Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 427
3049632

	BETWEEN	ALEX BAGLEY Applicant
	AND	DELOITTE LIMITED (AS TRUSTEE FOR THE DELOITTE TRADING TRUST) Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	David Marriott, counsel for the Applicant Andrew Schirnack, counsel for the Respondent
Investigation Meeting:	25 March 2019 at Auckland
Submissions Received:	21 and 27 March 2019 from the Applicant 21 and 27 March 2019 from the Respondent
Date of Determination:	18 July 2019

DETERMINATION OF THE AUTHORITY

A. The settlement agreement entered into under section 149 of the Employment Relations Act 2000 was not valid.

B. Payments made to Mr Bagley under the settlement agreement were significant and exceeded entitlements to which he may have been entitled in the event there was no settlement agreement.

C. The Authority declines to award remedies to Mr Bagley.

D. Costs shall lie where they fall.

Employment Relationship Problem

[1] The applicant, Mr Alex Bagley, claims that he entered into a settlement agreement with the respondent, Deloitte Limited (Deloitte), relying on information provided to him by Deloitte, which was incorrect. Mr Bagley claims he was misled by Deloitte with regard to his entitlement to redundancy compensation and the settlement agreement is invalid.

[2] Mr Bagley seeks remedies including payment of redundancy compensation of 16 weeks salary, which he says he was entitled to, a penalty against Deloitte for breach of contract, and costs.

[3] Deloitte denies Mr Bagley's claims and says that Mr Bagley is barred from bringing his claims by the settlement agreement entered into by the parties under s 149 of the Employment Relations Act 2000 (the Act). Deloitte says in the alternative that if Mr Bagley's claims are not barred, Deloitte acted at all times with an honest belief that he was not entitled to redundancy compensation under the terms of his employment with it and this was a genuinely held belief.

[4] Further, it says that Mr Bagley has no entitlements to redundancy compensation because his employment was not terminated by reason of redundancy, rather it was terminated by mutual agreement under the settlement reached between the parties and/or that the settlement was entered into by mistake under the Contract and Commercial Law Act 2017 (the CCLA). Deloitte claims that the Authority should not grant relief if it finds that the settlement was entered into by mistake because this would confer a benefit substantially disproportionate to the consideration paid pursuant to the settlement.

Non-publication order

[5] At the commencement of the investigation meeting, the parties jointly requested the Authority to issue an order prohibiting publication of commercially sensitive information contained in the settlement agreement. The settlement agreement provided that " … the existence, terms and process used to reach this agreement, including payment of any sums hereunder, shall be confidential to the parties and Confidential and Without Prejudice". I am satisfied that an order permanently prohibiting the publication of all evidence relating to the existence of, and

the quantum of, payments set out in paragraph 2 of the settlement agreement is appropriate. The non-publication order is to protect commercially sensitive information of both parties. It is appropriate in the circumstances that a non-publication order in relation to the payments set out in the settlement agreement are made and I order accordingly.[1]

[6] I make an order pursuant to clause 10 of the Second Schedule to the Act prohibiting the publication of all the contents of all the financial details of the settlement agreement.

The investigation meeting

[7] The investigation meeting took almost one full day in the Authority. Mr Bagley filed a witness statement. For Deloitte, Mr Gareth Glover, Partner, Ms Emily Sluter, Human Resources (HR) Advisor, and Ms Lisa-Jane Taiapa, former HR Manager and Head of Recruitment, each filed witness statements.

[8] Each of the witnesses giving evidence before the Authority affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[9] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states finding of fact and law and makes conclusions on issues necessary to dispose of the matter.

Relevant facts

[10] Mr Bagley was employed by Asparona Limited (Asparona) in a business development role in late 2010. In 2013, Asparona was acquired by Deloitte and became known as Deloitte Asparona Limited. From 1 June 2017, Deloitte Asparona Limited was renamed Deloitte Limited.

[11] At the time of renaming Deloitte Asparona to Deloitte, Mr Bagley's employment agreement was replaced by a new agreement. In a letter to Mr Bagley dated 10 April 2017, it was confirmed that Mr Bagley's employment with Deloitte would come into effect on 1 June 2017 and his employment with Deloitte Asparona would terminate on that same date. The letter further stated:

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[1] *Crimson Consulting Limited v Berry* [2017] NZEmpC 94 at [96]; and clause 10, Schedule 2 of the Employment Relations Act 2000.

> " …For all service-related entitlements, your employment with Asparona, Deloitte Asparona and Deloitte would be treated as continuous.
>
> Your accrued leave entitlements will transfer from Deloitte Asparona to Deloitte.

[12] Mr Bagley's employment by Deloitte was in the position of Manager - Oracle Community of Practice within the consulting service line. Mr Bagley received a base salary and commission. In May 2018, Mr Bagley was promoted to the position of Associate Director, Oracle Practice.

June 2018

[13] Mr Gareth Glover, the Partner to whom Mr Bagley reported, says that during 2018 he was becoming increasingly dissatisfied with the sales commission scheme in operation, as it was becoming difficult and time consuming to administer.[2] Mr Glover began to form the view during the middle of 2018 that his preference was to retire the sales commission scheme and move those staff, such as Mr Bagley who were on sales commissions, to the general Oracle bonus scheme. Mr Glover felt that:

> The general Oracle bonus scheme would allow us greater collective flexibility to agree performance goals/KPIs to achieve bonuses on a quarterly basis. I also felt that as the sales commission could no longer easily formulaically determined (due to the level of subjectivity and judgement required) that this scheme had now passed its useful life. I felt I was really just subjectively awarding a discretionary bonus, using sales data as an input point.

[14] For these reasons, in early June 2018 Mr Glover initiated a conversation with Mr Bagley about his remuneration structure. Mr Glover and Mr Bagley were unable to reach agreement on a reasonable remuneration package, so no agreement was reached and the status quo with regard to Mr Bagley's remuneration structure continued. Mr Glover says that at the time that these discussions were occurring with Mr Bagley, he and his business partners had not received Deloitte's final end of year result. Mr Glover says the Oracle practice was going to be behind budget but the full extent of this had not been finalised. In response to questioning about Mr Bagley's promotion, Mr Glover says, although there were concerns about the performance of the Oracle practice, the decision was made to proceed to promote Mr Bagley. When the results for the Oracle practice became available, it became clear that Oracle's profitability in the previous year was 40% short of budget. Mr Glover says it was

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[2] Glover witness statement.

following this result that the decision was made to consider potentially restructuring the Oracle business. Mr Glover says the restructure and the discussions regarding possible restructuring had nothing to do with the discussions held with Mr Bagley over Mr Bagley's remuneration structure following his promotion.

Meeting on 15 June 2018

[15] On 15 June 2018 Mr Glover met with Mr Bagley. Ms Lisa Taiapa also attended. Mr Bagley believed the meeting was to continue discussions about his remuneration following his promotion. However, it quickly became apparent to him that the meeting was to discuss "a likely restructure which would result in my position being disestablished".[3] At the meeting, Mr Bagley asked Mr Glover: "Are we in a formalised process or are we having a discussion? Second is this process happening wider across the consulting business?" Mr Glover's response was: "This is more than just a chat, it's why LT is here. It's a warts and all conversation. More in a consultation process than outside one."

[16] Following the meeting on 15 June 2018, Mr Bagley contacted Ms Taiapa directly and asked her whether it was company policy to pay redundancy compensation. Ms Taiapa told Mr Bagley that Deloitte had to give him "two months' notice but that no redundancy compensation was payable". Ms Taiapa was referring to the redundancy provision in Mr Bagley's employment agreement which stated:

> **25. REDUNDANCY**
>
> 25.1 If your employment is terminated for redundancy, the employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any additional payment, whether by way of redundancy compensation or otherwise.

Meeting on 4 July 2018

[17] A further meeting was held between Mr Glover and Mr Bagley on 4 July 2018. The meeting was to further discuss issues from the 15 June meeting. The meeting concluded with Mr Glover informing Mr Bagley that there were three ways forward:

- Another opportunity within the firm and what that looks like
- No opportunity and we would be going through with the restructure

[3] Bagley witness statement

- An informal process to negotiate an exit with timeframes/costs that suit both parties.

Meeting on 16 July 2018

[18] At the meeting on 16 July 2018, Mr Glover informed Mr Bagley that he had explored other options within the firm but there was nothing at a similar remuneration to the one that Mr Bagley was currently on. Mr Glover was concerned that options at a reduced remuneration level would be "disengaging and not motivating" for Mr Bagley. Mr Glover then explained to Mr Bagley that the two other options would both end up in an exit for him and he wanted to discuss which option was the most suitable. The first option was a without prejudice exit settlement package which both parties agreed to, and the second option was a formal redundancy process.

[19] The details of the options put at that meeting are important. The notes from the meeting record Mr Glover putting the options as follows:

> Option 1 – A without prejudice exit settlement package which both parties agree on – work through to end of August (another six weeks) with September/October paid in lieu of notice. Out placement support offered. Goodbyes and all leave/other entitlements paid out.
>
> Option 2 – formal redundancy process – this process would take one to two weeks to go through the business case and then determine the outcome. If this outcome was to be redundancy – it would be two months plus all other leave entitlements, goodbyes and out placement support.

[20] Mr Bagley and Mr Glover discussed the nuances of the two options and the meeting concluded with Mr Bagley being given the opportunity to consider the options.

Letter from Mr Bagley to Mr Glover – 18 July 2018

[21] On 18 July 2018, Mr Bagley sent an email to Mr Glover with regard to the discussions held between them on 16 July. Mr Bagley indicated in the letter that his preference was to conclude a restructure settlement package, rather than go through a formal redundancy process. Mr Bagley asked for a draft settlement agreement so that he could review it and take advice.

Meeting with Mr Glover on 19 July 2018

[22] Mr Bagley says he was asked to attend a meeting with Mr Glover on 19 July to discuss his email of 18 July. There was discussion about the detail of the package on offer,

including commissions payable, restraint of trade and whether or not part of the payment would be under s 123 of the Act. The meeting ended with Mr Glover informing Mr Bagley that he would get back to him early the following week "as some time is required to draft a settlement and agree the abovementioned numbers with the partners/firm exec". A draft settlement agreement was provided to Mr Bagley who took legal advice on it and made some changes.

Settlement meeting 30 July 2018

[23] Mr Bagley says that he expected another draft settlement agreement before meeting with Mr Glover. Instead, Deloitte convened a settlement meeting on 30 July at which he had no representative. A settlement agreement was reached between the parties. However, redundancy compensation was not discussed or included in the settlement agreement. Mr Bagley says this was because he had been told by Ms Taiapa prior to the meeting that he was not entitled to it because of the provisions of his employment agreement.

[24] The settlement agreement was signed by both parties on 30 July 2018. Mr Bagley says that before he agreed to the settlement, he reviewed his employment agreement and Deloitte's intranet to see whether or not there were any redundancy policies applicable to him. He was unable to find the policies and relied on Ms Taiapa's advice to him that he had no entitlement to redundancy compensation.

Events following the settlement agreement

[25] Mr Bagley became aware that there was a redundancy policy which conferred an entitlement to redundancy compensation on him. This occurred on 8 August 2018 following a discussion with a colleague. Mr Bagley immediately sent an email that day to Ms Emily Sluter as follows:

> **Subject:** Redundancy policy
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> Hi Emily,
>
> I've come across a redundancy policy update from October 2017 (attached), which appears to suggest, in conjunction with clause 15.3 of my employment contract, that I should have actually been entitled to full redundancy as a permanent Deloitte employee. This is not an option that was presented to me, and also not provided or advised when I specifically queried if I had redundancy inclusion with Lisa Taiapa in early June. Assuming that my understanding of eligibility is correct, I calculate this to be somewhere

> between 16-18 weeks of entitled redundancy, based on me joining Asparona in 2010 and serving continuous employment since.
>
> I'll be disappointed if I have been informed incorrectly, and seek that you clarify this with urgency, in addition to outlining suitable option(s) and/or resolution. Whilst we have recently signed a settlement, this was entered into on the advice from Deloitte that I was not entitled to redundancy. I look forward to hearing from you.
>
> Thanks,
> Alex

[26] The response from Ms Sluter was contained in an email on the same day to Mr Bagley as follows:

> … We don't believe there is a conflict between what is stated in your employment agreement and Deloitte policies that would warrant deferral to the policy. Your IEA is very clear regarding your entitlement to redundancy hence this was the advice you were given by Lisa. We did present both the option of a settlement agreement or the formal redundancy process. …

[27] The letter went on to talk about the settlement agreement and concluded with stating that the settlement agreement is full and final, has been signed off by a mediator and cannot be cancelled.

[28] Mr Bagley was not happy with the response from Ms Sluter and sought legal advice. Mr Bagley says he is entitled to redundancy compensation and was explicitly told he was not by members of the People and Performance team at Deloitte. Mr Bagley says he was entitled to rely on the information provided to him on behalf of the company by the People and Performance team. The information he received was incorrect and Mr Bagley says he entered into a settlement agreement on the basis of incorrect information. Accordingly, Mr Bagley says the settlement agreement is not valid. Mr Bagley seeks payment of the redundancy compensation to which he says he is entitled.

Redundancy policy

[29] The redundancy policy provided to the Authority is People and Performance Policy 11.03 which was reviewed on 1 October 2017. The first page of the redundancy policy states:

> **Eligibility**
> All permanent Deloitte people are entitled to redundancy benefits.

> **Notification**
> In the event of redundancy, Deloitte people will receive a minimum of four weeks written notification. When we give a Deloitte person notice in writing they will be made redundant, we reserve the right to pay them in lieu of notice or have them work part or all of their notice period away from the office.
>
> **Compensation**
> Compensation for retrenchment will be based on the formula of four weeks' salary for the first complete and continuous year of service, and two weeks' salary for each additional complete and continuous year of service, to a maximum of 24 weeks salary. In the case of redeployment to an alternative role within the Firm the Deloitte person will not be eligible for any compensation. If the Deloitte person is offered an alternative role in the Firm on terms and conditions, which are generally no less favourable than their existing terms and conditions, and they do not accept the alternative position, they will be given notice but will not be entitled to any redundancy compensation.

[30] Mr Bagley's employment agreement states in clause 25 that, upon termination of employment for redundancy, there is no entitlement to an additional payment of redundancy compensation. Clause 23 provides that if the employment agreement is terminated, either party is to give two months' notice. Clause 15 of the employment agreement states:

> 15. **POLICIES**
>
> 15.1 The company has standard policies on many matters. A number of these matters are, or will in the future, be relevant to you. A list of Deloitte policies which apply to your employment will be made available to you on commencement of your employment. You must ensure that you know the policies on these matters and observe them strictly at all times.
>
> 15.2 The company reserves the right to amend all or any of the policies from time to time at its discretion on reasonable notice to you.
>
> 15.3 Where there is any conflict or inconsistency between the terms of this employment agreement and company policies, then policy will prevail.

[31] The important provision for the purposes of this matter is clause 15.3. The employment agreement provides in a situation of termination of employment that in Mr Bagley's case he would be given:

1. two months' notice of termination (clause 23)
2. no compensation for redundancy (clause 25.1).

However, these provisions conflict with the redundancy policy which provides that in the event of redundancy, Mr Bagley would be entitled to a minimum of four weeks written notification which could be paid out in lieu of notice and compensation based on a formula of four weeks' salary for the first complete and continuous year of service and two weeks' salary for each additional complete and continuous year of service.

[32] Mr Bagley says he is entitled to 16 weeks compensation for redundancy under clause 15.3 of the policy and the policy prevails over the provisions of the employment agreement. Both Ms Sluter and Ms Taiapa say that their experience was that in the event of a conflict between a provision in an employment agreement and a policy provision, the employment agreement always trumps the policy. When they fully understood this was not correct, after receiving advice, they both accepted that in Mr Bagley's case in the event of a redundancy, he was entitled to redundancy compensation in accordance with the redundancy policy which, in accordance with clause 15.3, trumped the provisions of the employment agreement. It appears that this concession was not made for some months following the raising of the matter by Mr Bagley in early August. Ms Taiapa says the concession was made "very recently".

[33] Mr Bagley filed his statement of problem in the Authority on 19 December 2018, approximately 4½ months after he raised the matter with the HR department of Deloitte.

Are Mr Bagley's claims barred by the terms of the settlement agreement entered into between the parties on 30 July 2018 pursuant to s 149 of the Act ?

[34] Deloitte did not terminate Mr Bagley's employment on the grounds of redundancy and no redundancy process was undertaken. Rather, negotiations were held between the parties which resulted in a settlement agreement. This was entered into on 30 July 2018. There was no mention of redundancy compensation in the settlement agreement. A significant payment under s 123 of the Act was agreed to, together with notice and commissions.

[35] The terms of the settlement agreement include the following relevant clauses:

- That Mr Bagley's employment agreement was to terminate by reason of redundancy with his final day of employment being 31 August 2018;

- To settle the matter, Deloitte was to make various payments to Mr Bagley including compensation under s 123(1)(c)(i) of the Act;
- Payment was made on a denial of liability basis;
- Agreement was expressed to be in full and final settlement (reached in "in full and final settlement") on all matters between the parties arising out of the employment relationship between them…". Mr Bagley "agrees that the terms of the settlement agreement are reached in full and final settlement of all claims he may have against the employer, associated in related companies or any partners, officers, employees or personnel of the Company, whether arising by way of contract, statute or otherwise."
- Both parties had the opportunity of taking independent advice.

[36] On 9 August 2018, Mr Bagley became aware that he had an entitlement to redundancy compensation in the event of redundancy. He raised this matter with Deloitte. Deloitte disputed his understanding on the basis of its interpretation of his employment agreement and its policies. Mr Bagley remained in employment until 31 August 2018 at which time he was paid the sums pursuant to the settlement agreement. Subsequently, Mr Bagley sought compensation in the form of 16 weeks salary being redundancy compensation he says was owing to him pursuant to the redundancy policy.

[37] The settlement agreement was signed by the parties and by a mediator under s 149 of the Act. Section 149(3) of the Act states:

> Where, following the affirmation referred to in subsection (2) of a request made under subsection (1) where the agreed terms of settlement to which the request relates are signed by the person empowered to do so, -
>
> (a) Those terms are final and binding on, and enforceable by, the parties; and
> (b) The terms may not be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017; and
> (c) Except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whereby action, appeal, application for review or otherwise.

[38] The wording of the settlement agreement includes that it was entered into in "full and final settlement" and was in contemplation of a redundancy situation as is evident from the above clauses. The potential termination of Mr Bagley's employment for redundancy was, in my view, within the contemplation of the parties when it was signed. Counsel for Deloitte

referred me to the decision of *Marlow v Yorkshire New Zealand Limited* WEC109-98[4], a decision of the Employment Court.

[39] In *Marlow*, the Employment Court held that the settlement agreement in question settled "all claims under the contract of whatever nature and whether already commenced or only potential or inchoate" but should be "limited to claims the existence of which both parties were aware and to claims of the nature they were discussing".

[40] Counsel for Deloitte argues that the settlement was agreed as an alternative to a possible redundancy, the claim in connection with redundancy was clearly "potential or inchoate" and a claim of the "nature they were discussing". As such any claim in connection with redundancy was settled by the settlement agreement.

[41] Counsel for the applicant says that Mr Bagley was misled into entering the settlement agreement and accordingly it was invalidly entered into by him. The settlement agreement under s149 cannot therefore bar Mr Bagley from making claims, because it is not a valid agreement. The argument is that Deloitte misled Mr Bagley into thinking he was not entitled to redundancy compensation, and it would now be unfair and inequitable to allow the company to benefit from its own error, to his detriment.

[42] Mr Bagley says he is entitled to relief, either by way of cancellation of the settlement agreement, by variation of its terms to include redundancy compensation, by way of damages for the loss suffered, or by way of compensation he ought to have been entitled to under his agreement.

Valid settlement agreement?

[43] The Employment Court has reasonably recently considered the situation of whether a s 149 settlement agreement could be set aside by the Court on the ground of mental incapacity.[5]

[44] In that particular case the ground advanced for setting aside the settlement agreement was that of mental incapacity. At paragraph [27], Judge Inglis states: "The issue of whether the

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4 [2000] 1 ERNZ 206 (NZEmpC).
5 *TUV v WXY* [2018] NZEmpC 154.

employment institutions can disturb a record of settlement entered into under s 149 has been touched on in a number of cases but has not been conclusively determined." [6]

[45] At paragraph [41] of *TUV v WXY*, Judge Inglis referred to two judgments of the Employment Appeals Tribunal (UK) which dealt with the issue of the extent to which the "restrictive statutory scheme for challenging employment settlement agreements prevented the Court from intervening". The first judgment was *Glasgow City Council v Dahhan*[7] in which the Tribunal held that it had jurisdiction to set aside an agreement said to have been entered into where one party to the agreement lacked mental capacity. The second was *Industrious Ltd v Horizon Recruitment Ltd*[8] in which the Employment Appeals Tribunal considered whether it could set aside an agreement on the basis of misrepresentation.

[46] In both cases, the Tribunal held that the applicable legislation permits parties to enter into settlement agreements, but the agreement reached must be a valid agreement.

[47] At para [45] of *TUV v WXY*, Judge Inglis states that s.149(3) is

> [45] … "directed at limiting the circumstances in which parties can revisit their agreements by seeking to bring the terms of settlement before the Court (including, for example, in instances of settlor remorse). It is not directed at deeming validity of the agreement itself.
>
> [46] If that is correct, and if the plaintiff can establish that she did not have the requisite mental capacity to enter into the settlement agreement in this case, then s 149(3) would not be engaged. That is because the fundamentals of contractual formation would not have been made out and there would be no agreement for s 149(3) to leverage off. Such cases are likely to be rare because of the hurdles that must be overcome in establishing, for example, lack of mental capacity, knowledge and unconscionability.[9]

[48] Judge Inglis found that the applicant had lacked mental capacity. However, because the respondent had not been aware and could not reasonably have known about the lack of capacity, the settlement agreement was not set aside.

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6 (Footnote 1 in original text) *Lumsden v Sky City Management Limited* [2015] NZEmpC 225, [2015] ERNZ 389 at [42].See too *Lumsden v Sky City Management Limited* [2017] NZEmpC 30 at [21] – [22]; *Sawyer v the Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 71 at [21] – [37]; *AFT v BCM* [2015] NZEmpC 234 at [58].

7 *Glasgow City Council v Dahhan* UKEATS/0024/15/JW

8 *Industrious Ltd v Horizon Recruitment Ltd* (in liq) [2009] UKEAT 0478_09_1112

9 (Footnote 14 in original text) *Gustav & Co. Limited v Macfield Limited* [2008] NZSC 47

[49] Both parties were of the mistaken view that if made redundant, Mr Bagley would not be entitled to redundancy compensation. This was an error. Mr Bagley relied on the mistaken representation by Deloitte that he was not entitled to redundancy compensation and entered into a settlement agreement which in my view was not valid

Second Issue

If the settlement agreement is not a valid agreement, is Mr Bagley entitled to redundancy compensation pursuant to the Deloitte redundancy policy?

[50] Mr Bagley says he was induced to enter the settlement agreement on the basis of the misrepresentation and is entitled to damages under s135(1)(a) of the CCLA. Mr Bagley seeks a cancellation or variation of the settlement agreement pursuant to the CCLA to allow for payment of redundancy compensation he says he is entitled to.

[51] The settlement agreement included a payment under s123 of the Act, together with other monetary benefits which, in my view, must be taken into account when assessing remedies. They exceeded any payment Mr Bagley may have received if the settlement agreement was not entered into and Mr Bagley's employment had been terminated for redundancy.

[52] Mr Bagley received a significant payment from Deloitte and it would be inconsistent with the Authority's equity and good conscience obligation to ignore this. I do not consider a further payment to Mr Bagley to be just and equitable.

[53] I decline to award a remedy to Mr Bagley.

Costs

[54] Costs shall lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority