Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 105
5335819 and 5336527

	BETWEEN	"V" Applicant
	AND	"AN INCORPORATED SOCIETY" Respondent

Member of Authority:	Robin Arthur
Representatives:	David Martin for Applicant No appearance for Respondent
Investigation Meeting:	17 March 2011
Determination:	18 March 2011

DETERMINATION OF THE AUTHORITY

A. The Society has breached the terms of a Record of Settlement made in mediation and certified under s149 of the Employment Relations Act 2000 (the Act).

B. Under ss 137 and 138 of the Act the Society is ordered to comply with those settlement terms by:

(i) paying the third instalment of agreed compensation by no later than the agreed date of 1 April 2011; and

(ii) within 14 days of the date of this determination providing Ms V with a written reference containing the agreed wording; and

(iii) Within 14 days of the date of this determination sending a letter to the Police setting out the view that the Society agreed to convey to the Police and to

provide a copy of that letter to Ms V's representative.

C. The Society is ordered to pay to Ms V's the sum of $1000 as a reasonable contribution to her costs of representation and a further $143 in reimbursement of the fees for lodging her two applications for compliance in the Authority.

Order prohibiting publication of identifying details of the parties

[1] The applicant is referred to in this determination as Ms V, an initial chosen randomly and not related to her name. The respondent is a registered incorporated society and is referred to here as the Society.

[2] The actual names of Ms V and the Society are not to be published. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) for the purpose of preserving confidentiality and effectiveness of terms agreed in the Record of Settlement. Those terms include arrangements intended to assist with Ms V's future employment but which would be undermined by publication. She should not have to bear that real risk as a result of breaches by the Society of its settlement agreement with her.

Employment Relationship Problem

[3] Ms V worked at a preschool childcare centre operated by the Society in Auckland from July 2009 to September 2010.

[4] She had raised an employment relationship problem with the Society which was settled in mediation on 3 February 2011. In mediation the Society was represented by an experienced lawyer and two members of its board. A member of the board signed the record of settlement on its behalf. That board member is referred to as Ms P in the remainder of this determination.

[5] The agreement was certified under s149 of the Act by a mediator of the Department of Labour. That certification confirmed, that before making the agreement, the parties were advised and accepted they understood the agreed terms:

(i) were final, binding and enforceable; and

(ii) could not be cancelled; and

(iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[6] Two applications were before the Authority. The first, lodged on 24 February 2011, sought orders requiring the Society to comply with the agreed terms by:

(i) providing Ms V "*with an appropriate reference which could be helpful to her in her search for future employment*"; and

(ii) writing a letter to the Police "*stating that, in the Employer's considered view, there were no grounds for the allegations made by the anonymous complainant*".

[7] The second application, lodged on 3 March 2011, sought orders requiring the Society to pay the second instalment of agreed compensation which had not been paid to Ms V by the agreed date of 1 March 2011.

[8] Ms V, through her representative, NZEI Te Riu Roa legal officer David Martin, sought urgency.

[9] The Society did not participate in a case management conference to make arrangements for the Authority's investigation. The Authority set a hearing date which was communicated to the parties by a Notice of Investigation Meeting and an Authority Minute. This notice and minute was sent to both Ms P and to Radhe Nand, a lawyer who had represented the Society (but not at the 3 February mediation).

[10] The Society lodged a statement in reply on 16 March 2011. It stated two instalments of compensation had been paid and a letter of reference had been sent to Ms V. It also stated the Society had approached the Police for a letter and lodged a copy of the reply received – an email from a police officer dated 7 March 2011 and addressed to Mr Nand.

[11] The Society's view was that "*the matter is settled and there's no need for mediation*".

[12] I had a support officer of the Authority confirm to Ms P and to Mr Nand that

the notified investigation meeting would go ahead and was an Authority proceeding, not mediation. I am satisfied this information was conveyed to them. The support officer reported to me that both Mr Nand and Ms P told her they had met with the board members of the Society last week to discuss the issue. On that basis I consider the Society had adequate opportunity to review its legal obligations and to prepare to participate in an Authority investigation.

[13] No one appeared on behalf of the Society at the appointed time for the investigation meeting. A further telephone call was made to Ms P who confirmed no one would attend as there was "*no use*" and all necessary documents had been sent to the Authority.

[14] I was satisfied the Society was properly notified of the investigation meeting and no good cause was shown for its failure to attend or be represented. Exercising the discretion permitted under clause 12 of Schedule 2 of the Act I proceeded to hear from Ms V, under oath, and her representative.

Determination

[15] From the evidence available to the Authority I was satisfied compliance orders were necessary because the Society had breached the terms of settlement in the following three ways.

(i) Late payment of instalments of compensation

[16] The bank records of Ms V confirmed a compensation payment instalment due on 4 February was not available to her until 8 February and an instalment due on 1 March was not available until 4 March 2011.

[17] While, by the time of the investigation meeting, the instalments due were paid, the Society twice breached the agreed dates for payment. The pattern of late payment was a breach. An order requiring payment of the third and final instalment on the agreed date of 1 April 2011 was necessary to prevent further non-compliance.

(ii) Provision of an inadequate and non-compliant reference

[18] The written reference provided to Ms V met neither the spirit nor the express terms of the agreement. It was due to be provided by 10 February but was not sent to her until 10 March 2011. The Society had agreed to describe Ms V as a "*competent*" teacher but the reference only stated she was "*trained well*". I accepted Mr Martin's submission that the word 'competent' – as used in the education sector – carried a specific meaning, relating to registration and employability, and which explained why that word was to be included in the reference.

[19] The reference given to Ms V said she provided "*good*" documentation but the agreed term was that she would be described as providing "*excellent*" documentation.

[20] It also included a paragraph referring to Ms V being suspended from work and an official investigation ending with her being given a formal warning by Police. That is plainly inconsistent with the stated intention of the term regarding the reference being to help her search for future employment. It is also inconsistent with the next agreed term that stated the Society would tell any putative employers who asked about the investigation that it "*found no evidence of wrong-doing on [Ms V's] part*".

[21] I have ordered the Society to provide a written reference to Ms V which meets the agreed terms. It must do so within 14 days of the date of this determination.

(iii) Failure to write to the Police

[22] On the information available to me I have found it more likely than not that the Society failed to write a letter to the Police stating, as agreed, that "*in the Employer's considered view, there were no grounds for the allegations made by the anonymous complainant*". It was due to do so by no later than 10 February 2011. Instead Ms P wrote to the Authority on 3 March that the Society was still trying "*to find out the depth of the investigation done by police and the warning stated in their report*".

[23] The email of 7 March from a police officer to Mr Nand stated that officer was

asked to contact him by Ms P. The email stated the Police decided not to seek prosecution of the allegations made against a number of teachers at the childcare centre. Ms V was named as one of those teachers. It was alleged she verbally abused and physically disciplined children and put them into "*inappropriate time out situations*". The officer's email said prosecution "*was not considered to be in the best interest of the children*". It said Police gave Ms V a formal letter of warning.

[24] Ms V provided the Authority with a copy of that Police letter of warning, dated 8 November 2010. The letter referred to Police receiving "*information*" that some teachers at the centre at which she was employed had assaulted children. The letter did not identify Ms V as one of those teachers but then stated that the letter "*serves as a record that you have been formally warned for physically disciplining the children*". The letter contained no evidence or corroboration of the allegation or any explanation about how such a conclusion was reached without charges being laid or prosecution carried out. It did state that a Police child protection team, after consulting the Child Youth & Family Service, "*have no need to take any further action*".

[25] The Society representatives who attended the 3 February mediation were aware the Police had issued Ms V with the so-called formal warning. It was in that knowledge that they agreed to write to the Police setting out a "*considered view*" which stated a different conclusion about the allegations. There was no new information justifying the Society resiling from its agreed position, even if such a change were permitted under the binding terms agreed (which it is not).

[26] I have found it necessary to require the Society to complete that aspect of the agreement under the compulsion of a compliance order. I have ordered the Society to write to the Police in the agreed terms by no later than 14 days from the date of this determination. I have further directed the Society to provide a copy of that letter, at the same time, to Ms V's representative.

Further comment

[27] The Society was legally represented in the mediation. It was not required to make such an agreement in that forum but chose to do so. As certified by the

mediator, it did so knowing of the final and binding nature of the agreement. It knew the agreement could not be reviewed or appealed. Despite that, the Society failed to honour the agreement in its entirety and took deliberate steps to avoid providing the agreed reference for Ms V and the letter to Police.

[28] Parliament has provided that the Authority may impose penalties on a party which breaches such settlement agreements. Ms V could have sought orders imposing a penalty of up to $10,000 on the Society. Fortunately for the Society she did not. Because its actions in breaching the agreement appear to have been deliberate and calculated, I would most likely have imposed a significant penalty on the Society if Ms V had sought one.

Costs

[29] Ms V was successful in gaining the compliance orders she asked for and sought costs in that event. She is entitled to a contribution to her representative's costs and reimbursement of the fees for lodging her applications. I applied the usual tariff for costs in the Authority and set costs at $1000 for a meeting which took less than two hours. The Society is to pay that amount directly to Ms V's representative also with a further $143 in reimbursement of the fees for lodging her applications.

Leave reserved

[30] Leave is reserved for Ms V to apply for further orders in respect of her applications or in the event of non-compliance with the Authority's orders set out at the head of this determination.

Robin Arthur
Member of the Employment Relations Authority