IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 115
5359357

	BETWEEN	ROSAURO GAPUZAN Applicant
	A N D	PRATT & WHITNEY AIR NEW ZEALAND t/a CHRISTCHURCH ENGINE CENTRE Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in Person Geoff Carter, Counsel for Respondent
Investigation meeting:	5 June 2012 at Christchurch
Submissions Received	5 June 2012
Date of Determination:	12 June 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant's claims of breaches of a settlement agreement fail.

B. The Applicant's claim of breaches of good faith fail.

C. Costs are reserved.

Employment relationship problem

[1] Mr Gapuzan seeks an order for compliance with the terms of a settlement agreement, together with a penalty for breach of the settlement agreement and damages.

[2] Mr Gapuzan was employed by the respondent as a New Zealand licensed aircraft maintenance engineer until he resigned on 21 December 2011 pursuant to the terms of a settlement agreement. One of the terms of the settlement agreement stated as follows:

> *Having attended mediation and resolved their employment relationship problem Rosauro & CEC undertake that when speaking of each other to third parties they will only do so in positive or neutral terms.*

[3] Mr Gapuzan sustained an injury to his right elbow at some time in November 2011 which he attributes to the work he was employed to carry out. He completed one of the respondent's General Incident Reports but described the injury as *"pain on elbow, left. Probable cause repetitive task, kitting in awkward position"* [emphasis added].

[4] Mr Gapuzan's manager, Mr Crackett, completed the General Incident Report form by stating that it was a pre-existing condition, referring to a previous General Incident Report dated June 2008 and stating that he had arranged for an occupational assessment to be carried out.

[5] Mr Gapuzan visited his GP who recorded on an ACC work and referral form that Mr Gapuzan was suffering from *"right elbow pain from repetitive movements and awkward position of the right arm at work, (lateral epicondylitis – elbow) right"*.

[6] The Accident Compensation Corporation wrote to Mr Gapuzan on 7 December 2011 acknowledging his claim relating to *"tennis elbow – right"* and asked him to, amongst other things, arrange for his supervisor or manager to complete the *ACC 273 Employer/Self-Employed Cover and Work Injury Questionnaire*. Mr Gapuzan says that he gave the questionnaire to Mr Crackett to complete.

[7] On 14 December 2011, an occupational assessment took place by Dr Souter, who prepared a short report of the same date. The report included the following comments:

> *According to the workplace review notes on file, Ross* [the name used by Mr Gapuzan at work] *has given a history in the past of symptoms in his right elbow of this current nature that occurred when he worked at Saudi Arabia Airlines and was hammering. He did not disclose any relevant problems on pre-employment in relation to this if that is indeed the history (the form specifically asks about tennis elbow and other conditions of this nature). ...*

In an email to me recently Ross said that symptoms in his right elbow had been going on for a year now (he said they started when he was doing alternative duties painting). We have no record I am aware of in regard to his Right arm and these duties, however these notes may exist elsewhere. In 2008 (July) there was a complaint (and GIR) in relation to symptoms in his left elbow which Ross felt were caused by work tasks in the BX area. A workplace assessment was completed at this time. understand [sic] *an ACC claim was raised at this time, which I believe according to the notes on file, was declined subsequently. I don't have the ACC documentation around this. I think may have gone to see another specialist in relation to this problem.*

In terms of the history above (in particular the left elbow) a workplace assessment was completed by Ingrid before Ross started work in the CX area in January 2011. The purpose was to identify whether there were any potentially aggravating tasks in the area which were felt to be unmanageable for Ross given his history. The work was described as a mix of kitting and work station work. No significant problems were identified, and Ross agreed at the time of the assessment that the work was suitable.

I understand that over the first half of this year there have been no identified problems in relation to right elbow symptoms. I understand from Ross that he feels he is doing more kitting recently in the past few months, and that this has caused his "flare up" of symptoms. It seems likely from our discussion today that he has been doing more kitting, as they are now short in this area, but there are others whom [sic] *also rotate through this task. Assistance is provided for lifting of heavy items. Frequent actions using the right (and left) arm such as filling up trays and scanning are part of the tasks we looked at, however the weight of the items is small.*

… In addition, there is currently an ER issue with Ross and CHCEC and he views any of our involvement with suspicion as to the intentions of our service.

… My recommendations therefore (in terms of managing the right elbow pain currently) are

- *that Ross sees his GP for investigations and medical management as required to treat his current right elbow pain as soon as possible.*
- *that CHCEC management assist where possible to reduce his time kitting, or at least limit kitting sessions and rotate through desk work whilst the symptom* [sic] *settle over the next few weeks.*
- *that CHCEC request an independent workplace assessment from ACC provider to establish whether there are any independent concerns about the work tasks in terms of causation or aggravation of the right elbow symptoms, and recommendations for management from an independent provider (given the current ER issues).*
- *that ACC provide an independent assessment of causation with an Occupational Physician (if required for their claim process) following workplace assessment.*

> *... Please let me know if you have anything to add to this by way of background. Hopefully Ross's current symptoms will settle over the next few weeks, with appropriate treatment and work modifications. These conditions are usually chronic, variable in terms of symptoms, and can be aggravated by certain activities, or without prompting even, as explained to Ross when I saw him.*

[8] Mr Crackett filled out the ACC 273 questionnaire but, in the section headed up *"Work Injury Details"*, to the question *"do you agree this injury was caused by the employee's work?"*, ticked the *"No"* box. Where he was asked to provide a reason, Mr Crackett stated the following:

> *Refer attachment (2). Request an ACC Assessment due to Ross's previous claims against ACC and CHCEC.*

[9] Attachment (2) was a copy of the email from Dr Souter, extracts of which have been cited above. Where the questionnaire asked *"any other possible cause of this injury or relevant information"*, Mr Crackett wrote *"refer attachment (2)"*.

[10] In completing the section of the questionnaire headed up *"Work Tasks"* in respect of the section in relation to *"Lifting"*, Mr Crackett specified the maximum weight as under 1kg but said that the *"number of lifts per day"* was *"numerous"*. Mr Crackett signed the questionnaire and dated it 19 December 2011.

[11] Also attached to the questionnaire was an email dated 11 January 2011 from an occupational nurse called Ms Barclay. This stated that Mr Gapuzan had had *"previous flare ups of epicondylitis L (elbow) and low back pain"*. She states that she had been requested to assess the tasks associated with Mr Gapuzan's new job in the CX area (which was to comprise auditing Kit Carts, a task required in the maintenance of air engines). She states in her report that she was to advise on potential tasks that could contribute to a relapse in symptoms associated with his previous epicondylitis.

[12] The report states that the job involves:

> *"Checking parts, scanning barcodes and assigning parts to a Kit Cart. There is a proportion of the job that involves lifting parts on and off trolleys but in most part these were manageable by one person or for larger parts lifting devices were made available. There is also a reasonable amount of time spent entering data onto the computer. The computers are set up as a sit/stand work station. There was reportedly a frequent rotation throughout the different jobs.*

> *On discussion Rosauro felt that there were no repetitive actions involved in these duties.*
>
> *Findings*
>
> *1. There were no tasks assessed that would foreseeable* [sic] *cause a reoccurrence of epicondylitis.*

[13] On 20 December 2011, a settlement agreement was negotiated between Mr Gapuzan and the respondent and signed by both parties and by a Department of Labour mediator. Mr Gapuzan then resigned the following day in accordance with the terms of the settlement agreement.

[14] Mr Crackett gave evidence that, because Mr Gapuzan had resigned, and was therefore no longer an employee, he did not send in the ACC 273 form to the Accident Compensation Corporation. As a result of this failure, ACC wrote to Mr Gapuzan on 6 January 2012 advising him that the ACC was unable to approve his claim because it did not have enough information about the cause of the medical condition because he did not return the employer questionnaire. However, the letter also stated the following:

> *If you would like to continue with your claim, please return all the completed questionnaires as soon as possible. Your claim will be reconsidered on receipt of all the questionnaires.*

[15] Mr Gapuzan gave evidence that he spoke to ACC on 9 January 2012 and also called the mediator who telephoned the respondent to pass on Mr Gapuzan's concerns. The evidence of the respondent was that, as soon as the mediator contacted it, it arranged for the questionnaire to be faxed to ACC.

[16] The Authority saw a note of a conversation on 9 January 2012 between an ACC case officer and Mr Gapuzan, made by the case officer. The note confirms that the case officer advised Mr Gapuzan that ACC could reopen the claim and reconsider it based on the information from the GP and himself. The note also shows that the case officer advised that a work-related injury claim needed to be considered in accordance with the legislative criteria and that Mr Gapuzan understood that and that he would send in more information.

[17] Mr Gapuzan expressed concern at the Authority's investigation meeting that the respondent had obtained copies from ACC of case notes recording his conversations with the case officer, citing a breach of his rights of privacy. Whether

or not these notes were obtained in breach of the Privacy Act, I found that they were useful in assisting me to investigate the matter and so admitted them into evidence. It is likely that, if the documents had not been disclosed by the respondent, that the Authority would have sought them in any event as part of the investigation.

[18] On 13 January 2012, having considered the questionnaire completed by Mr Crackett, ACC wrote to Mr Gapuzan again stating that it could not approve his claim for the following reasons:

> - *There is no work task or factor in your work environment that can be identified as having caused your condition.*
> - *The work you do and/or your work environment is not recognised as placing workers at a significantly greater risk of developing your medical condition.*

[19] Mr Gapuzan claims that the respondent breached clause 6 of the settlement agreement in two ways:

(a) By failing to send in the questionnaire prior to ACC's deadline; and

(b) By responding in the questionnaire that the injury was not caused by his work, and by making a misleading response that he did not lift weights above one kilogram.

[20] Mr Gapuzan claims that, were it not for these actions by the respondent, his claim would not have been refused by ACC.

Issues

[21] The Authority must decide the following:

(a) Whether the respondent's failure to send the questionnaire to ACC by the expected deadline constituted a breach of clause 6 of the settlement agreement.

(b) Whether the answers given on the questionnaire by the respondent constituted a breach of clause 6 of the settlement agreement.

(c) If the answer of either is in the affirmative, whether damages are payable to Mr Gapuzan as a result of the breach(es) and whether a penalty or penalties should be imposed on the respondent.

(d) Was there a breach of good faith by the respondent by its actions?

Was the failure to send in the questionnaire by the deadline a breach of clause 6?

[22] In evidence, Mr Crackett gave his explanation for the failure to send in the questionnaire; namely, that he had misunderstood the duty of the respondent when he believed that, once Mr Gapuzan had resigned, the respondent's duties in respect of the return of the ACC Questionnaire were discharged. As soon as the mistake had been realised, by the mediator advising the respondent to send the questionnaire in, the failure was rectified.

[23] I do not believe that the failure by the respondent to send in the questionnaire within the deadline constituted a breach of clause 6. It is clear that the wording of clause 6 is intended to prevent the parties from making disparaging remarks about each other. In my view, it is not possible to stretch the meaning to include a duty on the respondent to send in a questionnaire to the Accident Compensation Corporation nor, in a wider sense, to send information to any third party. The duty is simply not to make negative or disparaging remarks about Mr Gapuzan. A duty may have existed pursuant to the Accident Compensation Act, but the Authority does not have the jurisdiction to consider that.

[24] In addition, even if this failure by the respondent did constitute a breach of clause 6, it caused only minimal prejudice to Mr Gapuzan as he was allowed to reopen his claim and have it considered. In other words, no damage flowed as a result of any such breach.

[25] In summary, I find that Mr Gapuzan fails in his assertion that the failure by the respondent to send in the questionnaire form ACC 273 constituted a breach of clause 6 of the settlement agreement.

Were the contents of the questionnaire in breach of clause 6 of the settlement agreement?

[26] In my view, Mr Crackett's responses to the questions on the ACC questionnaire did not constitute a failure to refer to Mr Gapuzan in *"positive or neutral terms"*. To state in the questionnaire that Mr Gapuzan's right elbow epicondylitis was not an injury caused by his work is not a disparaging remark but is an expression of Mr Crackett's opinion in relation to a matter of causation.

[27] Even if I am wrong on that, and even if it could be argued that the clause required Mr Crackett to give an answer that was helpful to Mr Gapuzan, I do not believe that Mr Crackett caused the respondent to breach clause 6 of the settlement agreement wilfully as I accept that he formed the opinion that the right elbow epicondylitis was not work-related genuinely, based on the reports of Ms Barclay and Dr Souter.

[28] Mr Gapuzan sought to argue that he had drawn to the attention of the respondent the risk of injury arising out a job change when he wrote an email in October 2011 setting out his concerns about the change. However, the email makes no mention of his fear of an injury arising from the change, and refers to the terms of the collective agreement in force. Mr Crackett could not legitimately have been expected to have been alerted to Mr Gapuzan's concerns of injury by that email therefore.

[29] Insofar as it may be said that Mr Crackett giving an answer on the questionnaire which Mr Gapuzan did not want him to give constitutes a failure to speak of Mr Gapuzan in mutual or positive terms, I believe that such an agreement to do so must be modified by an implied term that clause 6 must not be read to force the respondent knowingly to give untrue statements.

[30] As Mr Gapuzan submitted himself, the respondent was under a duty to complete the questionnaire and return it to ACC. It could not, therefore, refuse to fill it in, in case it breached the terms of clause 6. Equally, it could not deliberately state an opinion in the ACC questionnaire that it did not believe was true solely in order to comply with clause 6 of the settlement agreement.

[31] Given the statements made by Dr Souter, cited above, in relation to the possible ultimate cause of the right elbow epicondylitis (the hammering work in Saudi Arabia), I believe that Mr Crackett had no choice but to indicate that he did not believe that the injury was caused by Mr Gapuzan's work. However, Mr Crackett also requested that ACC carry out its own assessment and so cannot be said to have given ACC an indication that the respondent's view regarding the cause of the injury was to be taken as definitive.

[32] Mr Gapuzan has pointed out that Mr Crackett was incorrect when he stated that the maximum weight lifted by Mr Gapuzan during the work was less than 1kg.

Mr Crackett has explained that he believed that the vast majority of the parts that Mr Gapuzan had to lift was less than 1kg in weight, although acknowledged that, occasionally, heavier parts would need to be lifted. Mr Crackett should probably have answered this question differently, but said that this was the first time he had ever filled in an ACC 273 form before. I do not believe that Mr Crackett deliberately set out to mislead ACC in this answer, but, in any event, even if he did, I do not find that his answer breached clause 6 of the settlement agreement for the reasons already given.

[33] Finally, even if the respondent was in breach of clause 6, I do not believe that this alone was the cause of the ACC declining Mr Gapuzan's application. The ACC had explained to Mr Gapuzan that it had to assess his application in accordance with s 30 of the Accident Compensation Act 2001, which distinguishes causation with aggravation of an injury, and that it did not rely solely on what an employer opines in terms of causation. In light of this, it unlikely that a breach of clause 6 would have been directly responsible for the refusal by ACC in any event.

Did the respondent breach the duty of good faith towards Mr Gapuzan?

[34] Mr Gapuzan has also argued that the duty of good faith survives the termination of his employment through resignation and that the respondent's failings to send in the questionnaire in time, and the content of the questionnaire, constituted a breach of the duty of good faith.

[35] It is my view that the respondent's duty of good faith towards Mr Gapuzan ended at the point when his employment ended. There is nothing in the settlement agreement that states that there was a general duty of good faith which survived his resignation other than in the specific context of the non-disparagement clause. As I have already found, I do not find that there was any breach of clause 6 of the settlement agreement and, therefore, do not find there was any breach of the limited duty of good faith that may be said to vest in clause 6.

[36] Mr Gapuzan also raised an argument that the respondent had failed to be communicative and responsive by not responding to his October 2011 email which he had sent to the respondent questioning an alleged change of his duties. However, this email had been sent prior to the settlement agreement being signed, and that agreement had contained the usual clause that it was in full and final settlement of all

matters arising out of the employment relationship and its termination, including but not limited to all or any statutory entitlement, save as provided. This clause therefore extinguishes any right Mr Gapuzan has to complain of an alleged breach of good faith arising out of his employment.

Summary

[37] I decline to find that there has been a breach of clause 6 of the settlement agreement and, further, that there has been a breach of any duty of good faith towards Mr Gapuzan by the respondent. His claims, therefore, must fail.

Costs

[38] Costs are reserved. If the parties are unable to agree how costs should be disposed of between them, the respondent may lodge a memorandum within 28 days of the date of this determination seeking a contribution towards its legal costs. Mr Gapuzan will then have a further 28 days within which to serve and lodge a memorandum in response.

David Appleton
Member of the Employment Relations Authority