Employment Court of New Zealand

Evans-Walsh v Southern District Health Board [2018] NZEmpC 46 (14 May 2018)

Last Updated: 17 May 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 46
EMPC 196/2017

IN THE MATTER OF	a proceeding removed to the Court by the Employment Relations Authority
BETWEEN	JANE EVANS-WALSH Plaintiff
AND	SOUTHERN DISTRICT HEALTH BOARD Defendant

Hearing:	1 – 2 March 2018 (Heard at Invercargill)
Appearances:	M Thomas and A Anderson, counsel for the plaintiff J Copeland and J Frame, counsel for the defendant
Judgment:	14 May 2018

JUDGMENT OF JUDGE K G SMITH

[1] Jane Evans-Walsh was employed as a nurse in a specialist care unit of a hospital in Southland operated by the Southern District Health Board. On 14 October 2016, she resigned after they both signed a record of settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[2] That settlement agreement also concluded the DHB's investigation into complaints made about her behaviour by four nurses in the unit in which she worked. On 31 January 2017, the DHB notified the Nursing Council of New Zealand about Ms Evans-Walsh's resignation despite having signed the settlement agreement. The Nursing Council was informed she had resigned before the conclusion of an investigation into complaints about her it was considering. The Nursing Council began an investigation.

[3] Ms Evans-Walsh considered the DHB's notification breached the settlement agreement and issued proceedings in the Employment Relations Authority. She sought a penalty, payable to her, and an order for the DHB to comply with the settlement agreement.1

[4] The DHB did not accept it had breached the settlement agreement. It also relied on statutory protection from civil liability provided in s 34(4) of the Health Practitioners Competency Assurance Act 2003 (HPCAA).

[5] The Authority determined that the whole matter should be removed to the Court.2

The DHB's inquiry

[6] In January and February 2016 the DHB received separate complaints, from four nurses, about Ms Evans-Walsh's behaviour towards them. It decided to investigate the complaints and appointed Alice Rabbidge as an independent investigator. Before the investigation began the terms of reference for the investigation were provided to Ms Evans-Walsh for comment.

[7] The scope of Ms Rabbidge's investigation was to ascertain the circumstances giving rise to the complaints. She was to decide if they could be substantiated, including whether the DHB's Code of Conduct, or the Nursing Council's Code of Conduct, had been breached. She was to consider if any established conduct was misconduct or serious misconduct.

[8] Despite those wide terms of reference Ms Rabbidge was not delegated the responsibility to deal with any disciplinary outcome that might arise if misconduct or serious misconduct was established. Any decision of that nature rested with one of the DHB's nursing directors, Heather Casey.

1 The application for compliance was withdrawn during closing submissions.

2 *Evans-Walsh v Southern District Health Board* [2017] NZERA Christchurch 133.

[9] Ms Rabbidge's investigation was not completed until she provided a report on 10 June 2016. During the investigation Ms Evans-Walsh was on special paid leave by agreement. In her report Ms Rabbidge concluded that the complaints were substantiated and breaches of both codes of conduct had occurred. She concluded that the complaints showed a pattern of behaviour constituting workplace bullying and was serious misconduct. Recommendations were included in the report but dismissal was not one of them.

[10] Throughout the investigation Ms Evans-Walsh maintained there was no substance to the complaints and her work was always of a high standard. She rejected the report's conclusions and any suggestion her behaviour in dealing with other nurses fell short of what was expected.

[11] The complaints did not call into question, and could not reasonably be interpreted as questioning, the quality of Ms Evans-Walsh's clinical care for patients. They were about her dealings with, or behaviour towards, the nurses who complained.

The DHB's response to the report

[12] On 15 June 2016, a copy of Ms Rabbidge's report was sent to Ms Evans- Walsh's lawyers and a response, either in writing or at a meeting, was sought. The DHB's letter informed her it would decide what further steps to take after receiving her response and that if it decided misconduct, or serious misconduct, had taken place:

...this matter may be elevated to a disciplinary level and disciplinary action may be taken up to and including possible termination of employment.

[13] At the point where the report was supplied to her the DHB had not adopted its conclusions.

[14] A meeting took place on 13 July 2016. Subsequently, on 21 July 2016, the DHB wrote to Ms Evans-Walsh's lawyer recording her responses to the report and its comments about them. This letter contained the DHB's preliminary conclusion accepting the findings of the report. As previously stated, the DHB said the matter was being "elevated to a disciplinary level" and her further comment was sought in that context. A meeting was proposed and she was advised again that, if misconduct

or serious misconduct was established, any disciplinary action could lead to a final written warning or termination of her employment.

[15] The DHB's letter was ambiguous because it accepted Ms Rabbidge's report, and therefore its findings, but seemingly left open the possibility that it might reach a different conclusion. That ambiguity was identified and questioned by Ms Evans-Walsh's lawyer. The DHB was asked whether the point had been reached where it had decided she had engaged in serious misconduct. That was not an idle inquiry, because it was the backdrop to asking whether the requested comments were confined to possible sanctions to be imposed or could be about the complaints themselves.

[16] The DHB confirmed a decision was still to be made. That reply led to a detailed challenge to the adequacy, and completeness, of Ms Rabbidge's investigation and report. Thirty potential witnesses were nominated for the DHB to interview, whose evidence was intended to show Ms Evans-Walsh's work was of a high standard and that she worked co-operatively with others in her profession. This evidence was not directly about the events that gave rise to each complaint.

[17] On 25 and 26 July 2016, several personal grievances were raised on Ms Evans- Walsh's behalf alleging the DHB had unjustifiably disadvantaged her. The DHB declined to remedy the grievances but extended an opportunity for her to provide a response to the Rabbidge report so it could progress matters towards "...some sort of conclusion".

[18] What followed was a settlement agreement signed by Ms Evans-Walsh, the DHB and by a mediator under s 149 of the Act. The DHB's preliminary conclusion about the complaints, and breaches of the codes of conduct, did not progress any

further because its deliberations were truncated by the settlement agreement.

Notification to the Nursing Council

[19] Entering into the settlement agreement did not, however, bring to an end the need for Ms Evans-Walsh to deal with the complaints to the DHB. On 31 January 2017, the DHB's Executive Director of Nursing and Midwifery, Leanne Samuel, wrote to the Nursing Council purporting to notify it under s 34(4) of the HPCAA. Her letter was brief and did not explain what aspect of s 34 was relied on to justify giving notice. It stated Ms Evans-Walsh had resigned from her position as a registered nurse prior to the conclusion of an investigation into complaints about her. It included a statement that, because of the seriousness of the allegations in the complaints, she was off work on paid leave during the investigation and resigned prior to a conclusion about them being reached. Attached to the letter were copies of the complaints by the nurses, the DHB's letter to Ms Evans-Walsh informing her about them and the terms of reference for the investigation. The investigation report was not included.

[20] The DHB's notice to the Nursing Council mentioned s 34(4) of the HPCAA but probably intended to refer to s 34(3). Those sections read:

> (3) Whenever an employee employed as a health practitioner resigns or is dismissed from his or her employment for reasons relating to competence, the person who employed the employee immediately before that resignation or dismissal must promptly give the Registrar of the responsible authority written notice of the reasons for that resignation or dismissal.
> (4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

[21] Ms Samuel was aware the complaints had been made but was not involved in handling them or in agreeing to the terms of settlement in the settlement agreement. Before writing to the Nursing Council she talked to Ms Casey who was involved in both.

[22] Not surprisingly, the Nursing Council advised Ms Evans-Walsh that it had received the DHB's notification which it described as a complaint. A professional conduct committee was established to investigate the complaint, which was summarised as allegations of bullying behaviour towards colleagues undermining their practice and confidence in decision-making and making disparaging remarks about colleagues.

[23] Ms Evans-Walsh's response was to invite the Council to dismiss the complaint under s 36(1) of HPCAA as frivolous and vexatious. Her lawyer informed the Nursing Council that the DHB investigation had not advanced beyond a preliminary conclusion, the complaints had not been proved and were denied. Issue was taken with the DHB's reliance on s 34(4) (although referring to s 34(3)) because she did not resign "for reasons relating to competence". The complaints to the DHB were said to have nothing to do with Ms Evans-Walsh's competence as a nurse and the delay between the date on which the settlement agreement was signed and when notice was given was drawn to the Council's attention.

[24] The Nursing Council declined to dismiss the complaint. Instead it said the complaint was being considered under s 64 of the HPCAA. Clare Prendergast, the Deputy Registrar and Senior Member Adviser for the Nursing Council, explained that it deals with notification under any section of the HPCAA considered appropriate regardless of the views expressed by a notifying DHB. By the time this proceeding was heard the professional conduct committee of the Nursing Council had not completed its investigation.

Has there been a breach of the record of settlement?

[25] Ms Evans-Walsh claimed the DHB's notification breached the settlement agreement's confidentiality, disparaged her, and contravened its finality. Underpinning all of these allegations was a claim that the DHB could not rely on satisfying its duty under the HPCAA to justify what it had done, because the legislation did not require the Council to be informed about the complaints made about her. The DHB's response was that the HPCAA meant it had no alternative.

The settlement agreement

[26] There are three parts of the settlement agreement relevant to Ms Evans-Walsh's proceeding. First, cl 1 provided that the terms of settlement were confidential to the parties "…so far as the law allows". That clause also contained an undertaking by both parties not to make disparaging comments about each other to third parties. Second, cl 2 provided that Ms Evans-

Walsh agreed to resign. Third, cl 8 provided that the settlement was full and final as follows:

This is the full and final settlement of all matters between the employee and the employer arising out of their employment relationship.

[27] The settlement agreement did not contain any statement explaining the decision to resign or about complying with the HPCAA.

The HPCAA

[28] Central to this proceeding is the nature of the duty placed on the DHB by the HPCAA and its relationship to settlement agreements under s 149 of the Act.

[29] The purpose of the HPCAA is to protect the health and safety of members of the public by providing mechanisms to ensure health practitioners are competent and fit to practise their professions.3 To ensure that purpose is attained the legislation was designed to provide for consistent accountability for all health practitioners, that each practitioner is competent to practise within the relevant scope of his or her practice, and by providing the power to restrict activities to particular classes of health practitioner to protect the public.4

[30] Section 34 is in Part 3 of the HPCAA which creates mechanisms to deal with, and improve, the competence of health practitioners who practise below the required standard of competence or are unable to perform the required functions.5 What is meant by a "required standard of competence" is defined: the standard of competence reasonably to be expected of a health practitioner practising within the practitioner's scope of practice.6

[31] The Nursing Council of New Zealand is an authority under the HPCAA appointed to be responsible for the registration and oversight of nurses.7 It follows, therefore, that nurses must adhere to the Nursing Council's practice-related requirements which, in turn, ensure compliance with the HPCAA.8

3 Section 3(1).

4 Section 3(2)(a) – (e) inclusive.

5 Section 4(3).

6 Section 5.

7 Sections 5(1), 114 and sch 2.

8 Section 5(1). See also s 184.

[32] The functions of the Nursing Council are in s 118 of the HPCAA. That section empowers the Nursing Council to prescribe the qualifications required for scopes of practice for nurses. It is empowered to review and promote the competence of nurses,9 to recognise, accredit, and set programmes to ensure the ongoing competence of them10 and to receive and act on information from health practitioners, employers, and the Health and Disability Commissioner about the competence of nurses.11 Amongst those functions is: 12

To set standards of clinical competence, cultural competence, and ethical conduct to be observed by health practitioners of the profession.

[33] The HPCAA, therefore, creates the framework within which each health profession establishes and monitors professional practice to protect the health and safety of members of the public.13 The HPCAA leaves the task of establishing and meeting the required standards of professional conduct to each health profession.

Nursing competencies

[34] As allowed by the HPCAA, the Nursing Council has developed competencies to assist in regulating the professional practice of registered nurses. They apply to all aspects of nursing practice. The competencies are stated in four "Domains of Competence" each one of which is amplified by explanatory statements of the expected competence; Domain 1 is professional responsibility, Domain 2 is management of nursing care, Domain 3 is interpersonal relationships and Domain 4 is inter-professional health care and quality improvement.

[35] The DHB drew attention to Domain 3, competency 3.3 and Domain 4, competencies 4.1 and 4.2, which read:

(a) Domain 3:

Interpersonal relationships

9 Section 118(d).

10 Section 118(e).

11 Section 118(f).

12 Section 118(i).

13 Section 3.

This domain contains competencies related to interpersonal and therapeutic communication with health consumers, other nursing staff and interprofessional communication and documentation.

(b) Domain 3, competency 3.3

Communicates effectively with health consumers and members of the health care team.

(c) Domain 4, competency 4.1:

Collaborates and participates with colleagues and members of the health care team to facilitate and coordinate care.

(d) Domain 4, competency 4.2:

Recognises and values the roles and skills of all members of the health care team in the delivery of care.

[36] The DHB also relied on principle 6 of the Nursing Council's Code of Conduct, requiring a nurse to work respectfully with colleagues to best meet health care needs. This principle includes communicating clearly, effectively and respectfully with other nurses.

[37] In summary, the DHB's point was that the alleged bullying behaviour referred to in the complaints it received, if demonstrated to have occurred, fell within the ambit of the Nursing Council's Domains, competencies and Code of Conduct. Once the DHB reached that conclusion the statutory duty to notify was compulsory. Section 34(3) says notice must be given.

[38] Ms Evans-Walsh accepts that notification under the HPCAA is compulsory and that the duties imposed by it cannot be circumvented by a settlement agreement. Her case was that the DHB could not have properly decided to give notice under s 34(3) that her resignation was "...for reasons relating to competence" in the circumstances which were known to exist before she agreed to resign. That is because a causal connection is needed between the resignation and concerns about competence to activate that section; in this case she said the evidence did not show such a connection. When she resigned no conclusions had been reached about the complaints and the DHB had gone no further than to express a preliminary conclusion that was still being

disputed. The investigation ended when the settlement agreement was signed so the DHB was being disingenuous by saying it had to notify.

[39] Ms Thomas submitted that there was nothing in the circumstances of this case justifying the DHB deciding competence was in issue, because there may be any number of reasons for a resignation. The DHB could not conclude a concern about competence motivated Ms Evans-Walsh to resign; it was possible she resigned because of dissatisfaction with a long investigation that reached conclusions she thought to be unjustified and unsupported by evidence. Her motivation to resign could well have been to bring an unpleasant situation to an end not because she realised an adverse finding about her ability as a nurse was about to be made.

[40] Attention was also drawn to the way in which the Nursing Council characterised the DHB's notification to show that s 34 had been wrongly relied on and, therefore, could not assist the defence to this proceeding. From these submissions it followed, therefore, that since there was no basis to apply s 34 the disclosures to the Nursing Council must have breached the confidentiality of the settlement agreement.

[41] I agree that s 34 requires a causal connection between dismissal or resignation and notice, but Ms Thomas' submissions would result in the test being too narrow and would be inconsistent with the HPCAA. The words "...relating to..." suggest no more than that the subject of competence was raised or played some part in the decision to end a nurse's employment. It was not necessary for the DHB to establish a competence issue, or to attempt to take into account Ms Evans-Walsh's views

about the complaints against her, or to try to ascertain why she had resigned before notifying. Requiring that level of inquiry would involve the DHB in reaching conclusions about complaints or undertaking steps that are the antithesis of the investigation procedure created by the HPCAA. If that were the case a nurse could avoid notification, perhaps in all but very serious cases, by the expedient step of resigning while frustrating a DHB's inquiry by disputing a complaint to prevent adverse conclusions being reached. That is not what s 34(3) intends and also explains why s 34(4) provides protection from civil liability; to prevent repercussions from notification that does not result in action by the Council.

[42] Given the purpose of the HPCAA the threshold for notification under s 34(3) must be low. Support for that interpretation comes from s 34(1) and (2), providing for notification by other practitioners, the Health and Disability Commissioner or the Director of Proceedings under the Health and Disability Commission Act 1994. Those sections only require the person giving notice to have reason to believe the behaviour has fallen below an acceptable standard.

[43] The duty is imposed on the DHB as Ms Evans-Walsh's employer and it did not require an evaluation of the circumstances from her perspective. The DHB had adequate information, in the Rabbidge report, from which it was able to reach preliminary conclusions that involved both the employment relationship and discharging professional responsibilities.

[44] The Nursing Council's Domains and competencies go beyond patient care and apply to ethical matters such as the way in which nurses' deal with each other. The Code of Conduct has a similar reach. The complaints to the DHB, if substantiated, could show a breach of those Domains or the Code of Conduct. That information was enough to satisfy the threshold in s 34 of the HPCAA. The subsequent reaction to notification by the Nursing Council cannot be used to undermine the integrity of the decision to notify. The response occurred only after circumstances arose triggering the duty to notify. The Nursing Council did not criticise the DHB for notifying it and refused to dismiss the complaint as frivolous or vexatious. Those are indications the Council considered what was raised required at least an investigation.

[45] The standards expected by the Nursing Council, and whether or not a breach of them has been established, are matters for it when discharging functions under HPCAA. Notification was inevitable once the DHB considered the complaints were about Domains, competencies and the Code of Conduct. The statutory duty is compulsory arising from the use of "must" in s 34(3).

Conclusion on breach

[46] The notification was said to be a breach of confidentiality. The agreement required confidentiality to be maintained but was qualified so that it applied only "...so

far as the law allows". There is nothing in s 149 of the Act giving primacy to a settlement agreement over the statutory duty to notify the Nursing Council in s 34. The DHB was under a duty to notify and cannot, therefore, have breached the settlement agreement by acting accordingly. In any event, the agreement itself did not purport to prevent the DHB from notifying the Nursing Council and a contract to maintain confidentiality cannot oust that statutory duty.

[47] The settlement agreement could not have been written in a way purporting to prevent the DHB from giving notice and did not attempt to do so. In the language of the agreement, the law would not "allow" confidentiality in a settlement agreement to be used to stifle notification required to be given by the HPCAA.

[48] Confidentiality was not infringed in any other way. What was said, and supplied, by the DHB did not go any further than was necessary to satisfy the HPCAA. The notification did not divulge the terms of settlement. It went no further than providing basic information to inform the Council and all other aspects of the settlement, necessary to reaching agreement, remained confidential. It follows that the confidentiality of the settlement agreement was not breached.

[49] Ms Evans-Walsh's statement of claim alleged that the notification contained disparaging comments. The letter to the Council did not contain any comments by the DHB that could be described as disparaging. It contained simple statements of fact: complaints were made which the DHB thought were about her competence.

[50] The most that might be said about the notice is that what the DHB relayed was disputed and Ms Evans-Walsh may feel aggrieved at having to address the complaints again. That is a consequence of working in a profession where standards are required to be met and was an obligation she accepted as a nurse. There is no basis to conclude that sending the letter to the Council breached the record of settlement by making disparaging remarks about her.

[51] Because the DHB had a duty to notify the Council it did not breach cl 8 of the settlement agreement in doing so. That clause provided the settlement was a full and final one of all matters between the employer and employee arising out of their

employment relationship.14 It ended the relationship but went no further than that. The plain words of that clause cannot be stretched to attempt to impose an obligation on either the DHB, or Ms Evans-Walsh, to prevent either of them from satisfying their professional

or statutory duties. Those duties did not end on the termination of the employment relationship. The agreement could not have gone that far because, if it had purported to do so, it would have cut across s 34.

[52] It follows that there has been no breach of the settlement agreement arising from the DHB's notification to the Nursing Council.

Section 34(4)

[53] For completeness, it is necessary to add brief remarks about s 34(4). Having concluded the settlement agreement was not breached it is not strictly necessary to comment about the protection from civil liability provided by that section. The protection exists only so long as notification was not made in bad faith. Ms Thomas submitted that the protection from civil liability afforded by s 34(4) was lost where either notification was motivated for improper reasons or, alternatively, the DHB was wrong about its statutory duty applying. Here the submission was that Ms Samuel had been wrong in her interpretation of s 34 and that deprived the DHB of protection. She was not attempting to argue that making a simple error was enough but, in this case, there was carelessness which deprived the DHB of protection. I disagree. The concept of bad faith involves more than a simple error or carelessness.

[54] There is no evidence that in deciding to notify Ms Samuel did anything other than apply the section to the facts as she understood them. The briefing she obtained from Ms Casey, which she was entitled to receive, gave her information about the complaints which she thought were sufficient to trigger s 34. There was no evidence that the motivation for notifying was because of animosity towards Ms Evans-Walsh or was in any other way of such a quality or nature as to be an expression of bad faith depriving the DHB of statutory protection. The decision was not carelessly made either, it was deliberate after taking into account the complaints and the HPCAA. Had

14 See [26].

it been necessary to do so, I would have concluded the DHB had protection under s 34(4).

[55] In case the analysis of the settlement agreement or s 34(4), is wrong, a penalty would not have been imposed on the DHB in the circumstances of this case. The worst that might be said about its conduct is that senior nursing staff believed steps were required to be taken to satisfy the HPCAA by notifying the Nursing Council. If they were wrong to do so it was not the sort of egregious behaviour justifying a penalty.

Disposition

[56] The claim by Ms Evans-Walsh is unsuccessful and is dismissed.

[57] Costs are reserved. If the DHB intends to apply for costs it must do so within 15 working days and Ms Evans-Walsh has the same amount of time to respond.

K G Smith Judge

Judgment signed at 9:00 am on 14 May 2018.