



[3] The Board says Mr Harrison is estopped from claiming these payments because the deed of settlement entered by the parties resolves all claims between them. In the alternative the Board says Mr Harrison is not entitled to the contractual payments claimed because he was on sick leave for the remainder of his employment with the Board and he has not meet the experience payment criteria.

[4] For the purposes of this determination the key terms of the deed of settlement are:

- The Board agreed to Mr Harrison retiring on medical grounds effective 7 February 2008 contingent on the provision of a supporting medical certificate (clauses 1 and 2);
- Mr Harrison would relinquish his day to day duties as principal and undertake tasks set out in the schedule attached to the deed of settlement (clause 10);
- The Board accepts the external appraisal of Mr Harrison's performance (clause 11(d)); and
- The deed of settlement is entered in full and final settlement of all claims arising out of Mr Harrison's employment with the Board (clause 14).

[5] I have received affidavit evidence and submissions from the parties in support of their respective positions. By consent this employment relationship problem is determined on the papers.

### **Sick leave payment**

[6] When the parties entered the deed Mr Harrison was on sick leave. He had tendered a medical certificate declaring him unfit to work from 19 November to 3 December 2007.

[7] Mr Harrison submits this sick leave certificate was superseded by the settlement agreement and that Mr Harrison was not unfit for work from 23 November. In support he relies on the following; that it was agreed Mr Harrison would return to work to perform limited duties, that he did so on Monday 26 November, that he was

available to perform duties as directed by the Board and cooperated with the direction of Geoff Mercer, the chair of the Board, who directed him not to attend the school on 26 November.

[8] Mr Robertson submits Mr Harrison was entitled to sick leave for the period commencing 19 November to his retirement and the Board had clear medical evidence that Mr Harrison was not medically fit to carry out his duties as principal. In support of this submission the Board relies on the 19 November medical certificate and the medical certificate tendered pursuant to clause 1 of the deed. Mr Robertson submits Mr Mercer was entitled to ask Mr Harrison to return home on 26 November given the medical evidence of his ill health and the arrangements entered to manage the school after his agreement to relinquish day to day responsibilities as principal.

[9] The starting point is the deed. The deed does not address the issue of sick leave. It says Mr Harrison will relinquish the principal's day to day duties and will agree to perform tasks set out in a schedule attached to the deed (cl 10). The deed does not describe the tasks as limited or ceremonial. I accept the schedule tasks do not represent a full time workload.

[10] The deed is silent as to how the schedule task hours, or the remaining contracted hours, are to be paid. It is implicit that Mr Harrison would not be receiving paid sick leave when he was carrying out work duties – he cannot be sick and working. It follows that the 19 November medical certificate would not apply to those duties.

[11] Is it reasonable to say the 19 November medical certificate stands for the remaining hours? In the absence of evidence this was the parties' intention no; that scenario would be too artificial.

[12] The Board seeks to rely on the second medical certificate to support the payment of sick leave. The deed provides that the purpose of the second medical certificate is to support an application for medical retirement. The second medical certificate is written in such terms. It is beyond its scope to say it is an application for sick leave for the remainder of Mr Harrison's employment with the Board.

[13] For these reasons I find Mr Harrison ought not to have been paid sick leave for the remainder of his employment with the Board, those payments should be treated as ordinary pay and any outstanding sick leave entitlement (which I accept is 21 days) paid in accordance with the provisions of the applicable CEA.

### **Experience payment**

[14] The relevant collective employment agreement<sup>1</sup> provides that from 28 January 2008 principals who have met the expressed criteria will receive additional remuneration of \$3000 per annum. The criteria are:

- 3 years current continuous service as a principal; and
- Recent successful appraisal by the Board, pursuant to part 4 of the agreement, which provides that the process and criteria of a general performance review will be developed in consultation with the principal and recorded in a Performance Agreement.

[15] Mr Harrison submits Mr Harrison is entitled to the experience payment because he meets the criteria – he had held the position of principal for three years and had recently received a successful appraisal from the Board (the agreed performance appraisal process for 2007 involved the Board delegating the appraisal to an external reviewer and accepting that appraisal if Mr Harrison had achieved professional standards, that appraisal was undertaken in May 2007 and confirmed Mr Harrison meet all professional standards) and the Board agreed in the deed to accept the performance appraisal (clause 11(d)).

[16] Mr Robertson advances two arguments in relation to this matter – that Mr Harrison is estopped from seeking to recover any contractual benefits additional to those agreed in the deed and, in the alternative, the appraisal process was not complete or was not successful.

[17] The estoppel argument does not succeed. Obligations arising from the employment agreement, not anticipated by the deed of settlement, are not restricted or curbed.

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<sup>1</sup> Secondary School Principals' collective agreement 2007 - 2010

[18] Does the acceptance of the external review complete the appraisal process? On its face that is not what the deed of settlement provides; I accept Mr Robertson's submission that clause 11(d) of the deed is neutral. However, if the parties have agreed, by way of the applicable performance agreement, that acceptance of the external reviewer's appraisal completes the appraisal process then that informs clause 11(d) and the parties are bound by that agreement.

[19] If the parties are unable to resolve this issue themselves then leave is reserved for further evidence to be provided concerning the performance agreement and its application to the external reviewer's appraisal.

### **Interest**

[20] Mr Harrison's claim in relation to sick leave is successful. He has been unfairly deprived of monies due and owing under his employment agreement.

[21] Interest should be calculated on that sum from due date (Mr Harrison's final day of employment) until date of determination at today's 90-day bill rate (2.7%) plus 2%: schedule 2 clause 11 Employment Relations Act 2000.

### **Penalty**

[22] I accept a genuine dispute existed between the parties as to the obligations under the deed of settlement. The penalty application is declined.

### **Costs**

[23] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority