

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 147
5377417

BETWEEN

JOHN PRICE
Applicant

AND

THE CHIEF EXECUTIVE OF
THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: P R Stapp

Representatives: John Price in person
Hamish McIntyre, Advocate for the Respondent

Investigation Meeting: 18 October 2012 at Wellington

Further submissions by: 31 October 2012

Determination: 29 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Price claims the Ministry of Social Development (MSD) has breached a Record of Settlement. He alleges first that MSD paid him his final payments late. Second that MSD disclosed to a prospective employer that he had a written reference provided by MSD, but which was subject to confidentiality under a record of settlement, and third that MSD did not speak to the prospective employer that was consistent with the written reference he had been given by MSD.

[2] MSD denies all Mr Price's claims, and has rejected the remedies he has asked the Authority to give him to resolve the employment relationship problem.

Issues

[3] The issues for determination by the Authority are:

- (a) Has there been a breach of clauses 1, 3 and 5 of the Record of Settlement;
- (b) What remedies are available to Mr Price?

The facts

[4] Mr Price and MSD settled an employment relationship problem in mediation with the Ministry of Business Innovation and Employment (MBIE) (formerly the Department of Labour). The settlement was recorded and formally signed off in a Record of Settlement by a mediator from MBIE on 24 August 2010. Thus, as the settlement is recorded under s.149 of the Employment Relations Act 2000 (the Act), it is enforceable.

[5] The relevant terms of the Record of Settlement are:

1. *These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties*

...

...

...

5. *The Ministry will provide John with a written reference including the following points: the date of employment; the roles and responsibilities; that John resigned to pursue other options; that John is committed to the role of Chartered Accountant; that John works hard to deliver good financial advice; and that the Ministry wishes him well for the future. The written reference will be sent to John by 17 December 2010, or within one week of the date of commencement of employment with any new employer, whichever comes first. Phil Archer agrees to speak in terms consistent with the written reference should there be any request for a verbal reference. In the absence of Phil Archer the Chief Financial Officer will act on Phil's behalf.*

...

[6] The record of settlement also made provision in clause 3 for Mr Price to be paid up by 11 January 2011. I do not need to repeat all the details of the provision, suffice to say that was the date Mr Price reasonably expected to be paid upon ceasing work with MSD.

[7] The settlement was signed off by all the parties and the mediator and dated 24 August 2010. It represented a full and final settlement of all matters between Mr Price and MSD arising out of their employment relationship, including its termination. Mr Price's employment ceased with MSD on 15 December 2010.

[8] After the settlement was reached in mediation, there was a delay associated with MSD meeting one of the terms to pay Mr Price on 11 January 2011. The payment was not made on time and he contacted the mediator immediately, and the mediator contacted Mr Phillip Archer the Ministry's signatory on the record of settlement and the Acting Manager, Strategy and Management at MSD, to get his payment made from MSD. MSD paid Mr Price the outstanding amount on 28 January 2011. There has been no evidence on the reason for the full payment not being made in time, but I heard submissions that the late payment occurred over the holiday period, MSD deals with a large payroll, and various relevant people were on leave at the time, but in any event when the non-payment was notified, quick action was taken to make the payment.

[9] After Mr Price left MSD, he tried to get employment elsewhere. One prospective employer contacted MSD for a more up-to-date reference about Mr Price. Since then Mr Price has experienced considerable difficulties getting another job.

[10] Mr Price called one person from a prospective employer to give evidence about an interview where that person requested an up to date reference. The person concerned contacted Mr Archer at MSD, who disclosed the existence of the written reference. Mr Archer informed the person to ask Mr Price for a copy of the reference. Mr Archer did not know that Mr Price had not included it in the application for the vacancy.

[11] Mr Archer considered that the reference "*could speak for itself*" and he would not compromise Mr Price's ability to get the job. Also the same person asked Mr Archer if he could contact him again, and Mr Archer responded that he would not answer any questions.

[12] As it transpired, Mr Price did not get the job. The reason he was given was that the reference was "*not sufficient ... to form a decision*".

[13] The parties were directed to mediation by the Authority. It now rests with the Authority to determine the matter.

Determination

[14] First there has been a breach of the record of settlement when MSD did not make full payment to Mr Price on 11 January 2011 under clause 3 of the record in the

required time. It was entirely reasonable for Mr Price to expect full payment in the time as had been agreed. This was especially so as the record of settlement was signed off on 24 August 2010, and MSD had full knowledge of the cessation of employment date. However the failure by MSD to pay on time was not deliberate, wilful, malicious and not sustained. I hold that the evidence does not establish that Mr Archer was deliberately and/or wilfully involved in Mr Price not being paid on time. Instead, Mr Archer, I hold, acted immediately he was advised of the problem and acted to fix the problem for Mr Price. Mr Price was paid in a reasonable time thereafter, but was deprived the use of money he was entitled to for the short period. The short period was 18 days by my calculation.

[15] Second Mr Price says that the record of settlement only made provision for the reference to be provided to him. He says that it was then up to him as to how he used it. He did not include the reference in the application to the prospective employer called in the Authority's investigation. The person concerned only found out about the reference from Mr Archer. Mr Price drew the analogy with MSD providing him with his last payments and that it was his decision as to what he did with his money. As such the provision of a reference is as much part of the terms of settlement as the other provisions, but Mr Archer's concluded opinion was that it was reasonable to believe that the reference would be used for prospective employment purposes. He genuinely explained why he referred the person, who rang him, to the reference, and asked that person to get a copy from Mr Price. The terms of settlement restricted him to speaking "*in terms consistent with the written reference should there be any request for a verbal reference*". The person concerned did not make any further request for information because Mr Archer had indicated that he would not answer any more questions. There are a couple of points that are relevant here. First the clause did not stipulate what could be done with the reference except to provide it to Mr Price. Any speculation on what should have been done and what was proposed should more properly have been raised with Mr Price on what he wanted to do first. In hindsight that would have been the best thing for Mr Archer to do. Second the reference to "*...any request for a verbal reference*" leaves it open to conclude that it was Mr Price's decision on what he wanted to do with the reference, including keeping it private. That would leave him to rely on Mr Archer speaking "*in terms consistent with the written reference*". Mr Archer did not do that, I hold.

[16] As such this is a further breach of the record of settlement, but I hold that Mr Archer's action on behalf of MSD was deliberate based on genuine reasons. His action is understandable based on wanting genuinely to help Mr Price and in doing so he decided to act overly cautiously, but was a mistake and in error, I hold.

[17] It follows that by not speaking in terms consistent with the written reference Mr Archer fell short of completing what had been agreed to in the record of settlement. This is a breach of the record of settlement, I hold. It is also a lesson and reminder that parties need to be clear about expectations and obligations especially concerning the use and content of references.

[18] I now turn to remedies. I have no hesitation in saying that some of the remedies can not be used to settle the application.

[19] There is no provision enabling the Authority to fix a breach with damages, loss of salary, lost future earnings, loss of reputation, loss of career prospects, and compensation for humiliation and stress. There is simply no jurisdiction for these to redress a breach of a record of settlement. The Authority is a creature of the statute and as such can only do what is prescribed in the way of remedies. The enforcement of a record of settlement is usually achieved by compliance order under the Employment Relations Act 2000. Damages can be sought, and only apply if liquidated damages are agreed to in the terms of the record of settlement. Indeed any liquidated damages would have to be specified and indeed even they would have to be realistic. The record of settlement made no provision for any damages for default and/or breach.

[20] The Authority has no jurisdiction to award damages for a purported breach of the settlement agreement. There is a decision of the full Employment Court: *South Tranz Ltd v Strait Freight* [2007] ERNZ 704 which stated expressly that, where parties have concluded an agreement which is enforceable under section 149(3), the only means of enforcement available are those provided for in section 151.

[21] Section 151(2) makes clear that a matter may be enforced by a compliance order under section 137 or, in the case of a monetary settlement, by a compliance order under section 137 or by using the procedure applicable under section 141. Section 141 states that any order or judgment given under the Act by the Authority may be filed in any District Court and is then enforceable in the same manner as an

order made or a judgment given by the District Court. Moreover I do not accept that the Authority has the jurisdiction under section 137(2) and section 162 of the Act to award damages in Price's favour. Relying on the phrase *in addition to any other power it may exercise* in section 137(2) it is clear from the *South Tranz* case that the wording *in addition to any other power it may exercise* does not confer in the Authority additional jurisdiction over and above that conferred.

[22] In conclusion, therefore, I decline to award any damages to Mr Price.

[23] Furthermore, a claim for a penalty of a breach of good faith does not apply to a record of settlement since the employment has ended. The Court has confirmed that the statutory obligations of good faith in s 4 of the Employment Relations Act (the Act) end when the employment ends, thus the employer owes no on going good faith obligations post termination: *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808. Furthermore there are no provisions in the Act that relate to good faith and the enforcement of a record of settlement. The enforcement is a statutory matter under s 149 (3) of the Act, and subject to penalty for a breach under s149 (4) of the Act.

[24] The delay in the pay has been explained by MSD with the reasoning provided, but it is also reasonable to expect a large Government department with all its resources and upon reasonable notice, to pay on time. Once Mr Archer became aware of the problem he dealt with it as quickly as he could and I accept that he did this in reasonable time for the final payment to be made on 28 January 2011 when it went in to Mr Price's bank account.

[25] Also, Mr Archer genuinely tried to apply the terms the best way he thought he could in order to communicate a reference that is restricted to certain matters and which had been agreed by the parties would form the basis of any oral reference. Whilst his action was deliberate Mr Archer did so for genuine reasons although it was not correct for him to act as he did, I hold.

[26] There is insufficient proof that MSD can be held responsible for Mr Price failing to get work with any other employer since the record of settlement was executed, I hold. Indeed the evidence before me only related to one prospective employer. That is not enough to make inferences about any other prospective

employers. This is especially so where MSD has had no involvement since Mr Archer has not been asked for any more references for Mr Price.

[27] This is not a matter for penalties. This is because first MSD has provided reasons for the 18 day delay on the payment. Mr Archer did his best to expedite the payment at the earliest opportunity. The amount of time it took for the payment to be made and the actual payment being made means it is probable that internal processes were at fault at MSD relating to the holiday period. Thus it is not appropriate to make a penalty for this breach.

[28] Second Mr Archer genuinely believed he was doing his best to help Mr Price when he disclosed the reference and to avoid having to answer and be compromised. He was genuinely trying to assist Mr Price. Although his action was deliberate it was not malicious and/or wilful, I hold. He provided the Authority with genuine reasons for his action. This is not a matter for a penalty. The safest thing Mr Archer decided to do was to say nothing when he understood he might have to answer further questions and/or answer a questionnaire. More properly he should have consulted Mr Price first and/or at the very least sorted out his response to any requests for an oral reference since he agreed to it in the record of settlement. Also, Mr Price could have warned Mr Archer that the person would be making contact for an oral reference to avoid any surprise and difficulties.

[29] Mr Price's claim for compensation for any lost wages and hurt and humiliation loss of dignity and injury to feelings can not succeed under the law. This is because compensation is a particular remedy for personal grievance. This is not a personal grievance claim. There are no powers and no provision for compensation in the enforcement of a record of settlement. Mr Price's employment ceased with MSD and his statement of problem filed in the Authority can not represent a personal grievance, I hold. This is because his employment ceased on 11 January 2011 and the record of settlement was full and final.

[30] I have decided not to make a compliance order because the opportunity for Mr Archer to speak in terms of the reference with the prospective employer that the Authority heard from has passed, and there has been an outcome with the prospective employer involved. That position can not be altered and any compliance order in regard to that would have no affect. In regard to Mr Price's other attempts to get work there is no evidence that MSD has had any involvement. Mr Archer says he has

had no requests for any further oral references and there no evidence that Mr Price has relied on MSD for any oral references. A statement Mr Price produced from another prospective employer was not sufficient to adduce any evidence since the person did not appear at the Authority's investigation and the person's statement does not assist.

[31] The record of settlement means that MSD is required to speak consistently in regard to the written reference if there is a request for an oral reference. As such MSD should have the opportunity to do so if required now that the position has been clarified.

[32] MSD's failure to pay Mr Price on time means it deprived him of the use of his money. MSD is required to pay interest on the sum for the time of the delay. Interest is calculated at 5% pa under the Judicature (Prescribed Rate of Interest) Order 2011. The money was paid on 28 January 2011 when it was received by Mr Price in his account. It was due on 11 January 2011. MSD is required to pay Mr Price 5% per annum interest on the late payment for 18 days that amounts to the sum of \$13.84.

[33] MSD is also required to pay Mr Price \$71.56 filing fee.

Conclusion

[34] MSD is to pay John Price:

- a. \$13.84 interest, and
- b. \$71.56 filing fee

to close the matter.