

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 356
5422543

BETWEEN CATRIONA MADAY
Applicant

A N D AVONDALE COLLEGE
BOARD OF TRUSTEES
Respondent

Member of Authority: James Crichton

Representatives: Rebecca White, Counsel for Applicant
Paul Pa'u, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 25 October 2017 and 13 November 2017 from Applicant
7 November 2017 from Respondent

Date of Determination: 15 November 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] This determination deals exclusively with a series of preliminary issues which were canvassed in my Minute of 5 October 2017.

[2] Put shortly, it was agreed between the representatives of the parties and I that on the basis the representatives had the opportunity to file submissions on these preliminary issues, I would issue a determination on each of the points in issue prior to the substantive investigation meeting which is set to start on 20 November 2017.

[3] To that end, and in response to my Minute of 5 October 2017 and the subsequent case management conference, helpful submissions have been filed by both parties and I am now in a position to deal with each of those preliminary issues by this determination.

[4] Some context is relevant. Mrs Maday was employed by Avondale College as a teacher and was dismissed from her employment effective 10 July 2014.

[5] A statement of problem was filed in the Authority on 22 December 2015 and the matter has been on foot since then.

[6] Because of the nature of the dismissal, the Board of Trustees of Avondale College were required by force of law to notify the Education Council and the effect of that notification was to initiate a process of inquiry by the Education Council.

[7] Put shortly, and notwithstanding the decision made by the employing board, the Education Council formed the view that Mrs Maday was not incapable of holding a current practising certificate as a teacher.

[8] The stark juxtaposition between the decision made by the Board of Trustees to dismiss Mrs Maday for what might loosely be referred to as performance deficits, and the decision of the Education Council to reach the opposite conclusion has, not unnaturally, transfixed the parties and their representatives.

[9] Amongst other things, the parties have invited me to determine whether material provided by two school witnesses for Mrs Maday who engaged with the Education Council on Mrs Maday's behalf, ought to be required to produce to this Authority the material that they provided to the Education Council.

[10] In addition, I am asked to determine whether the Education Council itself should be called to give evidence before the Authority. The purpose of this inquiry would be to explore the question of whether the process undertaken by the Education Council ought to inform the decision of the Authority about the propriety of the Board of Trustees' decision to dismiss, or not.

[11] A subset of that wider inquiry is the question whether the standard that the Education Council applies to its investigation is even handed as between the teacher on the one hand and the teacher's employer on the other. It is maintained by the Board of Trustees, for instance, that the Education Council adopts a different standard as between the two protagonists; in relation to the employed teacher it is said the natural justice obligations apply as between the teacher and the Education Council whereas as between the Board of Trustees and the Education Council, no such obligation exists.

[12] A particular concern of the Board of Trustees is that the Education Council would apparently be able to make decisions on the competence or otherwise of a teacher based on evidence which had been provided to it by the teacher and on the teacher's behalf, but without the employing Board of Trustees having any right whatever to comment on the accuracy or balance of that material.

[13] A further issue which I am asked to consider is whether Mrs Maday can refer to the decision of the Education Council in the prosecution of her personal grievance case. I have already observed that there seems to me to be some logical links between some of these questions and in particular the question whether Mrs Maday can rely on the Education Council's conclusion in the prosecution of her personal grievance and whether the Board of Trustees is entitled to have before it for its response, and in particular to resist Mrs Maday's claimed personal grievance, all the material on which the Education Council made its decision.

[14] Put shortly, it seems to me to follow that if Mrs Maday is to be allowed to refer to the Education Council decision in the prosecution of her personal grievance, it must follow that the Board of Trustees, as her former employer, is entitled to know all of the material which the Education Council relied upon in order to make that decision which was a decision contrary to the decision the Board of Trustees itself made.

[15] In addition to the intertwined matters relating to the work of the Education Council, there are a number of other matters on which the parties are in dispute and which I need to make a determination on in advance of the investigation meeting.

Issues

[16] The issues for determination then are as follows:

- (a) Should the phone memos of Alan Jones and Vicki Elmes be disclosed?
- (b) Are there any documents that ought to be disclosed which one or other party is currently resisting the disclosure of?
- (c) Should the Education Council attend the investigation meeting and give evidence about their process and how they reached their decision?
- (d) Can the Education Council decision be referred to by Mrs Maday in the prosecution of her personal grievance?

- (e) Should the Board be allowed to strike out the disadvantage grievance raised by Mrs Maday?

Should the phone memos of Alan Jones and Vicki Elmes be disclosed for the purposes of this hearing?

[17] I am satisfied that there should be a limited release of the telephone memos. By this I mean that those telephone memos and, in relation to the material generated in respect to Ms Elmes a further email which Ms Elmes sent to the Education Council, ought to be provided to me on a confidential basis so that I can assess their utility for the purposes of the Authority's investigation meeting.

[18] I make the point again that it seems to me that Mrs Maday cannot have it both ways; if on the one hand she wants to rely on the decision made in her favour by the Education Council, and I am minded to allow that, then it follows that the Board of Trustees of her former employer is entitled to know the basis on which the Education Council reached the decision that it did and that basis presumably includes the evidence provided by Mr Jones and Ms Elmes.

[19] It is of course a truism that the decision the Board of Trustees would have to make in such a case and the decision the Education Council makes are different decisions with different consequences, and arguably informed by different material. Notwithstanding that, if one party wants to rely on the decision of a third party to the employment relationship (albeit a professional body) it is unfair for that reliance to be granted without giving the other party to the employment relationship the right to consider the evidence that the third party considered.

[20] Put shortly, if the decision of the Education Council is relevant to my decision as to whether or not the Board of Trustees of Avondale College misdirected themselves in dismissing Mrs Maday, then the basis on which the Education Council made that decision must be relevant to my investigation.

[21] I emphasise that I make no determination at this point as to whether I will release to the Board of Trustees the material that will be supplied to me by the applicant; I will consider the nature of that material and if I decide it is relevant to my investigation then I will engage with the representatives and determine, with them, a basis on which that material is to be released to the Board of Trustees.

[22] Central to that decision will be my assessment of how influential, if at all, the material was in impelling the Education Council to reach the decision it did. I have of course studied the report of the Education Council's Competence Assessor in this matter and the decision of the Education Council itself. It is only if I can be satisfied that the evidence in dispute was compelling in the Education Council reaching the decision it did that I would want to release the material to the Board of Trustees on some basis that might be agreed.

[23] In the alternative, if I am not satisfied the material has any relevance to my investigation, then I will return it to Mrs Maday's representative without more.

[24] A final point I make in relation to this aspect is that both Mr Jones and Ms Elmes are giving evidence in my investigation meeting for Mrs Maday. That of course is their absolute right but a particular issue of difficulty is the allegation consistently made by the Board of Trustees that the evidence that both these two former colleagues gave to the Board of Trustees was different in kind from the evidence they gave to the Education Council. That, as the Board of Trustees representative correctly asserts, goes to credibility, if true. It is difficult to see how I can question these folk about what their position really is if I am unable to see what they have told both of the entities investigating Mrs Maday's performance. On the face of it, the only way I can pursue those inquiries is to know what it is that they told each of those bodies and the evidence of what they told the Education Council would presumably be contained in the phone memos.

[25] The question whether the material contained in the phone memos is imbued with a confidence which makes it improper for it to be publically disclosed can, I fancy, be dealt with very easily by closing part of the investigation meeting to the public, assuming that I conclude that the material in the phone memos is relevant to my investigation. I certainly take the point that teachers ought to be encouraged to speak frankly to the Education Council about colleagues, both positively and negatively, and I am satisfied that there is a relatively straightforward process for ensuring that those protections are provided.

[26] However, those protections must be balanced against the right that both parties have to accessing natural justice to say nothing of the need for me to assess credibility and balance in making any final determination. If the allegation is made out that either or both of these witnesses said one thing to their employer and something else to the Education Council (to put it loosely) then I accept that that goes to their credibility as

witnesses and moreover goes to the weight that I should put on any conclusion that has been informed by their view.

Is there any other disputed document which should be disclosed?

[27] There is only one document that appears to still be in dispute. This is Mrs Maday's response to a phone memo generated by Avondale College's Principal. It appears that the Principal's memo was sent to Mrs Maday for comment and she provided a response which was ultimately made available to the Education Council.

[28] Exactly the same argument applies as I have advanced in the previous section of this determination. If Mrs Maday wishes to call in aid in her proceeding the decision of the Education Council, then the basis on which that decision was made ought to be available to the Board of Trustees or at least ought to be considered for referral to the Board of Trustees.

[29] I propose again that I will review this document first and if I am satisfied that it has any probative value I will discuss that conclusion with the representatives and arrangements will be made for it to be given to the Board of Trustees. Conversely, if I am not satisfied it has any probative value then I would immediately return it to Mrs Maday's representative and the matter would form no further part in this proceeding.

Should the Education Council attend the investigation meeting to discuss their process and decision making?

[30] I think I have been clear since I picked up this file that it seems to me that there are questions which I want to ask the Education Council about their process relative to Mrs Maday and I am satisfied I need to do that in order to determine how much weight to put on Mrs Maday's reliance on the Education Council's conclusion which was a different conclusion from that reached by her former employer.

[31] I am satisfied I cannot make any proper determination on that question unless I am able to ask questions of the Education Council or their representative and to that end I am satisfied that the Education Council ought to be asked to assist the Authority with its investigation.

[32] I should make clear that I do not think this sets an alarming precedent; this is an unusual situation where the Education Council has reached a different conclusion from

the employing board and, not unnaturally, Mrs Maday as the subject of those various inquiries wants me to consider the alternative conclusion reached by the Education Council.

[33] All of the elements in the present case are not usually found together in cases on similar facts. Moreover, as I have been at pains to point out in response to earlier questions that I am required to dispose of in this determination, I have wide powers to close hearings and take evidence in camera and I have no difficulty about doing that in respect to evidence that is given and taken from the Education Council.

[34] The Education Council is of course entitled to maintain its confidentiality and to protect the professional integrity of its staff and indeed of teachers who supply it with information about the competence of their peers.

[35] There is no need for me to refer in detail in any determination to the evidence that is given by the Education Council and a hearing of that evidence in camera will ensure that only the parties to this proceeding and their representatives would hear what the Education Council has to say.

[36] In a practical sense, I agree with the Board of Trustees that it is unlikely that the Education Council will be able to attend on the Authority at short notice and that being the likely position, I intend to serve a copy of this determination on the Education Council and negotiate with them around their availability to contribute to my investigation of Mrs Maday's employment relationship problem.

Should Mrs Maday be allowed to rely upon the Education Council decision in prosecuting her personal grievance?

[37] I have already intimated that I am satisfied Mrs Maday ought to have the right to call in aid the Education Council's decision in her favour; it would seem to be a breach of natural justice not to allow that to occur and I am satisfied that she is entitled to that right.

Should the Board's strikeout application be allowed?

[38] As Counsel for Mrs Maday correctly points out, as a matter of fact, there is no strikeout application from the Board of Trustees; it is more correct to say that the strikeout application was simply foreshadowed by the Board of Trustees.

[39] In any event, the Board of Trustees has sensibly indicated it will not persevere with that application but will deal with the factual matrix around its claim by different means.

A final issue

[40] The Board of Trustees raises a final issue requesting that Nick Maday should provide a statement attaching his notes and when they were made and that he should be available for cross examination.

[41] Counsel for Mrs Maday helpfully indicates a willingness to assist the Authority by providing such evidence and making Mr Maday available to give his evidence by telephone. Mr Maday is resident in the United Kingdom.

[42] I am satisfied it may assist me to hear from Mr Maday.

Determination

[43] I now direct that:

- (a) The phone memos of Alan Jones and Vicki Elmes be disclosed to me on the basis set out in this determination; and
- (b) That the only disputed document that has not been released namely Mrs Maday's response to the Principal's phone memo be released to me on the basis set out in this determination; and
- (c) The Education Council should attend the investigation meeting to assist me with my investigation of Mrs Maday's employment relationship problems; and
- (d) The Education Council decision may be called in aid by Mrs Maday in the prosecution of her personal grievances; and
- (e) The Board's application to strikeout need not be considered because no such application has been made; and
- (f) As it would be of assistance to me, a statement from Mr Nicholas Maday is to be prepared and filed in due course and Mr Maday is to be available to give evidence via telephone.

Costs

[44] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority