

NOTIFICATION TO NURSING COUNCIL NOT A BREACH OF SETTLEMENT

By Hamish Kynaston & Jennifer Howes

Evans-Walsh v Southern District Health Board [2018] NZEmpC 46

The Employment Court recently held that parties in a health context could not contract out of mandatory reporting duties through a settlement agreement, and that notifying the Nursing Council did not breach the confidentiality, non-disparagement or full and final settlement provisions in the agreement.

Ms Evans-Walsh was a registered nurse employed by Southern District Health Board (the DHB). Several nurses made complaints against Ms Evans-Walsh alleging bullying, undermining the practice, confidence and decision-making of colleagues and disparaging others. Following an independent investigation, the investigator concluded that the complaints had been substantiated and that the DHB's Code of Conduct and the Nursing Council's Code of Conduct had been breached.

Ms Evans-Walsh rejected the report's conclusions and any suggestion that her behaviour fell short of what was expected. After receiving the report, the DHB informed Ms Evans-Walsh that its preliminary decision was to accept the report's findings. Prior to reaching any conclusion on whether misconduct had occurred (and the resulting disciplinary action), the parties entered into a settlement agreement, which was signed by a mediator.

The settlement agreement included the following:

- The terms of settlement were confidential to the parties "so far as the law allows"
- Both parties would not make disparaging comments about each other to third parties
- Ms Evans-Walsh agreed to resign

- The settlement agreement was a "full and final settlement of all matters between the employee and the employer arising out of their employment relationship".

There was no reference in the settlement agreement to Ms Evans-Walsh's reasons for resigning or about the DHB's reporting obligations under the Health Practitioners Competency Assurance Act 2003 (HPCAA).

Notification to the Nursing Council

Several months later, the DHB's Executive Director of Nursing and Midwifery notified the Nursing Council pursuant to section 34(3) of the HPCAA. The notification was brief. It stated that Ms Evans-Walsh had resigned prior to the conclusion of an investigation into complaints about her and that, due to the seriousness of the allegations, Ms Evans-Walsh had been on paid leave during the investigation. The DHB attached copies of the complaints, its letter to Ms Evans-Walsh informing her about the complaints and the investigation terms of reference.

Ms Evans-Walsh claimed that the DHB's notification had breached the settlement agreement and could not rely on the HPCAA to justify its behaviour. The DHB did not accept this given its statutory obligations under the HPCAA. It also relied on the statutory protection from civil liability in section 34(4) of HPCAA.



NOTIFICATION TO NURSING... - CONT.

of these expectations. Even though no decision had been made by the DHB, once the DHB reached this view, notification to the Nursing Council was compulsory and inevitable.

No breach of settlement agreement

The settlement agreement required confidentiality "so far as the law allows". The DHB acted in reliance on its statutory obligations and only disclosed information necessary to discharge its obligation. The notification contained simple statements of fact and did not include the settlement agreement or any terms of settlement. As such, there was no breach of confidentiality, nor was there any disparagement.

Further, while the settlement agreement was a full and final settlement of all matters arising out of their employment relationship, this did not and could not cut across the DHB's statutory duties.

Potential for wider professional consequences

The Court was very clear that the parties could not contract out of their statutory obligations and that the settlement agreement did not prevent notification to the Nursing Council. It is not clear whether the DHB informed Ms Evans-Walsh at any stage of the process that it was considering notifying the Nursing Council. While doing so could have been a barrier to settlement, arguably the DHB's obligation of good faith required disclosure. We expect that the obligation to disclose will depend on the circumstances, including the employer's own assessment of whether the behaviour meets the relevant threshold.

Different thresholds and statutory reporting duties apply to professionally registered employees whose work is subject to regulatory supervision and oversight, including health practitioners, educators, lawyers and accountants. The dismissal or resignation of a professionally registered employee endangers

The DHB's mandatory reporting obligations could not be circumvented by a settlement agreement

Section 34(3) of the HPCAA requires employers to notify the relevant regulatory authority (here the Nursing Council) whenever a health practitioner resigns or is dismissed from employment "for reasons relating to competence".

The Employment Court confirmed that section 34(3) is a compulsory reporting obligation that could not be circumvented by a settlement agreement. It also held that the HPCAA threshold for notification is low and that section 34(3) only required that the subject of competence was raised or played some part in the decision to end the nurse's employment. It was not necessary for the DHB to establish a competence issue or issue a final decision prior to notifying the Nursing Council.

The Court also analysed the meaning of competence, including whether Ms Evans-Walsh's behaviour fell within the Nursing Council's domain. The Nursing Council's competencies extend beyond patient care and clinical competence and apply to ethical matters such as the way in which nurses deal with one another. These include effective communication, collaboration and participation with colleagues. The Code of Conduct also requires nurses to work and communicate clearly, effectively and respectfully with other nurses.

In the Court's view, the alleged bullying behaviour (if substantiated) could be a breach

NOTIFICATION TO NURSING COUNCIL NOT A BREACH - CONT.

not only their employment, but their prospects of working again in their chosen field.

Employers should therefore take additional care in reaching adverse findings that may result in a professional body investigation.

Employers should consider advising an employee early on in the process if there is the potential for wider professional consequences and expressly take professional consequences into account in its decision-making. As there is little, if any, opportunity for employment

without registration, notifying the relevant professional body could give rise to a claim for unjustified disadvantage. Employers should therefore ensure that they consider their statutory obligations carefully before deciding how to proceed, and whether the threshold for notification has been reached prior to contacting the relevant professional body.

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