

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 66
3014752 & 3001399

BETWEEN ROBERT JENKINS
Applicant

A N D NELSON COLLEGE BOARD OF
TRUSTEES
Respondent

Member of Authority: Peter van Keulen

Representatives: Janette Andrews, Advocate for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 25 and 26 October 2017 at Nelson

Submissions Received: 29 November 2017 and 20 December 2017 for Applicant
13 December 2017 and 4 May 2018 for Respondent

Date of Determination: 15 May 2018

DETERMINATION OF THE AUTHORITY

- A. The Nelson College Board of Trustees breached the record of settlement between it and Robert Jenkins, however the circumstances of the breach do not justify a penalty being imposed. Mr Jenkins' claim for penalties for alleged breaches of the record of settlement does not succeed.**

- B. Mr Jenkins did not breach the record of settlement. The Board of Trustees' claim for penalties for alleged breaches of the record of settlement does not succeed.**
- C. The Board of Trustees owes Mr Jenkins payment for 47.5 days of accrued but untaken annual leave. The Board must calculate the amount and make payment within 14 days of the date of this determination. If Mr Jenkins does not accept the calculation, he may apply to the Authority for a further determination on quantum.**
- D. I decline to impose penalties against the Board of Trustees for alleged breaches relating to keeping holiday and leave records and the failure to pay accrued but untaken annual leave at the termination of employment. Mr Jenkins' claim for penalties for these alleged breaches does not succeed.**
- E. The Board of Trustees did not constructively dismiss Mr Jenkins. Mr Jenkins' claim for constructive dismissal does not succeed.**
- F. Mr Jenkins failed to provide the correct notice of his resignation to the Board of Trustees. This failure is not a breach of the duty of good faith but it is a breach of Mr Jenkins' employment agreement. I impose a penalty of \$1,000.00 against Mr Jenkins for this breach. This penalty is payable to the Board and must be paid within 14 days of the date of this determination.**
- G. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] The Nelson College Board of Trustees employed Robert Jenkins as a Special Educational Needs Coordinator (SENCO) at Nelson College and as a House Master of Fell House (a boarding house at Nelson College).

[2] Mr Jenkins resigned from both roles in 2017. First, he resigned from the House Master role as part of a negotiated settlement, which the parties recorded in a record of settlement, signed off by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act), on 24 May 2017. Mr Jenkins then resigned from the SENCO role on 16 June 2017.

[3] Mr Jenkins has three claims – these arise out of the record of settlement, his employment in the SENCO role and his resignation from the SENCO role. First, he says the Board of Trustees breached the confidentiality provision and the non-disparagement provision of the record of settlement. Second, he claims he is owed payment for accrued but untaken annual leave from the SENCO role. And third, he claims his resignation from the SENCO role was a constructive dismissal.

[4] The Board of Trustees denies any breach of the record of settlement. It disputes the annual leave claim, accepting there is some accrued but untaken annual leave owing to Mr Jenkins. It also says there was no constructive dismissal because it did not breach its obligations to Mr Jenkins. And it says in any event, he had accepted another job before he resigned and this was the reason for his resignation not the alleged breaches by the Board of Trustees.

[5] The Board of Trustees says Mr Jenkins breached the record of settlement by disparaging the Board of Trustees and not adhering to the agreed statement regarding Mr Jenkins' resignation from the House Master role. It also says his actions in accepting another job and not providing the required notice when he resigned, respectively amount to a breach

of the duty of good faith and a breach of Mr Jenkins' employment agreement. The Board of Trustees seeks penalties for these various breaches.

[6] In summary, there are four groups of claims between the parties:

- (a) Various breaches of the record of settlement by both parties;
- (b) Wage arrears for accrued but untaken annual leave for the SENCO role;
- (c) Constructive dismissal arising out of Mr Jenkins' resignation from the SENCO role; and
- (d) A breach of the duty of good faith and a breach of Mr Jenkins' employment agreement, arising out of Mr Jenkins accepting another job and not providing the Board of Trustees with sufficient notice.

Preliminary matter

[7] The record of settlement that both parties allege the other has breached contains a confidentiality provision. In order to deal with the respective claims regarding breaches of the record of settlement I do not need to refer to the specific terms of settlement in the record of settlement, other than the confidentiality provision, the non-disparagement provision and the provision relating to an agreed statement. Given that I do not need to refer to most of the specific terms of settlement and given the continuing obligation of confidentiality, it is appropriate that I prevent the publication of those further terms of settlement.

[8] In the course of investigating this matter I heard evidence from students at Nelson College. It is appropriate that their identity is kept confidential and not published.

[9] And, Mr Jenkins started a new job after he resigned on 16 June 2017. Mr Jenkins says that role is sensitive and he would prefer it be kept confidential. I am prepared to respect that wish and will not publish details of his new role.

[10] Accordingly, pursuant to clause 10 of Schedule 2 of the Act I order that the details of the record of settlement, the identity of any students at Nelson College and the details of Mr Jenkins' new job are not to be published except as otherwise set out in this determination.

Breach of Record of Settlement

Relevant terms

[11] The record of settlement between the parties, dated 24 May 2017 included the following terms:

1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties and is entered into on a denial of liability basis.
...
5. [The Board of Trustees] & [Mr Jenkins] agree that his resignation will be communicated to the College community on the following basis:
...
8. Having attended mediation and resolved their employment relationship problem [Mr Jenkins] & [the Board of Trustees] undertake that when speaking of each other to third parties they will only do so in positive or neutral terms to the intent they will not disparage one another.

Actions complained of

[12] Mr Jenkins complains of four sets of actions, which he says evidence breaches of clauses 1 and 8 of the record of settlement. Due to the non-publication orders I have made I must limit the detail of these allegations that I publish, but broadly they are:

- (a) The principal of Nelson College, Gary O'Shea, advised his wife, Sue O'Shea, of the actual terms of settlement as contained in the record of settlement. Mrs O'Shea then subsequently sent a text to Donna Jenkins (Mr Jenkins wife) advising her of specific terms of settlement and also discussed the terms of settlement in a cafe in front of customers.

- (b) Jim Dicken, an employee at Nelson College who replaced Mr Jenkins as House Master at Fell House, threatened Mr Jenkins that he would disclose the terms of settlement to parents of the boys at Fell House.
- (c) Various boys from Fell House heard conversations about Mr Jenkins' departure and the terms of settlement.
- (d) Mr O'Shea sent an email to parents of boys at Fell House about Mr Jenkins' resignation, which was not in the terms set out at clause 5 of the record of settlement and given the tone and content of the email this was also a breach of clause 8 of the record of settlement.

[13] The Board of Trustees complains about an email chain involving the parents of boys in Fell house, which Mr Jenkins contributed to – again, I will not record the detail of the complaint because of my orders for non-publication.

Have there been breaches of the record of settlement?

[14] I am satisfied that Mr O'Shea breached the record of settlement by advising Mrs O'Shea of specific terms of settlement. There is no clear evidence of the scope of any subsequent disclosure of those terms by Mrs O'Shea except the text message sent to Mrs Jenkins. In any event, that Mrs O'Shea may have discussed or disclosed those terms further is not a breach by the Board of Trustees; it is however, an aggravating feature of the initial breach by Mr O'Shea.

[15] I am not satisfied that the Board of Trustees breached the record of settlement because of the actions allegedly undertaken by Mr Dicken or because of the various statements some of the boys of Fell House heard¹:

- (a) At best, this evidence shows the Board of Trustees disclosed some details to Mr Dicken about his new role replacing Mr Jenkins, e.g. the date of Mr Jenkins

¹ Without providing any detail of the evidence I heard, I confirm I did hear evidence from boys in Fell House and was satisfied that they did hear some statements about Mr Jenkins' departure and possible settlement terms.

resignation and his intended leaving date from the school accommodation he and his wife occupied.

In my view, this is not a breach of the confidentiality provision of the record of settlement by the Board of Trustees. This is information that was either public knowledge or would become public knowledge in time and had no element of confidentiality. There is no evidence to show that the Board advised Mr Jenkins of any of the confidential terms of settlement.

(b) Similarly there was no evidence linking the statements the boys heard about Mr Jenkins' departure to specific disclosure of terms of the record of settlement that were confidential by the Board of Trustees. In short, the statements appeared to be gossip² and contained no correct information regarding the terms of settlement.

