

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 243
3138361

BETWEEN

LAUREL KERR
Applicant

AND

THE ANGUS (LOWER HUTT)
LIMITED
Respondent

Member of Authority: Sarah Kennedy

Representatives: Laurel Kerr for the Applicant
Peter Dowell for the Respondent

Investigation Meeting: On the papers

Submissions Received: 14 March 2022 from the Applicant
8 April 2022 from the Respondent

Date of Determination: 10 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Laurel Kerr was employed by The Angus (Lower Hutt) Limited (“The Angus”) and there was an additional contracting arrangement between the parties. On 26 March 2021, the parties attended mediation to resolve issues that had arisen in the employment relationship. Ms Kerr resigned, and the parties entered into a record of settlement (“the settlement agreement”) in accordance with s 149 of the Employment Relations Act 2000 (“the Act”).

[2] A Ministry of Business, Innovation and Employment mediator certified their agreement. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] Ms Kerr says The Angus breached the settlement agreement when it did not provide a certificate of service and nor did it pay the agreed settlement amount to Ms Kerr. This was later paid but outside the timeframe agreed to. Ms Kerr also says the mediator was misled when he followed up about non-payment on her behalf. Ms Kerr seeks compensation and costs and a further \$5,000.00 to cover the detrimental effect of not having a record of service for her job applications.

[4] Peter Dowell, on behalf of The Angus, denies non-compliance but accepts that payment was late and says that the certificate of service was sent by email to Ms Kerr's legal representative.

The Authority's investigation

[5] The parties agreed that the matter could be heard on the papers. In addition to her statement of problem, Ms Kerr provided a written timeline, and an invoice showing the legal fees she had incurred.

[6] Mr Dowell did not attend the case management call. He had previously lodged a statement in reply attaching a letter and an impact statement he provided at mediation. Given the letter contained mostly information about allegations against Ms Kerr and that material from mediation is confidential between the parties, I have not relied on those documents when assessing and determining this matter. Mr Dowell also lodged a letter dated 24 May setting out his further responses to the statement of claim lodged by Ms Kerr.

[7] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The settlement agreement

[8] Clause 3 of the settlement agreement between the parties provided that The Angus would issue, within seven days of the agreement being signed, a certificate of service document confirming Ms Kerr resigned from her employment. The agreement was signed on 26 March 2021 meaning the certificate of service was to be provided by 2 April 2021.

[9] Clause 4 provided The Angus would pay Ms Kerr an agreed amount in accordance with s 123(1) (c)(i) of the Act, within ten working days. That was due to be paid to Ms Kerr by 9 April 2021.

Background

[10] On or about 14 April 2021, Ms Kerr asked her advocate to follow up Mr Dowell's non-compliance because she had not received payment or the certificate of service. He contacted the mediator. The mediator contacted Mr Dowell who replied that it had been paid.

[11] On 4 May 2021, having still not received payment Ms Kerr's advocate contacted the mediator again who emailed Mr Dowell again. Mr Dowell replied to the mediator saying he remembered processing the payment after the mediator's last email. Ms Kerr says this shows a lie because Ms Dowell previously told the mediator he had paid the money the day before the mediator's previous email.

[12] Mr Dowell asked the mediator for Ms Kerr's bank account number. On 5 May 2021, the mediator replied saying Ms Kerr now had legal representation and he should request the bank account details through the lawyer. Several more emails were exchanged. The lawyer provided Mr Dowell with Ms Kerr's account details and advised him that a statement of claim was ready to be filed if payment and provision of a certificate of service in accordance with the agreed terms of settlement did not take place by 9.00 am on 6 May 2021.

[13] On 5 May, Mr Dowell emailed the lawyer with proof of payment. On 10 May the lawyer advised him that the statement of problem would still be lodged due to no certificate of service being received. On 10 May, Mr Dowell emailed the certificate of service stating the original was in the mail. Ms Kerr says this was never received.

[14] Ms Kerr says she has attended two job interviews where she would have presented the certificate of service but has not been able to because Mr Dowell did not provide it. Ms Kerr says not being able to supply the certificate of service hampered her in her search for employment.

[15] Much of Mr Dowell's information lodged with the Authority contains material not able to be taken into account by the Authority given the s 149 agreement was to be a full and final settlement of all issues between the parties and what was said at mediation must remain confidential. Mr Dowell admits the payment was made late and but says it does not warrant the penalty that Ms Kerr seeks.

[16] Mr Dowell also says the certificate of service was provided by email to the lawyer on 10 May 2021 and in his earlier letter of 24 May 2021 he offered to provide a letter again, if one was still being sought. He says it was never requested.

Has there been a breach of the settlement agreement?

[17] Given the evidence that the agreed amount has now been paid, compliance is no longer an issue. In addition, given the certificate of service was provided electronically, with reference to the definition of a "document"¹ in other jurisdictions, it is likely there has also been compliance with that agreed term.

[18] Having said that, Ms Kerr had to follow up several times, request help from her advocate and then the mediator before she engaged a lawyer to ensure the agreement terms of settlement were complied with by Mr Dowell. Even taking a generous approach to the material lodged with the Authority that is relevant, it seems more likely than not that the agreed amount would not have been paid without Ms Kerr having to resort to taking legal action. While I make no finding about dishonesty on Mr Dowell's part, there is no conclusive evidence that he made any effort to ensure that payment was made.

Penalty and costs

[19] Ms Kerr sought compensation which is not available as a remedy for non-compliance of a s 149 settlement agreement. A person who breaches an agreed term of a s 149 agreement is, however, liable to a penalty imposed by the Authority.

¹ Crimes Act 1961, s 217.

[20] In this case it is difficult to conclude this is a situation that warrants a penalty because whilst a breach occurred, overall, it was quite quickly remedied after Ms Kerr engaged a lawyer so it is not sufficiently serious to warrant a penalty.

Costs

[21] In these circumstances, while costs are reserved and the parties are encouraged to resolve any issue of costs between themselves, if the Authority were asked to determine costs, given the matter was heard on the papers, the parties could expect a costs determination that considered Ms Kerr's invoice of \$680.00 for legal services required to ensure compliance by Mr Dowell with the settlement agreement.

[22] If the parties are not able to agree on costs and an Authority determination on costs is needed Ms Kerr may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Dowell would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.²

Sarah Kennedy
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1