Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 162
5470895

BETWEEN	SANDRA JANE WALLACE Applicant	
A N D	BASKETBALL INCORPORATED Respondent	OTAGO

Member of Authority:	Helen Doyle
Representatives:	Malcolm McDonald, Advocate for Applicant Werner van Harselaar, Counsel for Respondent
Investigation Meeting:	9 October 2014 at Dunedin
Submissions Received:	On the day Further information 13 and 16 October 2014
Date of Determination:	17 October 2014

DETERMINATION OF THE AUTHORITY

A **Basketball Otago Incorporated is to pay a penalty to Sandra Wallace in the sum of $2000 for breaching a settlement agreement.**

B **Basketball Otago Incorporated is to pay costs to Sandra Wallace in the sum of $1000 together with reimbursement of a filing fee in the sum of $71.56.**

Employment relationship problem

[1] Sandra Wallace and Basketball Otago Incorporated (Basketball Otago) entered into a settlement agreement on 19 June 2014. The agreement was certified on 23 June 2014 by a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment.

[2] Under the settlement agreement, Basketball Otago was to make payments to Ms Wallace within 14 days of it being executed by both parties and return a laptop and mobile telephone within seven days of Ms Wallace returning them to the employer for cleaning. Basketball Otago was to provide a reference reflecting the positive aspects of Ms Wallace's service within 14 days of the agreement being executed. Each party was to bear their own costs in relation to the agreement.

[3] I prohibit from publication any other aspects or detail of the settlement agreement.

[4] As at 4 July 2014 Basketball Otago had failed to make the payments under the agreement. The laptop had not been returned and a reference had not been provided. There was no breach in respect of the mobile telephone. Mr McDonald sought immediate compliance in relation to the outstanding matters failing which he advised that enforcement steps would be taken.

[5] Ricky Carr, the Chairperson of Basketball Otago in an email dated 8 July 2014 responded to Mr McDonald and advised that the financial position of the organisation meant that the requisite funds were not available to complete the obligations. Mr Carr advised that Basketball Otago would be in a better position to comply with the agreement after 20 July 2014. He further advised that they were waiting for the *IT person* to wipe the memory from the laptop and he would keep Mr McDonald advised as to the availability of the laptop. On 10 July 2014 Mr Carr provided a history of service for Ms Wallace.

[6] Mr McDonald sent a strongly worded email to Mr Carr dated 12 July 2014. He advised that the document provided as a history of service was not the positive reference which had been agreed to. He noted that the laptop had not been provided. He attached to his email a bank statement from Basketball Otago as at 10 July 2014 which showed a credit balance and further available balance and said it cast doubt on

the statements that there were no funds to meet the obligations under the settlement agreement. A response to that matter was invited but there was no written response.

[7] Mr McDonald lodged an application with the Employment Relations Authority on 22 July 2014 in which he sought compliance with the settlement agreement, a penalty for breach and costs. On 12 August 2012 Mr van Harselaar advised that he was acting for Basketball Otago in a pro bono capacity.

[8] The Authority held a telephone conference on 20 August 2014 by which time two of the payments under the settlement agreement had been made and the third was made shortly after the telephone conference. During the telephone conference Mr McDonald and Mr van Harselaar agreed to try to agree on the wording of a reference in terms of the settlement agreement and the arrangements for the return of the laptop computer.

[9] There was an urgent date given to the parties if those matters were unable to be agreed and resolved.

[10] The Authority was advised that there had been compliance with the settlement agreement and the only remaining issues therefore were the claim for a penalty and costs.

[11] The Authority heard evidence from Mr Carr and submissions about those matters.

Breach

[12] Basketball Otago accepts that there were breaches of the settlement agreement in that it did not perform its obligations under that settlement agreement by the required time.

[13] Section 149(4) of the Employment Relations Act 2000 (the Act) provides that a person who breaches a mediated term of settlement is liable to a penalty imposed by the Authority. The penalty action in this matter was commenced within the time limit of 12 months after the breaches.

[14] Mr McDonald submitted that the breaches were flagrant and of particular concern was the fact that some of the moneys payable were moneys owing for

statutory entitlement and wages. He referred to the content of the document provided as a reference as insulting. Mr McDonald submitted that the treatment Ms Wallace had received since the agreement was entered into has had a detrimental impact on her.

[15] Mr Carr said that he thought at the time of entering into the agreement it was in good faith and that there was money for payment but subsequently funders withheld payment and alternative arrangements had to be made to obtain the money. Mr Carr also said that he did not reside in Dunedin and it was more difficult therefore to monitor day to day matters in respect of the settlement agreement and work through matters. He said that he thought the reference was appropriate.

[16] Mr van Harselaar submitted that there was a delay in dealing with matters as a result of funding issues and that although some accounts would suggest that there was money available to pay Ms Wallace, there were also other obligations that Basketball Otago had to meet. He submitted that after his involvement matters moved quickly, and payments and other obligations under the settlement agreement were attended to. Mr van Harselaar submitted that any penalty if one was to be awarded should be at a lower level as otherwise it would make a difficult situation worse for Basketball Otago.

Determination

Penalty

[17] I have considered some statistics on the level of penalties awarded under s 149 (4) of the Act since 1 July 2012 by the Authority to the current time. There have been penalties imposed at a level between $2000 and $5000. These are at a higher level than the average penalty for that period. The higher awards have typically been made in situations where there has been no compliance at the time of the Authority investigation meeting with one or more aspects of the settlement agreement and there is a sustained and continuing default.

[18] The Employment Court in *Xu v McIntosh* [2004] 2 ERNZ 488 at [47]-[48] provides some guidance as to what to consider when imposing a penalty. A penalty is imposed for the purpose of punishment of a wrongdoing which in this case is the breaching of a mediated settlement agreement. *Xu* recognises that not all breaches are

equally reprehensible and the Authority should consider how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it. There needs to be consideration as to whether the breach was technical and inadvertent or flagrant and deliberate.

[19] I did not hear evidence from Ms Wallace but it is clear from the correspondence at the time that the failure to comply with the settlement agreement in a timely manner did cause her frustration and concern. Ms Wallace was entitled to conclude that a settlement agreement would not be entered into in circumstances where there was no ability for Basketball Otago to meet their obligations in that agreement. She was further entitled to conclude that the obligations under the agreement would be met by the time agreed to without further involvement on the part of her or her representative.

[20] There is documentation before the Authority for it to conclude that there was some money in the accounts of Basketball Otago to pay the amounts in the settlement agreement at the time they were due. I am not satisfied that the failure to make the payments on time therefore was inadvertent and technical but rather stemmed I find in all likelihood from a deliberate decision to make other payments at that time which were regarded as more pressing. In that way I find that the failure to make the payments was flagrant. Mr McDonald had sent an email to the solicitor then acting for Basketball Otago on 23 June 2014 setting out the amount for payment under the agreement and details of Ms Wallace's account. That was a clear reminder of the obligations for payment.

[21] I do not see the breaches in respect of the form of the reference provided by Mr Carr and the delays about the laptop return in the same way as the breaches to pay the monetary amounts. Although unsatisfactory I find that they were more inadvertent than deliberate and flagrant.

[22] I do take into account that the breaches are not ongoing and the obligations have now been satisfied. I consider however that the actions of Basketball Otago do warrant a penalty to express disapproval of its conduct. Many employment relationship problems are resolved by a settlement agreement certified by a mediator. Parties to settlement agreements must have confidence that the obligations therein will be adhered to by the time agreed without the need for proceedings to be lodged. The

penalty should act as a deterrent to others who may enter into settlement agreements under s 149 of the Act and then maintain that they do not have the financial resources to meet their obligations under the agreement and/or do not meet other obligations by the time agreed.

[23] I am of the view that an appropriate penalty to impose on Basketball Otago would be the sum of $2,000. There is discretion under s 136 (2) of the Employment Relations Act 2000 (the Act) for the Authority to award some or the entire penalty to a person rather than the Crown. I find this is an appropriate case to award the entire penalty to Ms Wallace. I accept that there has been harm to her by the breaches.

[24] Basketball Otago Incorporated is ordered to pay to Ms Wallace a $2,000 penalty for breaches of a settlement agreement.

Costs

[25] Mr McDonald provided details of invoices in relation to fees charged for work to Ms Wallace.

[26] $2000 was charged for work up and including the entering into of the settlement agreement. I do not find that costs should be awarded in respect of the first invoice. Those costs are not related to the compliance and the penalty claim. I note that the settlement agreement specifically provides that the parties will meet their own costs in relation to the agreement.

[27] There was a further invoice for fees in the sum of $2000 for matters in relation to the breach. Those costs are relevant. The investigation meeting was a brief one of less than one hour and the daily tariff of $3500 should be adjusted accordingly. It would be fair to divide the tariff by six to arrive at a rate of $583.33. I then adjust that amount upwards to reflect the communication that took place in an attempt to secure compliance with the settlement agreement, the work to prepare and lodge the Statement of Problem and an attendance at an Authority telephone conference on 20 August 2014. I do not find that the attendances with a reporter should be part of the costs consideration. I find that a fair and reasonable contribution towards costs in all the circumstances is $1000 together with reimbursement of the filing fee of $71.56.

[28] I order Basketball Otago Incorporated to pay to Sandra Wallace costs in the sum of $1000 together with the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority