IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 286
3098692

	BETWEEN	TROY CAMERON Applicant
	A N D	ASHTON WHEELANS LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Kevin Murray, advocate for the Applicant Claire McCool, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	6 July 2020 from the Applicant 26 June 2020 from the Respondent and oral submissions from both on 14 July 2020
Date of Determination:	23 July 2020

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] Troy Cameron, a registered chartered accountant and member of The New Zealand Institute of Chartered Accountants ("NZICA") was employed by Ashton Wheelans Limited ("AW Ltd"), a firm of chartered accountants and business advisors in Christchurch, for a period between 11 June 2012 and 20 March 2020. The employment came to a conclusion on terms set out in a settlement agreement made pursuant to s 149 Employment Relations Act 2000 ("the Act").

[2] Mr Cameron has filed a statement of problem alleging the terms of the settlement agreement have generally been breached by AW Ltd's director and a member of NZICA, referring a complaint to NZICA's ethics committee that is also said to be in breach of good faith obligations owed. The remedies Mr Cameron seeks are:

(i) That the Authority absolves Mr Cameron from his duty to abide by the settlement agreement's confidentiality clause.

(ii) That costs be awarded to Mr Cameron in order to allow him to defend his reputation with his professional body.

(iii) A penalty for breach of confidentiality in the amount of $20.000.

(iv) A penalty for breach of good faith in the same amount as above.

(v) Reimbursement of the filing fee.

(vi) Costs of representation.

[3] AW Ltd has made an application for an order that Mr Cameron's claims be dismissed in their entirety as "frivolous or vexatious" pursuant to s 12A, Schedule 2 of the Act.

[4] As a preliminary issue the applicant's advocate, Mr Murray, accepted that the only potential remedy I can consider pursuant to s 149(4) of the Act is a penalty for a breach of "an agreed term" and as discussed below the only term I can identify as potentially being breached is the confidentiality provision.

The Authority Process

[5] The parties have agreed that the preliminary issue be determined on "the papers" being submissions from both parties written and oral.

[6] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

Issue

[7] The issue for determination is whether or not Mr Cameron's claim that there has been a breach of a confidentiality term in a s149 settlement agreement that he entered into with AW Ltd, is frivolous or vexatious pursuant to s 12A, Schedule 2 of the Act and if so, should the entire claim be dismissed.

How this dispute arose

[8] Mr Cameron commenced employment with AW Ltd in 2012 as a graduate account pursuant to an individual employment agreement and progressed to being an accountant. Mr Cameron tendered his resignation on 15 January 2020 by letter with effect from 20 March 2020. The text of the resignation letter was cordial, stating in part:

> Thank you very much for the opportunities for professional and personal development that you have provided me during the last seven years. I have enjoyed working for Ashton Wheelans and appreciate the support provided during my tenure with the firm.
>
> If I can be of any help during this transition, please let me know.

[9] However, a dispute arose during the notice period that led to AW Ltd emailing Mr Cameron on 22 January, detailing concerns about the custody of company information and the ownership of such.

[10] Mr Cameron obtained advice and after discussion about the concerns identified, the parties entered a record of settlement on 28 January 2020 that was affirmed by an MBIE mediator on 29 January pursuant to s 149 of the Act.

[11] The settlement agreement records a mutual agreement to bring Mr Cameron's employment to an end on 28 January. The agreement contained a provision indicating that the terms of such 'shall remain, so far as the law allows, confidential to the parties". The agreement was also expressed as being a "full and final settlement of all matters between Troy Cameron and Ashton Wheelans Ltd arising out of their employment relationship".

[12] The agreement did not contain a mutual 'non-disparaging' term.

[13] Then on 17 February 2020, a director of AW Ltd (the signatory to the s 149 agreement) completed and forwarded an NZICA "Complaint Form" setting out AW Ltd's concerns about Mr Cameron's actions prior to departing employment. In the form's section entitled "Your Complaint", the director briefly detailed concerns and then disclosed that "[A] confidential employment settlement was reached to cease Troys [sic] employment with Ashton Wheelans Limited".

[14] Further, under a heading in the form "Attempts to resolve the complaint" the director indicated that the identified matter of concern "…was discussed as part of the confidential settlement with Troy via his representative".

[15] The settlement agreement in itself was not disclosed at the time the complaint was made or in subsequent correspondence with NZICA but further details of AW Ltd's concerns were provided to NZICA's Professional Conduct and Complaints Investigator (PCCI) after a request for such.

[16] From correspondence disclosed NZICA did not seek a copy of the settlement agreement. All NZICA correspondence with AW Ltd was disclosed by the PCCI to Mr Cameron as part of their ongoing investigation that is yet to conclude.

[17] AW Ltd's position on the issue was that despite the settlement bringing the employment relationship to an end, they were obliged to disclose to NZICA for investigation anything they had reasonable grounds to consider was a breach of the NICA's Code of Ethics.

[18] AW Ltd's statement in reply opposing the claim that the settlement agreement has been breached and seeking that the action was groundless and should be dismissed, summarised their view as "[A]accordingly, reporting is compulsory and the duties imposed by a member of NZICA cannot be circumvented by a settlement agreement under s 148 of the Act".

Legal status of NZICA's code of ethics

[19] The NZICA's code of ethics that was updated effective from 15 June 2019 contains the following explanation under a heading: "NOTICE OF LEGAL STATUS OF THE CODE OF ETHICS":

> The Code of Ethics of the New Zealand Institute of Chartered Accountants NZICA) is made pursuant to section 7 of the New Zealand Institute of Chartered Accountants Act 1996. The Act states, in section 8, that the Code of Ethics is a disallowable instrument for the purposes of the Legislation Act 2012. This means that the Code of Ethics must be tabled in Parliament and can be disallowed by Parliament. NZICA has prescribed the following Code of Ethics to be binding on all members of NZICA.

Claim that referral to professional body breached settlement agreement is frivolous or vexatious

[20] AW Ltd is seeking to have Mr Cameron's claims dismissed in their entirety on the basis that they are frivolous or vexatious pursuant to s 12A, Schedule 2 of the Act and that AW Ltd's director who reported Mr Cameron, had a professional duty to do so that arose from a statutorily based code of professional ethics.

[21] The approach the Authority takes is well established[1] and stems from the Employment Court first considering the matter in *Lumsden v Sky City Management Limited*[2] a decision that made it clear that the Authority discretion to dismiss a matter is very limited in scope.

[22] In *Lumsden* Judge Inglis found that something more was required to deem a matter frivolous than simply that it has no reasonable prospect of success[3] and concluded:

> …the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step and not one to be taken lightly. It cuts the claim off at the knees and, because of its draconian effects and having

[1] A detailed summary of the Authority's legal approach is set out in Member Robinson's determination *Qiang Deng v Henry Feng Lawyers Ltd* [2017] NZERA Auckland 118, 19 April 2017.
[2] *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.
[3] At [37].

> regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases.[4]

[23] Helpful guidance on assessing such 'threshold' claims is found in an earlier Employment Court case *Newick v Working In Limited* where Judge Inglis in approaching a strike out application, outlined the following criteria the Court must apply:

> [2] There is no dispute that the Employment Court has power to strike out all or part of a pleading. The criteria applying to strike out applications are well accepted, and can be summarised as follows:
>
> a) It is assumed that facts pleaded are true;
>
> b) The cause of action must be so clearly untenable that it cannot possibly succeed;
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> c) The jurisdiction is to be exercised sparingly;
>
> d) The jurisdiction to strike out is not excluded where the claim includes difficult questions of law requiring extensive argument;
>
> e) The Court should be slow to strike out claims in a developing area of law.
>
> [3] A claim should not be summarily struck out unless the Court can be certain that it cannot succeed.
>
> [4] The Court can strike out a pleading where it constitutes an abuse of the Court's process.[5]

The case for dismissal

Primacy of reporting to professional organisation

[24] As a starting point, emphasising the wording in the settlement agreement's confidentiality provision, AW Ltd's counsel, Ms McCool notes that it is qualified by the use of the words "…so far as the law allows". This raises the issue of whether the duty to report to a professional body has primacy over the confidentiality provision.

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[4] At [39].
[5] *Newick v Working In Limited* [2012] NZEmpC 156

[25] Ms McCool asserted that the duty to report to NZICA arose out of a statutory provision and that settled case law allows an exemption from the obligation to keep the agreement confidential in such a context and that the s149 agreement does not specifically deal with the issue of a report to the professional body and does not exclude such a report.

[26] Ms McCool made a submission that the overall premise of Mr Cameron's case that AW Ltd has breached the confidentiality of the settlement agreement by reporting him to a statutorily endorsed professional body cannot succeed because the disputed point of law involved has already been resolved by the Authority in a number of cases [6] and decided by the Employment Court in *Evans-Walsh v Southern District Health Board.* [7]

Breach of good faith

[27] Likewise, Ms McCool asserts that Mr Cameron's claim of breach of good faith stretching beyond the period after the agreement was signed has also been resolved by the Employment Court. Ms McCool cited *Balfour v The Chief Executive, Department of Corrections*[8] where Judge Shaw found that the statutory obligation of good faith does not survive where the parties have "mutually agreed to end their employment relationship" and struck out Mr Balfour's claim for compensation for breach of a settlement agreement.

[28] Mr Murray despite unsuccessfully attempting to distinguish *Balfour* in his submissions conceded that a claim trying to establish a breach of the duty of good faith could not survive the employment relationship.

[29] Mr Murray did develop an argument in his oral submission that AW Ltd breached its duty of good faith prior to entering the settlement agreement by not advising Mr Cameron of their intention to report him to NZICA. Whilst this certainly would bring the duty into play as the employment relationship was still technically ongoing at the time the settlement agreement was made and it is conceptually a duty that arises under s 4(1A)(c) of the Act, I

[6] Including *Perrott v Rotorua Boy's High School Board of Trustees* [2019] NZERA 74.
[7] *Evans-Walsh v Southern District Health Board* [2018] NZEmpc 46.
[8] *Balfour v The Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31].

find that it is equally arguable that because Mr Cameron had already ended the employment relationship and was serving out his notice period, the duty is only limited by statute too acts that do not have an "adverse effect on the continuation" of an individual's employment.[9]

[30] Mr Murray also alluded to the duty under s 4(1A)(b) of an employer being "active and constructive" requiring disclosure of AW Ltd's intention to report Mr Cameron to NZICA. However I find that the wording of s 4(1A)(b) describes a goal of "maintaining a productive employment relationship" which Mr Cameron in this context, had brought to an end on his own volition prior to the dispute arising that led to the s 149 agreement.

[31] I do find that the door may not 'conceptually' be closed on Mr Murray's contention because the concept of good faith is not restricted to matters specified in s 4 and it is expressed at s 4(1a)(a) as being "wider in scope than the implied mutual obligation of trust and confidence". Mr Cameron could argue that a failure to be upfront about the possibility he would be reported to his professional body may have influenced Mr Cameron's decision of whether he entered the s 149 agreement. This would be clear cut where an agreement was involuntarily bringing an employment relationship to an end but again I stress Mr Cameron had already chosen to leave and the terms of the agreement only released him from his obligation to work out his notice period and resolved a dispute over his use of company data.

[32] I do observe that Mr Murray also attempted to advance the claim, that he withdrew, that AW Ltd somehow misled or deceived Mr Cameron into entering the s 149 agreement by not disclosing that they also intended to report him to NZICA. I find that element of Mr Cameron's claim would have been untenable.

The leading authority

[33] In *Evans-Walsh* consideration was given as to whether a s 149 settlement agreement's confidentiality provision could oust a statutory duty to notify the Nursing Council of a competency issue involving a registered nurse. Judge Smith found emphatically that it could

[9] Section 4(1A)(c) Employment Relations Act 2000.

not cut across such a duty because a full and final settlement of matters in an employment relationship context is limited in scope and:

> It ended the relationship but went no further than that. The plain words of that clause cannot be stretched to attempt to impose an obligation on either the DHB, or Ms Evans-Walsh, to prevent either of them from satisfying their professional or statutory duties.
>
> I follows that there has been no breach of the settlement agreement…[10]

The case opposing dismissal

[34] Mr Murray, as I understand it, sought to distinguish the above cited case by suggesting first that in *Evans–Walsh* and cases involving teacher registration, matters involve a clearer or mandatory statutory duty to report and here AW Ltd only had a professional duty to discharge arising out of a code of ethics developed by the NZICA.

[35] Mr Murray also sought to distinguish Mr Cameron's settlement agreement from the one under scrutiny in *Evans-Walsh* as there was "no non-disparagement term" in Mr Cameron's agreement and that Ms Evans-Walsh's report involved a competency rather than ethical issue.

Are there any distinguishing features of Mr Cameron's situation?

[36] In deconstructing Mr Murray's submission, I could not perceive how the latter point, assisted Mr Cameron or distinguished the case of *Evans-Walsh* where a non-disparagement clause existed alongside an identically worded confidentiality provision. The former provision did not persuade Judge Smith that the report to the Nursing Council was an act of disparagement.[11]

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[10] At [51].
[11] At [49] and [50].

[37] Here Mr Murray sought to initially argue in pleadings that a non-disparagement clause was 'implied' and should be considered. Even if I was persuaded to go that far, I do not find that the tenor of AW Ltd's report to the NZICA was disparaging – it was factual.

[38] Mr Murray appeared to suggest that there was a distinction between a 'professional' duty to report and a mandatory or clearly defined statutory obligation to report - in that, accountants have discretion to not report ethical matters and deal with them at a lower level (Mr Murray also contended that a failure to exercise the discretion in favour of his client was actionable but such a claim formed no part of his client's pleadings).

[39] Whilst this may be so, I am not at this point in time, convinced that the claimed distinction alters the reasoning in *Evans-Walsh* and other cases the Authority has dealt with on the central question of whether reporting to a professional body is not permitted by a s149 confidentiality provision or indeed a provision that brought an employment relationship to an end on a full and final basis.

[40] However, I accept that Judge Smith did not make out a detailed distinction in *Evans-Walsh* between professional and statutory obligations (even though they may overlap). *Evans-Walsh* involved a subjective reporting of alleged competency issues arising during an employment relationship. The issue before the Authority is one of principle rather than an examination of whether AW Ltd reported Mr Cameron in bad faith (of which no evidence has been advanced to ground this assertion and NZICA's PCCI has not rejected the referral as being outside the scope of a matter requiring investigation).

[41] I do see the distinction between statutory regimes where 'mandatory' reporting is required but in this context, it is arguable that the NZICA ethical code was a 'creature of statute' requiring the ethics code to be tabled in parliament and it creates a duty or obligation on AW Ltd's director to report what they saw as a potential infraction of Mr Cameron's ethical obligations.

[42] How a report is dealt with is a matter for NZICA including consideration of whether the report was made in bad faith. I have no ability, as Mr Murray has suggested, to consider the fairness or circumstances of the report unless such arose in the context of a disadvantage claim under s 103(1)(b) of the Act.

[43] On the suggestion that the professional duty to report was of less consequence than that pertaining to nurses or teachers I nominally disagree on public interest grounds. The rules or obligations of a profession that are derived from statute have a general, overarching purpose of ensuring no public harm flows from a regulated profession.

[44] Whilst the accountancy profession may on the surface, be conceptually viewed as potentially causing less harm to the public than nurses where health outcomes are paramount or teachers where educational or student safety is at issue (and a failure to report conduct or competence issues of teachers is an offence), [12] I nevertheless view their rules of professional accountability just as important. Chartered accountants amongst other fiduciary obligations, have to maintain a very high degree of public trust.

Conclusion

[45] It is my finding that the "serious question of law" Mr Murray alluded to in his submission of "… whether the respondent is estopped from raising issues with a professional body when there is an agreement entered into which resolved the employment issues" has been addressed by the Employment Court in ***Evans-Walsh*** (albeit in the context of a Nursing Council matter) and that finding may be an insurmountable barrier to these proceedings succeeding as I am bound to follow that precedent unless I can be convinced of any distinguishing features to depart from this decision.

[12] Section 396 Education Act 1989.

[46] I thus consider Mr Cameron's challenge to be potentially 'futile' - a term that in *Smith v Attorney General* Judge Palmer considered was an adequate synonym for "frivolous". [13]

[47] However, the threshold for the Authority dismissing cases is more limited than the strike out jurisdiction of the Employment Court and Mr Cameron is not, as counsel for AW Ltd accepted in submission, advancing a vexatious claim.

[48] I am left with deciding how Judge Corkill put the matter in *Gapuzan v Pratt & Whitney Air New Zealand Services* who after extensively traversing authorities concluded that:

> The underlying theme of these statements is that there must be significant lack of legal merit so that it is impossible for the claim to be taken seriously.[14]

[49] On this basis, I with the above expressed reservations about the substantive merit of the claims raised and by a narrow margin as this is not a 'clear cut' case, do not grant AW Ltd's application to have Mr Cameron's claims dismissed.

[50] I however, strongly caution Mr Cameron that proceeding to seek what can only be a narrow remedy has significant risks and potential litigation costs should he fail to persuade the Authority away from the indicative views that I have expressed above.

[51] If I am wrong in my indicative findings of very limited distinction with decided cases and Mr Cameron does not want to proceed further in the Authority, he has the alternative option of making an application under s 178(1) of the Act to have this matter removed to the Employment Court.

[52] Likewise, AW Ltd has the same option or the alternative one of challenging this determination under s 179 of the Act.

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[13] *Smith v Attorney General* [1991] 3 ERNZ 556 at [589].
[14] *Gapuzan v Pratt & Whitney Air New Zealand Services (T/A Christchurch Engine Centre)* [2014] NZEmpC 206 at [58].

Outcome

[53] **I determine that AW Ltd's claim to have Mr Cameron's claim dismissed on the grounds that it is frivolous and vexatious under s 12A, Schedule 2 of the Act, does not succeed.**

Next Steps

[54] The Authority will contact the parties shortly to progress the matter.

Costs

[55] Costs are reserved pending resolution of the substantive mater.

David G Beck
Member of the Employment Relations Authority