day with more detail about his situation, outlining that it may be several weeks before he was fully recovered. Ms Burke then thanked Mr Colgan for the update and hoped he got well soon.

[47] On 22 October 2021 Mr Colgan emailed Mr Hood apologising for his lack of communication, noting his international obligations.<sup>6</sup>

[48] Aware that the Board had advised the Teaching Council of Ms William's resignation and the investigating continuing, Mr Colgan describes prioritising preparing a letter to that Council over other aspects of the investigation, including the summary report.

[49] On 26 October 2021 Mr Colgan provided the Board and Ms Williams a letter which set out his position of having:

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<sup>5</sup> STP – St Peters.

<sup>6</sup> Mr Colgan undertook tribunal work for the United Nations.

...reached a clear view about the statutory obligations of the Board under the Education and Training Act 2020 ... that Ms Williams' relevant conduct did not reflect adversely on her fitness to be a teacher and did not bring, and was not likely to bring, the teaching profession into disrepute.

[50] On 23 October Ms Burke emailed Mr Colgan and Mr Hood seeking an approximate date for the draft report.

[51] This was followed up on 28 October 2021 with Ms Burke emailing Mr Colgan:

Can you please confirm whether you have been instructed by STP to provide a summary of your report, that Yevette is able to show prospective employers? The parties agreed to this when Yevette resigned.

If you have been instructed, is it possible for the summary report to come out sooner, given capacity issues with getting the full report out?

[52] Communications between the representatives on matters unrelated to the report continued.

[53] Mr Macaskill-Smith was surprised heading into the Christmas holidays that the investigation had not concluded but expected closure in the new year. But he had no feeling that Ms Williams was concerned by the delays. The absence of concerns raised with the Board from October 2021 to March 2022 influenced the Board's impression that she was comfortable with progress.

[54] In the December 2021/January 2022 the Board's lawyers emailed Mr Colgan a few times looking for an update or asking when the draft report was going to be provided. No response was received.

## **2022**

[55] In mid-February 2022 the Board's lawyers emailed Mr Colgan seeking a convenient time for a discussion. On Tuesday 15 February Mr Colgan replied that he was away for the first half of the week but would be in touch on return to set up a time. Mr Hood responded, noting discussion with trustees about questions from staff and others on the report's timing. He imagined the delay has not been easy for Ms Williams as she looks to move forward to roles in other organisations.

[56] No time was proposed by Mr Colgan so by Tuesday 1 March 2022 Mr Hood phoned Mr Colgan, leaving a message requesting an urgent update. An email from Mr Hood followed - "...the radio silence is starting to put me in a difficult position". On the

same day, Mr Colgan emailed in response with “profuse apologies for the radio silence”, referring to COVID issues in the family. He reported working on the report and hoping to let the Board’s lawyers have something by the end of the weekend.

[57] Having received nothing by 28 March Mr Hood emailed asking for an update.

[58] On 1 April 2022 Ms Burke phoned Mr Colgan without leaving a message. Mr Colgan phoned her a week later by accident, she messaged back with him then advising it was a pocket dial.

[59] In the morning of Friday 8 April Ms Burke emailed Mr Colgan in detail asking for a response that day to various questions including whether he was still engaged by the Board to investigate and whether it had instructed him to delay the report and summary or have no communications with her or Ms Williams. Details were provided of Ms Williams’ difficult circumstances. Reference was made to a compliance order from the Authority was “looking increasingly likely” to be the only way Ms Williams could progress this matter.

[60] At the end of the day Ms Burke, having received no response, copied the Board’s lawyers in. Mr Hood emailed Mr Colgan, noting a threat to sue the school. Mr Colgan responded promptly, regretting the delays. He indicated he will be working on the final report on the weekend and probably the following Easter weekend.

[61] Mr Colgan replied to Ms Burke on 11 April 2022 that he had been working on the draft and was hopeful to get it through by Easter Thursday (14 April). He denied that he had been instructed to delay the report and summary.

[62] At some point the Board considered whether there might be grounds for legal action against Mr Colgan, with concern that the time being taken might not be seen as reasonable.

[63] On 12 April Ms Burke indicated to Mr Hood that proceedings would be lodged in the Authority following Easter weekend, on Tuesday 19 April.

#### **Activity after proceedings lodged**

[64] Having received no draft, Ms Williams lodged Authority proceedings, received on 21 April 2022, seeking amongst other things, a compliance order. The order required the

Board to take all necessary steps to ensure a draft report is provided no later than 27 April 2022.

[65] On 1 May 2022 Mr Colgan provided a draft report which, whilst identifying a management style, concluded that Ms Williams' actions did not constitute bullying or harassment.

[66] Mr Colgan sees no direct relationship between the lodging of proceedings and the provision of the draft report.

[67] Ms Williams provided extensive feedback to Mr Colgan on 9 May. The emails expressed the view to Mr Hood that the Board had not complied with its instructions to provide a summary report to her "to show to prospective employers".

[68] On 15 May 2022 Mr Colgan released his final report with the same conclusion that Ms Williams' actions had not constituted bullying or harassment, recording:

I regret the investigation delays, but I do not consider the Board responsible for such delays.

### **Preliminary points**

[69] A few preliminary points should be made.

[70] Both parties are critical of the other's action and lack thereof.

[71] I accept that Ms Williams, through her representative requested substantial information from the Board and supplied substantial information to Mr Colgan. Bullying allegations often involve the examination of a protracted history. A more detailed approach was taken by or on Ms Williams' behalf. There were moments when this went further than might have been usual, but this was a very important matter to Ms Williams in terms of her reputation and her future career.

[72] Ms Williams emphasised to the Authority that it was not right to pressure Mr Colgan or be seen to be doing so, particularly given the bullying complaint. Submissions about Mr Colgan's credentials substantiating his immunity from bias do not entirely deal with an impression a non-lawyer may have of risk of being seen as a bully.

[73] There is a sense of 'damned if you do and damned if you don't' here. Ms Williams and her lawyer now face both an implication that they contributed to some of the delay by

seeking too much information and providing too much comment, along with the suggestion that they did not follow up enough to inform others that they saw urgency.

[74] At least six updates on progress with the investigation or report were sought on Ms Williams' behalf. These were focused on the period leading up to and including 28 October 2021 and from 8 April 2022 onwards, so there was a window with no comment made.

[75] The Board also did a substantial amount, primarily through its lawyers, to ensure that the investigation was finalised. A number of requests for updates by the Board's lawyers to Mr Colgan went unanswered for a period. The requests were not passed on one by one to Ms Williams although groups of communications were provided at times.

[76] One further point. Mr Colgan is not a party to this proceeding. The question for the Authority is not whether his actions were reasonable. Mr Colgan was hired by the Board and it is the Board's actions which are the focus.

### **Claims able to proceed**

[77] The Board's first argument is that Ms Williams is unable to bring a breach claim because of clause 14 of the settlement agreement:

This Agreement is in full and final settlement of all matters between the parties arising out of the employment relationship between the employee and the employer, including termination of that relationship and *the investigation*. The employee agreed the employee will not bring any claim against any trustee, agent or employee of the employer. (emphasis added)

[78] "Investigation" is defined in clause 8 of the agreement as being "an investigation by Graeme Colgan which includes (amongst other things) an investigation into the employee's conduct while an employee".

[79] I do not accept that Ms Williams is totally prevented from bringing any action regarding the investigation. Imagine, for example although there is no evidence of this, the Board instructed the investigator to delay the completion of the investigation until 2026 or not to complete it at all. This argument seems to contemplate no action being able to be taken by Ms Williams.

[80] Those possibilities are purely hypothetical but are a useful way of testing the implications of the interpretation proposed by the Board.

[81] There must be an exception for enforcement. Ms Williams can pursue her claims.

### **Supplementary TOR**

[82] The claims against the Board rely substantially on the inclusion of the Supplementary TOR being included in the settlement agreement's terms and thus enforceable by Ms Williams against the Board. This is because the body of the settlement agreement does not on its face provide much basis to challenge the Board's actions regarding the investigation.

[83] The background statements at the start of the settlement agreement refer to the investigation by Mr Colgan and note the investigation terms are more fully set out in a supplementary term of reference which annexed to the agreement. Clause 8 of the settlement agreement begins:

The parties agree that the Supplementary TOR and the Investigation will continue.

[84] The Board argues the TOR did not create enforceable rights - it was instructing its contractor Mr Colgan, with Ms Williams not a party to that arrangement.

[85] Arguably, whilst Ms Williams was employed, she could have effectively, even if indirectly, had an entitlement to TOR rights, once her employment finished her rights must be determined by the settlement agreement.

[86] The reference to the TOR in the settlement agreement and its annexure goes some way to supporting the TOR becoming incorporated into the agreement.

