IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 153
ARC 92/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out the proceeding
AND IN THE MATTER	of an application for leave to raise a personal grievance out of time
BETWEEN	CHRISTOPHER SCOTT ROY Plaintiff
AND	BOARD OF TRUSTEES OF TAMAKI COLLEGE Defendant

Hearing: 22 July 2014
(Heard at Auckland)

Appearances: Plaintiff in person
RM Harrison, counsel for defendant

Judgment: 20 August 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff did not raise his personal grievance of unjustified constructive dismissal with the defendant during the period of 90 days after 11 October 2010.

B The plaintiff has leave to raise his personal grievance of unjustified constructive dismissal pursuant to s 114(3) and (4) of the Employment Relations Act 2000.

C Pursuant to s 114(5) of the Employment Relations Act 2000 the parties are directed to use mediation to seek to resolve the grievance by mutual agreement.

D There will be no orders for costs between the parties to this point.

REASONS

[1] There are now two preliminary jurisdictional issues to be decided before Christopher Roy's challenge to a determination[1] of the Employment Relations Authority can progress.

[2] Until a few weeks ago the defendant contended that, having chosen to make a complaint under the Human Rights Act 1993, Mr Roy could not subsequently in law bring a personal grievance in reliance on the same conduct by his employer as formed the basis of his Human Rights Act complaint. This argument relied on s 112(4) of the Employment Relations Act 2000 (the Act). The defendant now accepts that the subject matter of his grievance is not the same as that of his human rights complaint. Nothing more needs to be said on this matter in these circumstances.

[3] However, even if Mr Roy is not precluded in this way from bringing a personal grievance, the defendant contends that he failed to raise his grievance with his employer within 90 days of his resignation, which he characterises as an unjustified constructive dismissal. Mr Roy says that he did raise his grievance in time but has also applied under s 114(3) of the Act for leave to extend the time for bringing a challenge.

[4] Both of these preliminary issues were before the Authority but it did not determine them. Rather, it dismissed Mr Roy's claims because it concluded that he had reached a settlement with the defendant before his employment ended. It said he was not entitled, in these circumstances, to bring a grievance covering matters that the Authority held had been the subject of an accord and satisfaction. That is a separate issue but, by agreement, the facts surrounding it are linked so inextricably to Mr Roy's substantive dismissal grievance claims that, if his proceedings survive these preliminary challenges, what the parties have termed the accord and satisfaction issue will be dealt with as part of the substantive grievance.

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[1] *Roy v Board of Trustees of Tamaki College* [2013] NZERA Auckland 514.

[5] There are, from the documents, a number of potential dates which may be said to be the date of his alleged constructive dismissal. First, in a "Statement of Service" written by the school's Principal on letterhead and dated 24 September 2010, the school said that Mr Roy was employed until 24 September 2010. A recent statement from the Ministry of Education's payroll service, known as Novopay, states that Mr Roy's last date of employment was 26 September 2010 and that "holiday day pay (sic)" was processed to 1 November 2010. I will refer again to these documents in a different context.

[6] In Mr Roy's latest statement of claim (his fourth amended statement of claim dated 17 May and filed on 21 May 2014), he alleges variously that he was "employed … until September 2010", that he was "constructively dismissed on 27 September 2010" and that "his resignation came into force on Monday 11th October 2010". In his emailed letter to the Principal of the school on 24 January 2011 Mr Roy wrote that he had "resigned in September …".

[7] Even taking the last of these dates (11 October 2010) as that on which Mr Roy's 90 days within which to raise a grievance most probably began to run, this period expired in early January 2011.

[8] Mr Roy has filed a substantial volume of material, much of which is not relevant to the determination of these preliminary questions. That has necessitated a careful search among this volume of documents for ones which are relevant to the preliminary question.

[9] Mr Roy claims that he raised a grievance on 28 December 2010 by an email sent to both the Deputy Chair of the Board and the staff representative on the Board of Trustees of Tamaki College (the Board). The defendant says that it has no record of receiving this email. Mr Roy says that, as a result of changes made to its email systems by his internet service provider and/or its email retention protocols, he is unable to corroborate either the content of the email or that it was sent and received.

