**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2015] NZERA Christchurch 141
5557145

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| | BETWEEN | CATHERINE EMMA CHILTON<br>Applicant |
| | A N D | RUTHERFORD STREET KINDERGARTEN INCORPORATED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Applicant in person<br>Anjela Sharma, Counsel for the Respondent |
| Investigation Meeting: | Determined by consideration of the papers by consent |
| Submissions Received: | 20 August and 18 September 2015 from the Applicant<br>11 September 2015 on behalf of the Respondent |
| Date of Determination: | 24 September 2015 |

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## DETERMINATION OF THE AUTHORITY

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**A. A penalty of $3,000 is imposed upon the respondent, payable to Ms Chilton.**

**B. Costs are reserved.**

### Employment relationship problem

[1] Ms Chilton's statement of problem sought a compliance order against the respondent in respect of the terms of a settlement agreement which was entered into by the parties pursuant to s.149 of the Employment Relations Act 2000 (the Act) together with the imposition of penalties against the respondent for alleged breaches of that settlement agreement.

[2] After Ms Chilton lodged her statement of problem, she has advised that the respondent has since provided a compliant certificate of service as required by the settlement agreement and so no longer seeks a compliance order. She still seeks the imposition of penalties.

[3] The respondent resists the imposition of penalties.

[4] The parties agreed that this matter can be determined by consideration on the papers as there is no conflict of evidence as to the sequence of events, which is largely self-evident from contemporaneous documents which have been made available to the Authority.

**The correct name of the respondent**

[5] Ms Chilton has cited the respondent in her statement of problem as the Rutherford Street Kindergarten Management Committee. The respondent referred to itself as the Rutherford Street Kindergarten Committee in the statement of reply. Interestingly, in previous actions between Ms Chilton and the respondent, the respondent was referred to as Rutherford Street Kindergarten Committee by the Authority in its determination[1], and as Rutherford Street Kindergarten by the Employment Court in its judgement[2].

[6] However, the matter presently before the Authority is the enforcement of a mediated record of settlement in which the respondent is referred to as Rutherford Street Kindergarten Incorporated. Ms Sharma accepts that this is the correct name of the respondent and Ms Chilton states that Rutherford Street Kindergarten is the entity, whereas Rutherford Street Kindergarten Management Committee is the group of elected persons who run the entity.

[7] On the basis that the current proceedings relate to the enforcement of a mediated record of settlement in which the respondent is referred to as Rutherford Street Kindergarten Incorporated, I find that this is the correct name of the respondent and that it should be substituted for Rutherford Street Kindergarten Management Committee.

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[1] *Chilton v. Rutherford Street Kindergarten Committee* [2014] NZERA Christchurch 77
[2] *Rutherford Street Kindergarten v. Chilton* [2014] NZ EmpC 235.

**Brief account of the events leading to the employment relationship problem**

[8] Ms Chilton signed a record of settlement on 16 April 2015. Her former employer, Rutherford Street Kindergarten Incorporated, entered into this record of settlement by way of its representative, Karina Murray, on 17 April 2015. On the same day, a mediator employed by Resolution Services of the Ministry of Business, Innovation and Employment, Michael Feely, signed the record of settlement pursuant to s.149(1) and (3) of the Act.

[9] A material term of the record of settlement for the purposes of the current proceedings was as follows:

> *The Respondent will provide the Applicant, within seven days, a certificate of service document that will cover dates of employment, positions held, duties performed and that the Applicant left by way of resignation.*

[10] The certificate of service document was therefore due to be provided to Ms Chilton by 24 April 2015. On Wednesday 29 April 2015 Ms Chilton telephoned Mr Feely to advise him that she had not received the certificate of service. She followed up the call, during which it appears she left a message for Mr Feely, with an email to him in which she stated that she had not received the certificate of service and in which she asked whether the respondent had breached the settlement agreement. She asked Mr Feely to make inquiries as to when it would arrive.

[11] On 30 April 2015 an email was sent from Rutherford Street Kindergarten attaching what it called a *certificate of service.* The document attached to the email was on headed note paper of the kindergarten and stated the following:

> *Certificate of Service*
> *Staff member: Catherine Emma Chilton*
> *Position held: Office Administrator*
> *Period of employment: March 2008 to July 2011*

[12] Ms Chilton emailed Mr Feely on 30 April forwarding the document that she had received from the kindergarten stating that she was not accepting it. She also attached a template of a certificate from an organisation called *People in Mind Limited.* Ms Chilton also attached the same template completed with the details that she regarded as being compliant with the terms of the record of settlement.

[13] On 5 May 2015 Ms Chilton emailed Mr Feely again to say that she had still not received the certificate of service. She stated that she was looking at applying for a position at another school and needed the certificate.

[14] On 7 May 2015 Ms Chilton emailed Mr Feely to say that the job application for the position at the other school closed the following day at 5pm and so she needed the certificate of service that day. Mr Feely was, it seems, passing these emails from Ms Chilton on to the representative for the respondent, Ms Sharma. Ms Chilton followed her email with a phone call to Mr Feely the same day.

[15] Later that day (7 May) Ms Sharma sent an email to Mr Feely which stated that it attached a certificate of service which Ms Sharma said was being put on headed note paper by the respondent. Mr Feely sent an email to Ms Sharma on 8 May at 7.55am which stated *Many thanks – I'll pass on to Catherine*.

[16] It would appear that no further communications ensued until Ms Chilton lodged her application in the Authority, which was received by the Authority on 19 May 2015. Ms Sharma released to the Authority in the statement of reply a number of emails between her and Mr Feely, some of which were dated 7 and 8 May and some after that date, subsequent to Ms Chilton lodging her statement of problem. One of the emails from Mr Feely disclosed that he did not send the draft certificate of service to Ms Chilton. He also says in his email that no further communication was received from Ms Chilton after 7 May until Sunday 22 May.

[17] In a subsequent email from Mr Feely to Ms Chilton he explains that, when he had stated to Ms Sharma in his email of 8 May that he would *pass on to Catherine* he meant he would pass on the message that the certificate had been completed whereas Ms Sharma had been of the view that Mr Feely had meant that he would forward the draft certificate to Ms Chilton. Mr Feely said that, as he had not heard from Ms Chilton again, he had assumed that Ms Chilton had received the certificate of service either directly from the kindergarten or from Ms Sharma, whereas Ms Sharma was of the view that Mr Feely had passed the certificate on.

[18] In its statement in reply the respondent alleged that Ms Chilton must have known about the email that Ms Sharma had sent to Mr Feely on 7 May attaching the draft certificate of service because Ms Chilton had contacted Mr Feely on Sunday

24 May (after she had lodged her statement of problem) asking for a copy of that email.

[19] Ms Chilton explains that she contacted Mr Feely on 22 May because she was aware of the email that Ms Sharma had sent Mr Feely on 7 May in which Ms Sharma stated the following:

> *Dear Mike*
> *I am attaching the COS which we are currently attending to have put on RSK letterhead. I have endeavoured to address your concerns as a matter of urgency. I am instructed that no further changes will be made, and that this version is more than acceptable. I can arrange for RSK to email this directly to Catherine this afternoon which is precisely what our intentions were. She has to realise that RSK have never been in this position before and it is a learning process for them also.*

[20] Ms Chilton says that that email had no attachment and notes that it said that Ms Sharma *can arrange for RSK to email this directly to Catherine this afternoon.* Ms Chilton states that the draft was neither attached to the email from Ms Sharma to Mr Feely of 7 May nor did the respondent send her a copy of the draft. Ms Chilton also states that the email from Ms Sharma to Mr Feely on 8 May which she has since seen also did not attach the certificate of service.

[21] In her submissions to the Authority Ms Chilton presents an analysis of the timeline of events which she relies upon to argue that the respondent was not acting in good faith when it failed to comply with the terms of the settlement agreement in respect of providing a compliant certificate of service. Ms Chilton makes the following points:

(a) Karina Murray of the respondent attended the mediation and signed the record of settlement, and so was aware that a certificate of service was part of the settlement;

(b) Karina Murray had from 17 April to 24 April to find a template that provided a certificate of service which would comply with the terms of the record of settlement;

(c) Ms Sharma emailed Ms Chilton requesting her bank account number on 22 April which demonstrates that Ms Sharma had Ms Chilton's email address;

(d) On 23 April Mr Feely emailed Ms Chilton confirming that RSK *want to comply with the settlement agreement as soon as possible*. On the same date another requirement of the settlement agreement was complied with by the respondent;

(e) On 29 April 2015 Ms Chilton contacted Mr Feely to say that the certificate of service had not arrived but Ms Chilton did not receive any contact from the respondent until 30 April when a non-compliant certificate of service was provided;

(f) The statement in reply lodged on behalf of the respondent states that Ms Sharma was instructed to make the necessary insertions to the first draft of the certificate of service on 30 April but it was not until a week later, on 7 May, that Mr Feely was told that the amended certificate of service was available;

(g) On the same day, Ms Sharma emailed Mr Feely stating *I can arrange for RSK to email this directly to Catherine this afternoon, which is precisely what our intentions were.* However, that did not occur;

(h) On 8 May a certificate of service was created on the respondent's letterhead. By this time, Ms Chilton had already had a conversation with Mr Feely that she wished to apply for a position at another school with the confidence that the certificate of service would be in her possession. On the assumption that Mr Feely passed this message on to Ms Sharma, the respondent should have been aware of the need for urgency;

(i) It was only after Ms Chilton lodged her statement of problem with the Authority that a copy of a compliant certificate of service was sent to her. She said that she first sighted it on 24 May 2015 when opening an email forwarded to her on 22 May. This was four weeks later than when it was due.

[22] Ms Chilton states in her submissions that she did not continue with her application for the position at the other school as she wanted *all her ducks in a row*. Ms Chilton does, however, concede in her submissions that Mr Feely had advised her during her telephone conversation with him on 7 May that she could apply for the

position at the school without having the certificate of service in her possession. Ms Chilton has not provided any evidence to suggest that she was required to provide a copy of her certificate of service at the same time as she applied for the position at this school and the inference I draw from this is that possession of the certificate of service at the same time as she lodged her application with the school was a preference rather than a requirement.

[23] Ms Sharma's submissions state that Mr Feely was a conduit between the parties during the mediation and continued to be so after the mediation agreement had been signed (which Ms Chilton accepts). She says that when Ms Chilton advised of her dissatisfaction with the content of the certificate of service originally provided, the respondent agreed to amend the document accordingly. Ms Sharma submits that this was not a deliberate act on the part of the respondent to submit an inadequate certificate of service but simply reflected its lack of experience in such matters.

[24] Ms Sharma submits that the respondent did comply with the terms of settlement when it provided Ms Chilton with the amended certificate of service but that there was a genuine and legitimate communication mix-up between the respondent and the mediator in making the amended certificate of service available to Ms Chilton as each thought the other would pass it on to her.

[25] Ms Sharma submits that Ms Chilton had a conversation with Mr Feely on 7 May *contemporaneous with* [the] *receipt of the* [amended certificate of service]. Ms Sharma submits that the presumption arises that Ms Chilton was made properly aware of the amended statement of service being received by Mr Feely but, for some unexplained reason, failed to act on this when she did not receive it herself. Ms Sharma submits that, with this knowledge to hand, Ms Chilton was obliged to carry out some level of inquiry, and her failure to mitigate the situation is causative of the delay in being given the amended certificate of service.

[26] Ms Sharma also makes reference to Ms Chilton's telephone call with Mr Feely on Sunday 24 May[3] requesting a copy of the 7 May email with the attached amended certificate of service on it. This suggests that Ms Chilton already knew of the existence of the amended certificate of service prior to her putting in her application to the Authority.

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[3] Ms Sharma appears to mix the dates up, and refers to a call on 26 May, which I do not believe is correct.

**Discussion**

[27] First, it is clear from the text of the record of settlement that the respondent was required to provide the certificate of service by no later than Friday 24 April 2015 and that that certificate of service was to include, as a minimum:

(i) Ms Chilton's dates of employment;

(ii) The positions held by her;

(iii) The duties performed by her; and

(iv) That Ms Chilton left by way of resignation.

[28] The actual certificate provided arrived six days late and was defective in that it failed to set out the duties performed by Ms Chilton and the fact that she left by way of resignation.

[29] Ms Chilton rejected the defective certificate of service the same day that it was received, and sent a template for a certificate of service together with a suggested completed one that would be compliant. The text of the certificate of service that was eventually sent to Ms Chilton was quite different from the one originally sent by the respondent but, whilst not mirroring the sample sent by Ms Chilton to Mr Feely on 30 April, does comply with the requirements of this record of settlement.

[30] Addressing the two points made by Ms Sharma with respect to alleged anomalies in Ms Chilton's case, I find as follows.

*Ms Chilton's telephone communication with Mr Feely on 7 May 2015*

[31] Ms Sharma suggests that, as this conversation was contemporaneous with Mr Feely's receipt of the amended certificate of service, Ms Chilton was made properly aware of the certificate of service having been received by Mr Feely but failed to act on this.

[32] However, reviewing the timeline submitted by Ms Chilton, which I have no reason to doubt, together with the copy emails that have been provided to the Authority, it is clear that Ms Chilton's conversation with Mr Feely on 7 May occurred

prior to Mr Feely receiving the email from Ms Sharma purportedly[4] attaching the draft amended certificate of service. Ms Chilton states that the telephone call from her to Mr Feely was at 15.23, lasting 7 minutes and 25 seconds, whereas the copy email from Ms Sharma to Mr Feely was sent at 15.57.

[33] I am therefore satisfied that, at the time when Ms Chilton had her telephone conversation with Mr Feely, Mr Feely had not yet received the email from Ms Sharma purporting to attach the amended certificate of service.

*Ms Chilton's conversation with Mr Feely on 24 May 2015*

[34] Ms Sharma submits that Ms Chilton contacted Mr Feely on 24 May in order to request a copy of the 7 May email with the attached amended certificate of service on it which is difficult to reconcile with Ms Chilton's claim that she had no knowledge of the existence of the amended certificate of service until after she had lodged her statement of problem with the Authority.

[35] However, I accept Ms Chilton's explanation that she did not know that the certificate of service had been prepared until Sunday 24 May 2015 when she opened an email from Mr Feely dated 22 May.

[36] Copy emails attached to the respondent's statement in reply show that Ms Sharma emailed Mr Feely on 22 May 2015 with an attachment which was entitled *COS C Chilton 8 5 15.pdf.* The email that was being forwarded to Mr Feely from Ms Sharma was her email to Mr Feely dated 8 May 2015 which refers to an attached certificate of service but which does not appear to have an attachment.

[37] I do not find, therefore, that Ms Chilton was in possession of the certificate of service, or knew of its existence, as at the date when she lodged her statement of problem.

**Conclusion**

[38] In conclusion, I am satisfied that the respondent breached the agreed terms of the settlement agreement.

[4] I use the word "purportedly" as it would seem that there was no attachment to the email.

**Should a penalty be imposed?**

[39] Section 149 of the Employment Relations Act 2000 (the Act) provides as follows:

> ***149 Settlements***
> *(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—*
> *(a) who is employed or engaged by the chief executive to provide the services; and*
> *(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—*
> *may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.*
> *(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—*
> *(a) explain to the parties the effect of subsection (3); and*
> *(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.*
> *(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), 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*
> *(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*
> *(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.*
> *(3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.*
> *(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.*

[40] The Employment Court provided guidance on the imposition of a penalty under the Act in *Xu v. McIntosh.*[5] Chief Judge Goddard stated the following:

> *[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the*

[5] [2004] 2 ERNZ 448 (EmpC)

> *party in default that such behaviour is unacceptable or to deter others from it?*
>
> *[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*

[41] These principles have been recently applied by the Employment Court in *G L Freeman Holdings Limited v. Diane Livingston*[6]. Whilst His Honour Chief Judge Goddard does not refer expressly to breaches of settlement agreements, that is presumably because the amendment to s.149 of the Act incorporating sub-section 149(4) was not added until 1 December 2004. However I am satisfied that the *Xu* principles are equally applicable to the imposition of a penalty for a breach of a settlement agreement.

*How much harm has the breach occasioned?*

[42] It is Ms Chilton's case that she did not apply for the role at the school she was interested in because she wanted to do so in confidence that she had the certificate of service at hand. As I have stated above, Ms Chilton has not provided any evidence that this was a requirement of her applying for the position and I believe that, if that were so, that would have been relatively unusual. I cannot find, therefore, that her decision not to apply for the job with the school in question constitutes harm that arises from the respondent's breaches.

[43] However, I note the number of contacts that Ms Chilton made with Mr Feely in order to try to obtain a compliant certificate of service. She also alludes to the purpose of entering into a record of settlement with the respondent which was to bring closure to proceedings that she had lodged with the Authority in 2012, and determined in 2014[7]. I note that those proceedings progressed to a challenge in the Employment Court against the finding of the Authority by the respondent which was unsuccessful[8].

[44] In light of that, I can readily infer that the terms of the record of settlement were of some importance to Ms Chilton and that her having to bring further

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[6] [2015] NZ EmpC 120
[7] *See note 1*
[8] *See note 2.*

proceedings before the Authority in order to enforce the settlement agreement, which should have brought closure, is likely to have had an adverse effect on her.

[45] Therefore, the first limb of the test set out by the Chief Judge in *Xu* has been satisfied.

*Culpability of the respondent*

[46] There were two breaches by the respondent: The first was the delay in providing any certificate of service at all, and the second was the failure to provide a certificate of service that complied with the minimum requirements of the settlement agreement.

*Delays*

[47] The first breach has two parts to it. The first attempt at providing the certificate of service was six days late, and was provided after Ms Chilton had sent an email of inquiry to Mr Feely on 29 April. The second delay occurred between 30 April when Ms Chilton made known her dissatisfaction with the defective certificate of service and the amended compliant certificate of service being prepared on 7 May. There was no explanation given by the respondent as to why it took a further seven days for the certificate to be prepared.

[48] Whilst Ms Sharma suggests that the respondent had a *lack of experience in such matters*, that assertion is open to question given that the respondent had been through proceedings in both the Authority and the Employment Court. It also had available to it the advice of Ms Sharma, who is an experienced employment law specialist.

[49] Even if one were to put that aside, the terms of the settlement agreement are completely clear in respect of the requirement to provide a certificate of service by 24 April 2015 and what it was to contain. The respondent complied with another aspect of the agreement by the agreed deadline. I do not accept there was anything difficult at all about what the respondent had to do in order to comply with its requirement under the record of settlement to provide a certificate of service.

[50] When I take these facts into account, I do not believe, on balance, that the delay in providing a certificate of service was inadvertent. At best, it was negligent,

and at worst wilful. Even if it was not wilful, a negligent disregard of its clear and positive obligations under the settlement agreement amounts to culpability. Although the Employment Court has held that the imposition of a penalty is appropriate only where there has been a wilful breach or default[9] , the Court of Appeal has rejected the contention that it constituted an error of law to impose a penalty where there was no wilful breach.[10]

[51] Therefore, I believe that there is sufficient culpability by the respondent to satisfy the second limb of the *Xu* test in so far as the two periods of delay are concerned.

[52] However, I do not regard that the further period of delay, from 7 May 2015 until the eventual receipt by Ms Chilton of the certificate of service, results from any culpability on the part of the respondent. I accept that there was a genuine misunderstanding between Ms Sharma and Mr Feely as to who would forward to Ms Chilton the terms of the certificate of service. This is especially so given that Mr Feely had been acting as the conduit between Ms Chilton and Ms Sharma and the respondent.

*Defective certificate of service*

[53] Turning to the second breach, which was the provision of a certificate of service that did not comply with the requirements of the settlement agreement, I must again conclude that the failure to comply was not inadvertent, for the same reasons. Again, therefore, I find that there was culpability.

*Conclusion*

[54] In conclusion, as both limbs of the *Xu* test have been satisfied and, as it would not be unjust to do so, I accept that it is appropriate to impose a penalty against the respondent.

*The amount of the penalty*

[55] Having established that the grounds for the imposition of a penalty have been satisfied, I must now consider how much that should be. Ms Chilton has asked for a penalty of $2,500 to be imposed in respect of each of three breaches of the settlement

[9] *Ruapehu District Council v Northern Local Government Officers Union* EmpC Wellington WEC54/92
[10] *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ239 at [57] and [58].

agreement, totalling $7,500. She also asked that the penalty be awarded in total to her, along with her costs.

[56] I have found there have been two separate breaches, rather than three.

[57] I also find that it is not appropriate to attempt to separate out the effects of the breaches into two separate penalties. This is because, although one of the breaches relates to the certificate of service not being provided in the correct format, in effect this had the effect of extending the delay. Therefore, I believe that it is appropriate to award one global penalty in respect of the failings of the respondent to comply with the terms of the record of settlement.

[58] As for the amount of the penalty, I consider that an appropriate global penalty to be imposed on the respondent is the sum of $3,000.

[59] Pursuant to s.136(2) of the Act, I order that the whole of this sum should be paid to Ms Chilton.

**Costs**

[60] Ms Chilton has sought that costs be awarded to her in a total of $1,421.56, comprising reimbursement of her Authority lodgement fee of $71.56, together with the costs of her preparation and research. However, a party who represents themselves is not entitled to reimbursement for their own costs, save in exceptional circumstances.[11] This principle includes assistance by immediate family members.[12] I do not believe that the position is any different when a party represents themselves before the Authority.

[61] I therefore decline to order that costs be awarded in Ms Chilton's favour, save in respect of the reimbursement of her lodgement fee of $71.56, which I order the respondent to pay to her.

David Appleton
Member of the Employment Relations Authority

[11] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd.* [2010] NZCA 400.
[12] *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 10.