[16] I do not accept that Mr O'Shea's email to parents of boys in Fell House was a breach of clauses 5 and 8 of the record of settlement. This is particularly so given the enormous amount of pressure Mr O'Shea was placed under regarding Mr Jenkins' departure and the obvious desire of many parents to have Mr Jenkins return to the House Master role. I am satisfied that he acted professionally and appropriately.

[17] Turning to the allegations made against Mr Jenkins, I am satisfied he did not breach the record of settlement by sending an email to the parents of one of the boys in Fell House. The email was part of an email exchange between parents about Mr Jenkins' resignation and departure from Fell House. It is my view that in doing this Mr Jenkins did present his resignation in the agreed terms set out in clause 5 of the record of settlement. I also do not accept that the email contains disparaging statements about the Board of Trustees.

² In making this assessment I do not suggest that any of the boys were responsible for these communications, they were recipients of information from others and there is no evidence that they did anything other than responsibly inform appropriate staff at Nelson College or Mr Jenkins of what they had heard.

[18] In coming to these two conclusions I believe Mr Jenkins was in a similar position to Mr O'Shea – this was a highly emotive matter for many people from Mr Jenkins and members of the Board of Trustees through to staff at Nelson College and down to the families of boys in Fell House. There was an enormous amount of pressure on Mr Jenkins and the Board to explain themselves and answer questions about the future arrangements for Fell House. Both Mr O'Shea and Mr Jenkins responded appropriately in their communications with staff and parents in these difficult circumstances.

Penalties

[19] So, having identified one breach of the record of settlement by the Board of Trustees I must now decide if that breach justifies a penalty being imposed.

[20] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement in a record of settlement signed pursuant to s 149 of the Act, is liable to a penalty imposed by the Authority.

[21] Section 133A of the Act sets out a number of factors the Authority should consider when determining the appropriate penalty. These factors include:

- (a) The object stated in s 3 of the Act;
- (b) The nature and extent of the breach;
- (c) Whether the breach was intentional, inadvertent or negligent;
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach, because of the breach;
- (e) Whether the person in breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;

(f) The circumstances in which the breach took place, including the vulnerability of the employee;

(g) Whether the person in breach has been previously found to be engaged in similar conduct.

[22] Judge Inglis considered these factors in *David Lumsden v Skycity Management Limited*³ and concluded that two further factors were relevant; the need for general and particular deterrence and the desirability of broad consistency with other penalties in similar cases.

[23] I have considered all of the factors as they relate to Mr O'Shea's actions and conclude that it is not appropriate to award a penalty against the Board of Trustees. My main rationale for this conclusion relates to the particular circumstances pertaining to the disclosure made by Mr O'Shea⁴. In my view, the breach was minor, it was not intended to cause harm but rather it was to correct misinformation and possible bad feeling arising, there was no loss suffered by Mr Jenkins as a result and this was not repetitive behaviour but rather a one off isolated disclosure. Weighed against that, any need for consistency and a desire to meet the need for general deterrence as it relates to this breach is not sufficient to persuade me that a penalty should be imposed.

Holiday Pay

Mr Jenkins calculation

[24] Mr Jenkins' claim for payment of accrued but untaken annual leave in his SENCO role is based upon, what he says is, an entitlement to 20 days annual leave per year for 2011 – 2014 and 23 days per year for 2015 and 2016. Mr Jenkins has deducted from this 126-day entitlement the number of days of approved leave he says he took, totalling 55 days.

³ [2017] NZEmpC 30

⁴ Given the nature of these reasons as they relate to personal explanations for the actions I do not consider it necessary to particularise the detail.

Therefore, he says he is owed 71 days leave up until the end of 2016. Mr Jenkins says this is \$13,728.56. In addition, he says he is owed 8% of his total earnings for 2017 less any leave he took in that time. Mr Jenkins calculates this to be \$1,329.28.