[10] What appears on its face to be an unlikely date on which a former teacher would raise a personal grievance with a school (28 December), Mr Roy gives the

following uncontradicted explanation. He says that on that day he had an interview for a teaching position with the Principal of another Auckland secondary school. He says that he was advised by that Principal to resolve his outstanding issues with Tamaki College as a first priority and, buoyed also by some other advice which that Principal had given him following his recounting of the circumstances of his dismissal, went home and promptly emailed the defendant. However, as well as there being no corroboration of Mr Roy's claim that he sent an email raising his grievance on 28 December 2010, there is no evidence at all of the content of this communication. So even if it was accepted that an email was sent to the school by Mr Roy on 28 December 2010, the plaintiff has not established that this communication did raise a personal grievance as the law expects to be done.

[11] In these circumstances, it is clear that Mr Roy did not raise his personal grievance with his employer within the statutory period of 90 days of its occurrence or his becoming aware of its occurrence, both of which events occurred on 11 October 2010.

[12] Mr Roy's case is that if he is found not to have raised a grievance on 28 December 2010, he did so by an email sent to, and received by, the Board on 24 January 2011 and that this should, in all the circumstances, support his claim for leave to make a late submission of a personal grievance. In these circumstances, the history of communications between Mr Roy and the Board concerning and following his termination of employment is relevant.

[13] On 20 September 2010 at 8:04 Mr Roy emailed the Principal using his (and her) school email addresses. This email referred to events earlier in his employment at the school and to events during his previous employment at another Auckland secondary school. His email to Ms Pamaka of 20 September records that he was reprimanded by the New Zealand Teachers Council (NZTC) in respect of the incidents at the previous school but asserted that this NZTC censure sanction expired on 20 September 2010. The sanction appears to have been that he was obliged to inform any new employer of the NZTC censure and had done so in respect of his only employer during that three year period, Tamaki College. Mr Roy asked Ms

Pamaka to confirm to the NZTC that Tamaki College had been aware of those conditions on his teacher's registration.

[14] The first documented indication of Mr Roy's intention to cease employment was contained in an email that he sent to staff of the school on 27 September 2010 at 14:18 hours (2.18 pm) immediately following a meeting that he had attended with the Board about his employment. The email says: "I have made a decision to resign from my position as a teacher [at] Tamaki College to pursue other opportunities. I will not be returning next term …".

[15] Next, on 29 September 2010 Mr Roy wrote an email to the school's Principal, Ms Pamaka, entitled "Best wishes from Chris Roy". The email was in a friendly and conciliatory tone, saying things like "This will probably be the last correspondence that the two of us will enter into", "Let's celebrate these positive things that we had between us and not dwell upon any negatives", and the like. The email concluded with Mr Roy's advice to Ms Pamaka that he had left some resources for his successor and that he would like to collect some personal items "at the end of the year". He continued: "I've cancelled my invitation to the sports dinner to avoid anyone any sense of uneasiness, but please give my best wishes to every student." The tone of the email is predominantly (even solely) one of sadness on the parting of ways on good terms but does not evidence an intention to treat the plaintiff's resignation as a constructive dismissal, let alone to raise a personal grievance.

[16] The next relevant document is the "Record of Settlement" prepared by the school's Board, containing the following relevant passages:

> The abovenamed parties have reached terms of settlement which shall be final …
>
> 2) Chris will provide a written resignation from his employment at the school, effective as at Monday 11 October 2010.
>
> …
>
> 4) The Principal will provide Chris Roy with a statement of service.
>
> …
>
> 6) Chris will return all property belonging to the School by Monday 11 October 2010.

7) The School will return all property belonging to Chris by Monday 11 October 2010.

8) In announcing Chris's resignation, the school will state that he has resigned to pursue other opportunities.

9) A mandatory report will be made to the Teachers' Council regarding the resignation in the face of disciplinary action.

[17] The document then recorded that "[all] parties to this agreement have had the opportunity to take advice from their respective representatives and sign this agreement with intent to bind the parties."

[18] Mr Roy's signature appears alongside the handwritten date 5 October 2010 and the document was signed by the Board's Deputy Chairperson, Alfred Ngaro, on the following day, 6 October 2010.

[19] By letter dated 24 November 2010 the Principal of the school wrote to the NZTC reporting formally Mr Roy's resignation "on 11th October, 2010, following advice from the employer of an intention of disciplinary action over an aspect of his conduct." That conduct was then described by the Principal. The Principal's letter asserted that after the Board formally initiated disciplinary procedures in respect of Mr Roy, he "resigned in this process". The Board did not send a copy of its report to the NZTC to Mr Roy. He first saw a copy of it when that was sent to him very shortly before Christmas 2010.

[20] In his email (from his own private email address) of 24 January 2011 and apparently sent at 5.41 am to Ms Pamaka and to another Board member called "Griffiths", Mr Roy wrote in the subject line: "An upgraded letter relating to our legal dispute". This email letter to the Principal began as follows:

> As you are most probably aware, I have not re-entered the teaching profession as a consequence of events that have occurred during the past twelve months. The legal issues that arose however in 2010 between us in my employment context at Tamaki College have not been professionally resolved. I resigned in September under duress, in circumstances that the PPTA have called unacceptable, unprofessional and appalling. I have made a formal complaint with the head office of the New Zealand School Trustees Association about [a STA representative's] deceitfulness, blatant dishonesty and unprofessional conduct, which resulted in my decision to unwillingly

> tender my resignation. For instance he claimed that if I took the [school's] Board of [Trustees] to the Human Rights Commission Tribunal or the Employment Court, which both the Ministry of Education and the Ministry of Justice recommended that I do, he'd make sure that I'd be charged up to $13,000 per day in legal fees. It usually costs approximately $350 per hour for a senior employment lawyer and if taken through the appropriate avenues, there would be no cost to me at all. I am still awaiting an outcome of that complaint.

[21] Mr Roy's email then set out the legal "issues that I will be requiring the legal authorities to address". These 11 numbered paragraphs deal with:

- a complaint about another staff member;
- a complaint about the religious nature of powhiri;
- an allegation that he would not receive professional support for not observing religious events at the school;
- the question of absenting himself from religious events in school time;
- the release of confidential information from a Human Rights Commission mediation; comments justifying his statement that "the Christian church subjugated women";
- his allegation that a named staff member had intimidated other staff members to sign a letter of complaint against him;
- his allegation of misinformation about the content of a collective agreement relayed by a representative of the New Zealand Secondary Teachers Association (NZSTA);
- a complaint that he had been required to be assessed by a registered clinical psychologist at his own cost in order to establish that it was contrary to his wellbeing to be present at assemblies; and

- a complaint that his rights of freedom of speech had been violated by the Principal purporting to prohibit him from speaking about any religious issue within the school.

[22] None of these matters appears to relate directly to the events on 27 September 2010 and between that date and 11 October 2010, which the plaintiff claims included his unjustified constructive dismissal. They may be background events.

[23] However, Mr Roy's email continued, relevantly: "I'll await the decision of the two enquiries that are underway at present. These are the complaint with the NZSTA and the New Zealand Teachers Council meeting in February before [proceeding] with the court action." It appears that the person copied into that letter "griffiths@tamaki.ac.nz" was Matt Griffiths, the then staff representative on the Board.

[24] What is important, however, is the Board's response to Mr Roy's email of 24 January 2011. This indicates how the defendant treated Mr Roy's email to it and, in particular, whether it may be said that the Board, because of its response, understood Mr Roy to be raising a grievance to which it responded. The Board's reply over the name of Mr Ngaro was short and to the point. It rejected Mr Roy's claims against the Board on several grounds. These included that the Board and Mr Roy had agreed in writing in early October 2010 that he would not make such claims. Mr Ngaro denied the substance of Mr Roy's allegations. Third, and significantly, Mr Ngaro on behalf of the Board said that it was now too late for Mr Roy to raise these complaints. I infer from this part of the response that Mr Ngaro intended to convey to Mr Roy that more than 90 days had passed from the ending of the parties' employment relationship so that it was, by late January 2011, too late to raise a grievance. The fact that the Board treated Mr Roy's email of 24 January 2011 as an attempt to raise a grievance is significant in determining his application for leave to do so late.

[25] Important also is an email that was sent by Mr Roy to the Principal (and to Mr Griffiths) on Monday 11 April 2011. In particular, Mr Roy says that the subject line of this email ("On-going employment dispute") and the reference in it to

"Personal Grievance issues due to Constructive Dismissal" as one of the "five areas that my lawyers are dealing with", tends to indicate the probability of his sending an email on 28 December 2010 raising his personal grievance.

[26] This email opens with the words: "There are now five areas that my lawyers are dealing with. These are listed below." The first to fourth of these legal issues are largely a reiteration and summary of those which had been set out in the previous correspondence and which I have summarised above. Number 5 is, however: "Personal Grievance issues due to Constructive Dismissal." After again rehearsing his particular complaints, Mr Roy adds:

> Finally, no employee can be ordered to resign or face being dismissed, especially when erroneous claims such as the board would insist that I would be forced to pay more than $13,000 per day in legal fees if I challenged the board in a court room. That's simply an intimidation and bullying tactic.

[27] Mr Roy's email of 11 April 2011 refers to his having lawyers who were said to be dealing with legal issues including his personal grievance. There does not, however, appear to be any correspondence between Mr Roy's lawyers and the Board or its lawyers, either in the period leading up to 11 April 2011 or indeed after that date, at least until two lawyers agreed to represent Mr Roy pro bono and did so during the Authority's investigation meeting on 2 and 3 September 2013.

[28] Mr Roy first consulted solicitors (the Grey Lynn Neighbourhood Law Office) on 22 March 2011, the same month in which he re-joined the Post Primary Teachers Association, having, for the previous five years or so, not been a member of that union.

Application for leave to raise personal grievance after 90 day period

[29] Having decided that Mr Roy has failed to establish that he raised his personal grievance within 90 days of the end of his employment which he categorises as an unjustified constructive dismissal, it is necessary to consider his application under s 114(3) of the Act. This requires the establishment by Mr Roy of two tests under subs (4). The first is that the delay in raising his personal grievance was occasioned by an

exceptional circumstance or by exceptional circumstances. Second, if that was so, the Court must consider whether it is just to allow the grievance to be raised now.

[30] Mr Roy's case does not rely on, nor can it rely on, any of the statutory exceptional circumstances set out in s 115 of the Act. However those are only examples of extraordinary circumstances and if there are other circumstances which are extraordinary as the courts have defined that adjective, then these may be relied on also.

[31] The following are the relevant circumstances that led to Mr Roy's resignation, which he categorises as a constructive dismissal that he says was unjustified.

[32] Mr Roy's claim is that at a meeting on 27 September 2010 between him, Mr Ngaro and a representative of the NZSTA (the latter two representing the Board), he was told, or at least he understood, that if he did not resign he would be dismissed. Mr Roy says that he was unclear about why he should resign or why he would be dismissed. Even to the extent that he inferred why this was said, he did not agree either that he needed to resign or that the Board was entitled to dismiss him. He says, nevertheless, that he considered that he had no option realistically but to resign although he still wished to ascertain the school's grounds for his constructive dismissal. Mr Roy was aware that the Board would report to the NZTC on the circumstances in which he resigned and he hoped that its report would reveal its grounds for dismissing him constructively. In these circumstances, Mr Roy elected to await the provision to him of a copy of the Board's report to the NZTC which it was obliged statutorily to make "immediately" following his resignation with effect from 11 October 2010.

[33] Although Mr Roy did not request the Board to provide to him its reasons for the actions which he says amounted to his constructive dismissal (pursuant to s 120 of the Act), what he did subsequently was tantamount to doing so. From 30 September 2010 Mr Roy was on notice that if he resigned as the alternative to the probability of his dismissal by the Board for serious misconduct, it would furnish a mandatory report about that resignation to the NZTC pursuant to ss139AK, 139AL

and 139AM of the Education Act 1989. Such report was required statutorily to be made by the Board to the NZTC "immediately".[2] On several occasions between 5 October and mid-December 2010, Mr Roy inquired of the school when he might expect to receive this report. He was told, in effect, that this was coming. Even if one takes the trigger point for the provision of that mandatory reporting to be 11 October 2010 at the latest, it was not until 9 December 2010 that the NZTC received the Board's mandatory report. The Board can, in all the circumstances, hardly be said to have reported to the NZTC "immediately". The delay in doing so was almost two months.

[34] The significance of this lies in what I accept were Mr Roy's reasonable expectations of steps to be taken by the school before he determined to take action in response to what he considered was his unjustified constructive dismissal. First, Mr Roy was aware that this mandatory report would be made by the school to the NZTC. That was expressed in the parties' written settlement agreement that he signed on 5 October 2010. Mr Roy wished to know precisely, (and as confirmed in writing by the Board), what he was alleged to have done which warranted the ultimatum given to him by the Board on 27 September 2010 that he either resign or face dismissal.

