

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 291  
3157126

BETWEEN	HARI SHANKAR Applicant
AND	EVOLVE EDUCATION GROUP LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Ben Nettleton, counsel for the Respondent
Investigation:	On the papers
Determination:	1 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Evolve Education Group Limited (Evolve) has asked the Authority to dismiss an application from Hari Shankar without investigating his claim. Mr Shankar's application says Evolve breached a term of a settlement agreement with him and for which he wants the Authority to impose a penalty on Evolve. Evolve has responded by saying Mr Shankar's application has been made for an improper purpose and the Authority should use its power to dismiss it as a matter that is considered to be frivolous or vexatious.

[2] With the parties' agreement Evolve's application for dismissal of the proceedings has been determined "on the papers". Those papers comprised Mr Shankar's statement of problem (lodged on 24 November 2021), Evolve's statement in reply (lodged on 9 December 2021), a memorandum from Evolve's counsel (lodged on 8 April 2022), a response from Mr Shankar by email on 4 May 2021 and a further memorandum of Evolve counsel (lodged on 10 May 2022). I have also read the

documents from both parties lodged in an earlier matter where Mr Shankar had applied for investigation of a personal grievance for unjustified dismissal. The earlier matter provided context to the settlement agreement referred to in his current application.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all submissions received but states necessary points of fact and law and expresses a conclusion on Evolve's request.

### **How the issue arose**

[4] In March 2020 Mr Shankar applied to the Authority for investigation of a personal grievance he said arose over how his employment with Evolve came to end in November 2019. Evolve's statement in reply to that application denied Mr Shankar had any grounds for a grievance of unjustified dismissal, saying instead that he had resigned on 8 November 2019.

[5] The parties were referred to mediation. In mediation they agreed terms of settlement to Mr Shankar's employment relationship problem. Those terms were recorded in a settlement agreement then certified on 12 May 2020 by a Ministry of Business employment mediator under s 149 of the Act. The certification confirmed the parties had been made aware that the agreed terms were final, binding and enforceable and could not be brought before the Authority except for enforcement purposes. The certification process also confirmed that they understood the terms of settlement could not be cancelled and that a person who breached an agreed term of settlement was liable to a penalty imposed by the Authority.

[6] The terms of that certified agreement included one stating those terms and all matters discussed in mediation were to remain, as far as the law allowed, confidential to the parties. For the purposes of this determination, however, it is necessary to disclose two of the terms – firstly, Mr Shankar agreed to withdraw his grievance application (which he did) and, secondly, the parties agreed their terms were “a full and final settlement of all matters between the parties arising out of their employment relationship”.

[7] It is the scope of the fullness and finality of the settlement that is now at issue between the parties.

[8] In his November 2021 application to the Authority Mr Shankar said Evolve had breached the finality clause by pursuing a further Police complaint against him. The company's complaint alleged he had engaged in fraudulent activity during the time he was employed by Evolve. He said this allegation had been raised with him before the settlement agreement certified in May 2020 and was part of the full and final settlement of "all matters" that arose out of his employment relationship with Evolve.

[9] He asked for a penalty to be imposed on Evolve for the alleged breach.

[10] In its reply, lodged on 9 December 2021, Evolve said it had informed Police of concerns "as to possible fraud during its investigations and has continued to assist the Police with their inquiries". It said the Police had laid charges against Mr Shankar and the criminal proceeding was ongoing.

[11] Evolve said it considered Mr Shankar's claim alleging a breach of the settlement agreement was really made for the improper purpose of getting Evolve to stop cooperating with the criminal proceedings pursued by the Police. It said Mr Shankar's application should be dismissed as "vexatious" because using the finality term in the settlement agreement to "to stifle prosecutions" would be contrary to public policy.

### **The power to dismiss a frivolous or vexatious claim**

[12] Under Schedule 2 of the Act the Authority has the following power:

#### **12A Power to dismiss frivolous or vexatious proceedings**

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[13] This power must be used in a principled manner, observing the Authority obligations to carry out its role of resolving employment relationship problems according to the substantial merits of the case, complying with principles of natural justice and generally furthering the objects of the Act.<sup>1</sup> Those objects include promoting good faith behaviour, use of mediation as the primary problem-solving

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<sup>1</sup> Employment Relations Act 2000, s 157.

mechanism and addressing the inherent inequality of power in employment relationships.<sup>2</sup>

[14] Consistent with the principles applied in exercise of similar powers by courts and tribunals elsewhere in the legal system, the Authority's power to dismiss proceedings as frivolous or vexatious has to be exercised sparingly and is reserved for clear cut cases.<sup>3</sup>

[15] For a claim or matter to be held to be "frivolous", there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously.<sup>4</sup>

[16] Useful questions to guide the Authority's assessment of whether a claim or matter is "vexatious" include:<sup>5</sup>

- (a) How should the fundamental right of access to justice be balanced with the desirability of freeing respondents from the burden of groundless proceedings?
- (b) Does the proceeding have a reasonable basis and has it been conducted reasonably?
- (c) Is the proceeding attempting to re-litigate issues already determined?
- (d) Does the applicant have an improper purpose in commencing the proceedings said to be vexatious?

### **Evolve's argument**

[17] Evolve's application for dismissal of Mr Shankar's proceedings relies, in essence, on the notion that he has really pursued this issue as a means of undermining or diverting criminal proceedings underway against him. It says this amounts to an improper purpose because, as a matter of public policy, a term of a settlement agreement should not be used to prevent allegations of what may be found to be criminal activity from being examined and decided in the appropriate court.

[18] For that reason, and further paraphrasing Evolve's argument, Mr Shankar's claim was also said to be frivolous because reliance on the finality clause was so lacking in legal merit that his claim could not possibly be taken seriously. It referred to a High Court decision about a private deed of settlement where the defendant agreed to pay

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<sup>2</sup> Employment Relations Act 2000, s 3.

<sup>3</sup> *Lumsden v Sky City Management Limited* [2015] NZEmpC 225 at [39].

<sup>4</sup> *Gapuzan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206 at [58].

<sup>5</sup> *Gapuzan*, above n 4, at [67] citing *Heenan v Attorney-General* [2011] NZCA 9, 200 at [22]-[25].

back funds his brother had misappropriated in return for the brother's former employer agreeing not to start any criminal or civil proceedings against the brother.<sup>6</sup> When the repayment plan went awry and the former employer issued proceedings to enforce the deed, the court found the agreement's term to "stifle prosecution" was illegal and unenforceable. It also found the term would not have prevented the former employer "informing the Police of the defalcations".<sup>7</sup>

[19] Evolve said Mr Shankar's true intention was apparent from a "resolution proposal" he sent the company in March 2022. His proposal referred to the criminal trial which, at that time, was scheduled for April 2022. He also attached a draft statement of claim raising claims of defamation against two Evolve personnel on various grounds, including what they had said about him in statements to the Police in October 2020 (some five months after the agreement settling his personal grievance was made).

[20] His proposal asked Evolve to consider resolving the matter "outside the judicial system" as that would save all parties stress, cost, time and public embarrassment. Evolve said Mr Shankar made that proposal in the misguided belief that he could negotiate with the company for settlement of a criminal proceeding. It said those prosecution decisions were made by the Crown Solicitor.

[21] Evolve said, with evidence on the point yet to be provided or examined, that its "engagement with Police" had pre-dated the May 2020 mediation and settlement agreement. Its subsequent involvement was only to co-operate, as it responsibly had to do, with an investigation and prosecution that the Police had decided to pursue and which was beyond Evolve's control or say so.

### **Mr Shankar's view**

[22] Mr Shankar said Evolve had raised the fraud allegation before the mediation. His personal grievance at that time had, in part, relied on a claim that Evolve had not given him relevant information that he asked for about that allegation before he resigned on 8 November 2019.

[23] On that basis he said the company was in breach of the term regarding full and

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<sup>6</sup> *Polymer Developments Group Ltd v Tiliato* [2002] 3 NZLR 258.

<sup>7</sup> *Polymer*, above n 6, at [97].

final settlement because it had known about that allegation but not specifically sought to exclude it from the scope of the settlement. He said the issue was not the criminal proceeding but that Evolve had “knowingly misled” him that all matters were resolved.

### **Analysis**

[24] Evolve’s submissions have not reached the high thresholds needed to have a matter deemed frivolous or vexatious.

[25] Mr Shankar’s claim is not so significantly lacking in legal merit that it is impossible to take seriously. This is not to say, however, that its merits or prospects for success are anywhere near certain. Rather, it has only a tenable cause of action in seeking to have the scope of what was agreed investigated and determined.

[26] While substantial public policy considerations would weigh against a term agreed for the purpose of inhibiting or interfering with the reporting and investigation of reasonably-made allegations of serious criminal offences, the case law on privately reached deeds of settlement made outside the employment jurisdiction may not apply as mechanically as Evolve suggested it would. This is for two reasons.

[27] Firstly, the provisions of s 149 of the Act do not create ordinary contracts between the parties in the employment jurisdiction. Rather they result in documents recording terms of settlement subject to specific statutory limits brought to the attention of the parties through the certification process. The resulting prohibition on cancellation of those terms or seeking their review also raises public policy considerations regarding certainty and finality which are not lightly set aside.

[28] Secondly, there are some factual aspects that may be relevant on a case-by-case basis as to whether supposed finality could be set aside for public policy reasons, such as not prohibiting disclosure of serious criminal activity. One example of that may be whether compliance with mandatory reporting requirements to external professional bodies, under other legislation, could properly be prevented by a full and final settlement of issues in the parties’ employment relationship. A different example is where a party knew of some unsatisfactory 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 complaint as a means of harrying or inconveniencing that 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.

[29] In Mr Shankar's case, the information is not sufficiently clear cut to say his application is frivolous or vexatious. An examination of the evidence may not be easy given Evolve's submission that it would rely on its privilege in the confidentiality of mediation to oppose Mr Shankar including any evidence about what was or was not raised in mediation. There is, however, some evidence about what was said between the parties before mediation which would be admissible for the purposes of assessing which might have been considered in agreeing the term on full and final settlement. Also relevant would be the timing and content of Evolve's contact with the Police about its concerns, before and after the mediation.

[30] Both parties should also understand, however, that the conclusion reached in this determination does not mean Mr Shankar's claim is accepted as being correct or likely to succeed. Neither does it preclude the possibility Evolve's submission that Mr Shankar is pursuing this claim for improper purposes will, once the evidence has been taken and submissions heard, be upheld. Rather, the conclusion reached is that his claim, at this stage, does not meet the criteria of being so clearly untenable that it cannot be taken seriously in any way and must be dismissed.

### **Outcome and next step**

[31] Evolve's application for Mr Shankar's claim to be dismissed as frivolous or vexatious is declined. If Mr Shankar still wishes the Authority to investigate his claim, the Authority will convene a case management conference to timetable necessary steps.

### **Costs**

[32] Costs are reserved.<sup>8</sup>

Robin Arthur  
Member of the Employment Relations Authority

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