

**Attention is drawn to the order
at paragraph 12 prohibiting
publication of certain
information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 12/08
CEA 249/05

BETWEEN GRAEME POLLOCK
 Applicant

AND PETER MACDONALD,
 Statutory Manager, Aranui High
 School
 Respondent

Member of Authority: Helen Doyle

Representatives: Graeme Pollock, In person
 Paul Robertson, Counsel for Respondent

Investigation Meeting: 7 August 2007

Submissions received: 10 September 2007 from Applicant
 16 October 2007 from Respondent

Further information: 5 February 2008

Determination: 14 February 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Graeme Pollock, was the Principal at Aranui High School until 28 June 2005.

[2] Mr Pollock was a member of the New Zealand Post Primary Teachers Association. His work was covered by the Secondary School Principals' Collective

Agreement 2004-2007 between the Secretary for Education and the New Zealand Post Primary Teachers' Association (the Collective Agreement).

[3] In October 2004, the respondent, Peter Macdonald, was appointed as limited statutory manager for the Board of Trustees at Aranui High School. As a result of that appointment, all the functions, powers and duties of the Aranui High School Board of Trustees (whether statutory or otherwise) were vested in Mr Macdonald and he became Mr Pollock's employer.

[4] On 29 June 2005 Mr Pollock and Mr Macdonald entered into a settlement under section 149 of the Employment Relations Act 2000 which was expressed to be a full and final settlement of all matters arising out of the employment relationship between the parties, *excluding the employer's rejection of the employee's application for medical retirement.*

[5] Mr Pollock has two problems he wishes the Authority to resolve.

[6] The first is the rejection of his application for medical retirement. Mr Pollock says that this was a breach of clause 7.1.3 of the Collective Agreement and/or an unjustifiable action of his employer that affected a condition of his employment to his disadvantage.

[7] The second problem Mr Pollock says is that there was a breach by Mr Macdonald of the confidentiality provision in the settlement agreement.

[8] Mr Pollock seeks:

- a determination that the employer's rejection of his application to retire for medical reasons amounts to a breach of contract and/or unjustified action causing disadvantage together with an order directing the employer to pay him the entitlements set out at clause 7.1.5 of the Collective Agreement;
- an award of compensation in the event that the breach of contract is found to amount to a personal grievance by way of unjustified disadvantage action at a level considered appropriate by the Authority;
- an order directing the employer to comply with the confidentiality provisions in the settlement agreement;

- a penalty for breach of the terms of the settlement.

[9] Mr Macdonald says by way of reply that Mr Pollock never formally applied for medical retirement prior to his resignation or, if he did, then the evidence put forward in support of the application did not meet the requirements of the Collective Agreement. Mr Macdonald says further that the application for medical retirement did not verify that Mr Pollock was, as required under clause 7.1.3 of the Collective Agreement *rendered incapable, currently and in the future, of the proper performance of the principal's duties and responsibilities ...* . He says that after Mr Pollock resigned he took up a principal position at an overseas school. Further, Mr Macdonald says that Mr Pollock's application for medical retirement was not rejected but rather, it has never been fully processed.

[10] Mr Macdonald says that after Mr Pollock resigned on 28 June 2005 he was not entitled to medical retirement and that resignation and retirement on medical grounds are mutually exclusive options. In terms of remedies, Mr Macdonald says that the medical evidence is inadequate and that the payments agreed to in the settlement agreement took into account the benefit available in terms of medical retirement.

[11] Mr Macdonald did not accept the confidentiality provisions of the settlement agreement were breached.

Prohibition from publication

[12] I have referred in this determination to settlement proposals and provisions in the settlement agreement entered into between Mr Pollock and Mr Macdonald on 29 June 2005. I prohibit from publication all other details of settlement proposals or provisions in the settlement agreement that I have not referred to in this determination.

The Authority investigation

[13] Mr Pollock has lived and been employed in the Middle East from shortly after his departure from Aranui High School in June 2005. This has resulted in some delay in investigating the employment relationship problem. Mr Pollock was represented by a solicitor, Richard Harrison, when he was principal of Aranui High School with respect to employment matters including those which the Authority is required to investigate. At the investigation meeting Mr Harrison withdrew from his counsel role

in order to give evidence. It was appropriate that he did so in the circumstances of this case because of the nature of the evidence.

[14] Mr Pollock was unrepresented during the investigation meeting, but I am satisfied that he was not prejudiced.

[15] Another partner in Mr Harrison's firm, Gretchen Stone, gave Mr Pollock some assistance with legal research in terms of his submissions after the investigation meeting and has agreed to be the solicitor on the record given that communication directly with Mr Pollock has some difficulties.

The Issues

[16] The issues for the Authority to determine are as follows –

- Did Mr Pollock apply for medical retirement?
- If Mr Pollock did apply for medical retirement, was his application considered in accordance with the provisions in his Collective Agreement?
- What did the settlement agreement provide with respect to the application for medical retirement?
- If there needs to be consideration of remedies in terms of breach of contract and/or for a personal grievance, then what remedies are available to Mr Pollock, and are there issues of contribution?
- Was there a breach of the settlement agreement by Mr Macdonald with respect to confidentiality and should there be a penalty awarded?

Did Mr Pollock apply for medical retirement?

[17] Mr Pollock set out in his evidence particular events and issues he said led to him becoming unwell after Mr Macdonald's appointment to Aranui High School. He said that these events preceded his instruction to Mr Harrison to make an application for medical retirement on his behalf. Mr Macdonald referred to the account of the events in Mr Pollock's written evidence as one-sided.

[18] I did not consider that my investigation into the employment relationship problem required me to determine any disputes in terms of those background matters. My investigation focused therefore on establishing the facts that assisted me to make findings in terms of the issues set out above.

[19] It was not disputed that following Mr Macdonald's appointment Mr Pollock's role and performance as principal was closely examined. Correspondence took place about that between Mr Harrison on behalf of Mr Pollock and employment advocate Peter Zwart, who was appointed to act on Mr Macdonald's behalf with respect to employment matters – applicant's documents 8 and 9.

[20] It was not accepted by Mr Zwart in a letter he wrote to Mr Harrison in May 2005 that such scrutiny was severe or unreasonable as Mr Harrison alleged in his letter in March 2005.

[21] Mr Pollock was required to attend a meeting in the nature of a disciplinary meeting which eventually took place on 17 June 2005 – applicant's document 13. Mr Macdonald, Mr Harrison and Mr Pollock amongst others attended. At the end of the meeting Mr Pollock was, by agreement, on paid leave and did not return to his role as principal of Aranui High School after that date.

[22] The relevant correspondence about the issues the Authority has to consider, and the settlement agreement were provided to the Authority by the parties. No issues of privilege were raised.

[23] Mr Harrison sent two letters to Mr Zwart dated 23 June 2005.

[24] One of the letters sent on that date sets out when the responses by Mr Pollock in terms of the disciplinary inquiry could be provided. Mr Harrison recorded that it was agreed that Mr Pollock would remain away from school while discussions were being advanced and that he would be off on pay. Mr Harrison also explained in his letter that Mr Pollock was not in a fit state to return to work *as he has been quite run down by the events and has contracted a flu*. Mr Harrison concluded his letter by proposing that if discussions are not concluded then responses [in terms of the disciplinary inquiry] be forwarded by next Friday, 1 July 2005.

[25] The second letter Mr Harrison wrote to Mr Zwart on 23 June 2005 was headed up "Without Prejudice – Settlement Proposal – Graeme Pollock".

[26] Mr Harrison said in his evidence that before sending that letter he had had a discussion with Mr Zwart about Mr Pollock making an application for medical retirement.

[27] Mr Harrison attached to his letter a draft medical certificate. It was expressed as provided on a without prejudice basis. The medical certificate was from Dr Api Talemaitoga. Mr Harrison said in his letter that the medical certificate was based on information already provided but redrafted in line with the wording of the contract and that Mr Pollock was having a further consultation with Dr Talemaitoga later that day.

[28] Mr Harrison proposed a settlement in the letter that Mr Pollock be medically retired under clause 7.1.3 on a date to be determined by Mr Macdonald, that there be a payment of a compensatory sum under section 123(1)(c)(i) of the Employment Relations Act 2000 and that the terms of settlement be confidential, full and final and subject to a mediated settlement if required by the employer.

[29] Mr Harrison said at the end of his letter that if Mr Macdonald was not agreeable to medical retirement that he would appreciate return of the draft medical certificate and *the application for medical retirement will obviously be withdrawn on the basis that it is being put forward as part of the settlement proposal.*

[30] The Authority asked Mr Macdonald when he gave his evidence at the investigation meeting whether he considered Mr Harrison's letter of 23 June 2005 to be an application under clause 7.1.3 of the Collective Agreement for medical retirement. Mr Macdonald said that he viewed medical retirement as part of a settlement strategy and, later during his evidence, he also used the phrase *settlement device*. Mr Macdonald did accept that as far as he considered the application he did so in terms of an application under clause 7.1.3 of the Collective Agreement for medical retirement.

[31] Mr Zwart responded to Mr Harrison about his letters of 23 June 2005 by letter dated 24 June 2005 and confirmed in his letter that it was both a response to Mr Harrison's letters of 23 June 2005 and a telephone conversation that had taken place that morning with Mr Harrison.

[32] Mr Zwart said in his letter amongst other matters that *the school has considered and rejects Mr Pollock's application for medical retirement.*

[33] A further settlement was proposed by Mr Zwart that would be in full and final settlement of all matters, *excluding our rejection of Mr Pollock's application for medical retirement*. The settlement proposed was that Mr Pollock resign, be paid in addition to outstanding holiday pay a sum equivalent to two months salary in lieu of notice and be paid a compensatory sum under s123 (1)(c)(i) of the Employment Relations Act 2000. That settlement proposal formed the basis of the settlement subsequently entered into by the parties under s149 of the Employment Relations Act 2000 which was signed on 29 June 2005.

