

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 81
5460369

BETWEEN NEVILLE SAWYER
Applicant

AND THE BOARD OF TRUSTEES
OF TAUPO-NUI-A-TIA
COLLEGE
Respondent

Member of Authority: Vicki Campbell

Representatives: Glenys Steele for Applicant
Gretchen Stone for Respondent

Investigation Meeting: 12 February 2015

Determination: 20 March 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Sawyer was not disadvantaged in his employment.**
- B. Mr Sawyer was not constructively dismissed by the Board of Trustees of Taupo-Nui-A-Tia College.**
- C. The parties are directed to attempt to resolve the arrears of wages claim. In the event that no agreement is reached leave is reserved to allow the parties to return to the Authority.**
- D. The counter-claim by the Board of Trustees of Taupo-Nui-A-Tia College against Mr Sawyer is dismissed.**
- E. Costs are reserved.**

Employment relationship problem

[1] Mr Neville Sawyer says that during his employment one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of his employer, Board of Trustees of Taupo-Nui-A-Tia College (the College) and he was then unjustifiably constructively dismissed. Mr Sawyer seeks remedies including lost wages and compensation for distress and humiliation. Mr Sawyer also says he has not received the full amount of wages owed to him for work completed in 2012.

[2] The claims are denied by the College. The College counter-claims against Mr Sawyer alleging he breached his duty of good faith by secretly recording a meeting on 2 September 2013 and seeks a penalty.

[3] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Sawyer and the College but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[4] The College is a Decile 6 co-educational school with approximately 1,000 students.

[5] Mr Sawyer was employed by the College as a relieving teacher in 2012 and 2013. The terms of his employment were set out in the Secondary Teachers Collective Agreement (STCA).

[6] As a reliever Mr Sawyer was employed to cover the absences of permanent teaching staff, primarily in the Maths Department. Relief teachers are called upon either on an ad hoc basis to cover illnesses, or for longer periods when permanent teachers have planned or unplanned absences.

[7] In 2013 Mr Sawyer provided teaching services to the College as required. In Term One of 2013 Mr Sawyer provided cover for four maths classes, including a Year 10 maths class (10MA2), while a teacher was on leave. From the beginning of Term Two Mr Sawyer was to continue to cover only 10MA2, but that cover would continue

until the end of the 2013 teaching year. 10MA2 was one of two top streaming maths classes provided to Year 10 students at the school.

[8] Mr Sawyer was absent due to an operation from Easter 2013 until he returned to his relieving position in early June 2013. During his absence 10MA2 was taught by another teacher. Prior to him commencing his period of leave Mr Sawyer met with the teacher and discussed with her the areas to be covered by her teaching in his absence.

[9] On his return Mr Sawyer had the students in 10MA2 undertake a maths test. Only two students passed the test. Mr Sawyer implemented some remedial work before retesting the students at which time the majority of the students passed.

[10] In Term Three of 2013 Mr Sawyer was relief teacher for a Year 11 maths class. Mr Bruce Forsyth, Deputy Principal, had to deal with concerns about students not attending classes and Mr Sawyer not managing the class well. Mr Forsyth offered Mr Sawyer the opportunity to swap that class with another teacher. Mr Sawyer was happy with that result and the swap of teachers was successful for the students.

[11] On 18 June 2013 and 20 and 28 August 2013 the College received three parent complaints about Mr Sawyer's teaching of Maths to their children. The concerns were about the number of assessments of the children and dissatisfaction with the amount of learning they seemed to be having in their class.

[12] Mr Sawyer met with Mr Moyle, Principal of the College, on 2 September 2013. During that meeting Mr Moyle, as well as assuring Mr Sawyer that his teaching was not in question, suggested that Mr Sawyer stand aside from teaching 10MA2 with a promise by Mr Moyle that he would not be disadvantaged financially if he did so. Mr Sawyer initially agreed with the proposal subject to him discussing it with his wife. In the meantime Mr Moyle was to seek clarification on the treatment of holiday pay for Mr Sawyer during the Christmas/New Year break.

[13] Unbeknown to Mr Moyle, Mr Sawyer secretly recorded the discussion. The recording together with a transcript of the recording has been provided to the Authority.

[14] On 4 September 2013 Mr Sawyer advised Mr Moyle that on reflection, he would not accept the proposal and asked whether the matter would be treated as a disciplinary or performance issue.

[15] Mr Sawyer proceeded on a period of sick leave on 4 September 2013 with a proposed return to work date of 21 October 2013. As events transpired, Mr Sawyer did not in fact return to work.

[16] On 9 September 2013, Mr Moyle responded to Mr Sawyer's 4 September 2013 letter and advised Mr Sawyer that the complaints would be investigated and formal disciplinary procedures would be instigated. Mr Moyle advised that he would outline the allegations in writing so that Mr Sawyer could respond and notified Mr Sawyer that termination of his employment was a possibility if there was a finding of serious misconduct.

[17] Mr Moyle suggested it would be best for Mr Sawyer to be transferred to other duties while the investigation was undertaken. Mr Moyle offered Mr Sawyer an opportunity to provide feedback on that suggestion before a final decision was made.

[18] Mr Sawyer responded to Mr Moyle's 9 September 2013 letter on 14 October 2013. Mr Sawyer set out why he did not believe the promise made on 2 September 2013 that he would not be disadvantaged financially if he was undertaking different duties, was viable. At the same time Mr Sawyer advised Mr Moyle that he had been cleared to return to work and would do so on 21 October 2013 and that he expected to return to teaching class 10MA2.

[19] On 17 October 2013 Mr Moyle confirmed he would plan for Mr Sawyer's return to school. At the same time Mr Moyle indicated he had worked through the concerns raised by the parents and identified the issues as being:

Limited number of assessments had been covered in comparison with the other Year 10 class working at a similar level;

Students struggled to understand a lot of the concepts taught and there did not appear to be any coherence in what was taught;

The relationship between the teacher and the students in the class appears to have broken down to the extent that it hindered the progress of the class as a whole.

[20] Mr Moyle advised Mr Sawyer that he was prepared to give Mr Sawyer a reasonable opportunity to remedy the matters identified over the remaining eight weeks of Term Four. Mr Moyle advised that Ms Lesley Purdon would teach 10MA2 with Mr Sawyer supporting her in a team teaching situation. It was envisaged that Ms Purdon would be in charge of the class and the lesson content, and Mr Sawyer would act in a supporting role. The proposed disciplinary process had been abandoned by the College, with Mr Moyle instead focussing on providing support to deal with competence issues.

[21] As well as the supporting structure proposed, Mr Moyle advised Mr Sawyer the opportunities would be provided to him to work with and observe a range of maths teachers as well as providing any appropriate professional development. Mr Moyle advised Mr Sawyer that at the end of the eight weeks an assessment would be made as to whether Mr Sawyer had remedied the cause of the concerns.

[22] Mr Sawyer did not return to work on 21 October 2013. On the day he was to have returned Mr Sawyer wrote to Mr Moyle and set out a response to the issues set out by Mr Moyle in his 17 October 2013 letter and requested a meeting for 24 October 2013. Mr Sawyer expressed his confusion about the apparent about face from the notification on 2 September 2013 that Mr Moyle did not question Mr Sawyer's ability as a teacher, then the notification on 9 September 2013 that Mr Moyle was considering disciplinary action which may have resulted in the termination of his employment, to the current situation which appeared to be related to his competency as a teacher. Mr Sawyer advised Mr Moyle that his expectations that he [Mr Sawyer] would sit in a classroom while some else did his job would be humiliating.

[23] The parties met on 24 October 2013 at which time Mr Sawyer was represented by his Union organiser Mr Bill Anderson. During the meeting Mr Sawyer provided a list of conditions which he required of the College to assist him to return to his role including a request for a meeting to clarify teaching and learning issues. The list of conditions became the sole focus of the meeting and it was agreed to meet again on 31 October 2013 to allow the parent and student concerns to be discussed more fully.

