IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 447
3266019

	BETWEEN	CHERYL MOANA MARIE WILSON Applicant
	AND	THE MANUREWA EAST SCHOOL BOARD Respondent
Member of Authority:	Peter Fuiava	
Representatives:	Lui Alofa, advocate for the Applicant Paul Robertson and Claudia Cooper, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions and further information received:	20 March and 25 July 2024 from the Applicant 26 April 2024 from the Respondent	
Determination:	25 July 2024	

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Cheryl Moana Marie Wilson claims that the Board of Trustees of Manurewa East School (the school Board) breached their record of settlement which was entered into on 31 August 2023 and certified by an Employment Mediation Services (EMS) mediator on 22 September 2023.

[2] Under s 489(1) of the Education and Training Act 2020 (the ETA), where an employer dismisses a teacher for any reason, the employer must immediately report the dismissal to the Teaching Council (the Council). Ms Wilson's employment ended on 21 April 2023 and because her employment ended by dismissal (which she disputes), the school Board was statutorily obligated to lodge a mandatory report with the Council which it did on 1 August 2023.

[3] Ms Wilson says that the school Board's mandatory report goes well beyond what is required under s 489 in that, figuratively speaking, everything including "the kitchen sink" was provided to the Council in an act of ill will and vindictiveness towards her. Because she learnt about the mandatory report until after the record of settlement was reached, she was not able to include that as an important part in her overall korero in resolving her personal grievance.

[4] The school Board in response says that because it made its mandatory report to the Council on 1 August 2023, and as the record of settlement was certified by an EMS mediator on 22 September 2023, the record of settlement cannot be breached retroactively.

How has the Authority investigated?

[5] I was initially invited by counsel for the school Board, Mr Robertson, to dismiss the employment problem on the ground that it was vexatious and frivolous. However, by minute of 2 February 2024, I declined to do so because applications for dismissal under sch 2, cl 12A of the Employment Relations Act 2000 (the Act) are rare, the threshold high, and to cut an application off at the knees would depart from the principle of access to justice. That said, if Ms Wilson was unsuccessful with her claim, this would likely sound in costs.

[6] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[7] The issues requiring investigation and determination included:

i. Can there be a retrospective breach of a record of settlement?

ii. Is there something about the school Board's mandatory report that breaches the record of settlement?

iii. Does the duty of good faith create an obligation on the school Board to disclose to Ms Wilson the wording of its report?

iv. Is it common practice for parties to come to a mutual agreement about the wording of the mandatory report and if so, when should that have reasonably occurred here?

What are the relevant facts?

[8] Ms Wilson was employed as a dual language specialist teacher for the school Board from 20 June 2022 until her employment ended on 21 April 2023. She subsequently challenged her dismissal in the Authority but before it could investigate, the matter was settled with both parties signing a record of settlement on 31 August 2023 and certified by an EMS mediator on 22 September 2023.

[9] The record of settlement relevantly states that it was entered into on a without admission of liability basis, neither party could make derogatory, pejorative or offensive remarks or references of the other, confidentiality around the terms of settlement applied, and that it was full and final of all issues between them.

[10] Accompanying the school Board's mandatory report were three letters. The first of these was dated 13 December 2022 and that letter set out the complaints and allegations the school had with Ms Wilson's conduct which would be the subject of initial enquiries. The second and third letters dated 21 and 31 March 2023 respectively concerned the school Board's preliminary and final decisions to terminate her employment.

[11] On 31 March 2023, Ms Wilson's statement of problem was lodged in the Authority. By leave of the Authority, the school Board lodged a statement in reply out of time. Following a case management conference with the representatives in July 2023, the matter was set down for an investigation meeting later that same year which was vacated after the Authority was advised that the parties had settled matters by way of an agreed record of settlement.

The Applicant's Case

[12] Ms Wilson says that the school Board's mandatory report incorrectly recorded that she had been dismissed when the record of settlement stated that the parties had agreed to part ways amicably with neither being liable to the other. The letters that were sent were unnecessary and contained "highly inflammatory and loaded language"

that disparaged Ms Wilson and harmed her reputation. As a result, she has found it difficult to find employment at the moment and (as of 20 March 2024) was still waiting for her teacher's registration to be renewed by the Council.

Discussion

[13] It is important to note that Ms Wilson accepts that one cannot contract out of s 489 of the ETA which is not the point of her claim. Her issue is with the content of the school Board's mandatory report and its three letters to the Council which contained inflammatory material and allegations that were never properly investigated because the parties had settled.

[14] There are two difficulties with Ms Wilson's present claim, the first is temporal in nature in that the school Board's mandatory report predated her settlement agreement by 30 days. For it to apply to an alleged breach that preceded the agreement's conception, there needed to be an express term or condition to that effect in the agreement. However, apart from requiring Ms Wilson to immediately withdraw, with no issue as to costs, any previously initiated complaint or proceeding in any of the stated forums, including her claim in the Authority, there was no other express provision that could retroactively apply to events in the past.

[15] The second difficulty with Ms Wilson's claim is whether the letters provided by the school Board fits the descriptors of derogatory, pejorative or offensive remarks to breach cl 8 of the record of settlement. The first letter of 13 December 2022 sets out the complaints and allegations the school Board wished to investigate. While I accept it would not have been a pleasant experience for Ms Wilson to have received such a letter, it merely specifies the allegations and concerns raised and notes that no decisions were made about them until she had a reasonable opportunity to respond.

[16] The school Board's second letter of 21 March 2023 informs Ms Wilson of its preliminary decision and the consultation process that preceded it. The third letter of 31 March 2023 was the school Board confirming its final decision to dismiss having regard to the available information before it.

[17] When all three letters are individually and cumulatively considered, they constitute a written record of a process spanning several months culminating in a final

outcome. Contextualised in this way, as the Council will have done, I do not consider the letters to be inflammatory or disparaging but matter of fact, chronicling a process undertaken.

[18] As to whether the letters should have been provided to the Council by the school Board, it was submitted that this was unnecessary and excessive and that the proverbial throwing of the kitchen sink approach had been adopted. I disagree because the mandatory report form expressly invites employers to provide additional documents such as emails, letters, photos or the names and contact details of those who may have access to that information. Rather than constraining an employer in terms of what could be provided, the mandatory form encourages the provision of other information and evidence. This serves to achieve one of the stated purposes of the ETA to establish and regulate an education system that assures the quality of the education provided and the institutions and educators that provide and support it.[1]

[19] The duty of good faith at s 4 of the Act does not advance matters for Ms Wilson who was dismissed three months before the school Board made its mandatory report to the Council. As stated by Chief Judge Inglis in *Idea Services Ltd v Baker*,[2] the duty of good faith ceases when the employment relationship ceases. As such, the duty of good faith that characterised Ms Wilson and the school Board's employment relationship no longer applied. The school Board's decision to provide the letters to the Council was tempered by the question of relevance only.

[20] The test of relevance is a low threshold. Evidence is relevant if it has a tendency to prove or disprove something that is of consequence in a proceeding.[3] The letters provided by the school Board are relevant as these contextualised the concerns that the school had. However, this does not mean that the Council was bound by those concerns to act.[4]

[21] Although Ms Wilson does not regard herself as having been dismissed by her employer, the reality is that she was. This is evident from the school Board's third letter confirming its decision to dismiss her, the background paragraph to the record of

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[1] Education and Training Act 2020, s 4(c).
[2] *Idea Services Limited (In Statutory Management) v Barker* [2012] NZEmpC 112 at [19].
[3] Evidence Act 2006, s 7(3).
[4] *Russ v Board of Trustees Taihape Area School* [2019] NZERA Wellington 155 at [33].

settlement which records Ms Wilson's employment problem of unjustified dismissal, and Ms Wilson's earlier claim in the Authority in which she alleged the same. Her dismissal meant that the school Board was statutorily obligated to make a mandatory report to the Council. Had it failed to have done so, it would have committed an offence under s 542 of the ETA.

[22] It was submitted that the school Board's failure to inform Ms Wilson of its mandatory report deprived her of the opportunity to use that information as part of her korero with the school Board to resolve her personal grievance. This is speculative particularly as the duty of good faith no longer applied and as an experienced teacher she will have appreciated that her dismissal warranted a mandatory report to the Council.

[23] Ms Wilson stated that according to her own enquiries with the Council, mandatory reports are lodged with it only after records of settlements have been finalised. While that may be the experience for some, there is no such express provision in s 489 to that effect. Instead, the provision requires an employer to *immediately* report a dismissal or relevant resignation. This will mean that for the common run of mandatory reports, lodgement will occur first before settlement.

[24] I consider dubious the assertion that there is a common practice for there to be a mutual agreement to the wording of a mandatory report. Again s 489 makes no such provision and the words of the mandatory report form indicates that it is an ex parte document to be completed by the employer or someone acting on their behalf. The declaration provision at the end of the form states that the employer understands the teacher will be notified of the mandatory report. Such a declaration would be redundant if the form required an affected teacher's input which it does not.

[25] There is nothing before me indicating that the Council has or will investigate Ms Wilson any further. A check of the Teachers Registry reveals that her practising certificate has recently been renewed which on its face suggests that the Council will not take any further steps. In any case, as a decision-making body of long standing, the Council would have, if it wished to commence an investigation, afforded Ms Wilson due process including the opportunity to respond to the mandatory report.

[26] I have invited and obtained further comment from Ms Wilson about her recent registration renewal but this has not changed the outcome of her employment problem. It is speculative that her employability has been adversely affected by the school board's mandatory report. She will be aided in her search for suitable employment in her profession by virtue of her practicing certificate which does not expire until 13 May 2027.

Conclusion

[27] I find that there was no breach of the record of settlement by the Manurewa East School Board. For the reasons given above, Ms Wilson's claim has not been made out and is unsuccessful.

What about costs?

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

[29] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the school Board may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Wilson will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[30] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[5]

Peter Fuiava
Member of the Employment Relations Authority

[5] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1