

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 383/10  
5314189

BETWEEN                      THE TRUSTEES OF THE  
   AHIPARA HEALTH AND  
   RESOURCE TRUST  
   Applicant

AND                              MARYANN ADLAM  
   Respondent

Member of Authority:      Alastair Dumbleton

Representatives:            Richard Upton, counsel for Applicant  
   Respondent in person

Investigation Meeting:     13 August 2010 (by telephone conference)

Submissions Received      18 and 23 August 2010

Determination:              25 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Terms of settlement to resolve an employment relationship problem that had arisen between the applicant, Ahipara Health And Resource Trust, and the respondent, Mrs Maryann Adlam, have been brought to the Authority for enforcement under the Employment Relations Act 2000.

[2]      The Trust has applied with urgency for a compliance order and a penalty against Mrs Adlam for allegedly breaching one of the terms.

[3]      Under s 137(1)(a)(iii) of the Act the Authority may order compliance where any person has not observed or complied with any term of settlement, and under s 149(4) a person who breaches a settlement is liable to a penalty imposed by the Authority. The Trust seeks the maximum penalty of \$5,000 against Mrs Adlam.

[4] Initially the Trust also applied for a permanent injunction to restrain Mrs Adlam from breaching the terms of settlement. She subsequently gave an undertaking to the Authority not to carry out a threat she had made to place a public notice about the Trust in the local newspaper, and later the Trust elected to seek the compliance remedy rather than injunction.

[5] Mrs Adlam was a founding trustee of the Trust when it was formed in 1998 and she later became employed as the Manager of its Health and Resource Centre at Ahipara. The termination of that employment in September 2006 gave rise to an employment relationship problem which was settled in February 2007 with the assistance of a Department of Labour mediator.

[6] The settlement was a composite of terms agreed between the parties themselves and a mediator's decision given under s 150 of the Act. In mediation Mrs Adlam and the Trust had conferred on the mediator the power to award a compensatory sum, within agreed parameters, to be paid by the Trust to Mrs Adlam. She was awarded \$9,000.

[7] While the settlement might now seem historical and no longer live given that four years have passed since the employment ended, it is still being performed so far as instalment payments are being made by the Trust and received by Mrs Adlam under it.

### **Clause 3**

[8] The term of settlement the Trust seeks to enforce is set out at clause 3 of the Record of Settlement dated 13 February 2007, which is expressed to have been made under s 149 of the Employment Relations Act. That provision applies to the settlement of employment relationship problems resolved by the use of mediation services.

[9] Clause 3 provides:

3. *The parties agree not to make any derogatory comments about each other to any third party.*

[10] The allegations that Mrs Adlam has breached clause 3 are contained in an affidavit of Ms Roselin Laban, the General Manager of the Health and Resource Centre. In her affidavit Ms Laban has traversed the lengthy and at times turbulent

relationship the Trust and she have had with Mrs Adlam, going right back to the grievance brought against the Trust and its resolution after mediation in February 2007.

[11] Unfortunately despite that resolution much of the relationship had to be revisited and was publicly aired after claims of breach were made in 2008 by the Trust and Mrs Adlam against each other. Following an investigation by the Authority a determination was issued by it on 3 February 2009 (under AA30/09). The Authority found evidence to support findings of breach of clause 3 by both Mrs Adlam and the Trust. No penalty was ordered against the Trust as Mrs Adlam withdrew her claim in that regard, but she was ordered to pay a penalty of \$500, of which \$400 was to go to Ms Laban.

[12] In this latest application it is alleged by the Trust that clause 3 has recently been breached again by the following conduct of Mrs Adlam:

- Making statements and utterances at a marae meeting in mid-April 2010;
- Sending trustees a letter at the end of April 2010;
- Threatening in late June 2010 to notify the public that the Trust was breaching the February 2007 settlement and acting unlawfully and/or improperly as had been detailed by Mrs Adlam in her April letter to trustees.

### **Threatening to notify public**

[13] With regard to this conduct, there is no dispute by Mrs Adlam that she did threaten to place a notice in the Northland Age to publicise what she regards as unlawful or wrongful conduct by the Trust towards her. There can be no dispute that to carry out that threat would amount to making comment derogatory to the Trust to third parties, being the general public who may read the Northland Age.

[14] Even if it were true that the Trust had breached the settlement terms or had acted unlawfully and/or improperly in any way, it would arguably be 'derogatory' to the Trust for Mrs Adlam to draw the attention of third persons to that fact.

[15] I must find that this threatened behaviour cannot be a foundation for a compliance order under s 137 of the Act or a penalty under s 149. Those provisions are clear that there must first occur conduct amounting to non-compliance with, or non-observance or breach of, terms of settlement before those remedies can be obtained under the Act. Section 137 provides that the purpose of a compliance order is to prevent any “further” occurrence of non-compliance or non-observation. In the case of threatened conduct, without a breach to begin with there can be no continuation of breach.

### **Writing to trustees**

[16] In relation to the letter dated 26 April 2010 sent to the trustees of the Trust by Mrs Adlam, much of its content is plainly ‘derogatory.’ In the letter a wide range of serious allegations are made by Mrs Adlam against the Trust, its trustees and also its employees or agents, particularly its General Manager Ms Laban. Some of the allegations are of conduct of a criminal nature in different respects, such as drink-driving, fraud and misappropriation of funds.

[17] I find that publication of the letter did not go beyond trustees of the Trust and, whatever the nature of its contents, therefore did not amount to comment made to any third party. The Trust presented no evidence to support its “understanding” that Mrs Adlam sent this letter to others as well as its trustees, and it is merely a suspicion Ms Laban has that she did. Mrs Adlam denied wider publication of her letter and there is no evidence to the contrary.

[18] I accept that Mrs Adlam intended the letter to go only to those who were trustees and who she reasonably believed held that office at the time she sent it. I find that this conduct did not give rise to any breach of clause 3 and there is therefore no basis for ordering compliance or penalties against Mrs Adlam.

[19] In any event compliance is a discretionary remedy which does not have to be ordered even where it has been shown that a person who used to be until recently a trustee had received the letter after ceasing to hold that office.

### **Marae meeting**

[20] The Trust alleged a breach of clause 3 occurred in mid-April during a meeting on a marae at Ahipara. Regrettably that allegation was based entirely on hearsay.

The Trust presented no direct evidence from any witness as to what Mrs Adlam had said or done during the meeting, which took place at the Roma Marae on 19 April 2010.

[21] Ms Laban's evidence in her affidavit was that in mid-April she was "told" that Mrs Adlam had attended a meeting at a marae, and she was told that while there Mrs Adlam had made a number of derogatory comments about the Trust's Health and Resource Centre. Ms Laban did not give the name of her informant or say what the derogatory comments were that she had been informed of by that person. She said that she was currently investigating the issue to determine precisely what Mrs Adlam had said.

[22] Much better evidence than this could be expected, especially where a penalty of \$5,000 is claimed and restraint sought by compliance order, a form of injunction. Mrs Adlam appeared to have nothing to hide, for at short notice and without representation she and Mrs Alice Graham were prepared to put themselves forward to be questioned by Mr Upton, counsel for the Trust, and by the Authority, about their participation in the marae meeting.

[23] I find from the direct evidence given by them about the meeting that Mrs Adlam and Mrs Graham attended the meeting at the Roma Marae on 19 April 2010. It lasted around half an hour and there were up to about 20 people present. Mrs Adlam was the treasurer of the Marae and required to be at the meeting, which was a monthly event and not a meeting Mrs Adlam had called for her own purposes.

[24] In the course of the meeting there was considerable discussion about the Trust's Health and Resource Centre, including its administration and the use it made of public funding. Comment, and what Mrs Graham described as "disgruntled criticism," was made and addressed by a number of those present at the meeting.

[25] Mrs Adlam denies that she made any derogatory comment about the Centre or the Trust or trustees. She said that during the meeting she had been mindful of her obligation under clause 3 and had also been cautioned by Kaumatua, Mr Tommy Murray, who was sitting next to her, not to say anything that might breach the 2007 settlement terms.

[26] Mrs Graham, who was also present, denied that Mrs Adlam had made derogatory comments. Mrs Graham I found to be a particularly credible witness. As

with Mrs Adlam, she too has been much involved in the Ahipara community and for many years. She was a founder trustee with Mrs Adlam of the Trust and was a trustee of it at the time the settlement was reached with Mrs Adlam in February 2007. Mrs Graham was present at the mediation that led to that settlement. She remained a trustee until December 2008. Whatever allegiances she may now have to anyone such as Mrs Adlam who is or has been involved with the Trust, I do not consider that Mrs Graham gave or was inclined to give false evidence to support Mrs Adlam or any other person.

[27] Mrs Adlam admitted that during the marae meeting when adverse comment and criticism was made about the Trust in relation to several matters, she had at times nodded in affirmation. It would be stretching it to say that body language and gestures of agreement like that even in the forum of a marae could amount to making comment. At best it was signifying agreement with comment expressed by others, rather than constructing or initiating comment. There is no evidence Mrs Adlam stood up and encouraged those at the meeting to say what they thought about the Trust.

[28] I do not accept, particularly in relation to the higher standard of evidence required before a penalty can be awarded, that it is sufficient to say that Mrs Adlam is likely to have made derogatory comments, or say that it is unlikely she did not make derogatory comments. To order compliance or penalties it seems fundamental that from evidence taken by it the Authority should be able to make reasonably precise findings as to what the derogatory comments made were, as well as by whom they were made. In relation to the marae meeting, the Trust itself has not been able to say that much.

[29] Mrs Adlam is regarded by the Trust as being “a live-wire with her opinions,” and it is clear to the Authority that she chooses to tread a fine line in publicising her views of the Trust, its trustees and Ms Laban, but I do not accept that the high risk of her eventually stepping over that line is sufficient to restrain Mrs Adlam, by legal order, unless good grounds are properly established to exist.

[30] Perhaps as submitted it would be for her benefit, as well as preserving the peace of Ahipara, to reel in Mrs Adlam but an order of compliance is just a step away from the risk of a fine (up to \$40,000) and even imprisonment (up to 3 months) being ordered by the Employment Court if the order is not obeyed. Before restricting her

freedom and exposing her to that risk the Authority must be able to find much better proof of breach than has been available from this investigation. The evidence falls far short of the standard required and, as a consequence, the application for compliance and penalties must be declined.

[31] If nothing else, this case highlights the limitations of terms of settlement like clause 3. It is a commonly included term and is intended to reflect the spirit of settlement overall as marking an end to conflict between an employer and employee. There are obviously limitations with the enforcement of the term and they are highlighted more in a case where the conflict is multi-dimensional than in perhaps the more usual case of employment between a corporate enterprise and employee, often in a larger urban environment rather than a small tight-knit community such as Ahipara was described.

[32] As well as being an employer the Trust is a charitable body. It was incorporated in 1998 and Mrs Adlam was one of the founders of it, along with Mr Adlam and Mrs Graham. As provided in its Deed, one of the Trust's purposes is "to provide a focus for all people of Ahipara." On that basis Mrs Adlam is clearly a beneficiary of the Trust and has an ongoing interest in it, even after her employment by the Trust ceased. The Trust receives public funding for its work. All members of the Ahipara community (and members of the wider public) have an interest in how that funding is being spent. Mrs Adlam has a further strong interest in the community through her role as a member and officer of her local marae. That is a natural place for members of the community to raise any grievances they may have about the Trust.

[33] As compliance is a discretionary remedy, before ordering it these sorts of circumstances of employer and employee would need to be taken into account. There is also the question of how long Mrs Adlam, and the Trust, can reasonably be expected to continue restricting the freedom of speech they otherwise have, even to speak of each other in derogatory terms if they wish.

[34] A further issue is the extent to which clause 3 could be enforced against Mrs Adlam if she were to take her concerns, especially about alleged criminal behaviour, to authorities such as the Police or to agencies that have provided public funding to the Trust.

[35] If the Authority had found from the evidence that Mrs Adlam had breached clause 3 by making any derogatory comments to third persons about the Trust, or its trustees, or the Centre or its employees such as Ms Laban, the Authority would then have had to consider a further matter going to its discretion. That is the Trust's breach of clause 3 in February 2008, as in its 2009 determination the Authority considered there had been, which contributed to Mrs Adlam losing the employment she had obtained as a health and disability advocate.

[36] Mrs Adlam has also claimed the Trust breached the confidentiality term of the settlement by disclosing outside the Trust the amount awarded to her by the mediator. In disposing of this application brought by the Trust the Authority does not need to make further findings about these matters, given its determination that Mrs Adlam has not recently breached clause 3, as alleged of her.

[37] A letter dated 28/8/08 from the Trust, a copy of which is attached to Mr Upton's final submissions, also highlights the difficulties arising from the clause 3 term of settlement. The letter is addressed to "David" and is signed by Ms Laban as Manager of the Trust. If "David" is a "third party" then arguably in the letter the Trust has made derogatory comment to him about Mrs Adlam. The advice David is given is that Mrs Adlam was dismissed as a trustee, implying there was some sort of fault on her part, and was the subject of a trespass notice, also implying misbehaviour by her.

[38] While it is true in fact that Mrs Adlam was dismissed as a trustee and did have a trespass notice issued to her by the Police, statements about that to others are derogatory to her. The Trust had undertaken in February 2007 not to make derogatory comments about Mrs Adlam to any third party.

[39] The Authority makes no determination that the Trust has breached the terms of settlement because it is not necessary to do so in disposing of this application, but if the Authority had found breach by the Trust it would arguably be inequitable to order compliance against Mrs Adlam, if she had been found to have again breached the settlement. Compliance is a discretionary remedy.

**Determination**

[40] For the above reasons, the Authority declines to make any orders under s 137 and s 149 of the Employment Relations Act 2000 as sought by the Trust against Mrs Adlam.

[41] The disposal of the Trust's application by this determination releases Mrs Adlam from the undertaking she gave to the Authority, but she remains bound by the terms of settlement not to make derogatory comments about the Trust to any third party. The terms of settlement continue to be enforceable.

**Costs**

[42] Given the result there should be no question of costs, as Mrs Adlam who successfully opposed the application was not legally represented.

A Dumbleton  
**Member of the Employment Relations Authority**