The Board of Trustees position

[25] The Board of Trustees disputes these calculations. It says:

- (a) Mr Jenkins was originally employed in the SENCO role on a term time only basis. This means Mr Jenkins was paid for working 46 weeks, primarily in term time, and then he received a lump sum of holiday pay based on 8% of his total earnings. On this basis he did not take holidays in the way a full time staff member might, by applying for leave and taking days off during the 52 weeks of work per year (albeit that most staff were required to take this leave outside of term time).
- (b) In 2012, the SENCO role became a 52-week role with an annual leave entitlement of four weeks per year. However, Mr Jenkins and Nelson College continued to treat his leave entitlement in the same way as before this change – that is, he did not formally apply for leave and Nelson College assumed he was using his leave entitlement in a six week period when there was no work for him in the SENCO role during the school holidays.
- (c) Unfortunately the treatment of the annual leave entitlement in this way caused a problem as Mr Jenkins was being paid his salary over 52 weeks for what the Board of Trustees says was a 46 week role, meaning he actually received six weeks holiday pay.
- (d) Brett Mochan, the Nelson College Chief Financial Officer, approached Mr Jenkins in April 2015 and explained to him the issue with his leave – that is, that he was in fact taking an excess of leave and there was 103 days of leave owing to the Board of Trustees. Mr Mochan says that at the end of these

discussions it was agreed that Mr Jenkins' leave balance would be written off and leave would be recorded from 8 March 2015.

- (e) With an annual leave entitlement starting at zero from 8 March 2015, the Board of Trustees calculates Mr Jenkins entitlement of accrued but untaken leave up until the termination of employment in the SENCO role, to be 28 days.

Analysis

[26] I have considered the calculations that comprise Mr Jenkins' claim and do not accept this is accurate. There are two clear problems with his calculation. First, his starting point for calculating his leave entitlement appears to be January 2011 when he was still a term time only employee, so therefore it includes calculations for a period of time when he was a term time only employee and his annual leave was paid out to him. Second, his calculation of days taken as leave in 2015 and 2016, when he began applying for leave correctly and Nelson College began recording leave correctly, does not match the Board of Trustees' total.

[27] I have also considered the Board of Trustees' calculation and accept that from March 2015 until the end of Mr Jenkins employment, it is accurate i.e. I accept its conclusion that for this period Mr Jenkins is owed 28 days.

[28] However, I do not accept what The Board of Trustees says about the period from 2012 leading up to March 2015. Mr Jenkins' role changed from a 46-week term time role to a 52-week role so it cannot be right to continue to treat his work and leave as if it had not changed. For whatever reason the Board changed the SENCO role to a 52-week role so it must have accepted there was at least 48 weeks of work per year with four weeks leave in addition. Nor do I find that Mr Jenkins accepted the proposal that any leave balance as of March 2015 be reset. To be clear, I do not accept that the Board could simply start any accrual calculation from zero at March 2015.

[29] So, in order to resolve Mr Jenkins' claim for accrued but untaken leave I must work out what Mr Jenkins' leave entitlement was for the period from when his SENCO role became a 52-week role in 2012 until 8 March 2015 and deduct from this any leave taken by him.

[30] To do this I need to identify the commencement date of the 52-week SENCO role. Some of the evidence on the start date of Mr Jenkins' 52-week employment was equivocal and unclear but I have determined the commencement date relying on the relevant employment agreement, the written evidence of Mr Jenkins and the oral evidence of Mr Mochan, all of which was consistent with a commencement date in October 2012.

[31] So, I have calculated Mr Jenkins leave entitlement for the period from 1 October 2012 until 8 March 2015. This is 47.5 days.

[32] The issue I have is how do I calculate what leave Mr Jenkins took during the period October 2012 until March 2015. This is because neither party recorded any leave taken during this time:

- (a) Mr Jenkins' position is that he did not take any leave except for trips back to the UK where he applied for leave and this was recorded. Otherwise, he says he worked in his SENCO role whether it was term time or school holidays.
- (b) The Board of Trustees says this is wrong. It says there was not enough work in the SENCO role for Mr Jenkins to continue to work in the school holiday. As an obvious point, it says there were no boys at school during the holiday period who would require his assistance and any administrative work he was expected to undertake would not have filled all of the holiday period. The Board also says that staff who were working during the school holidays did not see Mr Jenkins in his office.

[33] So, there are three possible ways of answering this question:

- (a) I accept Mr Jenkins view and award him all 47.5 days annual leave on the basis he did not take any leave and therefore worked all of the period.

(b) I accept the Board of Trustees' position and do not award Mr Jenkins any accrued but untaken annual leave on the basis he did not work at all during the school holidays so he must have taken at least the annual leave entitlement in this period.

(c) I determine what I believe, in equity and good conscience, to be a fair assessment of any leave taken by Mr Jenkins in this period based on the evidence I heard and my own observations relating to leave and the operations of schools outside of term time.

[34] I will adopt the third approach. I simply cannot accept that Mr Jenkins spent every day of the school holidays (other than weekends and public holidays) working 7.5 hours on his SENCO role. Equally, I cannot accept that he did not work at least part of the school holidays.

[35] As a starting point of my assessment, I take the premise that the SENCO role had sufficient work for 46 weeks per year as Mr Jenkins had been doing prior to October 2012. I also take from the 46-week term time only role that most of the work happened from about one week before the commencement of the school year until one week after the end of the school year, i.e. the role did not require any work through the December and January school holidays.

[36] This means I am left with assessing what amount of work Mr Jenkins did in the six-week period over December and January (when the school was closed for summer holidays). I have considered a number of ways of estimating how many days Mr Jenkins worked in this period. The best approach seems to me to do this in two parts:

(a) First, I will assume that Mr Jenkins did not work at all during the Christmas - New Year period as this is often a complete shutdown period for schools. This would mean Mr Jenkins took six days leave during this two-week period.

(b) Second, based on the Board of Trustees evidence I will assume that for the four week period comprising the week before Christmas and the three weeks in the new year, Mr Jenkins did not work every day and did not always work complete days. My estimate for this period is that Mr Jenkins took the equivalent of five days leave.

[37] As there are three sets of December/January holidays in the period of leave being considered this means there is a total amount of leave taken of 33 days (3 x 11 days). To conclude then, I am satisfied that an appropriate assessment of the annual leave Mr Jenkins took for the period from 1 October 2012 until 8 March 2015 is 33 days. This leaves a balance owing of 14.5 days.

[38] In total then, the Board of Trustees owes Mr Jenkins 42.5 days of accrued but untaken annual leave.

Penalties

[39] Mr Jenkins has asked for penalties to be imposed against the Board of Trustees for failing to pay his accrued but untaken annual leave at the termination of his employment and for failing to keep and provide holiday and leave records. These requests have been expressed as follows:

- (a) In his amended statement of problem, Mr Jenkins seeks a penalty pursuant s 149(4) of the Act for the failure to provide holiday and leave records.
- (b) In submission on behalf of Mr Jenkins, Ms Andrews requests a penalty be imposed for failing to pay Mr Jenkins his annual leave at the termination of his employment.

[40] Section 149(4) of the Act deals with breaches of records of settlements and not the failure to keep and provide holiday and leave records. However I do not believe this means I should not consider imposing a penalty.

[41] On my review of the evidence submitted I do not accept that there has been a breach by the Board of Trustees in relation to keeping holiday and leave records that warrants a penalty being imposed. It is my view that any breach as it pertains to the period from October 2012 until March 2015 is inadvertent as both parties were operating under a misunderstanding as to how the annual leave was to operate. Both parties must accept some responsibility for this and I will not impose a penalty on the Board, particularly as I concluded that Mr Jenkins did take leave during this time but failed to apply for it in the appropriate manner thus causing the records kept by the Board to be defective.

[42] The request for a penalty in relation to not paying annual leave was not raised prior to submissions being lodged. This does prevent me from imposing a penalty as the claim has not been raised within the necessary period nor has the respondent had an opportunity to answer it.

Interest

[43] Mr Jenkins has asked for interest to be awarded for the accrued but untaken annual leave. As an exercise of my discretion, I am not prepared to award interest on this sum. This is because there was a genuine dispute over the amount to be paid and an issue with overpayment that Mr Jenkins needed to approve.

Constructive Dismissal

[44] The first issue for any personal grievance for unjustified dismissal is, is there a dismissal. In this case the question is, should Mr Jenkins' resignation be treated as a dismissal because of the actions of the Board of Trustees.

[45] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁵ the Court of Appeal held that constructive dismissal includes, but is not limited to, resignations where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[46] In this case, Mr Jenkins is relying on the third limb of *Woolworths*.

[47] In *Wellington etc Clerical Workers etc IUOW v Greenwich*⁶ the Court, when discussing the third limb, stated:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[48] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*⁷. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

⁵ [1985] 2 NZLR 372 (CA) at 374-375

⁶ []

⁷ [1994] 2 NZLR 415 (CA)

[49] Therefore, in order to determine if Mr Jenkins has been constructively dismissed I must consider:

- (a) Was there a breach of duty by the Board of Trustees that was dismissive or repudiatory;
- (b) Was that breach of duty sufficiently serious that it was reasonably foreseeable that Mr Jenkins might resign in response to that; and
- (c) Did Mr Jenkins resign in response to that breach of duty?

[50] Mr Jenkins complains about:

- (a) The threat by Mr Dickin to disclose the terms of the record of settlement.
- (b) The breach of the record of settlement by Mr O'Shea.
- (c) Cleaners being sent in to clean Mr Jenkins' school accommodation before he had moved out.
- (d) Mr O'Shea emailing Mr Jenkins twice enquiring about whether he had another job.
- (e) Mr Mochan calling Mr Jenkins about a possible overpayment when he was away from work ill.

[51] I do not accept that the events complained of amount to repudiatory breaches by the Board of Trustees:

- (a) The first three complaints relate to Mr Jenkins' employment as the House Master of Fell House and the record of settlement connected with his resignation from that role. I do not accept that these actions relating to one role and the settlement of an employment relationship problem in that role, can be repudiatory breaches of duty in connection with Mr Jenkins SENCO role. For example, that the Board of Trustees may have sent cleaners in before Mr Jenkins had left the accommodation he was entitled to occupy in his House

Master role has nothing to do with his SENCO role and it cannot be taken as an action demonstrating dismissive or repudiatory conduct relating to Mr Jenkins' ongoing SENCO role.

(b) Mr O'Shea emailed Mr Jenkins to enquire if he had another job because he had heard rumours to that effect and he wanted to clarify the situation. I do not see how this is a repudiatory breach – the emails may have been blunt and to the point but Mr O'Shea had a concern that he wanted to have addressed. Again, I do not see how this can be taken as an act demonstrating dismissive or repudiatory conduct.

(c) Likewise, Mr Mochan's call was well intended and motivated by a need to resolve a pay issue. It may not have been well timed in terms of Mr Jenkins being on sick leave but that is not dismissive or repudiatory conduct.

[52] Because of this conclusion, I do not need to consider the other two aspects outlined above - Mr Jenkins personal grievance for unjustified dismissal fails.

Breach of Good Faith

[53] The allegation of breach of good faith by Mr Jenkins relates to his failure to advise the Board of Trustees that he had obtained another job, culminating in a failure to give the required notice under his employment agreement when he resigned.

[54] I do not accept that the duty of good faith extends to an employee having to advise his or her employer of an intention to leave, outside of giving the requisite notice. In this case then the only action that can amount to a breach of good faith by Mr Jenkins is the failure to provide the required notice period. This is also the basis for the Board of Trustees' claim against Mr Jenkins for breach of his employment agreement.

[55] On this basis, I will deal with this alleged failure to give the required notice under the claim for a breach of the employment agreement rather than a breach of the duty of good faith, as it would otherwise be a duplication of actions and potential remedies.

Breach of Employment Agreement

[56] As I have prohibited publication of Mr Jenkins' new job, I cannot outline the full details of the allegation made by the Board of Trustees as it relates to Mr Jenkins failing to give the correct notice on the termination of his employment.

[57] On my assessment of the evidence, it is clear to me that Mr Jenkins accepted the new job in April 2017, with a start date of 19 June 2017. He then undertook certain steps to fulfil his eligibility to start the new role, for example a pre-employment drug test. The steps were completed by 15 May 2017.

[58] Mr Jenkins did not give his notice of termination until Friday, 16 June 2017 with that day being his last day i.e. he gave no notice at all. He went on to say "I trust that given the circumstances and recent events the short notice won't inconvenience the school and you will waive any notice period." The Board of Trustees did not waive the notice period.

[59] Under the relevant provisions of the applicable collective agreement, Mr Jenkins was required to give four weeks' notice. So it is clear there had been a breach of the employment agreement.

[60] As with my assessment of penalties for the breach of the record of settlement, I will first consider if a penalty should be imposed applying the same criteria set out at paragraphs [21] and [22].

[61] In this case, a penalty should be imposed. Mr Jenkins was aware of the start date of his new role and of course, he knew he had accepted the role. He also knew he had completed the necessary requirements to commence work in the role, in May 2017. So, he could have given the requisite notice. He chose not to, so his breach was deliberate.

[62] The breach was also a significant one causing disruption to the school and students. As no notice at all was given, there was no ability to hand over any work and the Board of Trustees had to take immediate steps to find a replacement.

[63] Turning to the question of quantum of any penalty, in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*⁸ the Employment Court set out a four stage approach to the determination of a penalty as that pertains to breaches of minimum standards. I consider it useful to apply a similar analysis when considering the quantum of the penalty for a breach on an employment agreement.

[64] Stage one is to identify the number of breaches and the maximum penalty applicable. In this case there has only been one breach of the employment agreement and Mr Jenkins is liable to a maximum penalty of \$10,000.00.

[65] Stage two is to consider the severity of the breach. I should consider the nature and extent of breach, whether the breach was intentional, the nature of any loss suffered and whether there have been any previous breaches. I have already stated that I consider this a significant breach, one that was blatant and deliberate. However, the action was not intended to cause harm to the Board of Trustees – in fact, Mr Jenkins genuinely believed given the circumstances of his departure that not giving notice would not cause any hardship and was the best course of action. This factor lessens the severity of the breach. I assess the degree of severity at 40%, a potential penalty of \$4,000.00

[66] The second part of stage two is to consider any mitigating circumstances, whether compensation has been paid and/or some steps taken to mitigate the effect of the breach, and the personal circumstances of Mr Jenkins. In this case there are no mitigating steps have been taken. However, given the circumstances between the parties and Mr Jenkins overall reluctance to leave the school I believe he was motivated by a desire to wait to the very last

⁸ [2016] NZEmpC 143

minute with giving notice on the chance that things between himself and the school would be resolved.

[67] Given this motivation I consider it appropriate to reduce the potential penalty. I therefore reduce the potential penalty to \$2,000.00.

[68] Stage three is an assessment of Mr Jenkins ability to pay. There was no evidence of means provided and I conclude that this stage has no effect on my calculation.

[69] Stage four is to apply the proportionality principle. Based on my assessment of proportionality and counsel's submissions I conclude the appropriate penalty is \$1,000.00.

[70] Adopting the approach applied by Judge Inglis in *Lumsden* I also consider it appropriate that all of the penalty be paid to the Board of Trustees as it suffered the impact of the breach and has not been compensated by way of damages.

Determination

[71] The Board of Trustees breached the record of settlement between it and Mr Jenkins, however the circumstances of the breach do not justify a penalty being imposed. Mr Jenkins' claim for penalties for alleged breaches of the record of settlement does not succeed.

[72] Mr Jenkins did not breach the record of settlement. The Board of Trustees' claim for penalties for alleged breaches of the record of settlement does not succeed.

[73] The Board of Trustees owes Mr Jenkins payment for 47.5 days of accrued but untaken annual leave. The Board must calculate the amount and make payment within 14 days of the date of this determination. If Mr Jenkins does not accept the calculation, he may apply to the Authority for a further determination on quantum.

[74] I decline to impose penalties against the Board of Trustees for alleged breaches relating to keeping holiday and leave records and the failure to pay accrued but untaken

annual leave at the termination of employment. Mr Jenkins' claim for penalties for these alleged breaches does not succeed.

[75] The Board of Trustees did not constructively dismiss Mr Jenkins. Mr Jenkins' claim for constructive dismissal does not succeed.

[76] Mr Jenkins failed to provide the correct notice of his resignation to the Board of Trustees. This failure is not a breach of the duty of good faith but it is a breach of Mr Jenkins' employment agreement. I impose a penalty of \$1,000.00 against Mr Jenkins for this breach. This penalty is payable to the Board and must be paid within 14 days of the date of this determination.

Costs

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

[78] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority