

**Attention is drawn to the Order
Prohibiting Publication of certain
Information (Refer paragraph [5]
– [10]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 45
3072154 & 3074596

BETWEEN QKD
Applicant & Respondent

AND LJL
Respondent & Applicant

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Gretchen Stone, Counsel for the Respondent

Investigation Meeting: On the Papers

Submissions and/or further evidence 15 November and 1 December 2019, 6 January 2020 from QKD
15 November, 29 November and 18 December 2019 from LJL

Determination: 31 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, QKD, claims that the Respondent, LJL, breached a mediated record of settlement dated 3 May 2018 (the Record of Settlement) by failing to fully endorse his Teacher Registration Renewal Application thereby disadvantaging him and breaching the duty of good faith it owed to him.

[2] LJL denies it unjustifiably disadvantaged QKD or failed to act in good faith and claims that the Record of Settlement with QKD provided for the full and final settlement of all matters arising from the employment relationship.

[3] LJL claims that QKD breached clause 5 of the Record of Settlement by writing a letter to the Teaching Council which contained disparaging comments about it and its Principal VFB.

[4] QKD denies that he has breached clause 5 of the Record of Settlement on the basis that he made a protected disclosure pursuant to the Protected Disclosures Act 2000.

Non-Publication Order

[5] The Respondent has applied in a memorandum dated 18 December 2019 for non-publication orders in relation to the name and identifying details of the school involved in this matter.

[6] The basis for seeking such an order is that serious allegations have been made by QKD about the school and its staff which name students of the school who are not parties to the legal proceedings and are vulnerable young people.

[7] It is submitted by LJL that publication of the details relating to QKD's allegations could cause irreversible damage to the school's reputation, and the reputation of its staff.

[8] It is submitted that the identification of the school, its staff and students, are not necessary for QKD to pursue his claim effectively and he will not be prejudiced by a non-publication order.

[9] I have considered the submission of LJL, and the fact that QKD does not oppose the application for non-publication orders in respect of the matters set out above, and I accept that a non-publication order is both necessary and appropriate in this case, and that it is in the interests of justice to make such an order.

[10] Accordingly I order that the name of the school involved in this matter, its staff, its students, and any information which may identify them are subject to a non-publication order.

Issues

[11] The issues requiring investigation are whether or not:

- LJJ breached the terms of the Record of Settlement by failing to fully endorse QDK's Teacher Registration Renewal Application and as a result failed to act in good faith towards QKD and unjustifiably disadvantaged him
- QKD breached clause 5 of the Record of Settlement by making disparaging comments about LJJ

Note

[12] The parties agreed to the Authority determining these issues based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, affidavit evidence, documents submitted by the parties, and submissions from the parties.

The Authority's investigation

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[14] QKD was employed as a teacher at LJJ in 2012. In 2016 he was placed on a performance improvement plan by VFB as a means of addressing issues in regard to his performance.

[15] VFB said the performance improvement plan was effective for a period of time but in March 2018 there were more performance issues and VFB made the decision not to fully endorse QKD's renewal for Teacher Certification, informing QKD of this decision.

[16] Following a meeting between LJJ and QKD he did not return to work at LJJ and entered into negotiations for an exit package during which he was represented by the education union NZEI Te Rui Roa, and LJJ was represented by the New Zealand School Trustees' Association.

[17] The Record of Settlement was dated on 3 May 2018 and signed by QKD and VFB on behalf of LJJ. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 4 May 2018.

[18] The Record of Settlement contained the following clauses:

1. These terms of settlement and all matters discussed shall remain, so far as the law allows, confidential to the parties.
2. The parties agree that the following represents a full and final settlement of all matters arising from their employment relationship and from the termination.
3. The parties agree that the relationship will end by way of resignation on the 29th of April 2018.
4. The Employer shall provide a certificate of service in respect of length of service and role.
5. Neither party shall make disparaging comments in regards to the other party.

[19] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[20] QKD's Teacher Registration renewal application was due for renewal on 2 June 2018. This needed to be endorsed by LJJ.

[21] LJJ signed QKD's Teacher Registration renewal application on 23 August 2018 but it was a partial endorsement which triggered the requirement for LJJ to submit a Mandatory Report in accordance with the requirements of the Education Act 1989.

[22] As required by the Teaching Council, VFB completed a Mandatory Report Form in respect of QKD on 11 March 2019 selecting the option box entitled 'Resignation' which stated:

Use when teacher has resigned and you had advised dissatisfaction with an aspect of their conduct or competence within the 12 months preceding their resignation. You do not need to have begun formal competence procedures as outlined in the relevant employment agreements.

[23] QKD claims that the delay in his teacher registration being approved prior to April 2019 was a result of LJJ failing to fully endorse his Teacher Registration Renewal Application. QKD further claims that LJJ delayed submitting a separate summary to the Mandatory Report for some time, which delay adversely affected his ability to obtain alternative employment in a timely manner given the academic calendar.

[24] QKD stated that this caused him loss of income and job opportunities. Moreover QKD states that he is still unable to apply for permanent jobs because the Mandatory Report is still active and unresolved pending the filing of further information by LJJ.

Did LJJ breach the terms of the Record of Settlement by failing to fully endorse QKD's Teacher Registration Renewal Application and as a result failing to act in good faith towards QKD and unjustifiably disadvantaging him?

(i) Clause 1

Good Faith

[25] QKD stated that the employment relationship remained in existence during the active status of the Mandatory Report. Accordingly QKD claimed that a duty of good faith was owed to him and breached by LJJ by its delaying submission on the Mandatory Report.

[26] The duty of good faith is set out in s 4 (1A) of the Act which states at s 4(1A)(b) that the duty of good faith:

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship ...

[27] At the time LJJ completed the Teacher Registration renewal application on 23 August 2018 and the Mandatory Report on 11 March 2019 QKD's employment had ceased with effective from 29 April 2018 by reason of his resignation.

[28] The Record of Settlement confirms in clause 2 that: "The parties agree that the following represents a full and final settlement of all matters arising from their employment relationship and **from its termination**" (emphasis mine). Clause 3 states the agreement of the parties that their relationship would end as a result of QKD's resignation and clause 4 provides that LJJ would provide a certificate of service.

[29] As stated by Chief Judge Inglis in *Idea Services Ltd v Barker* the duty of good faith ceases when the employment relationship ceases:

I do not consider that there is scope for arguing that the statutory requirements imposed by s 4 continue to apply once the employment relationship has ended.¹

[30] The Teacher Registration renewal application was signed on 23 August 2018, the Mandatory Report was completed in March 2019. QKD's employment ended by way of

¹ *Idea Services Limited (In Statutory Management) v Barker* [2012] NZEmpC 112 at [19]

resignation effective 29 April 2018. Both forms were therefore completed after QKD's employment with LJJ had ended.

[31] I find that LJJ did not owe a duty of good faith to QKD at the time of completing the breach the Mandatory Report on 11 March 2019 because there was no longer an employment relationship between them.

Unjustifiable Disadvantage

[32] QKD claims that he was unjustifiably disadvantaged by LJJ's failing to fully endorse his Teacher Registration Renewal Application as a result of which he suffered a loss of income and job opportunities. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[33] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[34] QKD must therefore establish that there was some unjustifiable action by LJJ which affected his terms and conditions of employment to his disadvantage.

[35] Once his employment with LJJ ended there were no extant terms and conditions of employment which could be affected to QKD's disadvantage by LJJ and on that basis I find that there could be no unjustifiable disadvantage to him.

Breach of the Record of Settlement

[36] Pursuant to s 149(3)(b) of the Employment Relations Act 2000 (the Act) which states that: "except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise", I now turn to consider whether or not LJJ breached the terms of the Record of Settlement by its failure to fully endorse QKD's Teacher Registration Renewal Application.

Clause 1: Confidentiality

[37] The Record of Settlement stated at clause 1 that the terms of settlement and all matters discussed would remain: “so far as the law allows” confidential between the parties. This is a key proviso because parties, including employers and employees, cannot contract out of statute and therefore the requirement of confidentiality would be subject to, and limited by, any requirement of law.

[38] In this case the applicable statute is the Education Act 1989 which states at s 392(2) that:

If, within the 12 months before the resignation of a teacher from a teaching position (including a fixed-term position) or the expiry of the term of a teacher’s fixed-term position, the teacher’s employer had advised the teacher that it was dissatisfied with, or intended to investigate, any aspect of the teacher’s conduct, or the teacher’s competence, the employer must, immediately after the resignation or expiry, report it to the Teaching Council.

[39] QKD resigned from his teaching role with LJL as recorded in clause 3 of the Record of Settlement. In the 12 month period before QKD’s resignation LJL had advised QKD that it was dissatisfied with an aspect of his performance.

[40] LJL did not fully endorse QKD’s Teacher Registration renewal application by failing to endorse all the statements on the application. There is no evidence that LJL breached any confidentiality in so doing.

[41] This partial endorsement had the effect of triggering the statutory requirement for LJL to make a Mandatory Report to the Teaching Council.

[42] Section 4 of the Mandatory Report Form is relevant to resignation and required LJL to: (i) set out: the full details of the aspect of QDK’s conduct or competence it had been most concerned with; (ii) provide the advice given; (iii) QDK’s response; and (iv) any further action taken by LJL.

[43] LJL had also to: “State the date on which the teacher resigned, and the date on which the resignation took place.”; and attach any relevant information to the form.

[44] I find that VFB who completed the form did so factually. VFB states in section 4 that: “I will forward separately a summary of this meeting.”

[45] Section 4 of the Mandatory Report required LJL to provide ‘full’ details of the aspects of QKD’s conduct or competence that gave rise to dissatisfaction by LJL, and section 5 stated that LJL as the employer had to provide a: “Brief Summary of employer actions” and required LJL to set out the actions it had taken prior to QKD’s resignation.

[46] Failure to report matters of conduct or competence to the Teaching Council is an offence for which a maximum fine of \$25,000.00 and \$5,000.00 respectively can be imposed.

[47] Moreover if the parties had agreed in the Record of Settlement to include a clause agreeing that LJL would not file a report regarding its concerns as regards QKD's performance issues I find that this would have been an illegal clause because it would be in breach of the relevant legal requirements.

[48] QKD claims that this separate summary was outside the requirements of the Mandatory Report and as such would breach confidentiality because it would traverse matters discussed in relation to the Record of Settlement.

[49] Whilst I find that it appears LJL delayed sending the separate summary in a timely manner, there is no evidence that this additional information provided by LJL in the separate summary document referred to any details relating to the terms contained in the Record of Settlement.

[50] I also observe that the Record of Settlement confirms in clause 2 that: "The parties agree that the following represents **a full and final settlement of all matters** arising from their employment relationship and from its termination" (emphasis mine). There are no clauses in the Record of Settlement which impose conditions on LJL in regard to the completion of the Teacher Registration renewal application.

[51] Accordingly I find no clauses in the Record of Settlement to have been breached in respect of the completion of QKD's Teacher Registration renewal application.

[52] I determine that LJL did not breach the terms of the Record of Settlement by failing to fully endorse QKD's Teacher Registration Renewal Application.

Did QKD breach clause 5 of the Record of Settlement by making disparaging remarks about LJL?

[53] Section 5 of the Record of Settlement states that: "Neither party shall make disparaging comments in regard to the other".

[54] QKD made what was headed as: "Protected Disclosure Made Under The Protected Disclosure Act 2000" to the Education Council (now known as the Teaching Council) which was received by it on 22 February 2019.

[55] The letter set out allegations that LJL:

- a) Had made an unlawful restraint of a student in November 2016; and
- b) Of nepotism in an appointment process held by VFB in November 2016

[56] Both allegations were investigated and subsequently dismissed by the Education Council.

[57] LJJ claims that the letter sent by QKD made numerous seriously disparaging remarks with respect to LJJ, its staff and management which related to historical incidents of which QKD had no personal knowledge.

[58] The allegations included:

- a) ... a member of school management sat on the chest of a student for approximately 20 minutes. There were several other members of management present as well as the class teacher who witnessed this incident.
- b) It appears that no action was taken against KMD by a member of management present. KMD was, in fact, promoted to a management position during 2018 despite the offence committed.
- c) It is also worth investigating a case of nepotism against the principal for the promotion of a teacher NLD.

[59] Section 6 of the Protected Disclosures Act 2000 (the PDA) provides that :

6 Disclosures to which Act applies

(1) An employee of an organisation may disclose information in accordance with this Act if—

- (a) the information is about serious wrongdoing in or by that organisation; and
- (b) the employee believes on reasonable grounds that the information is true or likely to be true; and
- (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
- (d) the employee wishes the disclosure to be protected.

(2) Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purposes of this Act.

(3) If an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) for the purposes of the protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993. (4) This section is subject to section 6A. Section 6(1): amended, on 6 May 2009, by section 5(1) of the Protected Disclosures Act.

[60] The purpose of the PDA is to protect people who raise concerns about possible wrongdoing in the workplace and provides for redress for employees who are dismissed or otherwise penalised for having reported possible wrongdoing in the workplace.

[61] Employees who raise concerns are required pursuant to s 6(1)(b) to have reasonable grounds for his or her belief that the allegations being made are true or likely to be true.

[62] QKD was making serious allegations about LJL and VFB in the letter to the Education Council received on 22 February 2019.

[63] In the Statement in Reply filed on 2 October 2019 QKD states: “I had no knowledge of whether his [the student] or the staff’s allegations were true or not and decided to get the necessary authorities to investigate the matter and decide on appropriate actions. I made no allegations of my own ...”

[64] I find that s 6 (1)(b) of the PDA requires that the employee had reasonable grounds for his or her belief that the employer had committed serious wrongdoing. QKD by his own admission had no knowledge that the allegations being made by the student or the staff were true or likely to be true.

[65] There is no indication that QKD carried out any investigation himself prior to making the allegations against LJL or VFB, and indeed he confirms that he did not do so in the Statement in Reply. I find therefore that he had no reasonable grounds for his belief that it was true, or likely to be true, that LJL and/or VFB had committed serious wrongdoing.

[66] The PDA requires an employee making a protected disclosure under the Act to comply with the Employer’s internal Protected Disclosures Policy.²

[67] In the affidavit made by SFA, Board Chairman of LJL, he states that that LJL has a Protected Disclosures Policy which outlines the process to be taken by an employee seeking to make a protected disclosure.

[68] No such disclosure in compliance with LJL’s Protected Disclosures Policy was made by QKD prior to his letter received on 22 February 2019 by the Education Council.

[69] I find that the correct procedure to have been adopted by QKD to prevent him from breaching clause 5 of the Record of Settlement would have been firstly to have made enquiries to ascertain a reasonable basis for his belief that the allegations he was intending to make against LJL and VFB were true or likely to be true; and secondly to have utilised the

² Protected Disclosures Act 2000 s 7

provisions LJL's Protected Disclosure Policy prior to sending the letter to the Education Council. However QKD did neither.

[70] I determine that QKD breached clause 5 of the Record of Settlement by making disparaging remarks about LJL

Remedies

Compliance Order

[71] I am satisfied that QKD has not complied with clause 5 of the Record of Settlement.

[72] Accordingly I find QKD to be in breach of clause 5 of the Record of Settlement.

[73] In order to effect compliance with the Record of Settlement, I therefore order QKD to desist from making any further disparaging comments about LJL with immediate effect pursuant to s 137(1)(iii) of the Act.

Penalty

[74] The disparaging comments made in the letter to the Education Council were of serious allegations against LJL and VFB. Whilst they were dismissed after investigation by the Education Council they nonetheless would have been concerning to LJL given their nature which was such as to undermine the integrity of LJL and VFB.

[75] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Record of Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[76] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[77] It is consequently in the public interest to impose a penalty which not only admonishes QKD for his behaviour in breaching the Record of Settlement, but will also act a deterrent to others who may contemplate engaging in such behaviour.

[78] Having considered the principles which should govern the imposition of a penalty³, I determine that a penalty of \$4,000.00 is appropriate.

[79] I order that QKD is to pay a penalty of \$4,000.00, to be paid to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.

Costs

[80] Costs are awarded on the usual tariff basis on the Authority on the basis of a half day investigation meeting.

[81] I order QKD pay to LJL the sum of \$2,250.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

**Eleanor Robinson
Member of the Employment Relations Authority**

³ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143