IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 87/08
5047426

	BETWEEN	PATRICK JOHN CLARK Applicant
	AND	DARGAVILLE HIGH SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Christine Chilwell for Respondent
Determination:	11 March 2008

DETERMINATION OF THE AUTHORITY

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[1] By Minute of 7 March 2008 I advised the parties that the Applicant's claims in this matter were dismissed and that an investigation meeting, notified on 20 December 2007 and to be held in Whangarei on 17 and 18 March 2008, was cancelled. This determination gives the reasons for those directions.

[2] It is unusual for a matter to be dismissed without an investigation meeting. It occurs in the present case because I am not satisfied that the Applicant has genuine and sufficient reasons for refusing to attend and participate in an investigation meeting to consider his claim.

[3] On 6 March 2006 the Applicant reconfirmed earlier declarations that he either would not or could not attend the notified meeting with this written statement:

> *… I cannot agree to attend the scheduled investigation meeting in March. Whatever action you intend to take from now on I ask you present as a determination I can appeal to the Employment Court.*

[4] The Applicant would not attend the investigation meeting because he wanted a later date that was more suitable for what he said were commitments to his present employer and that would better suit his attempts to pursue matters arising from his former employment with the Respondent in both the Authority and the District Court.

[5] I understand that the matter in the District Court relates to attempts by the Applicant to secure changes in requirements by the Teachers Council that he undergo a programme of support and guidance in future teaching work. The Applicant's position, paraphrased briefly, is that he would not be under those requirements if he had been fairly treated and supported while working as a teacher for the Respondent.

How these proceedings came about

[6] Much of the background to this matter is outlined in an earlier determination, AA344/07 (31 October 2007). It dealt with jurisdictional issues and declined an application for removal to the Employment Court. The Applicant had sought removal but changed his position after the Respondent, for different reasons, supported removal. The Authority's determination, not subsequently challenged, found that it had jurisdiction on the substance of the Applicant's claim.

[7] The Applicant is a science teacher. He worked at the Respondent's school from January 2004 until resigning in January 2006, alleging he suffered acute anxiety and stress due to unfair and unreasonable treatment over his registration. At the time the Respondent was investigating a complaint that the Applicant had sworn at two students.

[8] During the Respondent's investigation the Applicant appears to have accepted that he said: "*You f.....g c..t*" to a student. In his statement of claim in the District Court the Applicant referred to having "*used obscene language*" during the incident. However he denied the student's allegation that he said: "*Do you want your f…..g face smashed in, you c..t?*". The Board subsequently preferred the student's account that he was verbally threatened by the Applicant.

[9] In March 2007 the Respondent wrote to the Teachers Council reporting that the Applicant had resigned while under investigation for an incident where he "*threatened a student and swore at him*". The Education Act 1989 provides for mandatory reporting of resignations in certain circumstances, including, at s139AK(ii):

> *An employer must immediately report to the Teachers Council when a teacher resigns from a teaching position if, within the 12 months preceding the resignation, the employer had advised the teacher that it was dissatisfied with, or intended to investigate, any aspect of the conduct of the teacher, or the teacher's competence.*

[10] The Post Primary Teachers Association ("PPTA") raised a personal grievance on the Applicant behalf in May 2006. Mediation in October 2006 did not resolve the matter. The Applicant then dispensed with the PPTA's assistance and filed proceedings in the District Court.

[11] On 17 May 2007 the District Court (CIV 2006-011-000118, Judge Roy Wade) stayed the Applicant's proceedings in that court. The judge stated that he had

> *… no doubt that the Employment Relations Authority is the more suitable tribunal to determine the issues raised by the plaintiff and that the [A]uthority certainly has exclusive jurisdiction in a number of aspects of the plaintiff's claim.*

[12] The Applicant lodged a statement of problem in the Authority on 2 July 2007. At the time he was living and working in Thailand. He returned to New Zealand in January 2008 and says he has begun teaching at an area school in Northland.

Arrangements for investigation

[13] Prior to his return from Thailand, the Applicant and the Respondent's counsel took part in a lengthy directions conference, by telephone on 13 November 2007. The conference discussed how the Authority would proceed to investigate this matter. During that conference the Applicant agreed with a summary of his claims that the Authority has set out in determination AA 344/07. From the Applicant's statement of problem in the Authority, and his earlier statement of claim in the District Court, the Authority had identified the findings and remedies that the Applicant sought and

identified which of those, suitably worded, the Authority could investigate and determine. The Applicant had not challenged determination AA 344/07 and expressed a willingness, in the telephone conference, for the Authority to proceed to investigate his claim on that basis.

[14] Shortly after the Applicant sought, and was refused, postponement of the Authority's investigation. He made the application because he considered a "*new issue*" has arisen that he must have the opportunity to have heard by the District Court.

[15] The "*new issue*" was a recommendation from the Teachers Council in November 2007 that he advise his new employer (the board of the area school for which he was to start work in February 2008) of the Council's requirement that he undergo a guidance programme to manage stress levels and to help deal with students without resorting to swearing or other inappropriate responses.

[16] In February 2007 the Applicant had signed an undertaking to the Teachers Council's Complaints Assessment Committee that he would take part in a guidance programme with an appointed mentor. The undertaking enabled the Applicant to maintain his provisional registration as a teacher without publication of any censure on the Teachers' Register.

[17] By November 2007 the Applicant was concerned that his new employer not find out about this programme before he had completed legal endeavours – through an action in the District Court – to have the Teachers Council change or remove the requirement. For that reason he applied on 3 December 2007 for a "stay" of the Authority's investigation, giving this explanation:

> *… my main concern is that if I comply with the Authority's view [to hold an investigation meeting] I have to tell my new employer of an opinion the Teachers Council has of my personal and professional reputation.*

[18] The Applicant opposed the Authority holding its investigation meeting on any date other than during school holidays.

[19] During the November 2007 telephone conference the Authority agreed to explore the prospect of holding the investigation meeting in the first term holidays for 2008. This would have been around eleven weeks after the Applicant returned to New Zealand and given ample time for exchange of witness statements and additional documents. However shortly after that conference call Respondent counsel advised that the school Principal – the Respondent's key witness – had prior commitments to accompany groups of students travelling overseas in both the first and second term holidays of 2008.

[20] Consulting parties on the dates for an investigation meeting is a courtesy. Ultimately setting those dates is a decision of the Authority, balancing what is fair and reasonable, including having matters dealt with promptly so that both the applicant and respondent parties can get on with their lives.

[21] The Authority proceeded to set meeting dates in March.

[22] The Applicant opposed those dates. He considered that he had "*every right*" to an investigation meeting only being held in the school holidays. In this case that would have required postponing any hearing until the third term school holidays – which this year fall around late September and early October.

[23] The Respondent opposed further delay on the grounds that memories of relevant events in 2004 and 2005 would fade and a risk of reduced availability of some witnesses. One had already moved to the Cook Islands.

[24] The Applicant's position continued to be that he was "*unable to take time away from my school teaching until the term holidays*". He told the Authority that he had "*promised*" his new employing Board of Trustees that his case in the Authority would not interfere with his work.

[25] From this background it is likely that the Applicant has not ever sought leave from his new employer to attend the investigation meeting at the dates scheduled by the Authority, and the reason for this is partly an attempt to avoid the Board becoming aware of the Teachers Council requirements and partly to give more time for his

litigation strategy to work. This is apparent from the following extract of a letter from the Applicant to the Teachers Council dated 22 November 2007:

> *4. The case has travelled from the District Court to the Employment Relations Authority and is now heading back to the District Court.*
>
> *5. The legal arguments are complex, but only in relation to jurisdiction. I am confident because of comments from both the Court and the ERA that <u>one of them will sooner or later</u> order Dargaville High School to retract the report that lead to the hearing by the [Teachers Council] Complaints Assessment Committee.* [my emphasis]
>
> *6. There were arguably many failures of due care in the handling of my support and guidance to registration. Most of these have been presented to the District Court and the Employment Relations Authority.*

[26] It is not clear to me that there were any "comments" from the Authority that could the Applicant the confidence that his application would result in the orders he mentions to the Teachers Council. Neither it is satisfactory to have delays in the Authority investigating matters within its jurisdiction caused by any party's strategy of "whipsawing" between forums – a matter that Judge Wade had carefully considered and sought to prevent by the stay of proceedings he issued in the District Court in May 2007.

[27] The Authority has issued seven Minutes between November 2007 and February 2008 on various aspects of the management of this case and the parties have lodged many memoranda on matters raised. A Minute of the Authority dated 19 February 2008 noted that "*there is no information that the Applicant has actually sought leave from his present employer to attend the investigation meeting or been refused such leave if applied for*". Various responses from the Applicant stated that there was "*no point in organising a hearing*" that he "*cannot agree to attend*" and that he believed he had "*offered reasonable cause*" for that.

[28] The Applicant had belatedly lodged a witness statement setting out his evidence about the Respondent not providing him with salary increments to which he believed he was entitled, and which he alleged breached the terms of the Secondary Teachers Collective Agreement. However his witness statement did not deal with any evidence relating to his claim regarding stress and psychological trauma he says he

suffered as a result of the Respondent's actions towards him and he did not lodge a witness statement from a psychologist that he had earlier agreed to provide.

Determination

[29] Having regard to all the circumstances of the case, including the Applicant's conduct and stated position regarding attending the notified investigation meeting, and the information available to me about the Applicant's reasons for not agreeing to do so, and weighing too the rights of the Respondent to be able to have the matter determined without undue delay, I have come to the conclusion that the Authority should do no more in investigating the Applicant's claim. Instead, acting as I think fit in equity and good conscience, the Applicant's claim is dismissed.

[30] The Applicant has already indicated that he intends pursuing his case elsewhere and, on the basis of this determination, is free to do so. The Respondent – in submissions on the earlier removal application – predicted this was likely in any event, relying in part on the Applicant's involvement in previous litigation: refer *Clark v Northland Polytechnic* (EC Auckland, AC15A/99, 19 October 1999, Travis J). I took the view that the Authority should however do what it could to attempt to resolve the employment relationship problem: refer AA 344/07 at [29]-[31]. Regretfully that has not proved successful.

Robin Arthur
Member of the Employment Relations Authority