

**NOTE: This determination
contains an order at paragraph
[1] prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 281
3263639

BETWEEN	KQJ Applicant
AND	RXT First Respondent
AND	HVZ Second Respondent
AND	UHR Third Respondent
AND	CHD Fourth Respondent
AND	SIMON MITCHELL Fifth Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Penny Swarbrick, counsel for the first, second, third, fourth respondents Simon Mitchell, in person as fifth respondent
Investigation:	On the papers
Submissions:	From the first, second, third and fourth respondents on 8 March 2024, from the fifth respondent on 20 March 2024 from the applicant on 10 April 2024 and, in reply, from the first, second, third and fourth respondents on 26 April 2024 and the fifth respondent on 8 May 2024.
Determination:	13 May 2024

DETERMINATION OF THE AUTHORITY

Certain information prohibited from publication

[1] This determination concerns issues relating to a settlement agreement certified under s 149 of the Employment Relations Act 2000 (the Act). Because the terms of that agreement were agreed to be confidential, publication is prohibited of the names and identifying details (including positions held in the employing organisation) of the applicant and the first, second, third and fourth respondents to these proceedings. This order is made under clause 10 of Schedule 2 of the Act. It confirms and continues an order made at a case management conference of the Authority held on 19 February 2024.

[2] Those parties, as listed in the intituling above, are referred to by three letters generated randomly and unrelated to their actual names.

[3] The order does not apply to the fifth respondent, Simon Mitchell KC. He represented KQJ in raising and resolving her employment relationship problem with the employing organisation, including during and following arrangements that led to the settlement agreement. Although it is unusual to have an applicant's former representative as a respondent, there were no sufficient grounds to prohibit publication of his name in relation to this matter.

Employment relationship problem

[4] KQJ worked for the employing organisation from 8 October 2018 until her employment ended under agreed terms of settlement. The agreement, later certified by an Employment Mediation Services (EMS) mediator, is dated 5 February 2021.

[5] Some concerns had arisen for KQJ and her employer during the early months of 2020. From August 2020 KQJ had been on sick leave. The concerns were not resolved in mediation held on 11 September 2020 and KQJ remained on leave. Her employer described her last day of employment as being 30 November 2020 while KQJ said she agreed to resign at a meeting held on 28 January 2021. The meeting was attended by four people - the employer's lawyer, the representative of her employer who later signed the record of agreed terms, KQJ and her counsel Mr Mitchell.

[6] The settlement agreement was drafted based on the agreement reached at the meeting. After being signed by the employer's representative and KQJ during the following days, the agreement was sent to EMS for certification by a mediator.

[7] The settlement agreement, amongst other terms set out later in this determination, included the following paragraphs explaining the legal effect of certification by a mediator:

We confirm that we fully understand that once the Mediator signs the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and
2. Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, and application for review, or otherwise; and
3. The terms of the settlement cannot be cancelled under section 7 of the Contractual Remedies Act 1979; and
4. That section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[8] KQJ and the employer's representative each signed the agreement in two places – once under these paragraphs and once under the agreed terms.

[9] The record of settlement shows the mediator certified their agreement on 10 February 2021. The mediator's certificate confirms she had explained to both parties the effects of her signing the agreement, was satisfied the parties understood and they had affirmed their request for her to sign the agreed terms of settlement.

[10] While the terms of settlement were agreed to be confidential, it was necessary for the purposes of this determination to disclose those terms. The confidentiality is protected, to the extent possible, by the order made prohibiting publication of the names and identifying details of the parties.

[11] The terms, with some details redacted here, as shown in square brackets, were:

1. These terms of settlement and matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.
2. The employee has resigned from her employment with the employer. She has raised an employment relationship problem. This Record of Settlement resolves the issues raised.
3. Neither party will disparage the other.
4. Within fourteen days of this Record of Settlement being signed by a Mediator, the employer will pay the employee the sum of \$[specified amount] pursuant to section 123(1)(c)(i) of the Act, by way of deposit to the [named solicitor] Trust Account. ...
5. Within fourteen days of receipt of an invoice from Simon Mitchell Barrister, the employer will pay the employee the sum of \$6,500 plus GST,

by way of costs. The invoice will be sent following this Record of Settlement being signed by a Mediator.

6. [A standard clause regarding not forgoing minimum entitlements].
7. This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.

[12] After receiving notification from EMS on 10 February 2021 that the mediator had certified the agreement, the employer's representative arranged for the compensation referred to in clause 4 to be paid to the trust account of the named solicitor. The solicitor subsequently transferred this sum to KQJ on 20 February 2021. The requirement for payment of that amount within 14 days was therefore met.

[13] On 10 February 2021 Mr Mitchell had sent KQJ a letter forwarding her a copy of the agreement with the mediator's certification. He requested a deposit slip for her bank account to pass on to the solicitor for use in transferring the compensation payment to her once it was sent by the employing organisation. Mr Mitchell's letter, in a reference to clause 5 of the agreement, also included this paragraph:

My costs will of course be paid. Once they are paid, I will provide you with a credit note, taking into account that you had already paid some of my costs by way of interim account.

[14] On the same day he sent the employer's lawyer an invoice for the agreed amount of \$6,500 plus GST, that is \$7,475. The employing organisation paid the amount due under that invoice directly to Mr Mitchell's account on 19 February 2021.

[15] Copies of correspondence provided by KQJ show there was subsequently an extended delay in Mr Mitchell providing a credit note to her for part of those fees, in part caused by his understanding that the credit was to be retained for another matter in which he was representing her. A credit note for \$2,875 was, however, subsequently issued on 18 May 2022, more than a year later. When issuing that credit note Mr Mitchell also apologised to KQJ for overlooking finalising this matter.

[16] On 15 November 2023 KQJ lodged a statement of problem in the Authority seeking to pursue a range of claims against RXT, HVZ, UHR, CHD, Mr Mitchell, the employer's lawyer and two other senior office holders in the employing organisation.

[17] Statements in reply lodged on behalf of those parties or purported parties said the Authority could not investigate KQJ's claims for two reasons.

[18] Firstly, they said all matters arising from KQJ's employment relationship with the employing organisation were fully and finally settled by the settlement agreement certified on 10 February 2021, more than two-and-a-half years before she lodged her statement of problem.

[19] Secondly, the respondents said other matters referred to in KQJ's statement of problem were outside the employment relationship and outside the jurisdiction of the Authority.

[20] On 19 February 2024 I convened a case management conference, held in person, with KQJ and, attending on behalf of all respondents, Ms Swarbrick. During that discussion KQJ agreed claims against the employer's lawyer and two senior office holders could not continue. The Authority has treated the claims against those three people as discontinued.

[21] During the conference KQJ was advised that the Authority could not investigate other matters mentioned in her application as arising under various other statutes (including the Privacy Act, the Human Rights Act and the Education Act) because the Authority's jurisdiction concerns matters arising under the Employment Relations Act.

[22] Arrangements were then made for the parties to provide submissions and some additional background documents related solely to issues within the Authority's jurisdiction. This included questions over how the certification process for the settlement agreement was completed and whether the employer had adhered to clauses 6, 5 and 2 of the settlement agreement.

Issues

[23] After considering the submissions and additional documents lodged, the following issues required resolution in this determination:

- (i) Should the second, third and fourth respondents be removed as parties to these proceedings?
- (ii) Was the certification process for the settlement agreement properly completed?
- (iii) Were clauses 5, 6 and 2 of the agreement adhered to?

[24] While the submissions for RXT, HVZ, UHR and CHD suggested KQJ's statement of problem had not raised issues (ii) and (iii) as specifically as put here, this determination has considered those issues in exercise of the Authority's discretion under s 160(3) of the Act to concentrate on resolving the employment relationship problem however described. It has done so after also sifting out from KQJ's statement of problem many topics or issues she wished to pursue that were not employment relationship problems or not ones she was still entitled to pursue. Issues (ii) and (iii) were clearly within the Authority's jurisdiction and identified from her statement of problem's reference to her concerns about the settlement process and 'adherence' to clauses of the record of settlement.

[25] KQJ's submissions, extending to 60 pages, canvassed a range of information and issues beyond the scope of the Authority's investigation. The parts of those submissions that do relate to issues open for resolution by the Authority have been considered in preparing this determination, along with the relevant parts of submissions lodged by the respondents.

(i) The second, third and fourth respondents are struck out of these proceedings

[26] The first respondent, RXT, is the employing organisation's senior officeholder in Auckland. KQJ's employment agreement identified the holder of that position as "the employer". The current officeholder is the appropriate respondent to KQJ's application to the Authority.

[27] The third respondent, UHR, and the fourth respondent, CHD, each previously held that senior office in Auckland. Any employment relationship with them ended on the completion of their term of office. Any liability of the employing organisation regarding the settlement agreement and observance of its terms rests with the current officeholder, not UHR and CHD. Accordingly, it was appropriate to exercise the Authority's power under s 221 of the Act to order UHR and CHD be struck out as parties to these proceedings.

[28] The second respondent, HVZ, is the employing organisation's senior office holder in New Zealand. In that role, or otherwise on behalf of the employing organisation, he had no employment relationship with KQJ and no responsibility for observance of the terms of settlement with her. Accordingly, it was also appropriate to

exercise the Authority's power under s 221 of the Act to order HVZ be struck out as a party to these proceedings.

(ii) Requirements of the certification process were complied with

[29] KQJ's application to the Authority questioned whether "the correct process was lawfully followed" during the "settlement process and after the settlement by [the] employer and both lawyers involved in the process".

[30] The question of whether the settlement process was lawfully followed has been addressed by considering whether the certification process was completed in the way required by the Act.

[31] Section 152 of the Act bars questioning of the services provided by a mediator. It does, however, include an exception to that bar. The agreed terms of settlement may be challenged or called in question if a mediator has not complied with the requirement of s 149 to check with the parties that they know about and understand the effect of the certification process, including its binding nature and the prohibition on further action on those terms (except for enforcement purposes).¹

[32] Here the question involved confirming the steps taken after KQJ and the employer's representative signed the settlement agreement. Correspondence provided by KQJ showed she had arranged to go to Mr Mitchell's office on 5 February 2021 to sign it. The employer's representative had already signed it by that time.

[33] The signed agreement was then sent to EMS. On 9 February, in separate emails, a mediator contacted KQJ and the employer's representative advising that she had received the record of settlement "for mediator certification". Her email set out an explanation of the effect of her signing the agreement and asked for their confirmation.

[34] At 8.57am the following day, the mediator sent a follow-up request to KQJ which asked: "Are you able to reply to my email below when you get a moment please?"

[35] KQJ has not been able to provide a copy of any email she sent in response to that request or to confirm that she spoke by telephone to the mediator after getting that

¹ Employment Relations Act 2000, s 152(2)(a).

email. The mediator's internal case management notes, as disclosed to KQJ in response to a Privacy Act request, do not include a note of any call or an email from her. My own inquiries to a senior EMS manager confirmed no information was held recording any email or call from KQJ at that time.

[36] While not confirmed from those EMS sources, completion of the certification process can reasonably be inferred from the following two facts.

[37] Firstly, the employer's representative received an automated email from an EMS email address at 12.21pm on 10 February 2021 with the subject heading: "Record of Settlement – Confirmation – record of settlement". The message included the following paragraph: "This has now been confirmed with both parties and signed by the mediator." This suggests KQJ was in contact with the mediator sometime between 8.57am and 12.21pm on that 10 February 2021 and, as shown by the mediator's certification of the agreement, confirmed to the mediator she understood the effect of certification.

[38] Secondly, on the same day, Mr Mitchell's secretary sent an email to KQJ with two attachments. One was Mr Mitchell's letter, already referred to, sending her a copy of the certified agreement. The other attachment was labelled "Record of settlement signed off 10.2.21". It was clear KQJ was advised of completion of certification and, at that time, made no suggestion she had not been in touch with the mediator to complete the certification process.

[39] Accordingly, returning to the check provided at s 152(2) of the Act, there was no evidence sufficient to challenge or call into question compliance with the provisions relating to confirming knowledge of the effect of a settlement. Rather, assessed on the balance of probabilities, they were complied with. There are, consequently, no grounds for calling into question of the effect of those terms.

[40] The agreement is final, enforceable and not open to further action in the Authority, apart for the purpose of enforcement, as made clear in the relevant section of the settlement agreement signed by both KQJ and the employer's representative. As a result, this also means KQJ cannot continue to pursue matters arising out of her employment relationship as "all matters" were, under clause 7, agreed to be fully and finally settled in the agreement certified on 10 February 2021.

(iii) Clause 5 of the agreement and s 150A of the Act not complied with

[41] KQJ's statement of problem queried whether the employing organisation, its lawyer and her lawyer had adhered to clauses 5, 6 and 2 of the settlement agreement. She was entitled to ask that question for the purposes of enforcement if it were found an agreed term had not been observed or honoured (as her former employer would be if she did not observe an agreed term).

[42] Clause 6 was a standard clause recording a confirmation that the agreement did not include a forgoing of minimum entitlements due under the Minimum Wage Act 1983 and the Holidays Act 2023. There was nothing to suggest that this confirmation was incorrect.

[43] Clause 2 comprised a statement of three facts as being agreed by the parties. There was no action required by any party to further 'adhere' to or comply with that clause.

[44] Clause 5's requirement for the employer to pay the employee's legal costs gave rise to an issue over whether the steps taken to pay those costs had met the strict wording of the clause and as explained below, some stringent requirements of the Act.

[45] KQJ said this term was not fulfilled because its wording said the employer would pay the *employee*, not the employee's *lawyer*, and she had not received that money. The employing organisation had paid the agreed amount for legal costs directly, on Mr Mitchell's invoice, to his account, not hers.

[46] While that concern may appear correct on strict reading of the wording used, there were two reasons that what was, in fact, done could be said to have met the spirit and purpose of the clause.

[47] Firstly, the wording had contemplated Mr Mitchell sending the employer an invoice for payment. This could also be read, in a practical way, as indicating the parties expected that the employer would pay the person who rendered the invoice.

[48] Secondly, the purpose of the clause was clearly for the employer to meet KQJ's legal costs, so she would not be out of pocket for that amount. Paying the sum due in the invoice directly to her lawyer met that purpose.

[49] There is however a significant statutory provision which must be read and applied to this situation. It has a result which may not be convenient for RXT and Mr Mitchell but cannot simply be put aside by the Authority for that reason.

[50] Section 150A sets some very specific rules about, firstly, who can be paid money due under a settlement agreement that has been certified through the s 149 process and, secondly, about the consequence of not meeting those specific requirements. These are the relevant parts of that provision (some **bold** emphasis added):

150A Payment on resolution of problem

- (1) **Any** payment by one party to another, required by **any** agreed terms of settlement under section 149 ... must be paid **directly** to the other party and **not** to a representative of that party, and the party receiving the payment may not receive, or agree to receive, payment in any other manner.
- (2) For the purposes of this Act, **a payment that does not comply with subsection (1) is to be treated as if the payment has not been made.**
- (3) Subsection (1) does not—
 - (a) ...;
 - (b) prevent a payment being made to the other party's **solicitor**.

[51] The section plainly bans payment (due under a s 149 agreement) being made directly to a representative and a party agreeing to get such a payment in any other way. One exception to that rule is relevant here - a payment made to a solicitor.

[52] Clause 5 of the agreement with KQJ does not breach that statutory rule because it clearly says “the employer will pay the *employee*”. It does not provide for a payment directly to her *representative*.

[53] However, the payment made by the employer in this case directly to Mr Mitchell (by paying his invoice to his account) was in breach of s 150A because he was “a representative” and not within the permitted exception of being a representative who is a solicitor. Rather, Mr Mitchell is expressly referred to as a barrister in clause 5. By contrast, clause 4 required payment of the compensation sum to the trust account of a solicitor – which *is* a type of payment permitted by s 150A.²

² See Lawyers and Conveyancers Act 2006, s 6 definition of “barrister” and “solicitor”.

[54] Counsel for the employer, RXT, submitted the reference in clause 5 to payment being made “to the employee” recorded an intention to pay the amount due for costs to KQJ’s account with Mr Mitchell. It was not, and not intended to be, a requirement to pay it into KQJ’s personal account.

[55] Counsel for RXT also submitted Mr Mitchell was KQJ’s representative and agent for the purpose of the payment, so the payment to Mr Mitchell was a payment made to “the employee”. Issuing an invoice to the employer, with direct payment to the representative, was submitted to be a normal practice in settlement agreements.

[56] Alternatively, counsel for RXT submitted that, if the wording of clause 5 did require payment to the employee personally, this was a mistake made by both parties and did not reflect their common intention at the time of making the agreement. Rather, the Authority could rectify the agreement as “the word ‘employee’ should have referred to the ‘employee’s representative’”. This would, it was submitted, avoid unintended tax consequences for the employee and reflect “the normal practice for contributions to legal fees to be made directly to the barrister or solicitor involved.” Counsel submitted both Mr Mitchell and the employer’s lawyer expected the fees contribution would be dealt with in that normal manner, acting for and on behalf of their clients, consistent with this expectation.

[57] An initial point in addressing those submissions is to acknowledge clause 5 had the clear well-intentioned purpose, as noted earlier, of ensuring KQJ was not out of pocket for her legal costs in resolving the employment relationship problem. What was then done in sending that invoice, and the employer paying it, met the intended practical outcome of that purpose. There was nothing to suggest those steps were followed in anything other than good faith.

[58] The difficulty lies with the stringent requirements of s 150A of the Act. It is a protective and prescriptive provision, applying to all people that falls within its scope, both those who are well-intentioned and acting in good faith as well as those who might not be. An explanatory note in the Bill which led to enactment of s150A in 2003 said this provision “enhances the authority of the applicant, by requiring any monetary settlements in mediation to be paid directly to the applicant rather than the

representative”.³ A report from government officials at that time described the intended purpose of the provision being, in part, “to increase the parties’ control of the process”.⁴

[59] Section 150A begins with the words “any payment”. It does not distinguish between compensation payments and clauses agreeing to the payment of costs.

[60] Contrary to the submissions made for RXT, the section makes a clear distinction between a party and a party’s representative. It would not be consistent with its provisions to rectify the wording of clause 5 by substituting the word ‘employee’ with the phrase ‘employee’s representative’. To do so would create a wording of the clause directly contrary to the requirements of s 150A.

[61] Similarly, the Authority cannot ignore a requirement of the Act because it may be ‘normal practice’ for settlement agreements to contain clauses providing for contributions to legal fees to be paid directly to barristers as well as solicitors. The Act allows, at s 150A(3), for payments directly only to solicitors. This exception may be because of the high level of accountability for any funds deposited to a solicitor’s trust account, although, as worded, it applies to all those entitled to practise as a solicitor, not only those who operate a trust account. The section does not however, on any plain reading, apply to barristers.

[62] If, as submitted, it is normal practice for representatives who are not solicitors, but are barristers or other kinds of non-lawyer advocates, to have direct payments to them agreed in certified s 149 settlements, they do so at their own risk given the express wording of s 150A.⁵ The Authority cannot disregard the meaning and application of a section of the Act simply because it may be honoured more in the breach than the observance.

[63] There was no principled basis, in this case or any other, for applying a looser wording attempting to separate out some trustworthy and reliable category of representative who the Authority could consider to be exempt from the import of the plain wording and apparent parliamentary intention of imposing a broad and strict restriction on all representatives except solicitors. If Parliament or the executive wished

³ Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 7.

⁴ Department of Labour Report to the Transport and Industrial Relations Committee, Employment Relations Law Reform Bill, 22 July 2004.

⁵ See *Armstrong v MTS Energy Ltd* [2023] NZERA 72, at [17]-[18].

such a distinction to be made, it would be for them to do so by amendment to the Act or other appropriate regulation, not ad hoc variation by the Authority in a particular case.

[64] In this particular case, the terms of the settlement agreement observed the distinction between the different roles of a solicitor and KQJ's counsel, a barrister, in how funds in different clauses (one for compensation, one for costs) were to be treated. It was open to the parties to have had both payments made through the solicitor's trust account.

[65] For the reasons given, it was necessary to find the payment for costs made in this case by the employing organisation to KQJ's counsel did not comply with the requirements of s 150A(1).

[66] Subsection s 150A(2) states that a payment not complying with subsection (1) "is to be treated as if the payment has not been made".

[67] It follows that the requirements of clause 5 of the settlement agreement with KQJ has, therefore, not been met. The employer has not paid to her the costs due to her as the employee.

[68] KQJ asked for a determination of whether the employer had, among other things, "adhered" to clause 5 of the agreement. It had not.

[69] In her statement of problem KQJ did not specify a remedy if that determination were made. She wrote only: "Remedy as deemed suitable by ERA".

[70] A suitable remedy is to require the employer to pay KQJ the sum set in clause 5. It is a requirement of the clause and it has not been complied with.

[71] Such an order would give rise to two related or consequential questions, but both are outside the Authority's jurisdiction to resolve – firstly, could the employer recover the funds already paid to Mr Mitchell and, secondly, must KQJ use that sum, when received from the employer, for its intended purpose of paying legal costs to Mr Mitchell? He may expect and be entitled to that payment, particularly if he has had to repay the sum he received directly from the employer. Both issues are matters of private debt between the respective parties, not matters for investigation and determination by the Authority.

[72] An order requiring RXT to comply with clause 5 of the agreement by paying the agreed sum to KQJ could be made now under s 137 of the Act. Such an order is within the Authority's discretion to make where a term in a s 149 settlement agreement has not been observed or complied with.⁶

[73] It is, however, also appropriate to pause so the parties can consider the situation in light of the findings in this determination. They may be able to resolve any necessary steps between themselves without the need for further intervention by the Authority.

[74] If not resolved and an order is sought, leave is reserved for KQJ to apply for one. RXT would then be given an opportunity to respond.

[75] The question of whether any penalty could also be claimed can be addressed in advance of that consideration however. Even if one were appropriate for not having paid the costs amount directly to KQJ in February 2021, it is now well outside the 12-month timeframe allowed to seek a penalty for such a breach.⁷

Summary of findings and orders

[76] For the reasons given:

- (i) RXT, HVZ, UHR and CHD are struck out as respondents to these proceedings.
- (ii) Certification of the settlement agreement was completed as required by s 149(2) so the agreed terms are final, binding and enforceable.
- (iii) KQJ may not pursue matters fully and finally settled by the terms of the agreement.
- (iv) The requirements for payment due to KQJ under clause 2 of the agreement have not been complied with.
- (v) Leave is reserved for KQJ to apply for an order seeking compliance with clause 5.

[77] A consequence of these conclusions is that, as observed in the submissions of counsel for RXT, clauses 1 and 3 of the settlement agreement concerning confidentiality and non-disparagement remain in force and enforceable.

⁶ Employment Relations Act 2000, s 137 and s 151.

⁷ Section 135(5).

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If unable to do so, and an Authority determination on costs is needed, a party seeking costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the other party or parties would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

Robin Arthur
Member of the Employment Relations Authority