IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

File Number: 5083586
Determination Number: WA 17/08

	BETWEEN	GREGG SMITH Applicant
	AND	DANNEVIRKE HIGH SCHOOL Respondent

Member of Authority:	James Crichton
Representatives:	David Balfour, Advocate for Applicant Christine Chilwell, Counsel for Respondent
Investigation Meeting:	24 September 2007 at Palmerston North and 6 November 2007 at Auckland
Determination:	14 February 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Smith) makes two claims against his former employer the respondent, Dannevirke High School (the High School). The first of Mr Smith's claims is that the High School procured Mr Smith's agreement to settle an employment relationship problem by dishonest practises and/or by bad faith. The second claim is that the High School breached the terms of the settlement agreement when its principal made a speech to the school prize giving ceremony in December 2006, breaking the confidentiality provision of the settlement agreement.

[2] The High School resists each of those claims and characterises the application made by Mr Smith as *vexatious litigation*.

[3] Mr Smith was employed by the High School down to 20 July 2006 when he resigned his employment. Three days before his resignation, on 17 July 2006, Mr Smith had filed a statement of problem in the Authority seeking a variety of orders and compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[4] A number of unsuccessful mediations followed and the matter proceeded to an investigation meeting on 7 November 2006 before Member Wood. During the course of the investigation meeting, and at Member Wood's initiative, the parties reached a settlement on all matters and that settlement was reduced to writing. The Authority subsequently issued a consent determination.

[5] Immediately prior to the investigation meeting, there had been further discussions between the parties in respect to possible settlement. Mr Smith had a new representative for the Authority investigation meeting and that new representative contacted the representative for the High School and settlement discussions resulted.

[6] It is what transpired during those settlement discussions that is in issue in relation to the first allegation made against the High School by Mr Smith, namely the contention that the High School had procured his agreement to settle matters by improper means.

[7] Mr Smith's evidence is that he was unaware of the circumstances giving rise to this first head of claim for some weeks after settlement. He told me that he had left New Zealand on 2 or 3 December 2006 to travel to the United States of America and that he did not return to New Zealand until early the next year. On his return to New Zealand he found in his mail a letter from the New Zealand Teachers' Council dated 6 December 2006 which advised of the Teachers' Council's receipt of a letter from the High School's principal reporting Mr Smith to the Council.

[8] The letter from the Teachers' Council makes clear that the High School was fulfilling its legal obligations under the Education Act and it explains the process that the Teachers' Council must adopt in matters of this kind. In essence, the Education Act requires schools to report to the Council the termination of employment of teachers in certain circumstances.

[9] Mr Smith's evidence is that he knew nothing of the report to the Teachers' Council by the High School and indeed had very little conception of what the Teachers' Council actually did.

[10] The essence of Mr Smith's claim under this head is that had he known that the High School was reporting him to the Teachers' Council he would not have settled or may not have settled on the same terms. He says that he was effectively tricked into settling when the High School would have known that the Teachers' Council matter

had to be important to him and yet he had no knowledge of it at the point that he committed to settlement.

[11] The High School sees matters differently. First, they point out that the obligation to report to the Teachers' Council is a statutory one and cannot be the subject of negotiation. They also contend that Mr Smith, as a professional teacher, must have known or at least ought to have known about his professional obligations to the Teachers' Council and therefore its involvement in the particular circumstances of his case cannot or should not have been a surprise.

[12] Next, the High School says that, in any event, the Teachers' Council matter had been the subject of extensive discussion and notification between the parties as the attempts to resolve the employment relationship problem continued. First, it seems common ground that the matter was discussed at mediation on 4 September 2006. It is important to note that Mr Single, who acted for Mr Smith in the Authority investigation meeting, was not then involved for Mr Smith and therefore not present at the 4 September 2006 mediation. Accordingly it could not be said that Mr Single heard the discussion about the Teachers' Council matter at that mediation, although Mr Smith was of course present. In addition, Mr Smith's then representative Mr Balfour was present at the mediation.

[13] Immediately after the mediation had concluded unsuccessfully, the High School and its advisers considered its statutory obligation in respect to the Teachers' Council. The High School had not at that point fulfilled that obligation by writing to the Teachers' Council. The High School considered that, given there would be no further mediation between the parties from that point down to the Authority's investigation meeting, and the Authority's investigation meeting was a public forum, it needed to fulfil its statutory obligations and notify the Teachers' Council. Accordingly, the High School wrote to the Teachers' Council by letter dated 26 October 2006. Mr Smith rather unkindly characterises the timing of this letter as being significant in that it was immediately prior to the Authority hearing. It would I think be more accurate, on the evidence I heard, to note that the letter was after the mediation process had been unsuccessfully concluded.