[35] Employees are entitled to require employers to so commit themselves in writing pursuant to s 120 of the Act and are not only entitled, but are often well advised, to hold off formulating a personal grievance to be raised until that information is received. Statutory acknowledgement of that commonsense tactic is contained in s 115(d) of the Act. This specifies that an employer's failure to comply with its obligation under s 120(1) to provide a statement of reasons for dismissal is an exceptional circumstance. If this occasions delay in raising a personal grievance within the 90 day time limit, it may allow for leave to be granted under s 114 if the Authority or the Court considers it just to do so.

[36] Although Mr Roy's circumstances do not fall within s 115(d) because he did not formally request reasons under s 120, in the circumstances of this case they are akin to a s 115(d) situation. Whilst an employment law practitioner might have

[2] Section 139AK(1).

made a request under s 120, I think it would be unreasonable to hold Mr Roy, as a lay person who was at that time without any professional or industrial advice or assistance, to the same expectation.

[37] The Board did not send a copy of its s 139 Education Report to Mr Roy at the same time as it was made to the NZTC. Rather, the NZTC sent Mr Roy a copy which was received by him very shortly before the Christmas break in 2010 at a time when it was difficult, if not impossible, for him to obtain professional advice and assistance even if he had wished to do so. It is not surprising, in these circumstances, that Mr Roy turned his attention seriously to dealing with his former employment situation in January 2011.

[38] Although there is no evidence of what Mr Roy claims to have sent to the Board by email of 28 December 2010, the subject line of his next email to the Board of 24 January 2010 is consistent with Mr Roy's account of an earlier email communication to the Board complaining about his treatment by it as his employer. Although I have accepted that its contents do not alone constitute the raising of a personal grievance, they tend to point more in favour of the communication that Mr Roy says he sent to the Board complaining about his treatment on 28 December 2010, than to the absence of such a communication.

[39] The Board responded to Mr Roy's 24 January 2011 letter after its first monthly meeting that year. This was by a communication from the Board's Mr Ngaro who wrote to Mr Roy declining to engage with the plaintiff on the matter of a personal grievance including because this had not been raised within time. In the absence of any evidence from Mr Ngaro to the contrary, there is a strong inference that Mr Ngaro (and therefore the Board) regarded Mr Roy's 24 January 2011 letter as purporting to raise a grievance even if, on closer legal analysis, that might not be said to have been so. What emerges from the Board's letter to Mr Roy of 21 February 2011 is that it understood that he was dissatisfied with his treatment by the Board which resulted in his resignation and that he had purported to express that dissatisfaction by raising a grievance, albeit, and as the Board calculated it, more than 90 days after 11 October 2010. Although the defendant now submits that Mr Roy's 24 January 2011 letter did not raise a grievance in compliance with the law, it

is significant that the Board appears to have acknowledged at the time that a grievance had been raised but that it was the delay in doing so that was fatal to Mr Roy's claim.

[40] The Board's letter to Mr Roy of 21 February 2011 concludes: "… your claim is out of time and the College will not be agreeing to reopen this case." The reference to being "out of time" can only refer to the 90 day period for the raising of a personal grievance. There was no other relevant applicable time limit. The significance of the Board's letter of 21 February 2011 is, therefore, that it signalled an awareness by the defendant that Mr Roy complained about the circumstances of his departure from employment and, although not using the language of personal grievance, may nevertheless have wished to pursue those dissatisfactions by that medium.

[41] In terms of timing it is significant that the defendant accepts in its written submissions to the Court that the 11 April 2011 letter from Mr Roy to the Board raised his personal grievance. At para 2 of those submissions under the heading "90 Day Issue" the defendant concedes: "An actual personal grievance claim did not get raised by the plaintiff until 11 April 2011 … In this email, Mr Roy makes reference to personal grievance issues due to constructive dismissal."

[42] It follows, then, that the period of delay between when Mr Roy might reasonably have been expected in all the circumstances to have raised his grievance (early January 2011 after he received a copy of the Board's managerial report to the NZTC) and his doing so, as the defendant acknowledges, on 11 April 2011, was approximately three months. Although not an insignificant delay, nor is it of such a degree that it should weigh heavily against a grant of leave to Mr Roy under s 114(3) of the Act.

[43] I accept that the foregoing are circumstances which are unusual, or exceptions to the rule and, therefore, "exceptional circumstances" in terms of s 114(4)(a).[3]

[3] *Creedy v Commissioner of Police* [2008] NZSC 31 at [31].

[44] Next, the Court must be satisfied nevertheless that the delay in raising a personal grievance was occasioned by the exceptional circumstances.[4] Given my acceptance that Mr Roy probably raised his grievance with the defendant by his email of 24 January 2011 and certainly did so by his email of 11 April 2011, I am satisfied that the delay in receiving the Board's report to the NZTC, which was in turn as a result of the lateness of the making of that report by the Board to the NZTC, was causative of the delay.

[45] Finally in this regard, the Court must also be satisfied that it will be just to allow Mr Roy to have the merits of his grievance of unjustified dismissal examined and determined.[5]

[46] This test does not require Mr Roy to establish an irrefutable or even a strong case in support of his grievance. If it is clear that the case is so weak that it is very unlikely to succeed, that may be a material consideration in the weighing of the respective justices of granting or refusing leave. It will be significant, also, that there has yet been no independent assessment of the merits of Mr Roy's claims to unjustified dismissal. Finally, as other cases have pointed out, the statutory consequence of mandatory reporting of a teacher's resignation or dismissal in such circumstances, with the potential consequences of deregistration, will also be a factor in determining whether it is just to permit the grievance to be examined on its merits.

[47] The Board's strongest argument against doing so is what it claims was the agreement entered into between the parties on 5 and 6 October 2010 that in return for resigning and receiving a modest lump sum payment, Mr Roy would not bring proceedings against the Board in relation to his employment including in relation to the termination of it. As I have already noted, the merits of that argument will be dealt with subsequently if the proceeding survives as I have determined it should. Nevertheless, the strength (to the extent that it can be ascertained) of Mr Roy's claim to have been dismissed unjustifiably is a relevant consideration going to the justice of allowing leave. The agreement of 6y October 2010 is a significant feature of the merits of Mr Roy's claim.

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[4] *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 330.
[5] Section 114(4)(b).

[48] Although on its face, this settlement agreement or accord and satisfaction appears to preclude Mr Roy from pursuing these proceedings, there is an argument in his favour that this would be in breach of s 238 of the Act which provides that: "The provisions of this Act have effect despite any provision to the contrary in any contract or agreement". The entitlement of an employee to bring personal grievance proceedings against that employee's former employer is one of the provisions of the Act. The settlement agreement or accord and satisfaction is "any contract or agreement". It is arguable that it was not permissible in law for the parties to have reached that agreement because of s 238. The circumstances in which the agreement was signed may be relevant to this argument.

[49] An allegation or allegations of misconduct had been made against Mr Roy by the school's Principal and had been referred to the Board. It had required Mr Roy to attend a meeting to answer those allegations. By his account, the Board's representatives indicated to him that the Board would be at least very likely to dismiss him as a result of finding those allegations upheld and in the circumstances offered him the possibility of resigning which he took. There was, in these circumstances, no personal grievance at the point that the agreement was entered into between the parties on 5 and 6 October 2010 and indeed Mr Roy's employment did not end until some days later, on 11 October 2010. At the point the agreement was signed, therefore, the parties were in a continuing employment relationship.

[50] There is some developed case law on s 238, although principally below Employment Court level. In *Tobin v Stayinfront Inc*[6] the Authority distinguished what it described as "a specific agreement" from a "general waiver". It decided:[7]

> … there is a difference between an agreement involving a promise by the parties not to pursue a cause of action that might otherwise be available (or is being pursued), and a general agreement that the cause of action is not available as between the parties whether or not any attempt at pursuit is in contemplation. The latter is not permissible under s 238, but the former is permissible. …

[51] Mr Roy was required by the Board to attend a meeting to investigate an allegation of misconduct that the school's Principal had referred to the Board. This

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[6] *Tobin v Stayinfront Inc* ERA Auckland AA 314/05, 18 August 2005.
[7] At [22].

meeting was held on 27 September 2010. The Board was represented by its Deputy Chairperson, Mr Ngaro, and a representative of the New Zealand School Trustees Association, Gary Reading. Mr Roy attended that meeting on his own and says that the upshot of it was that he was told by Messrs Ngaro and Reading that he was facing the prospect of dismissal for serious misconduct; that if he challenged such a finding it would be prohibitively expensive for him to do so; that he would have to pay the Board's significant costs; and that he should consider resigning to avoid dismissal.