[87] However, there is some awkwardness in incorporating the TOR holus bolus into the settlement agreement. The TOR includes elements about the investigation which was originally begun into another person and also contemplates steps by Mr Colgan. The connections with that other person and about Mr Colgan, neither of whom are parties to the settlement agreement, make it unlikely that the TOR is fully incorporated into the settlement agreement.

[88] There were other indications that the Supplementary TOR were still seen as being in operation. For example, on 19 August the Board's lawyers emailed Mr Colgan, noting that the TOR required Ms Williams' input before particular advice to the Board is finalised. A draft letter to Ms Williams was provided with hope that once Mr Colgan is

satisfied with the terms of the letter, he would send it to Ms Williams' representative and provide Ms Williams with an opportunity to feedback.

[89] For the sake of argument I accept that at least some of the TOR were incorporated in the settlement agreement becoming rights for Ms Williams.

**No obligation to ensure a report by 11 June 2021 or a date not far**

[90] Ms Williams argues for three breaches of express obligations. The first is a failure by the Board to take the necessary steps to ensure that the Colgan investigation report came out on 11 June 2021, or a date not far from 11 June 2021 as required by the TOR.

[91] The Board argues that there are five reasons why it never entered into an express contractual terms now contended for Ms Williams – primarily that there was no such pre-settlement agreement obligation and that situation continued under the settlement agreement.

[92] At clause 6.4 of the TOR it is “anticipated” that the investigation and report would be concluded by 11 June 2021. However, that date could be varied by agreement between the Board and the investigator.

[93] On its face the settlement agreement did not require completion by 11 June 2021. It was an anticipated date only.

[94] The TOR were agreed on 18 May 2021. Even by that date the anticipated completion date of 11 June 2021 seems optimistic. By the time the settlement agreement was signed on 2 August 2021 it was clear that the report was not available.

[95] The suggestion of obligation to report by a date close to 11 June 2021 suffers from uncertainty and was also unrealistic by the time the settlement agreement was signed over seven weeks later.

[96] Ms Williams continued to participate in the investigation and the Board submits that she therefore waived any entitlement or is estopped from relying on the TOR timeframe.

## *Conclusion*

[97] There is merit to the Board's submission that in these circumstances a date-based term would be nonsensical and unenforceable. Such an interpretation would mean the Board was immediately in breach when it entered into the settlement agreement.

[98] Ms Williams was very reliant on the report being completed to ensure that she was able to get some clearance of her name and resumption of her career. But there was no express obligation in the settlement agreement, whether directly or via the TOR, on the Board to ensure the report was available by 11 June 2021 or a date close to it.

### **No express obligation to set varied date**

[99] In the second breach allegation Ms Williams argued that the Board breached its obligation to "set agreement" on a variation of the date the report was due under the TOR.

[100] The TOR at clause 6.4 enabled the parties to vary the 11 June 2021 date by agreement between the Board and Mr Colgan "depending upon unforeseen circumstances arising during the course" of the investigation.

[101] Had there been an on-going employment relationship, the statutory duty of good faith could have required the Board and Ms Williams to discuss the possibility of a new date and attempt to reach an understanding. But that duty finishes on completion of employment.

[102] Ms Williams could have argued she was disadvantaged by an unjustified action of the Board but she has no grievance rights for matters arising after the employment relationship finished.

[103] Otherwise, the concept of some obligation on the Board on the basis of the express settlement agreement and TOR terms to set an agreement with Mr Colgan on a variation is challenging. There was not, for example, an obligation not to unreasonably withhold agreement to a date change. The TOR permitted variation but did not require it.

[104] Submissions for Ms Williams characterised two of Mr Colgan's date references as new completion dates but that overstates the references. For example, on 28 June 2021 Mr Colgan emailed that his "estimate" for a draft was optimistic and it "may well now be by the end of July...".

[105] For Ms Williams it is submitted that had there been regular contact with the Board insisting on getting a new date for completion when earlier dates passed, it was unlikely Mr Colgan “would have slipped into the relaxed state he did, stating “...There certainly wasn’t any pressure conveyed to me to complete my investigation or any reference to any timeframes or deadlines”.”

[106] The concept that the Board could “set agreement” is problematic. The TOR allows Mr Colgan and the Board to vary the date by agreement, rather than the Board simply setting a date.

[107] Even if there was some obligation to vary, this possibility was not something raised on Ms William’s behalf or otherwise discussed between the parties. This argument was not raised until the Authority proceedings were on foot and after the final report was provided.

[108] The Board also argues that, if there was such an obligation, it implicitly agreed to a variation of the anticipated completion date of 11 June 2021 – that the 11 June 2021 completion date was no longer to be in operation and no other definite date was set. This was supported by evidence from Mr Colgan and the school witnesses.

[109] Ms Williams is not successful in establishing this aspect of her claim.

### **No express obligation to communicate regularly**

[110] In the third breach allegation Ms Williams argues that the Board failed in its obligations to regularly communicate in relation to the investigator reporting to the Board under the TOR.

[111] The Board argues that even if it was bound by the TOR, clause 6.2 required only “periodic” rather than regular reporting by Mr Colgan to the board about general progress of the investigation. In addition, the reporting was to the Board not Ms Williams.

[112] There was no explicit obligation on the Board to pass Mr Colgan’s reports onto Ms Williams. Also, on occasion Mr Colgan communicated directly with Ms Williams and her representative.

[113] There was no attempt on behalf of Ms Williams to identify for the Authority how frequently or with what pattern “periodic” reporting would be and how it matched up with

Mr Colgan's reporting. Clearly from not too long after the settlement agreement was reached, he was not reporting "usually weekly, if not more frequently" to the Board.

[114] The Board further submits that Ms Williams waived any right to enforce such obligations or is estopped from doing so. This is based on a lack of communications from or on behalf of Ms Williams to raise concerns about the lack of periodic reporting or indication that the failure had an impact on her ability to obtain employment.

### **No breach of express provision**

[115] It is fair to say that in the course of this proceeding there were difficulties on Ms Williams' behalf in capturing an express obligation to assist in ensuring that the report was provided and arguing the Board had been in breach.

[116] I conclude that the Board was not in breach of an express obligation in the settlement agreement, even if the TOR are seen as incorporated in the settlement agreement.

### **Implied term**

[117] It was suggested for the Board that as this was effectively a contractual dispute, given there was no extant employment relationship, the Authority should not have raised the prospect of there being a relevant implied term.

[118] I disagree. The Authority has the power under s 160(3) of the Act to treat a matter as being of a type different to that described by the parties and to concentrate on resolving the problem however described. That power is not limited to situations where there is a live employment relationship. A substantial number of the Authority's cases involve former employment relationships.

[119] Certainly some caution is needed, particularly to ensure that relevant evidence was available and the parties had the opportunity to comment on the issue.

[120] The Supreme Court's decision in *Bathurst Resources Limited v L & M Coal Holdings Limited* identifies that a term may be implied to give a contract business efficacy where that is a matter of strict necessity, a high hurdle to overcome.<sup>7</sup>

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<sup>7</sup> *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85.

[121] The principles established in the *BP Refinery* decision remain relevant but are not to be applied in a rigid or formulaic way.<sup>8</sup> The principles are that the proposed implied term must:

- (i) Be reasonable and equitable;
- (ii) Necessary to give business efficacy, so the contract would not be effective without it;
- (iii) So obvious “it goes without saying”;
- (iv) Capable of clear expression; and
- (v) Not contradict any express term.

[122] I consider a possible implied term that the Board must take reasonable steps to ensure the completion of the investigation and report.

[123] The Board identifies that Ms Williams was legally represented throughout and entered into a sophisticated (settlement agreement) document with bespoke clauses.

[124] Those are factors but it is important that the Board agreed the investigation it established continue and a summary of the investigation findings be required. In those circumstances it is reasonable, equitable and goes without saying that the Board be obliged to take reasonable steps to ensure that the investigation and report are completed.

[125] I accept the Board’s point that a ‘reasonable steps’ duty does not specify what the steps were in advance but consider that such an obligation is not thwarted by uncertainty.

[126] The contract, namely the settlement agreement would not be effective without it, as the Board could potentially have deliberately taken steps to slow down or avoid completion all together. That is particularly problematic when there is no statutory good faith duty in place. The evidence does not establish that the Board took any such action.

[127] The term can be clearly expressed and does not contradict any express term.

[128] I conclude that the settlement agreement contained an implied term that the Board would take reasonable steps to ensure the completion of the investigation and report.

[129] I do not consider it necessary to deal with the other possible implied terms such as an implied duty of good faith, which raised on Ms Williams’ behalf. This is partly because

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<sup>8</sup> *Bathurst Resources* at [107]-[108], referring to *BP Refinery (Westernport) Pty Ltd v President, Counsellors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

some of the arguments raised would properly have been the subject of questions at the investigation meeting but were not. The same objection does not apply to the reasonable steps implied term discussed above, which has similarity to the express terms Ms Williams raised.

### **Implied term breached**

[130] The Board, through its representative, made a substantial number of attempted contacts and follow ups with Mr Colgan. These messages became increasingly urgent.

[131] However, standing back, given the length of time and the lack of timely responses on occasions, a conclusion can be drawn that the Board should have done more.

[132] Options included more frequent and earlier follow ups on occasions when no prompt response was received, formally writing to Mr Colgan, seeking a meeting with him and proposing deadlines for provision of the draft and final reports. Other more drastic measures were suggested in submissions for Ms Williams but were not all the subject of questions at the investigation meeting, so I stray no further.

[133] There is no guarantee that any of these things would have succeeded in a gaining an earlier result. But the Board should have done more. I conclude that it breached its implied obligation under the settlement agreement to take reasonable steps to bring the investigation to a conclusion.

[134] I am not persuaded by the Board's submission that Ms Williams waived any entitlement or is estopped from arguing that there was a breach due to not raising the issue for a time.

### **No penalty imposed**

[135] I have considered carefully whether a penalty should be imposed on the Board.

[136] Penalties are a serious matter of a punitive nature which are not warranted in all cases of breach of an agreement.

[137] Although I accept Ms Williams suffered as a result of not receiving the report earlier, there was no element of deliberateness on the Board's part. It took many steps to follow up on the investigation and report. The Board was in a difficult position and, particularly in the circumstances of an implied term, any breach was inadvertent.

[138] I also take into account the window from late October 2021 to early April 2022 where there was no indication to the Board on Ms Williams' behalf of concern or urgency, even though this may have been contributed to by a reluctance to appear pestering.

[139] No penalty is ordered against the Board.

### **Breaches alleged against Ms Williams**

[140] Two instances were identified by the Board in its amended statement in reply. A third later became apparent. On 28 October 2021, 8 April 2022 and 9 May 2022 Ms Williams' lawyer communicated to Mr Colgan that the summary report was to show prospective employers.

[141] The Board argues these communications amounted to breaches of the settlement agreement by Ms Williams.

[142] Under clause 1 of the agreement, the terms of the agreement are to be kept strictly confidential to the parties and their professional advisers and, subject to exceptions, not be disclosed.

[143] It is relatively unusual to have a current investigation continue and report provided as part of a settlement agreement, post-employment. This necessitates the on-going involvement of a third party, namely Mr Colgan the investigator, in communications likely both with him and between the parties.

[144] Clause 6 establishes the requirement for a report summary of investigation findings related to Ms Williams with clause 7 outlining disclosures of the report or report summary which are not prevented by the confidentiality obligation. Those include disclosure on a confidential basis by Ms Williams to a potential employer as part of a job application.

[145] Mr Colgan did not receive a copy of the settlement agreement although he was told that agreement had been reached and there was an additional requirement of a report summary. He was not told by the Board who the summary was for and in fact later indicated he was not instructed to provide a summary for Ms Williams.

[146] The Board suggests Ms Williams could have included an exception in the settlement agreement allowing Mr Colgan to be notified of the summary's purpose. That

may be true. However, there was little or no evidence of any specific Board reasons not to let him know.

[147] The summary in the draft report indicates a difficulty with the writer not knowing the purpose of the report. It included the names of others involved and was thus inappropriate for Ms Williams to show potential employers.

[148] It is hard to see the harm in Mr Colgan being informed of what the report was intended to be used for. Any suggestion for the Board that the information on the purpose was intended to influence the tone of the summary must be balanced against the Board's own words in defence - Mr Colgan's "credentials substantiate his immunity from bias". It is difficult to see how being informed of the summary's purpose would have any impact on his substantive decision making.

[149] It would have been preferable if the Board's agreement had been sought before contact was made on Ms Williams' behalf to let Mr Colgan know the purpose and intended recipients of the summary.

[150] However, at most this should be seen as a technical breach. Effectively the same information was provided on three occasions and that was likely done out of desperation to get the process moving and a summary provided.

[151] This is not a situation where a penalty against Ms Williams is justified, given the situation of a process which both parties agreed went on too long. The motivation was to provide some explanation to encourage completion of part of the process.

## **Costs**

[152] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[153] Both parties have established a breach by the other although Ms Williams' breach was technical in nature. If the parties are not able to reach an agreement on costs then a party seeking costs should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs would only be considered outside this timetable if prior leave is sought and granted.

[154] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.<sup>9</sup>

Nicola Craig

Member of the Employment Relations Authority

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<sup>9</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).