

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 201  
3157126

BETWEEN HARI RAVI SHANKAR  
Applicant

AND EMBARK EDUCATION  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Ben Nettleton, counsel for the Respondent

Investigation: 14 March 2023

Determination: 21 April 2023

---

**SECOND DETERMINATION OF THE AUTHORITY**

---

- A. The application by Hari Ravi Shankar for Embark Education Limited to be ordered to pay a penalty for breaching a term of a certified settlement agreement is declined.**
- B. Costs are reserved. A timetable has been set if an Authority determination of costs is needed.**

**Employment relationship problem**

[1] Hari Shankar asked the Authority to find that Embark Education Limited (Embark) had breached terms of a settlement agreement made in May 2020 between him and the company, under its earlier name of Evolve Education Group Limited. He asked the Authority to impose a penalty on Embark for the alleged breach.

[2] Embark opposed Mr Shankar's application. It denied breaching any terms of the agreement. It also said, however, if there were any breach, its actions were for a permitted public policy reason concerning the administration of justice.

### **The Authority's investigation**

[3] In investigating Mr Shankar's application, the Authority heard affirmed evidence from him, Embark's chief financial officer Edmund Mah and former employee Dinara Seyfulmulyukova. The parties also provided documents called for by the Authority and gave closing submissions on the issues for resolution.

[4] 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.

### **How the alleged breach arose**

[5] The settlement agreement at issue was reached in mediation on 11 May 2020. It was certified by a mediator under s 149 of the Act. The mediation was about a personal grievance Mr Shankar had raised over how he came to resign from his employment in 8 November 2019. The parties had been referred to mediation after Mr Shankar lodged an application to the Authority in March 2020 saying what caused him to resign really amounted to an unjustified dismissal.

[6] The formal certification of the agreement by a mediator confirmed its terms were final, binding and enforceable and could not be brought before the Authority except for enforcement purposes. It also confirmed the parties understood that a person who breached an agreed term was liable to a penalty.<sup>1</sup>

[7] One agreed term stated that the parties' "terms of settlement and all matters discussed in mediation" were to remain, as far as the law allowed, confidential to them. For the purposes of this determination, however, it was necessary to disclose two more of their agreed terms – firstly, Mr Shankar was to withdraw his grievance application (which he did) and, secondly, their agreement was "a full and final settlement of all matters between the parties arising out of their employment relationship".

---

<sup>1</sup> Employment Relations Act 2000, s 149(4).

[8] Mr Shankar's application to the Authority about the finality term said Embark had breached that provision of their settlement agreement by then doing more to pursue a complaint it had made to Police about him. He was referring to a complaint lodged on the company's behalf by Mr Mah on 24 February 2020. The complaint alleged Mr Shankar, in his role as its Facilities Manager, had been involved in "suspicious transactions". From January to September 2019 Mr Shankar had approved invoices for payment to a named entity for a total value of around \$85,000. The invoices were for property inspections at childcare centres operated by Embark under its previous name. Embark said there was no proof that the inspection services paid for had been provided.

[9] Mr Shankar learnt of the complaint in March 2020 after his lawyer was told about it by the company's lawyer.<sup>2</sup> He said he understood the complaint was then covered by the term of the settlement agreement agreed in mediation in May 2020 that said "all matters" between him and the company had been fully and finally settled. He said Embark breached that term by its subsequent contact with the Police over its February 2020 complaint. This contact included Embark personnel asking the Police about their progress in investigating the complaint and responding to Police queries for information to be used in prosecuting Mr Shankar for allegedly fraudulent activity.

[10] On 18 October 2020 Police arrested Mr Shankar. He was charged with using forged documents and theft by a person in a special relationship. Since then he has been on bail awaiting trial.

[11] Later on the same day the Police detective who arrested Mr Shankar contacted Mr Mah by email with a query about something he said Mr Shankar had mentioned after being arrested. The detective said Mr Shankar told him that "the invoice matter" had been discussed as part of mediation after Mr Shankar left the company and the company "may have agreed to not proceed with the allegation". The detective asked if this was correct and said "if so, I will require something in writing from [the company] outlining the result of any such resolution". Mr Mah responded on the company's behalf on 19 October 2020, writing:

The mediation with Mr Shankar was in relation to a personal grievance claim and we can confirm that the claim was settled without any reference to the alleged fraud or the police complaint that we had made regarding the alleged fraud.

---

<sup>2</sup> Email of 24 March 2020.

[12] From September 2020 onwards some Embark personnel had provided information, in response to Police inquiries, about the invoices and how arrangements for payment were made. In the following months the Police also took formal written statements from some personnel. This included Mr Mah and the company's property manager at the time, Henry Blundell.

[13] As part of the evidence called for by the Authority for its investigation of Mr Shankar's application, Embark provided copies of correspondence to and from the Police over its complaint and the Police prosecution. Emails provided showed Mr Blundell and other company personnel were in touch with the Police detectives on several occasions in 2020 and 2021 after the May 2020 settlement of Mr Shankar's employment issues.

[14] In September 2020 Mr Blundell and one of the company's financial administrators exchanged several emails with the investigating detective about locating documents he wanted to see and to arrange interviews with some staff.

[15] On 2 October 2020 Mr Blundell sent this message by email to the investigating detective: "Just checking in how this is all going from our last meeting".

[16] In mid-October the investigating detective liaised with Ms Seyfulmulyukova and a financial administrator about preparing statements to the Police.

[17] On 27 October 2020 Mr Blundell contacted the detective to advise that the company's insurer wanted an insurance investigator to look at the invoice issue. Mr Blundell wrote that he was "just wanting to make sure this would not affect your side of things". The detective replied that engaging an insurance investigator "does not affect our prosecution". When the insurance investigator contacted the detective for some information, the detective replied that the matter was "currently before the courts" and he was keeping Mr Blundell at the company "up to date with the progress of the complaint/prosecution so it's preferable that you make enquiries through them".

[18] On 19 November 2020 Mr Blundell sent this message to the detective: "We have a board meeting next week and was wanting to let them know of any progress in regards to [Mr Shankar]?"

[19] On 21 January 2021 Mr Blundell again emailed the detective asking for an update on progress on the case “as we have a board meeting next Friday”. The detective replied that a case review hearing was to be held in the District Court on 31 March.

[20] On 31 March 2021 Mr Blundell asked whether there was “any update from outcome of today’s proceedings”.

[21] In April and June 2021 the detective was in contact with Mr Blundell, Mr Mah and another company employee about providing signed statements to the Police.

[22] Mr Mah, in his oral evidence for the Authority investigation, said he had also been in touch with the investigating detective by telephone several times to ask for an update on progress with the case so he could update the company’s board. Mr Mah said he called on another occasion to check the insurance process, for a claim for losses on the invoices, would not prejudice the Police case.

[23] Trial preparation documents showed five current or former employees of the company could be called to give evidence at the District Court hearing. The trial is scheduled for June 2023.

## **Issues**

[24] Against that background, the following issues required determination:

- (a) Did contact with or information provided after 11 May 2020 to the Police by Embark, or anyone acting on its behalf, breach the finality term of the certified settlement agreement about Mr Shankar’s employment relationship problem?
- (b) If any contact or information provided did amount to a breach, should it be excused as necessary for reasons of public policy (concerning assisting Police with their inquiries into an earlier complaint and/or prosecution of allegedly criminal matters)?
- (c) If not excused, should a penalty be imposed on Embark and, if so, of what amount?
- (d) Should either party contribute to the costs of representation of the other party?

[25] The issues and evidence considered and conclusions reached in this determination relate only to matters within the Authority's exclusive jurisdiction under s 161 of the Act.<sup>3</sup> It does not determine or in any way impinge on matters within the criminal jurisdiction. Consideration of the Police's case against Mr Shankar and his defences to the charges made are entirely matters for the finders of fact and law in the court during the trial in that jurisdiction.

### **No breach of the finality clause**

[26] Mr Shankar's argument about the effect of the finality term in the settlement agreement, broadly paraphrased, concerned both the plain meaning of its words and the context in which it was agreed.

[27] His argument was that both parties knew about the company's February 2020 complaint to the Police when they met in mediation in May 2020. The complaint concerned his work in approving invoices while he was employed. Therefore, both that context and the plain words of the phrase "all matters between the parties" meant Embark accepted, he argued, its complaint was fully and finally settled as part of resolving his personal grievance. In his argument, if the company wanted its complaint and the prospect of prosecution over it to survive the settlement, an express exception would have been needed in the finality term of the agreement.

[28] What was said in mediation between the parties is confidential unless both parties agree to waive that confidentiality.<sup>4</sup> Embark had not consented to disclosing what was discussed so no such evidence about what was said in mediation was admissible.<sup>5</sup> There is, therefore, no evidence about what may or may not have been about the scope of the finality clause and particularly whether it was to include the complaint. On that basis, the term had to be interpreted from the plain meaning of the words used in the agreement and what is known of the context outside of the parties' mediation.

[29] The finality term was expressed as settling all matters "between the parties arising out of their employment relationship". Embark, in its submissions, stressed the importance of the reference to the context of the employment relationship in that phrase.

---

<sup>3</sup> Employment Relations Act 2000, s 161(1)(m)(ii) and s 149(4).

<sup>4</sup> Employment Relations Act 2000, s 148(1).

<sup>5</sup> Section 148(3).

[30] The company's complaint was made to the Police more than three months after Mr Shankar's employment had ended. Embark submitted that, by the time of the mediation, decisions about what would be done about the complaint were solely in the hands and discretion of the Police. It was no longer a matter simply between Mr Shankar and the company as former employee and former employer. If Mr Shankar had wanted the finality term to extend beyond the scope of his personal grievance, which concerned whether he was put under unfair pressure to resign on 8 November 2019, he would have needed to have sought and gained agreement to words which specifically addressed what would or could be done by either party about the complaint to the Police.

[31] As Embark submitted there will be some, albeit very limited, circumstances where a s 149 finality clause does not trump statutory or other obligations. One example is a former employer's obligation to notify a professional body of competency or ethical issues arising from conduct or performance of a former employee.<sup>6</sup>

[32] While, as Embark submitted, there may be no positive statutory duty to report allegedly criminal activity or to co-operate with Police, implying an obligation on an employer to cease to co-operate with Police would place a strained interpretation of the finality clause.

[33] Mr Shankar described contact by Mr Blundell and other company personnel after May 2020 as "an overwhelming volume of correspondence" which he considered put "pressure" on the Police to investigate the allegations against him and to then proceed with a prosecution. Part of his defence to the allegations made in the company's complaint is that he says they were made and pursued as part of a malicious personal vendetta against him by some company personnel.

[34] The proposition that the Police chose to proceed with a prosecution because of pressure from Embark personnel was not persuasive for two reasons.

[35] Firstly, the available evidence showed those personnel were responding to Police inquiries rather than pressing for more to be done. Mr Blundell and Mr Mah did ask, on several occasions, for updates on what was happening but that was consistent

---

<sup>6</sup> *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46 at [46]

with wanting to report to their board. Those requests were also mostly made after it was clear that a decision to prosecute Mr Shankar had already been made.

[36] Secondly, on the balance of probabilities, the Police decision was not likely made on the basis of expressions of concern or pressure from the company. Rather the decision more likely resulted from routine assessment against the Crown Prosecution guidelines on whether there was sufficient credible evidence to provide a reasonable prospect of conviction and the public interest required prosecution. Whether the alleged offence resulted in serious financial loss to a person or a company is one of those public interest considerations for prosecution.

[37] In the particular circumstances of this case, company personnel co-operating with Police inquiries and preparation for prosecution was not a breach of the finality term.

### **Public policy may excuse an apparent breach**

[38] If the conclusion that co-operation with the Police inquiry was no breach is wrong, there was another ground on which the actions of Embark personnel could be excused.

[39] There may be some limited and rare circumstances in which non-observance of a term of a certified s 149 settlement agreement may not amount to a breach of the term or, at least, weigh against enforcement measures by orders for compliance or imposing a penalty.

[40] One such instance could be where terms on confidentiality or finality were sought to be used in a way that prevented official inquiry into and prosecution of allegedly serious criminal conduct.<sup>7</sup> It may, for instance, be a circumstance where the phrase “so far as the law allows” used in the standard wording of a confidentiality clause applies. This allows, for example, for disclosure to comply with statutory obligations for reporting of certain offences or mandatory reporting requirements to external professional bodies.

---

<sup>7</sup> *Just Hotel Ltd v Jesudhass* [2007] NZCA 582 at [41]-[42].

[41] There is an arguable public interest in not allowing a finality clause to prohibit a former employer co-operating with a Police inquiry where the decisions about the inquiry and prosecution are beyond the hands of the employer, as was the case here. In Mr Shankar's case it was an important fact that the complaint was made before the settlement with the finality clause was agreed. A different evaluation might result where one party to an employment relationship knew of some allegedly serious criminal conduct by the other party and chose not to do anything about it at the time but, as an act of spite after concluding a full and final settlement agreement on employment matters, then made a criminal complaint as a means of harriving or inconveniencing that other party. In some cases those factual issues may be clear cut. In other cases they may require examination of the evidence through an Authority investigation.

[42] In Mr Shankar's case, given the nature and timing of the complaint and the former employer's actions being limited to co-operating with Police inquiries, public policy considerations prevail to excuse any breach.

### **No penalty**

[43] For the reasons given there was no breach of the finality term or, if there was one, it could be excused for public policy reasons concerning co-operation with Police in relation to allegedly criminal matters.

### **Costs**

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they cannot, and an Authority determination of costs is then needed, Embark should lodge and serve a memorandum on costs within 28 days of the date of this determination. Mr Shankar would then have 14 days to lodge a memorandum in reply. No consideration of costs will be made outside that timetable unless prior leave to do so is sought and granted.

[45] The following observations may assist the parties. The Authority usually assesses costs from the starting point of a daily tariff, adjusted upwards or downwards for factors or circumstances particular to the case.<sup>8</sup>

---

<sup>8</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).

[46] Embark is not entitled to any costs for its unsuccessful attempt, at an earlier stage in these proceedings, to have Mr Shankar's application dismissed as frivolous and vexatious.<sup>9</sup> That earlier request was determined on the papers. As Mr Shankar represented himself in responding to it, he is not entitled to any costs either.

[47] The substantive investigation meeting took less than five hours so the starting point for assessing costs would be two-thirds of the daily tariff, that is \$3,000. There was considerable traffic between Embark and the Authority before the investigation meeting over arrangements for the production of documents called for from Embark. As already indicated to counsel, the approach Embark took became unnecessarily complicated. As a preliminary indication, and subject to what memoranda on costs might say if an Authority determination of costs does become necessary, it is unlikely time spent on that process would attract any uplift on the tariff.

Robin Arthur  
Member of the Employment Relations Authority

---

<sup>9</sup> *Shankar v Evolve Education Group Limited* [2022] NZERA 291.