[52] Immediately following this meeting on 27 September 2010 Mr Roy emailed staff at the school indicating that he was resigning. He did not state the reason for doing so; rather, he focused on his appreciation of the relationships that he had developed with his colleagues and the beneficial time that he had spent on the staff of Tamaki College. Mr Roy then wrote a friendly and conciliatory email to the Principal. This and other correspondence at the time contained no indication of either dissatisfaction with the circumstances that led to his resignation or of its categorisation of a constructive dismissal. There was no suggestion of any intention to challenge those events.

[53] Mr Roy's evidence is that on 30 September 2010 he received a communication from Mr Ngaro that he should collect an envelope from the school's office. Mr Roy did so later that afternoon. The envelope was accompanied by a handwritten note dated 30 September 2010 written by Mr Ngaro. It asked Mr Roy to indicate his acceptance of the terms of an agreement contained in the envelope by the following day and invited him to contact either Mr Ngaro or Mr Reading on their cell phones. Mr Roy's case is that he received a subsequent telephone call from Mr Reading who put pressure on him to sign the agreement.

[54] Mr Roy did sign immediately this agreement prepared by the Board. He did so on 5 October 2010 and the agreement was counter-signed by Mr Ngaro on the following day, 6 October 2010. The agreement provided that Mr Roy's employment would cease with his resignation taking effect on 11 October 2010. The agreement provided for the payment of a modest sum of money ($6,500) to Mr Roy and that, in

return for this, the agreement constituted a full and final settlement of any claims that Mr Roy might make against the Board.

[55] From what exactly the Board purchased a release in these circumstances, is at least questionable. While it might be said to have been the purchase of a release from any proceedings that Mr Roy might bring against the Board, there are at least two difficulties with this assertion. The first is that there was at that point no dispute with the Board which might have put it at risk of suit by Mr Roy. Although he was dissatisfied with his treatment by the Board and did not agree that he had misconducted himself in a way that would warrant a disciplinary investigation and possible sanction including dismissal, Mr Roy had not manifested an intention to challenge the Board at that point. Indeed, the correspondence indicates the opposite, that he had elected to resign and was doing so in a civil and co-operative manner. It is potentially arguable that what the Board was purchasing was Mr Roy's forensic impotence.

[56] Section 238 of the Act provides as follows:

> **238 No contracting out**
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[57] The case law around the scope of s 238 is not well developed, at least in areas such as this, beyond the bargaining and agreement settlement stage of employment relationships. How and when persons in those relationships may compromise their statutory rights to forego access to the personal grievance or other procedures under the Act is both unclear and an important question.

[58] The defendant says that the terms of the settlement agreement are so likely to be a bar to consideration of the grievance on its merits that it would not be just to put it to the trouble and expense of defending its actions. In particular, it says that employers and employees, in the circumstances of these parties at the relevant time in early October 2010, entitled it to prepare such an agreement and obtain Mr Roy's assent to it in a proper manner.

[59] Although I accept that this may be a tenable argument in this case, the simple language of s 238 does not say so explicitly and unequivocally. Even if, therefore, the law may be that s 238 does not prohibit the resolution of personal grievances by such settlement agreements or accord and satisfaction, the same situation may not apply to the pre-grievance stage of what was at that time only a deteriorating employment relationship as in this case. It is probably best that I go no further than to say that the existence of the agreement in this case cannot be said to be so determinative of Mr Roy's claim that it would be more just not to allow it to be determined on its substantive merits.

[60] Without embarking on a detailed consideration of the numerous other complaints that Mr Roy makes about his treatment, they, or at least some of them, appear to raise serious issues about the manner of his treatment by the Board and the Principal concerning his unwillingness to engage in what he categorised as religious practices at the school which have not been addressed on their merits at any stage and may, in some respects at least, raise important questions of principle about related issues of employment relations in state schools.

[61] For the foregoing reasons Mr Roy has leave to proceed with his personal grievance despite it not having been raised by him within time.

[62] Section 114(5) of the Act requires the Court in these circumstances to direct that the parties use mediation to seek to mutually resolve the grievance. I make an order accordingly and recommend to Mr Roy that he engage professional advice and representation in that exercise. If the grievance is not able to be settled in mediation, it will be for the Court to decide the case following the reasoning of the judgment in *Abernethy v Dynea New Zealand Ltd*.[8] There is no statutory mechanism by which a case that was dismissed by the Authority can be referred back to it for investigation and determination.

[8] *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271.

[63] There will be no orders for costs between the parties to this point.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Wednesday 20 August 2014