[14] On the day before the investigation meeting was to take place (6 November 2006), Ms McMorran, who was then acting for the High School, was advised that Mr Single would appear for Mr Smith in the Authority's investigation meeting. As I

have previously noted, Mr Single quite properly endeavoured to explore whether settlement might be achieved.

[15] There was initial telephone discussion between the two representatives; Ms McMorran says that in telephone discussion with Mr Single, she made it clear that the Teachers' Council had been advised by the High School. Mr Single says that no such advice was ever received by him.

[16] Next, there were a series of email exchanges between the two representatives. Ms McMorran sent to Mr Single a letter and two suggested settlement proposals. Mr Single responded that he preferred one of the options and critically said in his responding email that with *a bit of clarity in regard to the Teachers' Council we can get it together*.

[17] Ms McMorran then promptly responded to Mr Single confirming her earlier telephone advice to the effect that the High School had already written to the Teachers' Council.

[18] Mr Single said in his evidence before me that he did not receive Ms McMorran's responding email confirming that the Teachers' Council matter had already been dealt with. And of course, as I have already noted, Mr Single denied that he had ever been told the Teachers' Council had been advised when Ms McMorran had earlier spoken to him by telephone.

[19] The matter then proceeded to settlement in the usual way.

[20] The Dannevirke High School prize giving evening was held in Dannevirke on 14 December 2006. Mr Smith was overseas at the time, as I have already noted. At the prize giving, the High School's principal, Mr Tribe made his usual speech. Mr Smith claims that in that speech, Mr Tribe made observations which breached the confidentiality provisions of the settlement agreement between the parties.

[21] The High School says that the comments made by Mr Tribe do not offend the confidentiality provisions of the settlement agreement. Amongst other things, the High School says that Mr Smith was not named in the speech, nor was the settlement referred to in any way.

[22] The High School says that the *mere fact of the proceedings is not confidential*, but they readily acknowledge that *people would know that the remarks made by Mr Tribe in his speech were a reference to the proceedings Gregg Smith filed against the school*.

[23] Indeed, Mr Smith, in his oral evidence at my investigation meeting made clear that his objection was not to the particular words used, but to the fact that the matter was referred to at all. Mr Smith said in answer to a question from me: *my complaint is that he (Mr Tribe) said anything at all.*

[24] In Mr Smith's view, the settlement agreement said there was to be no further comment and yet the speech made by Mr Tribe was plainly *further comment.*

[25] Mr Smith draws attention to the fact that he continues to live in the community and the further reference to the dispute between himself and the High School simply exacerbated the feelings of hurt and humiliation which he had felt in respect to the original collapse of his employment relationship.

[26] Having returned to New Zealand to find these two issues still, in his terms, on foot, Mr Smith sought advice and brought the present proceedings.

Issues

[27] It would be convenient to consider each of the complaints made by Mr Smith, separately.

The Teachers' Council issue

[28] I am satisfied on the balance of probabilities that Mr Smith's then advocate Mr Single was told about the Teachers' Council having been advised by the High School, prior to the settlement agreement being entered into.

[29] In essence, Ms McMorran's evidence is that she told Mr Single that the reporting letter to the Teachers' Council had already been sent and that she did that both verbally (by telephone) and in writing in a brief email exchange immediately before the investigation meeting at which settlement was achieved.

[30] Mr Single's evidence is that he did not receive the email which Ms McMorran sent which states unequivocally that the reporting letter to the Teachers' Council had

already gone, and Mr Single's evidence on the verbal communications between the representatives was that they discussed the **need** for the letter to be sent and what might be in it, but not the fact that it had already been sent.

[31] In essence, the Authority must make a choice as to which recollection of events is to be preferred. For reasons which I will now enunciate, I prefer Ms McMorran's recollection of events although I certainly would not wish to be understood as in any way impugning Mr Single's integrity. I have no reason to think that Mr Single was being economical with his evidence; simply that his recollection of events was less accurate than Ms McMorran's.

[32] The first relevant piece of information is the acceptance by both parties that the issue of the reporting to the Teachers' Council was discussed at the mediation on 4 September 2007. The letter had not been sent at that point. Mr Single was not present at the mediation; Mr Balfour was then acting for Mr Smith. However, the fact that the matter was, by common consent, discussed at the mediation ought to have put all parties on notice that the Teachers' Council issue was a matter that needed to be addressed in any resolution of the employment relationship problem between the parties.

[33] Next, as I have already indicated, the High School decided that given that the prospect of further confidential settlement discussions seemed remote and the matter was proceeding to an open forum, namely the investigation meeting in front of the Authority, the High School determined to fulfil its statutory obligations and it did this by letter dated 26 October 2006.

[34] When Mr Single took over from Mr Balfour as Mr Smith's advocate, he immediately engaged with Ms McMorran who was then acting for the High School, with a view to resolving matters by agreement. There was a telephone discussion between the representatives. Both remember such a discussion. Ms McMorran was very clear in her evidence that she raised the issue of the Teachers' Council matter with Mr Single and that she was explicit in telling him that the letter had been sent. Conversely, Mr Single, while remembering there was a conversation on the telephone, told me he understood from the conversation that the High School *had an obligation to advise the Teachers' Council but not that it had actually done so*.

[35] While it is conceivable that Ms McMorran gave Mr Single the message that Mr Single recalls receiving, it seems to me much more likely that Ms McMorran would have been explicit with Mr Single given that this would have been her first contact with him in relation to this file and the discussion would have been very much at the eleventh hour – literally the day before the investigation meeting in the Authority. Given that Ms McMorran is an experienced advocate, it seems to me most unlikely that she would have conveyed the wrong information in this early exchange, particularly when the letter to the Teachers' Council had been sent so recently. It would have been very fresh in her mind and it seems quite inconceivable to me that she would have, as it were, transmitted the wrong message.

[36] Next, I am influenced by the email exchange between the two advocates which also took place on 6 November 2006, the day before the investigation meeting. Ms McMorran sent Mr Single a covering letter with two settlement options. Significantly, Mr Single responded with an email in which he indicates a preference for one of the options and has this to say in relation to the Teachers' Council: (with) *a bit of clarity in regard to the Teachers' Council we can get it together ….*

[37] Clearly the issue of the Teachers' Council resonated for both the advocates and in this email, Mr Single is seeking clarity about the position. Those words could be taken to support Ms McMorran's recollection that she had already told Mr Single that the Teachers' Council letter had been sent, and Mr Single wanted that recorded. Or, it could be taken to support Mr Single's view that he understood that the Teachers' Council matter was an issue, but needed to be clear exactly what the High School's obligations were before matters could be concluded.

[38] Either way, I think it important to note that both the advocates were talking about the Teachers' Council issue as being an important one for them both. I think it reasonable to draw the conclusion that given Mr Single had raised the matter, and raised it in circumstances where it plainly was important to him, one would have expected that he, as an experienced advocate himself, would have followed the matter up if he was unsure or dissatisfied with the response.

[39] What happened next, according to Ms McMorran was that she immediately sent back a response to Mr Single in an email sent four minutes after Mr Single's email in which she says:

> *… as I indicated on the phone the Board (ie the Board of Trustees of the High School) has already written to the Teachers' Council advising of Gregg Smith's resignation but has given no recommendation as to any consequences. In other words the school would not prevent him becoming a registered teacher.*

[40] Mr Single is adamant that he never received that email and Ms McMorran is equally adamant that she sent it. Plainly, if Mr Single had received that email and that fact could be proved on the balance of probabilities, then the matter is free from doubt.

[41] I am satisfied that Ms McMorran sent the email. I made that clear to the parties at the investigation meeting; I am not persuaded that it would be helpful to engage in detailed forensic computer inquiries to try to demonstrate the veracity or otherwise of the witness's statements. It seems to me the short point is that the email was sent, but Mr Single says that he has no recollection of having received it.

[42] Mr Single says that, had he received the email in question, he would have given Mr Smith different advice as to settlement.

[43] Be that as it may, I am satisfied on the balance of probabilities that Ms McMorran's evidence on this point is to be preferred. I am satisfied she sent the email, and I am at a loss to understand why Mr Single would not have received it. I think the difficulty though for Mr Single is that it is not just this email that is in question. Mr Single also does not recall the evidence of the phone conversation in the same way that Ms McMorran does, and most important of all from my perspective, Mr Single himself refers to the Teachers' Council matter in his email response to Ms McMorran's two proposals. It is absolutely evident from that email of Mr Single that the Teachers' Council issue is an important one for him. That being the position, if he did not get a satisfactory answer or, on his evidence no answer at all, why did he not follow it up?

[44] For all these reasons then, I am persuaded that Ms McMorran's recollection of these events is to be preferred and that the fact of a reference to the Teachers' Council by the High School was made clear to Mr Smith's advocate Mr Single both by telephone from Ms McMorran and subsequently by email.

[45] I should say that for the sake of completeness, I am not persuaded by the High School's argument that Mr Smith knew or ought to have known that the High School had a statutory obligation to notify the Teachers' Council in the circumstances in which

Mr Smith found himself; it was manifestly clear from Mr Smith's own evidence that he had not the faintest idea what the Teachers' Council did, or the obligations that the High School had in respect to notification to the Teachers' Council, in certain circumstances. That being the position, I think it unwise of the High School to seek to rely on an assumption that a member of its teaching staff (or a former member for that matter) would necessarily understand the significance of the employer's legal obligations. I think in those circumstances, the employer has a positive obligation to communicate (as I have found they did in this particular case).

The alleged breach of the settlement agreement

[46] As I have already made clear, on 14 December 2006 at the High School's prize giving, Mr Tribe the High School's principal made a speech in which he referred obliquely to the issues between the High School and Mr Smith. I have already referred to the issue in some detail earlier in this determination.

[47] I think Mr Tribe's observations about the matter were ill-advised. I agree with Mr Smith that the fact of Mr Tribe referring to the issue at all was a breach of clause 8 of the settlement agreement which provides *inter alia* that :

> *No additional comment shall be made beyond the scope of the agreed statement.*

[48] The High School acknowledges in its statement in reply that it would be common knowledge that it was Mr Smith and his issues that were being referred to obliquely by Mr Tribe when he made the comments that he did.

[49] I note that Mr Rhodes, who was at the relevant time Chair of the High School's Board of Trustees and who gave evidence at my investigation meeting, told me that he *would have preferred nothing to be said*. As I say, I agree with that view. However, Mr Rhodes went on to say that it seemed to the High School that Mr Smith was himself breaching the agreement by making information available to the news media.

[50] With the exception of a letter which Mr Smith wrote to the newspaper to clarify matters to do with his issues, there is no evidence before the Authority that Mr Smith provided any comment to the news media or any documents to the news media **after** he executed the settlement agreement. The exception is the letter of clarification which Mr Smith claimed referred, not to his employment relationship problem, but to his Human Rights Commission claim.

[51] I think both Mr Smith's letter and Mr Tribe's speech reference are ill-advised and in principle it seems to me both breach the settlement agreement, the terms of which are clear.

[52] In those circumstances, if I were minded to consider the matter in terms of clause 9 of the settlement agreement which purports to impose a $5,000 penalty on any party breaching the confidentiality provision, given the factual findings I have made, a penalty might be imposed on each party.

[53] I do not think that approach is either necessary or sensible. In my opinion, and leaving aside entirely the High School's argument that it is not available to enforce clause 9 of the settlement agreement, the better view is that the breaches by each party in effect balance each other out and in any event are not activated by bad faith or malice. The substantial benefits to each party to having the employment relationship problem resolved and disposed of must militate against any suggestion that the agreement between the parties be set aside or varied in any way.

Determination

[54] Mr Smith's claim that the High School has failed to deal fairly and honourably with him in respect to the settlement of his employment relationship problem has not been made out.

[55] However, I am persuaded that in making oblique references to the employment relationship problem, the High School breached the settlement agreement through Mr Tribe's speech at the December 2006 prize giving. Set against that however is my considered view that Mr Smith himself breached the settlement agreement by his letter of 11 November 2006 to Hawke's Bay Today, notwithstanding Mr Smith's contention that those observations were in relation to his Human Rights Commission claim rather than his employment relationship problem.

[56] It follows that, in the circumstances as I find them, no penalty ought to apply against either party.

[57] Mr Smith's claim therefore fails under both heads.

Costs

[58] I think this is one of those unusual cases where, the normal principles in relation to the matter of costs can be varied, and I intend to make the direction that in this matter, costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority