IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 116
3022952

	BETWEEN	ESTHER ALBON Applicant
	A N D	KINETICS GROUP LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Paul Brown, Advocate for Applicant Peter Kiely, Counsel for Respondent
Investigation meeting:	17 May 2018 in Christchurch
Submissions Received:	At the investigation meeting
Date of Determination:	21 August 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Esther Albon worked for Kinetics Group Limited (KGL) until on 5 October 2017 she entered into a Record of Settlement with KGL, under s 149 of the Employment Relations Act 2000 (the Act).

[2] The settlement recorded that Ms Albon was resigning her position with KGL. Amongst other things, KGL agreed to pay Ms Albon some compensation within 14 days of 5 October 2017 and her fees for representation to date. It agreed to pay those fees within 14 days of receipt of a tax invoice for those fees.

[3] Ms Albon claims that KGL did not fully comply with the terms of the Record of Settlement. This application was lodged on 29 November 2017 and sought an order for compliance for non-payment of money, and a penalty to be imposed for the deliberate failure of the respondent to pay money owing under the Record of Settlement. In addition, Ms Albon sought costs for this application plus the filing fee.

[4] By the time this application came to be set down by the Authority, the disputed money had been paid by KGL to Ms Albon. There is no need now for a compliance order but Ms Albon has proceeded with her claim for a penalty and for costs.

[5] KGL resists the claim. It says there was no deliberate failure to pay what was owed under the Record of Settlement. Indeed, it does not agree that the money sought was payable under the Record of Settlement. It denies there are any grounds for a penalty or further costs to be paid to Ms Albon.

[6] I have issued this reserved determination outside of the three-month period after receiving the last of the submissions. Under s 174C(4) of the Employment Relations Act (the Act) the Chief of the Authority has decided that special circumstances exist and has allowed me to provide the determination outside of the usual three-month period.

The terms of the Record of Settlement and the dispute

[7] KGL agreed to pay Ms Albon a compensatory sum and her legal costs to date within 14 days of the record of settlement, as agreed. It paid the compensatory amount and legal costs within the time limit set out in the record of settlement.

[8] In addition, in clause 2 it agreed:

> 2. Esther resigns her position with KGL as at 5.00pm Thursday 5 October 2017 with no notice to be worked or paid as evidenced by the execution of this Record of Settlement.
>
> 2.1 Esther shall be entitled to the payment of salary up to and including such time together with the payment of outstanding statutory entitlements if any.

[9] I note that there was no time limit set out for the payment of any money under clause 2.1.

[10] Ms Albon's claim is that, under clause 2.1, KGL had agreed to pay her for a further four days of work to 5 October inclusive.

[11] KGL paid Ms Albon wages and Kiwisaver for the period ending 30 September 2017 on Thursday, 28 September 2017. The payslip noted that Ms Albon had .5 day of annual leave from the previous year and 5 days accrued within that year.

[12] Ms Albon submits that as well as paying her up to and including 5 October 2017 KGL agreed to pay her for the 5.5 days of annual leave that she had accrued by 5 October 2017. Those 5.5 days of annual leave were a statutory entitlement.

[13] On Friday morning, 20 October 2017, after KGL had paid the compensatory sum and costs agreed, Ms Albon sent her then representative the following email with the subject "Outstanding pay":

> Attached is the last payslip I received from Kinetics. It shows 5.5 days annual leave and is payment for the period up to 30.09.2017. I was employed until the 7th October therefore I am owed approx. 2 weeks including my annual leave.
>
> Can you please chase up for me? I was expecting to have all this finalised yesterday.

[14] Ms Albon's representative forwarded that email to Mr Kiely, who has acted as KGL's counsel throughout its dealings with Ms Albon. Mr Kiely responded later the same day:

> The agreement is in full and final settlement. Our client says that leave and her absence from work for several weeks was discussed in the mediation and that was taken into account in the agreement.

[15] KGL says in its view that it had complied in full with the record of settlement at that point.

[16] However, Ms Albon believed that the effect of clause 2 and 2.1, when read together, was that she would be paid up to and including 5 October 2017. At the investigation meeting she confirmed that is what she expected, despite sending the email that said she believed she should be paid up to Saturday, 7 October.

Contact with the mediator

[17] After 20 October 2017, Ms Albon contacted the mediator who had undertaken the mediation and signed the record of settlement, under s 149 of the Act, to ask for his understanding of the meaning of clause 2. Ms Albon took from that contact that the mediator agreed with her interpretation of the record of settlement.

[18] On 10 November 2017, the mediator emailed Mr Kiely about the issue and asked Mr Kiely to obtain instructions from KGL.

[19] On 16 November 2017, Ms Albon emailed the mediator again enquiring about payment for what she termed "stress leave". Ms Albon had not been at work up until 5 October 2017, but on sick leave. Ms Albon's evidence is that the words "stress leave" were just a different way of expressing that she considered KGL owed her more salary and her 5.5 days of annual leave.

Mr Brown's involvement

[20] Ms Albon changed representatives and engaged Mr Brown. On 22 November 2017, Mr Brown emailed Mr Hunt, KGL's Managing Director, directly. He did not copy in Mr Kiely. His email read:

> I act for Esther … She has come to me for advice regarding enforcement of the Record of Settlement that Kinetics have signed.
>
> I have seen the email correspondence between Esther, your lawyer, and [the mediator]. There is no debate that [the mediator] is correct when he says that the monies you seek to debate are explicitly covered under clause 2.1 in the Record of Settlement.
>
> This email will serve as proof that I have given you 48 hours to make the payment that you are contractually obliged to do so. Should you persist in your refusal to meet your obligations under the Record of Settlement, then I will be producing this email to the Employment Relations Authority, seeking not only an order for compliance (and legal costs) but also a penalty to be imposed against Kinetics for the deliberate and sustained lack of good faith in your dealings with Esther.

[21] Mr Hunt passed the email on to Mr Kiely who responded by asking the mediator to resume mediation on a dispute that had arisen. He also wrote to Mr Brown stating that Mr Brown was:

> ignoring section 159 of the Act. I ask again, are you a lawyer re reference to legal costs?

[22] Section 159 requires the Authority, when a matter comes before it for determination, to consider whether to direct the parties to use mediation to resolve the matter.

[23] Mr Brown replied that s 159 did not apply to an order for compliance. He stated that he considered Mr Kiely's query regarding legal costs to be irrelevant.

[24] In relation to Mr Kiely's application for mediation assistance the mediator emailed both Mr Kiely and Mr Brown. He advised that the original file had been closed but that he had arranged for it to be reactivated. He had also arranged for a case coordinator to contact the parties to arrange a time for mediation, which was likely to be by way of telephone. He stated that in light of correspondence, and its disclosure, he believed he had a conflict of interest and it was likely that the file would be reassigned to another mediator.

[25] Mr Kiely responded that KGL resolved to act with:

> prompt and immediate attention to resolve in the spirit of good faith and in compliance with all obligations under the Act.

[26] On 27 November 2017, Mr Brown replied to the mediator and to Mr Kiely:

> I will not be attending mediation regarding the enforcement of a record of settlement. That only serves to drive up costs which will be to the benefit of the employer in this matter.
>
> You say you have arranged for the file to be reactivated … I am not aware of any statutory authority that allows the ERS to continue discussions and possibly negotiations about a signed record of settlement.
>
> This matter has been to mediation / a section 149 record of settlement has been signed / I have no reason to doubt that you gave your usual explanations including that the settlement was full and final "all over red rover" / the issue is one of enforcement / as far as I am aware, the ERA is the only avenue for enforcement.
>
> Peter can make whatever arguments he wants for the non-compliance of the terms of the record of settlement, to the ERA. I will be proceeding with my application because it locks on a timeline for the resolution of this matter, and because costs are recoverable once filed in the ERA, and because I can ask for a penalty for the deliberate breach of the record of settlement by the employer.
>
> Having said that if [the mediation service] can arrange a telephone call to discuss these issues, then I am willing to participate in that phone call. But as above, there is no possibility I am going to try and renegotiate a signed record of settlement.

[27] On 28 November 2017, the mediation service confirmed a mediation date of 5 December 2017. On 29 November 2017, Mr Brown lodged Ms Albon's application in the Authority.

[28] Mr Brown attended the mediation on Ms Albon's behalf. Ms Albon was unable to be there because 5 December was the first day of her new job. The parties did not reach any agreement in the mediation that KGL owed Ms Albon any further money.

[29] However, on 7 December 2017 KGL made a payment to Ms Albon for salary for the period 2-5 October 2017 as well as pay for her accrued annual leave.

[30] Mr Kiely wrote the following email to Mr Brown:

> As we have previously advised you there was a dispute as to the application, operation and interpretation of the settlement agreement. Notwithstanding our clients view that it had satisfied the record of settlement dated 5 October 2017 it has made payment direct to Ms Albon …
>
> Our client says it is regrettable and a breach of good faith that you did not make contact with us as counsel for the company to resolve this matter. Instead, you have breached the confidentiality of the settlement agreement including placing in open correspondence dated 22 November reported views of the mediator for which breach our client reserves its rights.
>
> Further, as soon as the dispute was brought to our client's attention request was made for immediate mediation by email on 23 November 2017. Even though that application had been made and a date allocated Esther … decided to file a statement of problem in the Employments Relations Authority on 29 November 2017 which our client says was entirely unnecessary as on 28 November mediation had been confirmed for 5 December 2017.

The issues

[31] The issues I need to resolve are:

(a) Did KGL breach the record of settlement?

(b) If so, should a penalty be imposed? As part of the consideration of whether a penalty should be imposed, I need to consider the actions of both parties.

(c) Have Ms Albon or Mr Brown breached their confidentiality obligations under the Act?

(d) What costs should be awarded?

Did KGL breach the record of settlement?

The parties' positions

[32] Ms Albon submits that clause 2 is clear and that KGL breached it by not paying the money when it was due. Although clause 2 does not include a date when payment is due, Ms Albon argues that it is arguable that the date is "within 14 days", which is the period specified in the two other payment clauses.

[33] Before the first mediation, on 28 September 2017, KGL paid Ms Albon's salary up to and including Friday, 29 September 2017[1]. Mr Hunt says that:

> … in the end we agreed that the actual date of mediation, 5 October 2017, would be her last date for the records, but that the [compensatory] tax free payment would cover everything.

[34] KGL submits that it has not breached an agreed term of settlement. Mr Hunt's evidence was that in negotiating the amount of the compensatory sum during mediation, KGL took into account that although Ms Albon's last day of work had been 8 September 2017 it had paid her salary during September even though she had no sick leave remaining. Therefore, Mr Hunt's evidence was that he believed that KGL did not need to pay Ms Albon's 5.5 days annual leave.

[35] Mr Hunt says that Mr Kiely showed him an email from Ms Albon dated 16 November 2017:

> Please advise when I can receive the money owed for stress leave until the 5th October and annual leave of 6 days as agreed in mediation.

[36] He says the record of settlement makes no mention of stress leave. Therefore, he thought that Ms Albon was making a new claim in contravention of the record of settlement that stated that it was in full and final settlement of the personal grievance proceedings she had brought. He was concerned about that. He did not consider KGL was bound to pay Ms Albon any other amount.

[37] Mr Hunt says KGL did not agree to payment up to 5 or 7 October 2017. It conceded a variety of dates was discussed at the mediation but it had already paid Ms Albon what she was owed under the record of settlement. Mr Hunt gave evidence there was a whiteboard used that had a number of dates written on it by the mediator during the mediation. However, I note that the parties were in different rooms so Ms Albon did not know anything about various dates being discussed by KGL and the mediator other than any that may have been put to her as part of the mediation.

Interpretation of the clause

[38] I accept Mr Hunt's evidence that Ms Albon's emails after 20 October 2017 were confusing for him, with her reference to 7 October and payment for "stress leave" because

[1] The payslip recorded the payment was "For the Period Ending 30 September 2017".

there was no reference to 7 October or to stress leave in the record of settlement. However, when I refer to the payslip KGL provided when it paid Ms Albon's salary on Thursday, 28 September 2017 it says that it was for the "period ending 30 September 2017". A week after that is 7 October 2017, so Ms Albon's email should be viewed in the light of the pay periods KGL chose to use on its payslips.

[39] I also accept his evidence that he understood that the amount of the compensatory payment covered the week after 30 September and Ms Albon's annual leave. However, parties to an agreement are not bound by what they thought an agreement said or meant, but by the actual meaning of the contractual words they have agreed to.

[40] Clause 2 is worded clearly and is not ambiguous. The words "entitled to payment of salary *up to and including such time"* can only refer to the date of 5 October 2017. That is the "time" expressed in the paragraph above and the only date expressed in clause 2.

[41] Clause 2 also talks about KGL paying Ms Albon her statutory entitlements. In the circumstances, that could only be a reference to any annual leave entitlement owed to Ms Albon. In the payslip KGL issued to Ms Albon setting out the payment made on 19 October, it set out that Ms Albon had an entitlement to 5.5 days of annual leave. Therefore, KGL was aware that Ms Albon had 5.5 days of annual leave due.

[42] In addition, clause 9 of the record of settlement contains the standard clause confirming that neither party has agreed to forgo any minimum entitlements, including under the Holidays Act 2003.

[43] If KGL intended the compensatory payment to encompass Ms Albon's entitlement to annual leave, why was clause 2 worded as it was?

[44] For the above reasons, I consider that KGL breached clause 2 of the record of settlement.

Should KGL pay a penalty for the breach?

Submissions for KGL

[45] KGL submits that Ms Albon's claim for a penalty must fail because the conduct of the parties does not warrant imposition of a penalty.

[46] KGL submits that the conduct of Ms Albon and Mr Brown in relation to what it says was a dispute of interpretation of the record of settlement was "confrontational and unreasonable". It submits their behaviour contrasts with KGL's attempts to promptly resolve the dispute by involving the mediator and requesting telephone mediation.

[47] KGL says if there was a breach, it was unintentional and was not a wilful, deliberate or flagrant breach.

[48] KGL also says that prior to the mediation on 5 December 2017, there was no clear demand made of it by Ms Albon that she believed she needed to be paid salary from 2-5 October inclusive and 5.5 days of annual leave entitlement. That is because KGL says that her emails led Mr Hunt and Mr Kiely to believe she was trying to claim another amount beyond what the record of settlement included. In other words, KGL believed Ms Albon was not honouring the full and final nature of the settlement herself but trying to make a new demand.

[49] KGL is critical of Mr Brown filing this application in the Authority on the day after the mediation service had set a date for mediation. It also says that these proceedings were unnecessary because KGL paid Ms Albon what she said it owed her two days after the mediation.

[50] KGL is critical of how Mr Brown handled what it says was a dispute over the interpretation of the record of settlement, rather than a deliberate breach. KGL submits that a the proper way of resolving a dispute over the meaning of a record of settlement is to go to mediation first, not to lodge an application for compliance and a penalty in the Authority. KGL says, in contrast to the approach taken on Ms Albon's behalf, it immediately sought the assistance of the mediation service.

[51] Initially, KGL said that Ms Albon, via Mr Brown, had breached her duty of good faith to it. Later it conceded that good faith duties do not survive the termination of the employment relationship. Mr Brown became involved more than a month after Ms Albon's employment relationship with KGL ended.

[52] However, KGL remains critical of Mr Brown making direct contact with Mr Hunt in the first instance when he knew that KGL was legally represented.

[53] KGL also submits that Ms Albon, via Mr Brown, breached s 148 of the Act, when Mr Brown referred in open correspondence with Mr Hunt to views the mediator had expressed on the meaning of clause 2.

[54] KGL says that it was important to hold a face-to-face investigation meeting so that the Authority could gauge the credibility of the parties.

Submissions for Ms Albon

[55] Ms Albon submitted that clauses 2 and 2.1 are unambiguous, despite there being no date for payment. Therefore, KGL committed a deliberate breach of the record of settlement.

[56] Ms Albon asserts that the "conduct of the Respondent has been obstructive, argumentative and has unnecessarily increased costs".

[57] Ms Albon says that the impact of the non-payment and subsequent attempts to get the payment caused her upset. She says she was surprised and upset that KGL wanted to go back to mediation when she had incurred fees to go to the first mediation and considered that everything had been settled by way of the record of settlement. Ms Albon says that KGL's actions after the record of settlement have caused her to incur extra legal costs.

[58] She says that the non-payment caused pressure on her relationship with her husband, who, like her, believed everything had been settled at the first mediation. She says that the non-payment caused extra stress for her when she was going through fertility treatment that she and her husband had waited three years to be eligible for.

[59] The final submission for Ms Albon was that Mr Brown had asked for the Authority to deal with the matter 'on the papers' as opposed to an in-person investigation meeting. The necessity of having an in-person meeting, insisted on by the respondent, means that Ms Albon has incurred even more unnecessary legal costs.

Considerations when deciding whether to impose a penalty and quantum of the penalty

[60] Section 149(3) of the Act provides that in cases like this, in which the record of settlement is signed by the mediator, the terms of settlement are final and binding on, and enforceable by, the parties. In addition, no party can bring the terms before the Authority except for enforcement purposes.

[61] Section 149(4) provides that a person who breaches such an agreed term of settlement is liable to a penalty imposed by the Authority.

[62] Section 135 of the Act provides that a company, such as KGL, is liable to penalty for a breach of the Act not exceeding $20,000.

[63] Sections 133 and 133A give the Authority the jurisdiction to impose penalties and set out relevant considerations the Authority must take into account in determining an appropriate penalty. The relevant matters the Authority must consider are:

(a) the object of the Act set out in s 3;

(b) the nature and extent of the breach;

(c) whether the breach was intentional, inadvertent, or negligent; the nature and extent of any loss or damage suffered by any person, or the gains and losses avoided by the person in breach;

(d) Whether the person in breach has paid any compensation, reparation or restitution or has taken any other steps to mitigate any adverse effects of the breach;

(e) The circumstances in which the breach took place, including the vulnerability of the employee; and

(f) Whether the person in breach has previously been found by the Authority to have engaged in similar conduct.

[64] The purpose of penalties is to punish the person in breach and to deter the party in breach and any other employers, in this case, from non-compliance.

[65] The object of the Act includes promoting mediation as the primary problem-solving mechanism, other than for enforcing employment standards. A settlement agreement certified and signed by a mediator is an enforceable agreement. It is not in the interests of justice or within the object of the Act that such an agreement should be able to be breached without consequence.

[66] The non-compliance was only of one obligation KGL had entered into. The other obligations were met.

[67] I accept Mr Hunt's evidence that the breach was not intentional. However, I do not consider it entirely inadvertent either.

[68] In considering the nature of the loss suffered by Ms Albon, I take into account that the money was paid within two days of the mediation and within eight days of Ms Albon lodging her statement of problem.

[69] I do not consider Ms Albon to have been a particularly vulnerable employee. She was aware of how to exercise her rights and how to access representation.

[70] I am not aware of any other Authority or court proceedings in which KGL has breached a record of settlement. I have taken into account other cases in which penalties were imposed for breach of a term of a record of settlement.

[71] I consider that there should be a penalty imposed on KGL, although at the lower end of the permissible range. I now consider the parties' behaviour in trying to resolve their disagreement about the meaning of clause 2 in deciding on the quantum of the penalty.

[72] Mr Kiely for KGL was critical of Mr Brown's first contact being with Mr Hunt directly, as opposed to Mr Kiely's law firm. Mr Brown is admitted as a barrister and solicitor of the High Court of New Zealand. However, he does not currently hold a practising certificate issued by the Law Society so cannot hold himself out to be lawyer. Instead, he acts as an advocate in employment and immigration law matters.

[73] The objection Mr Kiely makes is based on a lawyer's obligation not to make direct contact with the other party if that party is legally represented. I accept that Mr Brown doing so was not the most courteous, usual, or even the most effective, approach. However, I do not consider that should reduce the penalty KGL should pay for breaching the record of settlement. It is a separate matter.

[74] Nor do I consider KGL's submission that there was not a demand for payment prior to the mediation on 5 December to be a factor that should reduce any penalty. If KGL did not consider Ms Albon or Mr Brown's correspondence to be clear it could have said so and asked what further amount Ms Albon considered was due and why.

[75] I consider KGL was correct to seek the assistance of the mediation service to try to resolve what it considered was a dispute about the interpretation of the record of settlement. It was a pragmatic approach. However, Mr Brown was also correct in considering that an order for compliance could only be achieved by the Authority.

[76] KGL criticises Mr Brown for saying that he would not attend mediation. However, he also said he would attend by phone and he did attend the mediation.

[77] KGL is also critical of Mr Brown lodging the application for these proceedings the day after the parties agreed to a second mediation date. However, it was Ms Albon's right to take action in the Authority to achieve compliance. Mr Brown said that he advised her to do so in order that she could apply for her costs to be covered. I do not consider that Ms Albon was incorrect or acting in bad faith by lodging these proceedings and continuing with them, despite the disputed money being paid two days after the second mediation.

[78] Mr Kiely also says that in writing an open letter to him Mr Brown wrongly breached the confidentiality obligation under s 148 of the Act, that states that without the consent of the parties everything said within mediation is confidential as between the parties and the mediator. Ms Albon showed Mr Brown an email from the mediator giving his opinion of what was agreed at mediation. Mr Brown wrote to Mr Hunt on 22 November 2017 that he had seen that email. He also wrote that if the matter was not resolved he would produce the email to the Authority, and seek orders for compliance, a penalty and legal costs.

[79] The mediator cannot be called to give evidence in these, or any other, proceedings about the provision of the mediation services or anything that came to his knowledge in the course of the provision of those services. I make no criticism of the mediator communicating with Ms Albon after the record of settlement was reached. He was simply trying to make sure the record of settlement was given effect to.

[80] For the purpose of determining these proceedings, I do not need to decide whether Mr Brown breached s 148 of the Act. In any event, Mr Brown's behaviour did not make it less likely that the matter could be resolved or have any impact on KGL's breach of the terms of settlement that had already occurred by the time Ms Albon engaged Mr Brown. Therefore, I do not consider that should have any impact on the amount of penalty that I will impose.

[81] I consider it is appropriate that KGL pays a penalty of $2,000 for its non-compliance with clause 2 of the record of settlement.

To whom should the penalty be paid?

[82] Section 136(1) of the Act says every penalty recovered in any penalty action must be paid into the Authority, for the benefit of a Crown Bank Account. Section 136(2) gives the Authority discretion to decide whether part of the penalty must be paid to any person. Ms Albon has applied for the penalty to be paid to her. Mr Brown submits that is appropriate because Ms Albon incurred costs before KGL made payment to her on 7 December 2017. I agree that Ms Albon been put to unnecessary trouble and expense. However, I consider that only 50% of the penalty should be paid to Ms Albon.

Orders

[83] Kinetics Group Limited breached a term of the record of settlement. Within 28 days of the date of this determination, Kinetics Group Limited must pay a penalty of $2,000.00 of which $1,000.00 is to be paid to the Authority to be paid into a Crown Bank Account. The remaining $1,000.00 must be paid to Esther Albon.

Costs

[84] I reserve the issue of costs. Mr Brown asked me to make costs part of this determination so that Ms Albon incurs no further cost. However, I do not consider I have enough information to do so. I invite the parties to resolve costs between themselves. If that is not possible, Ms Albon has until 28 September to make an application for costs. It need only be brief but must show a breakdown of what costs were incurred before KGL made its payment on 7 December 2017, and what costs were incurred after that.

[85] KGL then has a further 14 days to make its response in writing.

Christine Hickey
Member of the Employment Relations Authority