[34] In conclusion, I am satisfied from the correspondence and evidence that Mr Harrison acting on Mr Pollock's behalf applied for Mr Pollock to retire for medical reasons under clause 7.1.3 of the Collective Agreement. It was an application for medical retirement notwithstanding it was made as part of a settlement proposal.

[35] There is nothing to support in the correspondence between Mr Harrison and Mr Zwart that the application was to be considered as other than an application for medical retirement under clause 7.1.3 of the Collective Agreement and the application was accompanied by a medical opinion.

Was Mr Pollock's application considered in accordance with the provisions in his Collective Agreement?

[36] Part 7 of the Collective Agreement is headed up "Termination for Medical Reasons". The relevant clauses under that part for present purposes are: –

7.1.3 A principal may apply to retire for medical reason, i.e, mental or physical illness, where the principal has a medical opinion verifying that the principal is rendered incapable, currently and in the future, of the proper performance of the principal's duties and responsibilities under this agreement.

7.1.4 Before agreeing to the application for medical retirement the board may require, at its expense, require the principal to undergo a medical examination by a registered medical practitioner nominated by the board, or, if the principal wishes, two medical practitioners, one nominated by the board and the other by the principal. The board shall take into account any report or recommendations which it might receive or which may be tendered to it by or on behalf of the principal when making its decision whether or not to grant medical retirement.

7.1.5 Where the employment is terminated for medical reasons as provided for in subclauses 7.1.1 or 7.1.3 the principal shall be entitled to receive either:

(a) any unused sick leave as provided for in sub-clause 5.2.1 of this agreement; or

(b) three month's salary in lieu of notice.

[37] The appointment at Aranui High School was Mr Macdonald's third appointment to a school as a statutory manager. Mr Macdonald said that he had no previous experience with an application for medical retirement by a principal.

[38] Mr Zwart went to see Mr Macdonald to talk about Mr Pollock's application for medical retirement after he had received Mr Harrison's letter of 23 June 2005. Mr Macdonald also talked to an official at the Ministry of Education about the application.

[39] I find that Mr Macdonald, in all probability, read the draft medical opinion provided by Dr Talemaitoga. Importantly he said in his written evidence that it seemed to him that he needed a second medical opinion from a medical practitioner. He said that Mr Zwart advised him that obtaining such an opinion would *be prudent* and Mr Macdonald could have required Mr Pollock to undergo such a medical examination under clause 7.1.4 of the Collective Agreement.

[40] A second medical opinion was in my view particularly important in the circumstances where Mr Macdonald said in his evidence that he was not satisfied with the medical certificate provided with the application for medical retirement. He said that this was because it did not in his view confirm that Mr Pollock was rendered incapable in the future as well as currently of proper performance of his duties and responsibilities under his employment agreement.

[41] Mr Macdonald did not proceed to obtain the second medical opinion because he said he was operating under a *tight timeframe*. He said in his evidence that he was sure in respect of the employment relationship there was some urgency from Mr Pollock. I accept that it may well have been considered desirable to be able to deal with the application for medical retirement before Mr Pollock was required to respond in relation to the disciplinary inquiry.

[42] Mr Zwart had agreed to Mr Harrison's request in his letter of 23 June 2005 to extend the timeframe for reply from Mr Pollock in relation to the disciplinary inquiry to 1 July 2005 – document 16. Further, Mr Harrison in his letter of 23 June 2005 had proposed that Mr Pollock be medically retired on a date to be determined by the

employer and he did not put a timeframe on Mr Pollock's behalf in terms of any decision with respect to the application for medical retirement.

[43] There was still several days therefore between 23 June and 1 July 2005 within which to either obtain a second medical opinion, or at the very least to communicate with Mr Harrison about the need to do so and/or about any matters that Mr Macdonald thought required further information or clarification in terms of Dr Talemaitoga's medical opinion.

[44] Mr Harrison said that when he spoke to Mr Zwart on 24 June 2005 he was not advised that further information was required. He said in his evidence that the reason given to him by Mr Zwart on 24 June 2005 for the rejection of the application was that officials in the Ministry of Education were not prepared to pay for medical retirement and did not believe that Mr Pollock fitted the requirements.

[45] I find that the timeframe restraint put forward by Mr Macdonald was not a proper and justifiable reason for failing to obtain a second medical report or failing to communicate with Mr Harrison about any matters in the medical opinion that he felt were unsatisfactory or about which further information should have been provided. Mr Pollock said in his evidence that had it been proposed at the time he would have been able to attend any appointments and would have co-operated with the suggestion of a second medical opinion. Mr Pollock said that he was surprised that the application for medical retirement was rejected so quickly, the day after it was made.

[46] The second part of clause 7.1.4 provides that Mr Macdonald, performing as he did the functions and duties of the board, shall take into account any report or recommendations which he might receive or which may be tendered to him on behalf of the principal when making a decision whether or not to grant medical retirement. In my view this refers to a report/recommendation other than the medical opinion in clause 7.1.3, and supports that there should be communication about the application and an opportunity for further input on behalf of the principal before a final decision is made.

[47] I turn to the matters that Mr Macdonald says he discussed with an official at the Ministry of Education.

[48] I do not find that Mr Macdonald put to the official at the Ministry of Education the content of the draft medical certificate which was the basis for Mr Pollock's

application. The evidence did not support that there was any discussion about the medical reasons for Mr Pollock's application.

[49] Mr Macdonald said that he discussed with the official from the Ministry of Education whether Mr Pollock could be medically retired and resign. Mr Macdonald said that although it was not confirmed with him, he was aware that Mr Pollock had accepted and/or expressed interest in a principal's appointment overseas.

[50] Mr Macdonald explained that there were rumours that Mr Pollock was going onto another position but he agreed the matter was not raised for clarification with Mr Pollock and Mr Harrison directly. Mr Macdonald said that he was advised by the official from the Ministry of Education that medical retirement and a normal resignation were mutually exclusive outcomes and that the use of clause 7.1.3 in that way was unprecedented and outside the intention of that clause.

[51] Mr Pollock said that it was not possible for Mr Macdonald to have any awareness of overseas appointments at that point in time as the opportunity of the position in Kuwait which Mr Pollock took up after leaving Aranui High School had not been offered and/or accepted at that point.

[52] Mr Harrison had never suggested in his letter of 23 June 2005 that accompanied the medical opinion that Mr Pollock intended to resign. I accept Mr Pollock looked at the possibility of an overseas role but I am not satisfied at 23 June 2005 that Mr Pollock had accepted another position. I accept Mr Harrison's and Mr Pollock's evidence, which is supported by written correspondence at the time, that Mr Pollock's resignation was first referred to by Mr Zwart in his letter of 24 June 2005. That was in the letter when Mr Zwart advised that the application for medical retirement had been considered and rejected.

[53] Mr Macdonald said in his evidence that the Ministry of Education was not prepared to pay for medical retirement because clause 7.1.3 did not apply in the circumstances where they believed that Mr Pollock wanted to be medically retired and resign.

[54] Mr Macdonald explained that the school had real financial problems. He understood the value of medical retirement for Mr Pollock would be in the vicinity of \$100,000. A letter from the payroll company School Support dated 5 February 2008 confirmed the value of medical retirement to Mr Pollock was \$103,337.01. The

number of days sick leave that Mr Pollock had outstanding at the date of his departure was 291 days. The value of the benefit was assessed by multiplying that figure with Mr Pollock's daily rate of pay.

[55] Mr Macdonald explained in his evidence that any payment in terms of medical retirement would come from the Ministry of Education because medical retirement was viewed as a salary entitlement. Mr Macdonald compared that with lump sum compensatory payments under section 123(1)(c)(i) of the Employment Relations Act 2000 which are paid out of the operations grant provided to the school for its day to day non-salary operations. On that basis Mr Macdonald viewed a medical retirement option as financially advantageous to the school.

[56] I find that the advice that medical retirement for Mr Pollock would not have been funded by the Ministry of Education had a significant influence on Mr Macdonald in his decision-making. That advice though was based on unsubstantiated rumours that Mr Pollock was resigning and Mr Harrison had not suggested that Mr Pollock was intending to resign in his letter.

[57] Mr Robertson submits that Mr Zwart was incorrect in his advice to Mr Harrison that the application had been considered and rejected because Mr Macdonald had never processed the application apart from taking advice in terms of it.

[58] Mr Zwart had authority to correspond on Mr Macdonald's behalf with Mr Harrison about Mr Pollock's employment relationship with Aranui High School and his application for medical retirement. Mr Harrison was entitled to rely, and clearly did, on Mr Zwart's advice that Mr Pollock's application for medical retirement had been both considered and rejected.

[59] Further, not only did Mr Zwart's letter record that Mr Pollock's application for medical retirement had been rejected, but the record of settlement under section 149 of the Employment Relations Act 2000 does as well. The record of settlement was signed by Mr Macdonald.

[60] Mr Robertson in his submissions said that the application for medical retirement was withdrawn before it could be considered properly. Mr Harrison did state in his letter of 23 June 2005 that if Mr Macdonald was not agreeable to medical retirement then the application for medical retirement would be withdrawn.

[61] I find that Mr Zwart in his letter of 24 June 2005 clarified that the rejection of the application for medical retirement would be excluded or, to put it plainly, stand outside of the counter-offer. The application for medical retirement and rejection was not withdrawn as such. The counter-offer put forward by Mr Zwart in terms of the original proposal by Mr Harrison expressly excluded the rejection of the application for medical retirement.

[62] Mr Pollock's application for medical retirement was rejected by Mr Macdonald. The application was not withdrawn by Mr Pollock but was excluded in terms of the counter offer.

[63] In conclusion I find that Mr Pollock's application for medical retirement was rejected primarily as a result of advice Mr Macdonald received from an official at the Ministry of Education. Mr Macdonald had provided the official with unsubstantiated information about Mr Pollock's intentions so the official concluded that the application for medical retirement was irregular and on that basis advised the Ministry of Education would not fund such an application. There was no discussion with the official about the medical reasons for the application or the medical opinion. The funding of the medical retirement was an irrelevant consideration as to whether Mr Pollock should have been medically retired under clause 7.1.3 of the Collective Agreement but was I find a significant factor in terms of Mr Macdonald's decision making.

[64] Mr Macdonald did not obtain a second medical opinion on the basis that there was inadequate time to do so. He did not advise Mr Harrison on behalf of Mr Pollock that the medical opinion provided in support of the application for medical retirement was inadequate for the reasons he now says it was. He did not advise Mr Harrison that he did not believe there was time to obtain a second medical opinion. The timeframe did not justify the rejection of the application for medical retirement the day after it was made. I do not find in any event that the inadequacy of Dr Talemaitoga's medical opinion was given as the reason for rejecting the application, or was in all likelihood the main reason for its rejection.

[65] For the reasons I have set out above I do not find the application made by Mr Pollock for medical retirement on 23 June 2005 was properly considered by Mr Macdonald in terms of clause 7.1.3 and 7.1.4 of the Collective Agreement before it was rejected on 24 June 2005.

What was the effect of the settlement agreement with respect to the application for medical retirement?

[66] The rejection of the application for medical retirement was excluded from the settlement agreement.

[67] Mr Macdonald said in his evidence that *the way was left open for Mr Pollock to lodge an application at some subsequent point if he chose to do so.*

[68] Mr Macdonald said in his evidence that he was still unpersuaded that such an application was possible, but *did not see the harm in leaving open the possibility that such an application could be made in the future.*

[69] On 19 July 2005 Mr Harrison wrote to Mr Zwart and attached the medical certificate signed by Dr Talemaitoga which had already been forwarded to Mr Macdonald with the letter of 23 June 2005. Mr Harrison set out in summary form the events that led to the deterioration of Mr Pollock's health. Mr Harrison asked in his letter that there be a review by Mr Macdonald of his earlier decision which he said in the letter was not to the best of his knowledge made in accordance with the terms of the Collective Agreement.

[70] On 29 July 2005 Mr Zwart responded to Mr Harrison with respect to his letter of 19 July 2005. Mr Zwart said in his letter amongst other matters that the subsequent settlement was completed on the basis that Mr Pollock could, if he so chose, apply for medical retirement. He said in his letter that the application must provide a medical opinion verifying that Mr Pollock is, as a result of physical and mental illness, rendered incapable of the proper performance of his principal's duties and responsibilities currently and in the future.

[71] Mr Harrison then proceeded to lodge the statement of problem with the Authority.

[72] Mr Pollock obtained a further medical opinion from Dr Talemaitoga when he was in New Zealand during the week of the investigation meeting in August 2007. Mr Robertson says in his submission that Mr Macdonald has been advised there is now no legal basis for considering the application for medical retirement because Mr Pollock is no longer employed and it is impossible to apply for a contractual entitlement such as medical retirement once a person has resigned.

[73] Mr Robertson submitted that the Authority cannot make the agreement for the parties about medical retirement where there is a divergence of views as to what was intended and essential matters have not been agreed upon – *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand* [2002] 2 NZLR 433 at para. 63.

[74] This situation is capable of being distinguished from that in *Fletcher Challenge Energy Ltd*. The parties in this case had agreed in the terms of settlement to the essential matter with respect to the application for medical retirement. They had agreed that the rejection of the application for medical retirement would be excluded from the full and final settlement of all matters arising out of the employment relationship.

[75] Mr Zwart said in his letter dated 29 July 2005 that it was intended in terms of the settlement agreement that Mr Pollock reapply for medical retirement. The settlement agreement does not limit Mr Pollock's legal rights in terms of the rejection of his medical application.

[76] Mr Harrison asked on Mr Pollock's behalf that the application for medical retirement be reviewed by Mr Macdonald. I find in terms of the exclusion of the rejection of the application for medical retirement from the settlement agreement it was open to him to do so. The application was not reviewed.

[77] Mr Pollock's claim is that the application for medical retirement was not properly considered under the Collective Agreement before it was rejected. Mr Macdonald's decision was not reviewed. In those circumstances I do not consider I am faced with the difficulty as submitted by Mr Robertson of reconciling the resignation with a subsequent medical retirement.

[78] I find that the rejection by Mr Macdonald of Mr Pollock's application for medical retirement after failing to consider it in accordance with the Collective Agreement is a breach of clause 7.1.3 of the collective agreement and a personal grievance of unjustified action on the part of Mr Macdonald that caused Mr Pollock disadvantage. Mr Pollock was entitled to have his application properly considered under clause 7.1.3.

Remedies

[79] I shall assess remedies initially in terms of a personal grievance of unjustified action causing disadvantage.

[80] I spoke to Mr Robertson and Mr Pollock during the investigation meeting about how, if I got to the point of considering remedies, there could be assessment of loss and/or damage in this case. Mr Pollock has claimed the full entitlement as set out in clause 7.1.5 of his Collective Agreement which an employee would receive if his/her employment was terminated for medical reasons.

[81] I advised Mr Robertson and Mr Pollock that any benefit under clause 7.1.5 would probably have to be assessed on the basis that Mr Pollock lost a chance to be medically retired and receive the benefit under clause 7.1.5 of his Collective Agreement.

[82] Mr Pollock has to establish that he has lost a reasonable chance that he would have been medically retired. That chance must be real as opposed to simply a speculative chance of being medically retired and there must be a resulting loss. Remedies in a personal grievance setting have been awarded in other cases on the basis of a loss of a chance - *Waugh v Commissioner of Police* (2004) 1 ERNZ 450.

[83] It is for Mr Pollock to present evidence about his loss notwithstanding that he submits that there are difficulties in him doing so as a result of how his application for medical retirement was dealt with.

[84] Mr Robertson and Mr Pollock's submissions addressed a remedy assessed on the basis of a loss of a chance both in terms of the benefit of medical retirement and matters that the Authority should take into account if it gets to the point of considering remedies.

[85] Dr Talemaitoga's first medical opinion provided some background to Mr Pollock's deterioration in health and made reference to the stress having impacted on Mr Pollock's physical and mental health. Dr Talemaitoga said in his opinion that he was satisfied that due to the stress of the current position and the impact on Mr Pollock's mental and physical health that Mr Pollock was not medically capable of remaining as principal at Aranui High School. In that respect Dr Talemaitoga said in

his opinion *If he is to continue in the current environment, he would only endanger his health further.*

[86] The 10 August 2007 medical opinion from Dr Talemaitoga confirms his earlier report that Mr Pollock's mental health and physical symptoms were worsening to the point where he felt that Mr Pollock was not medically capable of remaining as the principal at Aranui High School. Dr Talemaitoga refers in the 10 August 2007 report to workplace stress being a well known cause of mental health issues of depression and anxiety and noted that it can lead to high blood pressure, insomnia and gastro-intestinal symptoms like heartburn. Dr Talemaitoga said in this report *I feared this usually healthy man would develop this if he remained in the same environment.*

[87] Mr Robertson submits that the initial and then the subsequent August 2007 medical reports are inadequate and that no reasonable employer could rely on it to conclude that Mr Pollock should be medically retired. He correctly submits that Dr Talemaitoga does not say that Mr Pollock suffered from the mental and physical health issues that he sets out in his report as symptoms that can result from workplace stress.

[88] The Authority does not have evidence as to exactly what symptoms Mr Pollock presented with in June 2005, but it is clear that Dr Talemaitoga considered Mr Pollock's health to be deteriorating and expressed his belief in June 2005 that mental health and physical symptoms will worsen if Mr Pollock remains in his current position.

[89] I am satisfied that the medical opinion meets the threshold requirements in clause 7.1.3 in that Mr Pollock provided to Mr Macdonald Dr Talemaitoga's opinion that verified he was incapable, currently and in the future of continuing at Aranui High School. An employer would in all probability have wanted to take steps to assess the veracity of the medical opinion. In this case that did not happen.

[90] I am satisfied that if Mr Pollock's application had been dealt with properly in accordance with the Collective Agreement before it was rejected, then Mr Pollock did have a real as opposed to a speculative chance of being medically retired.

[91] I turn to assess the probability or possibility of Mr Pollock, if his application for medical retirement had been considered in terms of his collective agreement, being medically retired and receiving the benefit in clause 7.1.5.

[92] The June 2005 medical opinion from Dr Talemaitoga recommends medical retirement but there is no prognosis in terms of whether appropriate medication, counselling/psycho-therapy or resolution of stressors would have enabled performance of duties and responsibilities by Mr Pollock in the future.

[93] Mr Pollock's duties and responsibilities under his Collective Agreement were those of a principal which would have required a high level of performance and application. Any medical opinion in terms of whether Mr Pollock was able to return to work in the future at Aranui High School would have had to take that into account.

[94] Mr Pollock had had over 30 years experience in teaching prior to his appointment at Aranui High School. When he made the application for medical retirement he was 54 years of age. He gave evidence that he developed after Mr Macdonald's appointment sleeping difficulties and had eating issues. Mr Pollock said that he felt anxious every time he received a letter or other communication from Mr Macdonald. Mr Pollock explained his wife had taken time off work because she was so concerned about his well being prior to making the application for medical retirement. That is a matter that Mr Harrison records in March 2005 correspondence between himself and Mr Macdonald – see applicant's document 8.

[95] Mr Pollock had been a patient of Dr Talemaitoga for five years prior to the medical opinion of 23 June 2005. Dr Talemaitoga would have in those circumstances been in a reasonable position to appreciate any decline in health and when that occurred, and, whether Mr Pollock could continue as principal at Aranui without risk to health. There had also been mention of Mr Pollock having been placed under stress in correspondence to Mr Macdonald from March 2005 so the medical opinion was not the first reference to stress – see applicant's document 8.

[96] Mr Pollock was in a position to consider other work at or about the time of making an application for medical retirement. That was relevant in terms of assessing any reasonable probability that Mr Pollock was rendered incapable in the future of the proper performance of his duties and responsibility in his principal role at Aranui High School. Mr Pollock says that the role he ultimately was offered and accepted in Kuwait after he left Aranui High School was less stressful although it was still a principal role. He submits in any event it is only the performance of his duties and responsibilities at Aranui that formed part of the consideration of whether he is unable to continue undertaking them for medical reasons.

[97] The matter in terms of prognosis is complex particularly in cases where stress due to work factors and/or environment is said to have caused physical and mental symptoms. Mr Pollock said he could see no change in the foreseeable future at Aranui to the situation that had caused him to become so unwell.

[98] Whether Mr Pollock was rendered incapable in the future of the proper performance of his duties and responsibilities under his Collective Agreement impacts on the reasonable likelihood of medical retirement. Mr Pollock could consider working again in the short term, albeit in a less stressful job. I have taken that into account in assessing the reasonable probability that Mr Pollock would have been medically retired and received the benefit of that medical retirement.

[99] Considering the evidence and known factors at the time I assess Mr Pollock's chance of being medically retired and receiving the benefit in clause 7.1.5 at 50%.

[100] Mr Robertson submitted that there is evidence from Mr Macdonald that he would not have agreed to pay the sums in the settlement agreement if Mr Pollock had been medically retired and paid the benefit in clause 7.1.5. On that basis Mr Robertson submits that Mr Pollock has suffered no loss and/or those payments have to be taken into account in terms of any loss.

[101] I do not accept Mr Robertson's submission that there is an exact overlap, with no daylight, between the grievance which gave rise to the settlement and resulted in a compensatory payment and the application for medical retirement and benefit thereunder.

[102] The medical retirement benefit is paid under the Collective Agreement if a principal is rendered incapable currently and in the future of the proper performance of his or her duties and responsibilities under the Collective Agreement for medical reasons. It is different in that way to a compensatory payment paid under section 123 (1)(c)(i) of the Employment Relations Act for humiliation and loss of dignity.

[103] I accept that had Mr Pollock been medically retired he would not in all probability have received the two month's notice that he was paid under clause 4 of the settlement agreement. Mr Macdonald referred in his evidence to that having been put forward in a counter-offer *as a sweetener* given that the application for medical retirement had been rejected.

[104] I am not satisfied from the evidence that Mr Pollock would not still have received the compensatory sum set out in the settlement agreement. Mr Harrison had claimed a figure higher than that which was ultimately agreed to by way of compensation in his letter of 23 June 2005 as well as applying for medical retirement. I also note the rejection of the medical retirement application was excluded from that settlement.

[105] I find in conclusion that Mr Pollock is entitled to an amount equal to 50% of the medical retirement benefit set out in clause 7.1.5 of the Collective Agreement from which sum is to be deducted the amount he was paid under clause 4 of the agreed terms of settlement dated 29 June 2005 for two month's notice.

[106] I order Peter Macdonald statutory manager Aranui High School to pay to Graeme Pollock the sum of \$51,668.50 less the amount Mr Pollock received under clause 4 of the terms of settlement dated 29 June 2005.

[107] Such amount is awarded under section 123(1)(c)(ii) of the Employment Relations Act 2000, being the loss of the benefit of medical retirement which Mr Pollock may reasonably have expected to obtain if the personal grievance had not arisen.

Compensation

[108] It was not clear to Mr Pollock until he received Mr Macdonald's statement of evidence exactly how his application for medical retirement had been dealt with and the grounds on which it had been rejected. Mr Pollock in his role as principal at Aranui High School understood clearly the principles of natural justice in dealing with applications that he received in his principal role.

[109] Mr Pollock explained that, at the very least, he expected his application for medical retirement would be properly considered. Mr Pollock did not give a lot of evidence about the stress or humiliation he suffered as a result of the way his application was dealt with. He impressed me as the sort of person who would not overstate matters. I found him to be as Dr Talemaitoga described him in his medical opinion of 23 June 2005 as a person who – *displays fortitude on the outside*.

[110] Notwithstanding that, it was clear that the way Mr Pollock's application was treated and the belated knowledge that it was not considered in accordance with the

Collective Agreement impacted on his feelings. Mr Pollock had been in a senior role at the High School and expected, and was entitled to expect, that an application that concerned his health and wellbeing would be treated in accordance with his Collective Agreement.

[111] In those circumstances I consider a compensatory award is called for, but the evidence is not such to support a substantial award.

[112] I order Peter Macdonald, Statutory Manager Aranui High School to pay to Graeme Pollock the sum of \$5,000 being compensation for humiliation, loss of dignity and injury to feelings under section 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution

[113] The Authority is required to consider the extent to which it determines that an employee contributed toward the situation that gave rise to the personal grievance.

[114] Mr Robertson submits that a 100% reduction in remedies is appropriate on the basis that Mr Pollock signed a settlement agreement that provided he resigned, left New Zealand for another principal posting and did not provide proper evidence of his incapacity.

[115] Mr Pollock's personal grievance is that his application for medical retirement was never properly considered under his Collective Agreement before it was rejected. If Mr Pollock had been asked for further medical information in June 2005 and failed to provide it or had made it clear that he needed an answer in terms of his application within two days then there may well have been some contribution. That was not however the situation. I do not find that Mr Pollock contributed to his personal grievance.

[116] Mr Pollock is not entitled to remedies under both heads of his claim of breach of contract and disadvantage grievance. He has been awarded remedies in terms of his grievance. I do not need therefore to have regard to any additional or alternative remedies in terms of the breach of contract.

Was there a breach of the confidentiality provisions in the settlement agreement and should there be a penalty awarded?

[117] Clause 6 of the settlement agreement provided that:

The parties agree that they will not speak in public or private about the terms of this settlement. These restrictions do not prevent the provision of information to the Ministry of Education or the Teacher Registration Council. It is the intention of the parties that neither will initiate a public statement, the intention of which is to be derogatory of the other party.

[118] In an article in the Christchurch Press dated 1 July 2005 which is headed *Embattled Christchurch high school head quits* Mr Macdonald is reported as saying:

Aranui High statutory manager Peter Macdonald said Pollock had resigned on Tuesday, effective immediately. It was decided he would be paid out his two months notice.

[119] Mr Macdonald said that he was asked by a reporter why Mr Pollock had left without working out his notice as it was public knowledge that he had physically left Aranui High School. Mr Macdonald said that he referred to the clause in the Collective Agreement and explained that notice can be worked out or paid out in lieu of notice. Mr Macdonald denied using the word immediately but otherwise did not dispute the words in paragraph 115.

[120] The settlement agreement is quite clear. The parties were not to talk about the terms of the settlement. One term of the settlement was that Mr Pollock would resign effective 28 June 2005. Mr Pollock told the reporter that he had resigned and would leave to become head of an international school in Kuwait the next month. I am satisfied that was before the reporter went to see Mr Macdonald.

[121] It was a term of the settlement that Mr Pollock would be paid in addition to holiday pay a sum equivalent to two months salary in lieu of notice. It was a breach of the settlement agreement for Mr Macdonald to say that Mr Pollock would be paid out his two months notice. Mr Macdonald should not have commented on that matter when asked about it as it was a term of the settlement.

[122] In the circumstances however where Mr Pollock had disclosed to the reporter that he had resigned and the reporter then went to see Mr Macdonald I am not minded to award a penalty in terms of the breach. In circumstances where part of the settlement has been disclosed in this determination, and I have prohibited from

publication the details that have not, I do not consider a further order directing Peter Macdonald to comply with the confidentiality provisions necessary.

Costs

[123] I will reserve costs. Mr Pollock, given that he is overseas has until 28 March 2008 to lodge and serve his submissions as to costs. Mr Robertson has four weeks after the date that he is served with Mr Pollock's submissions as to costs to make submissions in reply. The parties may be able to reach agreement as to costs.

[124] There is an issue with respect to the costs for Mr Pollock and Mr Harrison in travelling to attend a mediation that did not proceed. I advised the parties that I would obtain some information from the mediator. I do not understand however that the mediator has a written record as such. I am also mindful of the recent Court of Appeal judgment in *Just Hotel Ltd v Jesudhass* 14/12/07 CA 249/06 with respect to all communication for the purposes of mediation attracting statutory confidentiality. I have heard evidence about the costs Mr Pollock incurred in terms of travelling to attend mediation from Auckland and Mr Macdonald's and the Finance Statutory Manager, Mr Rondell's view of what occurred that morning. I provided Mr Robertson with copies of some relevant material received from Mr Harrison about the events. There was also an Authority telephone conference when the proposal by Mr Harrison of a telephone mediation was rejected by Mr Zwart.

[125] I shall proceed to determine that matter along with the other matters relevant to costs in terms of the evidence I have already heard and submissions with respect to costs.

Summary of findings and orders made

- I have found that Mr Pollock applied for medical retirement under clause 7.1.3 of the Collective Agreement.
- I have found that his application was not properly considered under the relevant provision of the Collective Agreement before it was rejected.
- I have found that the rejection of the application for medical retirement was excluded from the settlement agreement entered into between Mr Pollock and Mr Macdonald on 29 June 2005.

- I have found that the failure to consider the application properly under Mr Pollock's Collective Agreement was a breach of clause 7.1.3 of the Collective Agreement and an unjustified action that caused Mr Pollock disadvantage.
- I have assessed remedies in terms of the personal grievance and have not found Mr Pollock contributed to the personal grievance.
- I have ordered Mr Macdonald Statutory Manager Aranui High School to pay to Graeme Pollock the sum of \$51,668.50 under section 123 (1)(c)(ii) of the Employment Relations Act 2000 being the loss of a chance of receiving the benefit of medical retirement assessed at 50% from which sum two months salary paid to Mr Pollock under the settlement agreement is to be deducted.
- I have ordered Mr Macdonald Statutory Manager Aranui High School to pay to Graeme Pollock the sum of \$5000.00 without deduction under section 123 (1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation, loss of dignity and injury to feelings.
- I have found that Mr Macdonald breached the confidentiality provisions of the settlement agreement. I have not awarded a penalty in the circumstances or made any order in terms of future compliance in the circumstances of this case given that I have prohibited the terms of settlement not referred to in the determination from publication.
- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority