

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 118/08
5112453**

BETWEEN DEBORAH DENT
 Applicant

AND HARRIS NEIL & ASSOCIATES
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Andrea Twaddle for Applicant
 Anthony Harris for Respondent

Investigation Meeting: 18 March 2008

Further information: 19 March 2008

Determination: 28 March 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] Ms Deborah Dent (“Ms Dent”) claims penalty, interest and costs against Harris Neil & Associates Limited (“Harris Neil”). She had initially sought compliance as well. The claims arise out of an informal settlement of an employment relationship problem between the parties. I considered mediation would not contribute constructively to the resolution of the surviving claims.

[2] At the parties’ invitation I had initially agreed to deal with the matter on the papers. However, following consideration of their respective submissions, I concluded it would be inappropriate to proceed that way as the matter required the taking of evidence and findings of fact.

The facts

[3] On 12 October 2007 the parties attended mediation provided by the Chief Executive of the Department of Labour in relation to an employment relationship problem between them.

[4] There followed correspondence and discussions between the representatives. On 12 November 2007 the solicitor acting for Harris Neil, Mr Clark, telephoned the solicitor acting for Ms Dent, Mr True.

[5] The lawyers have assisted the Authority but there is disagreement between them. Mr True gives clear evidence of the discussion whereas Mr Clark is less equivocal. Having heard from them both, I consider it more likely than not that Mr Clark advised Mr True that his client Harris Neil offered Ms Dent the sum of \$16,000.00 in settlement of the employment relationship problem (“the offer”), and further, that Mr Clark when asked by Mr True, confirmed the payment would be made within seven days. I also accept Mr Clark’s information that previous negotiations had proceeded on a seven day payment basis.

[6] Mr True directed Ms Twaddle to communicate the offer to Ms Dent. Ms Dent telephoned Mr True on 15 November 2007 and advised she accepted the offer.

[7] That same day Ms Twaddle emailed to Mr Clark a Record of Settlement said to reflect the settlement reached. The Record of Settlement is endorsed with a date of 15 November 2007. The material term of it is this:-

2. Without accepting any liability for the circumstances giving rise to this agreement, the employer will pay, within 7 days of the date of this Terms of Settlement, that is on or before 22 November 2007, the compensatory sum of \$16,000.00 in terms of s.123(1)(c)(i) of the Employment Relations Act 2000. Payment will be made to the Trust Account of Harkness Henry & Co. Trust account details will be provided to Wilson McKay Barristers & Solicitors.

[8] By email of 21 November 2007, Ms Twaddle emailed Mr Clark as follows:-

*Dear Mr Clark,
On 15 November we sent you the Record of Settlement reflecting the agreed terms between the parties. Please confirm signature has been arranged by your client and when the documents will be returned to this office for Ms Dent to sign.*

[9] On 22 November 2007 Mr Clark responded by email to Ms Twaddle as follows:-

*Hello Andrea,
The documents have arrived in the office and will be forwarded to you in the DX tonight.*

[10] Ms Twaddle responded that same morning:-

*Good morning David,
Thank you for the update.*

[11] By letter of the same date 22 November 2007 Mr Clark wrote to Mr True enclosing the Record of Settlement executed in triplicate by his client. Materially he wrote:-

We enclose the Record of Settlement (in triplicate) duly executed by our client. Please arrange for execution by your client and Mediation Services and upon receipt of the signed copy our client will arrange for immediate payment.

[12] Ms Twaddle wrote to Mr Clark by email of 29 November 2007 attaching a copy of the Record of Settlement signed by both parties:-

*Dear Davis,
Please find attached a signed copy of the Agreement by both parties. The originals are being provided to the Mediation Services for signature. Please arrange payment by the Company.*

[13] By email of 3 December 2007 Mr Clark wrote to Ms Twaddle in reply as follows:-

Thank you for your email. I apologise but I have been in Court for the last few days and haven't been able to respond. The payment of the settlement funds will be made following confirmation that the Mediator has signed the Agreement. This is due to the fact that the payment is made under s123 and our client does not wish to be exposed to any PAYE liability if, for any reason a Mediator does not sign the Agreement. We look forward to receiving the Agreement.

[14] The mediator signed the Record of Settlement on 5 December 2007. The Record of Settlement duly executed by all parties and witnessed by the mediator were returned to both parties directly on 10 December 2007.

[15] Ms Twaddle telephoned Mr Clark late afternoon on 14 December 2007. She enquired as to why payment had not been received. Mr Clark told her he had not received the Record of Settlement from the mediator. Ms Twaddle informed Mr Clark the document had been issued to the parties directly. Mr Clark said he would need to check with his client and confirmed that payment would not be made until the mediator had signed consistent with his email advice of 22 November 2007. Ms Twaddle expressed concern with the time elapsed and said that any delay in payment was inconsistent with the terms of the Record of Settlement.

[16] Mr Clark told Ms Twaddle although the Record of Settlement stipulated payment by 22 November 2007, that term was inconsistent with what actually happened in terms of having the Record of Settlement executed by the parties.

[17] On 17 December 2007 Mr Clark left a message for Mr Harris. Mr Harris called Mr Clark back and confirmed he had received the Record of Settlement from the mediator but unfortunately was not in a position to pay the full \$16,000.00. He said he wanted to discuss with the mediation service the possibility of partial payment. He advised Mr Clark he would deal directly with the mediation service.

[18] On 19 December 2007 Ms Twaddle emailed Mr Clark attaching a copy of the Record of Settlement signed by all parties and the mediator. She wrote:-

*Dear David,
Our client has yet to receive payment in this matter, which is now well overdue. The Record of Settlement was signed off by the Mediator on 5 December 2007 (see attached copy of the Record of Settlement). Payment was to be made immediately. Please confirm payment will be made by Harris Neil & Associates Limited today.*

[19] On 21 December 2007 Mr Harris emailed Ms Twaddle directly. He wrote:-

*Andrea
Without Prejudice
I have been liaising with the DOL.
They suggested in my conversation with them a few minutes ago that I contact you direct to relay that Harris Neil & Associates Limited can make settlement on the basis of a payment immediately of \$5k, then \$5k on 25 January 2008 and the \$6k balance on 15 February 2008.*

[20] Ms Twaddle responded that same day at 4.37pm. She repeated clause 2 of the Record of Settlement and wrote:-

No payment has been received, therefore the total amount of \$16,000.00 remains outstanding. Timing of payment was a key term to Ms Dent's agreement to the Terms.

Accordingly, Ms Dent has now incurred further cost in today filing an application with the Employment Relations Authority for compliance. She has incurred additional legal costs to file the application, along with a filing fee. The application includes a claim for costs, interest and a penalty for breach. The application is being couriered to your for service.

Ms Dent invites payment and we attach to this email a copy of our Trust Account details for your information. Please note the reference for payment into the Trust account should be 470818-1. Ms Dent will be willing to accept payment today of the total sum of \$16,000.00 together with her further costs of \$350.00 plus GST, together with the filing fee of \$70.00. That is, a total of \$16,463.75. Upon receipt of the total, Ms Dent will withdraw the application for compliance.

We have not been notified if Mr Clark continues to act for you, therefore copy this email to him.

[21] Mr Harris responded by email of 24 December 2007 and wrote:-

Andrea

I see no need to involve David Clark in this process.

I have transferred \$5k into our Trust Account representing performance of the first leg of my offer. I look forward to service of the Application and dealing with that in the Authority.

[22] Ms Twaddle wrote a letter to Mr Harris endorsed "Without Prejudice Save as to Costs" dated 7 January 2008 in the same terms as her email to him of 21 December 2007. Materially she wrote :-

8. If payment is not made within seven days, Ms Dent reserves the right to produce this letter in support of an application for an award of costs against you at the conclusion of the Employment Relations Authority Investigation Meeting for compliance. The costs sought at that time will include her actual legal costs, i.e. solicitor/client costs, and disbursements/expenses, incurred by her from today.

[23] The application for compliance order, penalty, interest and costs was lodged in the Authority on 8 January 2008. This application was to proceed at the investigation meeting scheduled for the substantive employment relationship problem on 12 February 2008.

[24] Mr Harris emailed Ms Twaddle on 14 January 2008. He wrote:-

Andrea

Our offices have today reopened.

I have received from the Authority a copy of the Statement of Problem and will file my Statement in Reply within 14 days (ie on or before 28 January). I will in that Reply deal substantively with the comments made in your 7 January letter.

...

Can you please advise:

The time and date of the call you received from Maree Owen of DOL (on or about the early afternoon of 20 December) and the entire content of that call; and How your continuing proposition that funds be paid to you is consistent with s150A of the Act. That section seems to make clear that any monies must be paid to the party concerned and cannot (even with the other parties consent) be paid to any representative. You seem to be promoting an illegal act, to your own advantage.

Please respond within 7 days to avoid any delay in my filing my response.

Pending your response I am unable to presently reply to your 7 January letter.

[25] Ms Twaddle responded to Mr Harris by a letter dated 14 January 2008 endorsed "Without Prejudice Save as to Costs". She wrote:-

1. *I refer to your email of 14 January 2008.*
2. *Your Statement in Reply to the Authority should include no reference to our recent correspondence which is clearly identified as being without prejudice or without prejudice save as to costs. If any such reference is made, an application for it to be removed will be made with the Authority. The costs associated with that process will be included in a claim for costs against Harris Neil & Associates ("the Company") for non-compliance.*
3. *The questions in your email are irrelevant to the Company's non-compliance with the Terms of Settlement ("Terms"). However, for your reference:*
 - a. *Maree Owen of the Department of Labour mediation service confirmed with this office at 1.01pm on Thursday 20 December 2007 that payment of the Terms would not be made. This is confirmed in the facsimile received by this office from her dated 21 December 2007, which is attached to the Statement of Problem.*
 - b. *Section 149 of the Employment Relations Act sets out that where an agreement is made and authorised by mediation services, the agreed terms are final and binding on, and enforceable by, the parties. 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. Ms Dent has no interest in renegotiating the Terms with the Company.*
 - c. *Section 150A(3) of the Act provides that payment can be made to a party's solicitor, as set out in Term 2 of the Terms, which you agreed to and signed on behalf of the Company. The Terms are not illegal.*

[26] Mr Harris responded by email to Ms Twaddle of 21 January 2008. He wrote:-

Andrea

Following my various prior messages the \$16k settlement amount can be remitted today. I also offer to pay interest at 10% on the outstanding sum being, by my calculations from 17 December (35 days), a further \$153.42.

If not accepted my Statement in Reply (draft attached) will include this message.

I am required to file the Reply Wednesday so you will need to reply by then.

If this proceeds further you can anticipate my seeking costs on an indemnity basis.

[27] Ms Twaddle wrote a further letter dated 21 January 2008 endorsed "Without Prejudice Save as to Costs". A total of \$17,487.98 was sought from Harris Neil and if paid by 23 January 2008 Ms Dent would withdraw her application to the Authority.

[28] Mr Harris wrote by email to Ms Twaddle at 10.07am on 23 January 2008. he wrote:-

I have your 21 Jan response.

I note:

- *payment of the \$16k has been offered and rejected by you.*
- *you seek to claim interest from a date preceding the agreement. The Agreement takes effect on the date it is signed by all parties and provided to HNA. I have also previously noted that your own failure to have the Agreement executed by the mediator caused the delay.*
- *this matter is not about enforcement of payment (as payment has been offered and rejected), but your aspiration to bill more and collect more fees.*
- *any of your time you spend arguing about your own costs is for your (or your clients) account. Obviously you are motivated to simply continue a vexatious argument to apply more time. You have the misguided notion that simply refusing to agree entitles you to claim more.*
- *your seeking costs to document any agreement is absurd. The original Agreement remains, and any other agreement is simply as to reimbursing costs. An exchange of emails will suffice.*
- *an examination of the published decisions makes clear that the circumstances in this matter are consistent with an expected Authority outcome where:*
 - *no penalty is imposed,*
 - *no contribution to costs is ordered,*
 - *interest at 9% may be required*
 - *reimbursement of the \$70 filing fee may be required.*
- *your approach is an abuse of process*
- *HNA have offered to pay \$153 in interest. I now also offer to meet the \$70 filing fee. That is my final offer.*
- *if your client wishes to further erode the funds she receives, net of your fees, on account of your misguided actions, I cannot stop her. The responsibility for such actions however lies at her and your door.*
- *if this matter proceeds to the Authority I will produce this correspondence in support of a claim for costs on an indemnity basis.*

[29] On Tuesday 29 January 2008 Mr Harris emailed Ms Twaddle as follows:-

Andrea

I note you have now withdrawn from your position of only accepting amounts greater than set out in the Terms of Settlement (executed 5th December 2007) in satisfaction of the terms of that Agreement.

As you know from previous correspondence we have had the \$16k in our firms Trust Account, and following our exchange of correspondence today (in

particular the comment referenced above) it has been remitted in settlement of obligations per the 5th December 2007 Agreement.

[30] By advice of 1 February 2008, Harris Neil gave notice that it would seek by way of counter-claim a penalty against Ms Dent and/or her counsel for breach of the statutory duty of good faith.

[31] The investigation meeting scheduled for 12 February 2008 was vacated on 4 February 2008 by reason that the Authority accepted the parties' invitation to dispose of the application on the papers.

[32] On 7 February 2008 Mr Neil advised that Harris Neil would not be pursuing the claim for penalty.

The merits

[33] The preceding chronological narrative illustrates the unnecessary and needless application of time, resources, and effort by these parties.

[34] Harris Neil has paid \$16,000.00 to Ms Dent. It paid that sum by direct credit on 29 January 2008. Ms Dent now seeks a penalty, interest and costs.

[35] Typically the execution by the parties of a Record of Settlement occurs contemporaneously with the reaching of the agreement to settle. In this case however and very unhelpfully, the execution of the Record of Settlement was not attended to until days later.

[36] The parties ought to reflect on the wisdom of executing an agreement the time for satisfaction of which had well passed. In this case it was absurd to sign the Record of Settlement when the payment date had already passed. I would not have ordered compliance with the Record of Settlement on that basis. But the Record of Settlement is not the agreement itself - it is merely a written record of a settlement agreement. It is the settlement agreement that I enforce.

[37] The complication here is that the oral agreement to settle was varied during the delayed execution of the Record of Settlement which purported to reflect the

settlement. The settlement was varied and by the time of the execution of the Record of Settlement, it did not reflect the actual final settlement.

[38] I am satisfied however that the Record of Settlement did accurately record the initial settlement reached between the parties on 15 November 2007 - materially that payment was due on 22 November 2007. Harris Neil did not raise any objection as to that date for payment.

[39] The Record of Settlement stipulated payment by 22 November 2007 in reflecting what had been agreed as at 15 November 2007. But subsequently, I find there was a mutually agreed variation to the date for payment. By his email of 3 December 2007 Mr Clark on Harris Neil's behalf advised Ms Dent's solicitors that the payment of the settlement funds would be made following confirmation that the mediator had signed the Agreement. This the lawyer explained, was due to the payment being made under s123 of the *Employment Relations Act 2000* and Harris Neil's wish not to be exposed to any PAYE liability if for any reason a mediator did not sign the Record of Settlement. This advice was not challenged or rejected and so I find that Ms Dent through her lawyers thereafter by her conduct as apparent from the correspondence, at least acquiesced and accepted the variation. The variation meant that payment was due within 7 days of the signature to the Record of Settlement by the mediator. That payment date on that basis would have then been 12 December 2007.

[40] While that was actually the settlement agreement ultimately reached between the parties, they were busy attending on execution of a Record of Settlement which reflecting the agreement reached on 15 November 2007, because of its delayed execution it no longer reflected the final compromise.

[41] Mr Harris concedes that Harris Neil did not make payment on either 22 November 2007 or 12 December 2007. He consequently concedes breach by Harris Neil of its promise to pay Ms Dent. I consider the stipulation as to time for payment an essential term the breach of which ought not be inconsequential. It shall not be in this instance.

[42] I find that Harris Neil was in breach of the settlement agreement that it pay Ms Dent \$16,000.00 within 7 days of the mediator's signing, i.e by 12 December 2007. I do not enforce the Record of Settlement, but rather, I enforce the oral settlement agreement. I consider I am permitted to grant compliance with such a settlement¹, where it is sought, the jurisdiction to do so being found under sections 137 and 161(1)(r) of the *Employment Relations Act 2000*. Compliance was initially sought here while Ms Dent stood out of the funds due to her. Now she seeks a penalty, interest and costs.

Penalty

[43] It is preferable that the parties to employment relationship problems resolve the problems between them themselves. This and other underlying objects of the *Employment Relations Act 2000* are not to be compromised. In this case I am satisfied on the balance of probabilities that a penalty is warranted.

[44] I am satisfied that Harris Neil acted in breach of the oral settlement agreement. On the basis that the oral settlement agreement is an employment agreement for the purposes of section 134 of the *Employment Relations Act 2000* I order a penalty against Harris Neil.

[45] I take into account the relatively short period of delay and the fact that the payment was paid. Mr Neil says Harris Neil experienced cashflow difficulties and was unable to meet the payment it says was due to Ms Dent on 12 December 2007. However, Harris Neil had instructed its solicitor to offer payment within 7 days. It offered no explanation and did not communicate with Ms Dent's solicitors between 5 and 12 December 2007. Having regard to those circumstances, **I order Harris Neil & Associates to pay a penalty of \$1,000.00. I further order that all of that penalty is to be paid to Ms Dent.**

Interest

[46] The Authority has previously determined that an application for compliance order does not involve a judgment sum, and consequently, there is no basis for it to

¹ *Kerr -v- Associated Aviation (Wellington) Limited* [2005] 1 ERNZ 632, Shaw J, paras 31 - 33

order interest². They may also arguably not be primarily about the recovery of money. I therefore decline to award interest to Ms Dent.

Costs

[47] Ms Dent claims her legal costs in respect of this present investigation. Her total legal costs are advised as the total sum of \$7,965.12. She seeks her full solicitor/client costs.

[48] I note that Ms Dent compromised her substantive action by accepting settlement. I accept a material part of that decision was the desire to avoid further legal costs and further involvement with Mr Harris. As matters have transpired, she has incurred legal costs of a further investigation meeting anyway and contact with Mr Harris. I accept she should not have had to endure these things.

[49] Ms Dent has succeeded in obtaining formal orders from the Authority. She is therefore to be regarded as the successful party. She is entitled to a contribution to her costs. She seeks her full solicitor/client costs however.

[50] Ms Dent produces a copy of a letter her solicitors sent to Mr Harris dated 21 January 2008. It is marked "Without prejudice save as to costs". It invited payment from Harris Neil of the sum of \$17,487.98 by 4.00pm on 23 January 2008 in return for Ms Dent's withdrawal of this application. There is no reference to the level of costs now sought. I note that the invoice to Ms Dent dated 31 January 2008 with no narration is for the sum of \$1,491.50. There is a further invoice dated 20 February, again with no narration, for the sum of \$3,197.50.

[51] I take into account the fact of the advice of 21 January 2008 and also the non-acceptance of it. It does not of itself automatically entitle Ms Dent to recover full solicitor/client costs. It is another factor in the mix. I exercise my discretion by determining what is a fair and reasonable contribution as between the parties.

[52] I conclude that in all the circumstances that Ms Dent should be awarded the greater portion of the costs sought by her. This application is completely unnecessary

² *Taylor & Mai Media Limited*, unreported, AA365/07, 21 November 2007, M Urlich.

and entirely avoidable. Ms Dent should not have incurred her legal costs at all. She has only incurred those costs because Harris Neil did not meet its commitments. It did not do what it promised to do and Mr Harris concedes as much.

[53] Accordingly, exercising my discretion on a principled basis, I conclude a contribution of \$6,000.00 is appropriate. **I order Harris Neil & Associates Limited to pay to Deborah Dent the sum of \$6,000.00 as a contribution to costs.**

Leon Robinson
Member of Employment Relations Authority