[24] On 30 October 2013 Mr Moyle wrote to Mr Anderson setting out responses to each of the 12 conditions raised at the meeting on 24 October. Included in this response was Mr Moyle's confirmation that the suggestion that someone else teach 10MA2 while Mr Sawyer observed had been modified to providing for a support person being in the room while Mr Sawyer taught the class. Mr Moyle advised that this would be important to alleviate the possibility that Mr Sawyer would return to a disruptive class, which may have adverse consequences on Mr Sawyer's health. Having the support person would also provide a professional development opportunity for Mr Sawyer as he could observe different approaches to teaching the class. As Mr Sawyer had not yet returned to work following his period of sick leave Mr Moyle requested a further medical certificate to cover the extended absence from 22 October 2013.

[25] Mr Sawyer was not happy with the response from Mr Moyle, in particular he was not happy with the idea that a support person would be present in his class room. This unhappiness is at odds with the request by Mr Anderson at the meeting on 24 October 2013 that support and guidance should be put in place for Mr Sawyer.

[26] The meeting planned for 31 October 2013 did not take place as Mr Sawyer did not wish for the meeting to proceed and instructed Mr Anderson accordingly.

[27] Despite invitations to Mr Sawyer to meet and/or attend mediation to resolve the matters between him and the College, no agreement on a return to work was achieved.

[28] On 25 November 2013 Mr Sawyer raised a personal grievance for an unjustified action leading to his disadvantage claiming that Mr Moyle attempted to change the nature of the relationship making him a reliever instead of a fixed term employee and also raised a constructive dismissal claim on the basis that Mr Moyle's actions made it impossible for him to continue in his employment.

Relevant clauses from the Collective Agreement

[29] The STCA sets out clauses which assists principals to deal with performance and disciplinary matters. Of relevance to this matter are the following clauses:

3.3 Teacher Competence

Note: Refer to 4.2.4 and 3.5 of this agreement for additional guidance on the application of these provisions.

3.3.1 Questions of competence should be handled in a manner which seeks to protect the mana and dignity of the teacher concerned.

3.3.2 The employer shall provide reasonable opportunities for appropriate and effective professional development for all teachers.

3.3.3 (a) Where there are matters of competence which are causing concern in respect of any employee the employee concerned shall be advised as early as possible.

(b) The teacher shall be advised of her/his right to seek whanau, family, professional and/or Association support in relation to matters of competence and to be represented at any stage.

3.3.4 An appropriate assistance and personal guidance programme to assist that employee shall be put in place.

3.3.5 When that assistance and personal guidance has not remedied the situation, then:

(a) The teacher shall be advised in writing of the specific matter(s), in relation to the relevant section(s) of Supplement 1, causing concern and of the ways that such concerns can be remedied. The teacher shall be advised of her/his right to consult the Association and of the right to be represented by it at any stage of the process.

(b) The teacher is to be given a reasonable opportunity, normally 10 school weeks, to remedy the matter(s) of concern that have been identified. It is recognised that there may be circumstances where a timeframe of less or more than 10 school weeks will be reasonable. The teacher is to be advised of the actual timeframe for the necessary improvement to be achieved and of the monitoring or guidance that will be provided.

(c) At the end of this timeframe an assessment is made as to whether or not the teacher has remedied the matter(s) causing concern. The process and result of any evaluation is to be recorded in writing by the employer and sighted and signed by the teacher.

(d) No action shall be taken by the employer on a report until the teacher has had reasonable time to comment (in writing or orally) to the employer.

(e) If the teacher has failed to remedy the matter(s) causing concern then s/he may be dismissed without notice and paid one month's salary in lieu; or if a holder of units the teacher may be reduced in status and salary if the circumstances warrant such a reduction rather than a dismissal; or if appointed to a Community of Schools Teacher role under clause 4.22, 4.23 or 4.24, and the competency issues relate to that role, then the teacher may be removed from that role and lose the associated allowance if the circumstances warrant it rather than be dismissed from their substantive position.

3.3.6 A copy of any report to the New Zealand Teachers Council (or its successor) arising under clause 3.3.5 shall be made available to the teacher.

3.4 Teacher Conduct and Discipline

Note: Refer to 3.5 of this agreement for additional guidance on the application of these provisions.

3.4.1 Where a breach of discipline appears to have occurred, the employer shall determine whether disciplinary procedures should be initiated. Where the employer considers it appropriate it shall make initial enquiries to establish whether the disciplinary procedures should be initiated. In some cases, where the facts are clear and acknowledged, resolution may be achieved informally by discussion between the parties without the need for initiating the disciplinary procedures. Questions of conduct or discipline should be handled in a manner which as far as possible protects the mana and dignity of the teacher concerned. Teachers may seek whanau, family, professional and/or Association support in relation to such matters.

3.4.2 The teacher shall be informed of any allegation of breach of discipline and of her/his right to consult the Association and of the right to be represented by it at any stage.

3.4.3 Where an employer decides to initiate formal disciplinary procedures against a teacher, the following principles are to be observed:

(a) The employer or its agent shall advise the teacher in writing of the reason for the disciplinary procedures being initiated, invite the teacher to respond in writing, and advise the teacher of her/his right to request Association assistance and/or representation at any stage.

(b) Before any substantive disciplinary action is taken, an investigation must be undertaken by the employer. The teacher shall be invited to attend any such investigation and to make a statement concerning the matter either personally or through a representative.

(c) Notwithstanding 3.4.3(b) above if the employer is satisfied that the welfare and interests of any student attending the school or of any teacher at the school so requires the employer may at any time before the matter has finally been disposed of either:

(i) Suspend the teacher

(*Note: suspension would normally be on pay except in exceptional circumstances*); or

(ii) Transfer the teacher to other duties.

(d) Where a breach of discipline is held to have occurred, the employer shall not impose any penalty on the teacher without first:

(i) Giving the teacher the opportunity to make representations to it; and

(ii) Taking into account any period of suspension already imposed.

(e) In the case of a finding of serious misconduct the employer may dismiss the teacher without notice.

3.4.4 Where a teacher has been suspended, and subsequently a breach of discipline is held not to have been proved, the teacher shall, unless the teacher has already resigned, be entitled forthwith to resume teaching duties.

3.4.5 The following are examples of matters that may warrant disciplinary action. This is not an exhaustive list nor is it intended that every such matter listed here must always be treated as a disciplinary matter. Each case must be assessed on its individual merits.

(a) Disobedience of lawful orders or instructions.

(b) Negligence, carelessness or indolence in carrying out her/his duties as a teacher.

(c) Gross inefficiency as a teacher.

(d) Misuse or failure to take proper care of school property or equipment in her/his custody or charge.

(e) Absence from duty without valid excuse.

(f) Conduct in her/his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service.

Issues

[30] The issues to be determined are whether:

(a) Mr Sawyer was disadvantaged in his employment;

(b) Mr Sawyer was constructively dismissed;

(c) if the answer to either of the first two questions is yes, what if any, remedies should be awarded;

(d) Mr Sawyer is owed wages from 2012; and

- (d) the College should succeed with its counter-claim against Mr Sawyer.

Disadvantage

[31] Mr Sawyer claims the College has taken unjustified actions which affected one or more conditions of his employment to his disadvantage.

[32] The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[33] As highlighted by the Employment Court in its recent decision of *Edwards v The Board of Trustees of Bay of Islands College*¹ different standards of justification for disadvantage in employment are recognised not only in case law but also statutorily.² In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in s103A(3):

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[34] In addition to the factors described in s 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.³

[35] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the

¹ [2015] NZEmpC 6.

² Ibid at [10].

³ Employment Relations Act 2000, section 103A(5).

employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[36] As a full Court observed in *Angus v Ports of Auckland Ltd*⁴

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[37] Mr Sawyer raised a personal grievance on 25 November 2013. The grievance was that the College had attempted to change the nature of his relationship from being a fixed term employee to being a reliever. During the investigation of Mr Sawyer's application this grievance has not been pursued in the terms outlined in Mr Sawyer's letter.

[38] The statement of problem lodged in the Authority on 29 July 2014 did not contain sufficient information to advise the Authority of Mr Sawyer's claim regarding the disadvantage grievance and further particulars were requested. An amended statement of problem was lodged on 12 November 2014 which broadly alleged the actions giving rise to the disadvantage arose after June 2013.

[39] In his evidence Mr Sawyer alleged the following actions of the College led to his disadvantage:

- (a) the way it dealt with the complaints from the three parents disadvantaged him in that he had not been able to obtain any relieving work, either at the College or at the secondary school in Taupo, Tauhara College;
- (b) the lies told by Mr Moyle on 3 September 2013 that his ability in the classroom was not being questioned which was followed by proposed disciplinary action;
- (c) the 'win-win' solution proposed by Mr Moyle on 2 September 2013 disadvantaged him because he would have had to work 31.5 hours more to earn the same money;

⁴ [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

(d) being removed from the teaching roster on or about 4 September 2013.

[40] When questioned at the investigation meeting Mr Sawyer acknowledged that he has never raised any of the four matters listed above as a personal grievance to which the College could respond. In any event, I am satisfied that none of the four matters have disadvantaged Mr Sawyer in his employment for the following reasons.

[41] Mr Sawyer did have relieving work available to him at the College but he did not return to work due to his unhappiness at the way in which the College wished to address the performance concerns raised by the parents and students of class 10MA2. Mr Sawyer gave evidence that he had not received any relieving work from Tauhara College since 2012 because he was relieving at the College and it was perceived that because of this he had "*gone to the dark side*". Mr Sawyer had no expectations of being offered relieving work at Tauhara College while he was employed as a relieving teacher at the College.

[42] I find Mr Moyle did make assurances to Mr Sawyer that his teaching was not in question on 2 September 2013. Further, following Mr Sawyer's rejection of Mr Moyle's proposal to move him into other relieving duties Mr Moyle indicated that a formal disciplinary process was being considered. However, the formal disciplinary process was not put in place, instead Mr Moyle treated the complaints as competency issues. I find Mr Moyle remained open for suggestions on a way to allow Mr Sawyer to return to teaching 10MA2 but that no agreement could be reached as Mr Sawyer took matters into his own hands by resigning from his relieving position.

[43] The proposal by Mr Moyle on 2 September 2013 did not disadvantage Mr Sawyer because Mr Sawyer rejected the proposal and it was never acted on.

[44] I find Mr Sawyer's name was removed from the teaching roster because he was on sick leave and Ms Purdon took the class. For that reason it is her name which appears on the roster sheets. This did not mean that Mr Sawyer was removed as a relieving teacher.

[45] For the sake of completeness I have considered whether the College have attempted at any stage to change the nature of Mr Sawyer's employment. I am

satisfied Mr Sawyer was, for the duration of his employment, engaged as a permanent relief teacher. As a relief teacher Mr Sawyer could be offered and accept relieving appointments to as few as one class in a term to cover sickness, or as he did for Term Two of 2013, provide cover for a more prolonged absence and teach a class for more than one term.

[46] Mr Sawyer's claim for disadvantage does not succeed and I am unable to be of any further assistance to him in this regard.

Constructive dismissal

[47] Mr Sawyer says he was constructively dismissed as a result of the actions of the College when it acted in a way that was misleading, deceptive and dishonest when Mr Moyle made assertions in October 2013 that the conditions of his employment would be the same when he returned to work. Further, that the actions of the College were an injustice and he had done nothing wrong.

[48] In *Wellington etc Clerical Workers etc IUOW v Greenwich*⁵ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[49] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁶ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed.
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[50] There must also be a tendering of the resignation.⁷

[51] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*⁸ the Court of Appeal set out the correct approach to constructive dismissal:⁹

⁵ (1983) ERNZ Sel Cas 95; [1983] ACJ 965.

⁶ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA).

⁷ *Z v A* [1993] 2 ERNZ 469.

⁸ [1994] 1 ERNZ 168

⁹ *Ibid* at p 172.

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[52] I have concluded that Mr Sawyer's complaint falls into the third category set out in the *Woolworths (NZ) Ltd* case, in that the College is alleged to have breached a duty owed to him which has caused him to resign. It follows that the two relevant questions for the Authority are:

- (a) was there a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation; and
- (b) if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[53] Williamson J in *Wellington Clerical Workers IUOW v Greenwich* observed in describing this type of constructive dismissal:¹⁰

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[54] There is no dispute that by 25 November 2013 Mr Sawyer had decided that he would not return to work at the College. I am satisfied the letter of 25 November 2013 was notice to his employer that Mr Sawyer viewed the employment relationship at an end and that the letter constituted a resignation from his employment.

[55] The student and parent complaints about Mr Sawyer, and Mr Moyle's attempts to address them made Mr Sawyer unhappy. I am not satisfied however, that the way

¹⁰ *Supra* n5 at [975].

in which the College attempted to resolve the complaints was dismissive or repudiatory conduct.

[56] Mr Moyle attempted to enter into an agreement with Mr Sawyer on a similar basis as he had previously agreed when difficulties with student management had arisen. When that proposal was rejected Mr Moyle attempted to instigate a disciplinary process. That process was never taken through its intended course as Mr Moyle changed tack and attempted to address the complaints through the competency process set out in the collective agreement.

[57] Each time Mr Moyle and Mr Sawyer met, Mr Moyle listened to Mr Sawyer's submissions and the proposal for addressing the issues changed. The parties were to meet on 31 October 2013 to finally address the complaints and to discuss and agree on how Mr Sawyer would return to teaching his class. With no explanation Mr Sawyer cancelled the meeting and has taken no steps to engage any further with the College despite being cleared to return to work on 21 October 2013.

[58] The ongoing engagement by the College with Mr Sawyer and the attempts made to return him to teaching the 10MA2 maths course does not amount to a breach of duty or dismissive or repudiatory conduct, warranting a resignation from Mr Sawyer.

[59] Mr Sawyer has not established the first limb of the constructive dismissal test. For the sake of completeness I also find that even if there had been a breach of duty, Mr Sawyer's resignation was not reasonably foreseeable. The College had arranged a further meeting which Mr Sawyer cancelled. Attempts to reach agreement on Mr Sawyer's return to work continued until Mr Sawyer wrote claiming constructive dismissal on 25 November 2013. This notification came as a surprise to the College and was not anticipated.

[60] I find Mr Sawyer was not constructively dismissed and I am unable to be of further assistance to him.

Arrears of wages

[61] Mr Sawyer claims he did not receive the full payment of wages he was entitled to in 2012. It was common ground that at the beginning of 2013 Mr Sawyer raised with Mr Thompson his claim that he was owed outstanding wages from 2012.

[62] At the investigation meeting I advised the parties that this matter would not be determined as it required more extensive and clearer evidence than was currently before me. The parties are encouraged to attempt to resolve the matter between them. To assist this process the College should provide details of the actual teaching days Mr Sawyer worked during the period of his claim.

[63] If the parties are not able to resolve the matter leave is reserved to allow them to return to the Authority for a final determination.

Counter-claim

[64] The College claims Mr Sawyer breached his obligations of good faith when he secretly recorded a conversation between himself and Mr Moyle on 2 September 2013.

[65] The Court of Appeal has re-emphasised the importance of the requirements of good faith under section 4 of the Act, described as the “overarching duty of good faith”.¹¹ The duty of good faith requires parties to an employment relationship to, among other things, not to act in a way that will, or is likely to, mislead or deceive each other. This includes the obligation on both parties to be active and constructive in maintaining an employment relationship.

[66] Mr Sawyer secretly taped the conversation he had with Mr Moyle. Mr Sawyer did not disclose the existence of the recording until after these proceedings had been commenced in the Authority.

[67] In a decision made by the Court of Appeal under the Employment Contracts Act 1991, the Court of Appeal held that there may be cases where secretly recording a conversation constitutes a breach of the duty of fair dealing.¹² Following the Court of Appeal’s approach I have considered that it was not intended for the discussion between Mr Moyle and Mr Sawyer to be confidential or off the record and the recording was not so different from agreed note taking as to warrant a conclusion that it was unfairly obtained.

¹¹ *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

¹² *Talbot v Air New Zealand* [1996] 1 NZLR 414, (1996) 5 NZELC 98,381, [\[1995\] 2 ERNZ 356](#) pages 368 – 370.

[68] Even if the recording was a breach of Mr Sawyer's obligations of good faith, I am satisfied that a penalty is not warranted in this matter. To warrant a penalty I must be satisfied Mr Sawyer's actions were deliberate, serious and sustained. I am not satisfied Mr Sawyer's actions were serious or sustained.

[69] The counter-claim by the Board of Taupo-Nui-A-Tia College against Mr Sawyer is dismissed.

Costs

[70] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Board of Taupo-Nui-A-Tia College shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Sawyer shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority