A QUIET WORD

A recent decision by the Employment Court will hopefully encourage parties to settle employment disputes amicably, says Paul Robertson. He looks at the case and at a decision over the identity of the employer in the education sector.

MANY EMPLOYMENT DISPUTES are not resolved by the mediation service of the MBIE or by decisions of the Employment Relations Authority. Instead the parties, often with assistance from their union representative or a lawyer, confidentially negotiate a settlement.

Where allegations of misconduct are made, the settlement can include the employee resigning rather than facing disciplinary action. 'Off the record' discussions are held leading to an agreed outcome. However, just quite how 'off the record' are those discussions? Can they be discussed at a later Authority or Employment Court hearing?

This important issue was recently considered by the Chief Judge of the Employment Court.

Back at the Employment Court ...

'Off the record' discussions are technically known as discussions held 'without prejudice'. The parties' representatives agree that the discussions are to be held without prejudice so they can freely talk without the discussions being referred to later.

In *Morgan v Whanganui College Board of Trustees* [2013], a teacher faced dismissal following an allegation that he had inappropriately restrained a student.

The Board of Trustees took the allegations very seriously. It formed the view that the teacher's actions amounted to serious misconduct that would justify dismissal. There was a discussion held between the representative of the board and the representative of the teacher where, allegedly, the board representative asked whether the teacher wished to end his teaching career as a person dismissed for serious misconduct, or whether he would prefer to tender his resignation.

There was a discussion about compensation being paid to the teacher to encourage him to resign. The discussion was followed by email correspondence of the same ilk.

Rather than resigning, the teacher chose to fight the allegations.

Following a disciplinary process he was dismissed for serious misconduct. He challenged the dismissal and part of his case was that the discussion between the representatives should be referred to in evidence so it could be considered by the Authority.

The board argued that such without prejudice discussions should and could not be relied upon. The issue was referred to the Employment Court to resolve.

No dispute

Without prejudice discussions usually follow on from a dispute between the parties. The teacher argued that there was no dispute at the time of the discussion because he had not yet been dismissed, and for that reason the discussions could not be viewed as being without prejudice.

The Employment Court held that the word "dispute" should be read widely; it was enough that there was a problem in the employment relationship.

Secondly, the representatives had wanted to speak in confidence. The teacher's representative was exploring options short of dismissal. It was inevitable that in the course of such 'off the record' discussions either side would make concessions that they would not want to be held to in subsequent litigation.

The Court referred to the potential disadvantages in agreeing to the discussions being held without prejudice.

"These included, if no resolution was able to be reached, the inability to expose a concession made, a weakness acknowledged, or anything else that was said for the purpose of obtaining a settlement ..."

In spite of these downsides, the Court emphasised the benefits.

"[47] Such discussions are a long standing, important and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions frequently and much litigation, or potential litigation, is resolved or narrowed in scope by frank exchanges that are 'off the record'. It is in the broader public interest that such practices be allowed to continue in the safe knowledge that the fact of them, and in particular their contents will (except in some extraordinary circumstances) not be disclosed to the Authority or the Court subsequently."

Blackmail, unconscionable conduct

The teacher then alleged that the discussions involved threats designed to put improper pressure on him to resign or to face dismissal for serious misconduct.

The Court accepted that the without prejudice rule cannot be used "...as a cloak for perjury, blackmail or other unambiguous impropriety". However, the discussions between the representatives could not be read as blackmail or evidence of unambiguous impropriety. That was because the "threat" to report the matter to the Teacher's Council was something that the board was obliged by statute to do. It was not evidence of impropriety, nor was it misleading or in bad faith.

The result

The Court upheld the without prejudice status of the conversations and emails. It confirmed that there was no magic label to be used by the representatives to cloak their discussions in confidentiality; it is enough to say "can we speak off the record "or "can we speak confidentially".

Such discussions are not in absolute confidence because they are relayed to the clients, but beyond that, apart from exceptional situations, discussions cannot be referred to later in Court or in the Employment Relations Authority.

This sensible decision of the Employment Court will, hopefully, encourage parties to continue to settle their disputes amicably without the need to litigate.

Who is the employer?

On a different matter, board of trustee elections were held early this year. The newly elected members may be surprised to find that for many employment related issues, their hands are tied. They are required to implement decisions made by the Secretary of Education.

A recent dispute between a union representing teachers and the Secretary has led to a Court of Appeal decision over the identity of the employer in the education sector.

The decision in *Secretary of Education v NZEI* [2013] concerns pay parity. The Primary Teachers Collective Agreement requires the Secretary to ensure parity in the employment conditions of teachers in state and state integrated schools. The Secretary is required, for instance, to notify the NZEI of changes to the collective agreements for teachers employed under different collective agreements and to consult with the NZEI. The NZEI alleged the Secretary had not fulfilled her obligations and sought declarations and compliance orders from the Employment Relations Authority.

The Secretary said that the Boards of Trustees involved need to be joined as parties because they were the true employers. She proposed that if the Authority found the boards to be liable, she would indemnify them. The issue of whether the Secretary was correctly named as the respondent was referred first to the Employment Court and then to the Court of Appeal.

The Ministry argued that based on the definitions in the Employment Relations Act 2000, there was no employment relationship between the NZEI and the Secretary.

The Secretary argued that she steps into the employer's shoes for the purpose of negotiating collective agreements, but once the agreement has been ratified, the Secretary steps back and Boards of Trustees assume full responsibility as the employer. The Court took a more expansive view of the definitions in the Act and dismissed this submission.

The Secretary was also found to be bound by the terms of the collective agreement she had agreed with Board representatives (ie, the New Zealand School Trustees Association).

For these reasons the Court held that the NZEI had correctly named the Secretary of Education as the sole respondent in the Authority hearing into the alleged breaches of the collective agreement. et

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