

never resolved or finally agreed because the timing of payments remained an issue. The respondents say that the application for a compliance order is premature and cannot be sustained and that the Authority does not have jurisdiction to make such an order.

[3] Counsel for V and for Dr W and X Limited agreed that the Authority could deal with the matter by way of written submissions being lodged in advance of a telephone conference with the Authority. Counsel were invited to speak to their submissions on the telephone conference with the Authority on 8 April 2009. I thank counsel for the timely way in which they were able to provide submissions to the Authority and for their helpful submissions during the telephone conference.

Prohibition of publication

[4] There is an issue as to whether or not there has been agreement between the parties and if it is found that there was an agreement, the nature of that agreement. Relevant communications by the parties were made on a without prejudice basis. In the circumstances of this case, I consider it appropriate to prohibit publication of the parties' names rather than the contents of the without prejudice communications.

Issues

[5] The issues for the Authority are:

- Is it appropriate for the Authority to have regard to the without prejudice communication between the parties;
- Who were the respondent parties to the employment relationship problem;
- Did the parties reach an agreement of the employment relationship problem on 27 January 2009 which was to be investigated by the Authority on 17 and 18 February 2009;
- Does the Authority have jurisdiction to make an order for compliance under s.137 of the Employment Relations Act 2000?

Is it appropriate for the Authority to have regard to the without prejudice communication between the parties?

[6] Mr Singleton submitted that it was inappropriate for a compliance order to be made where the Authority had to rely on privileged correspondence when the terms of settlement had not yet been finalised.

[7] The Authority needs to consider the without prejudice correspondence to properly determine Mr Martin's submission that there was an agreement reached on 27 January 2009 and Mr Singleton's submission that there was not. In those circumstances, it is appropriate for the Authority to consider the without prejudice correspondence between the parties.

Who were the respondent parties to the employment relationship problem?

[8] Mr Singleton raised an issue about whether there was agreement reached with the correct respondent parties.

[9] The parties to the statement of problem lodged with the Authority on 20 June 2008 were V and Dr W and two other doctors trading in partnership and X Limited.

[10] An issue was raised as to the identity of the respondents by counsel during a telephone conference with the Authority in October 2008. The Authority, in setting the matter down for an investigation meeting on 17 and 18 February 2009, directed that the identity of the respondent(s) was a matter that should be dealt with in the statements of evidence unless the parties were able to resolve the issue earlier than was timetabled for lodging these.

[11] Mr Martin lodged statements of evidence in January 2009. In his covering letter dated 12 January 2009 he asked that the Authority amend the respondents name to the extent that it was accepted by V that the other two doctors did not practice in partnership with Dr W. Mr Martin advised in his letter that the respondents were therefore Dr W and X Limited.

[12] There were no statements of evidence received from the respondents in accordance with the timetable. The Authority file shows that the senior support officer made some inquiries in this regard as the investigation meeting dates drew closer. There is an email on file dated 13 February 2009 from the senior support

officer, Mr Gallen, to Mr Martin and Mr Reid who was counsel for the respondents advising:

On the basis of advice that there has been an offer and acceptance in this matter the Authority has cancelled the hearing next week in.....

Mr Reid, if you could advise the settlement is concluded please.

[13] I find that when the material correspondence took place on 26 and 27 January 2009 the parties to the problem were V and Dr W and X Limited. It follows, and there is nothing to satisfy me otherwise that if there was an agreement it would be intended to settle the employment relationship problem between V and Dr W and X Limited.

Did the parties reach a settlement agreement of the employment relationship problem on 27 January 2009 which were to be investigated by the Authority on 17 and 18 February 2009?

[14] Mr Martin wrote a without prejudice letter to Mr Reid dated 26 January 2009. The letter was headed up *re V v Dr W/X Limited*. In his letter, he made the following offer:

1. *Your client's offer is declined.*
2. *Our client would like to make a counter offer but has asked me to make it clear that this offer is put forward in good faith and as a genuine attempt to avoid the furtherance of this litigation. It therefore represents the minimum settlement acceptable to our client in the circumstances and our client believes it strikes a good balance between the interests of both parties.*
3. *Our client's counter offer is that she will agree to discontinue her action in return for a Section 123(1)(c) payment of \$24,000.00 plus an agreed reference and payment of her legal costs. It is noted that the s.123 claim in our client's claim was for \$35,000. Considering the aggravating features of our client's dismissal, our client believes that such a payment is more than justified.*
4. *Costs incurred thus far by V amount to \$3,680.00 including GST invoiced thus far, plus an additional amount of approximately \$2,900.00 including GST still to be invoiced. The total costs are therefore estimated to be \$6,580.00 including GST.*

[15] Mr Reid responded in an email dated 27 January 2009 and said:

Dear Greg,

We have just been able to obtain our client's instructions on this and can advise that your client's revived offer from yesterday is accepted.

We will need to discuss timing of payment. I am in Court tomorrow and unable to be contacted. I will be in touch on Thursday.

[16] Mr Singleton submits that an agreement in principle was reached between the parties as to how the personal grievance could be resolved but the precise terms of that settlement were never finally agreed because the timing of the payment by the respondents to the applicant remained at large. Mr Singleton refers to the behaviour of the parties following the email of 27 January 2009. He refers to an email from Mr Martin dated 28 January 2009 in which Mr Martin says that he is looking forward to speaking to Mr Reid to finalise settlement. He refers to Mr Martin sending a draft written record of settlement by email dated 2 February 2009 using the words *in order to help this matter to conclusion* in the covering email.

[17] The correspondence supports that the next written communication from Mr Reid after 27 January 2009 was on 25 February 2009 when there was an email that provided:

Dear Greg,

As I indicated to you at the time. We agreed to the payment sought by your client that we would come back to you regarding payment over time. My client has been working through these issues so that we may come back to you regarding a payment arrangement.

I have not been able to turn my attention to this matter because of my involvement in a High Court trial which finished yesterday.

I anticipate coming back to you about these matters in the next few days.

[18] Mr Martin submits that the acceptance of the offer on 27 January 2009 was unqualified and that any references to timing of payments comes after that acceptance. He further submits that in litigation, the timing of payment is usually discussed in the context of payment in exchange for the formal withdrawal from the litigation.

[19] There have been no payments at all made to V to date by Dr W and X Limited. A signed reference has not been provided although Mr Martin did provide on V's behalf a draft reference.

[20] The Authority is required to determine, in this matter, whether both parties intended that there be a binding settlement of the employment relationship problem at 27 January 2009. There is a need to consider whether there was agreement on all the terms which the parties regarded as essential to the conclusion of settlement or whether, as Mr Singleton submits, there was no agreement on an essential term as to the timing of payment. The Authority also needs to consider if there was found to be an intention to enter into a binding agreement as at 27 January 2009 whether the terms of that agreement was too uncertain.

[21] In order for the Authority to regard a term as essential to concluding an agreement, the Authority must be satisfied that that was how the parties regarded it. I find that the reference by Mr Reid to discussing timing of payments in the email of 27 January 2009, coming as it did after an unequivocal acceptance of the offer is about the mechanics of payment. I am not satisfied that it is an essential term to the conclusion of the settlement agreement. The reference by Mr Reid to *payment over time* in his email of 25 February 2009 (some weeks later) is a different and new matter and an attempt to renegotiate the agreement. Mr Martin did provide what he referred to as a draft written terms of settlement after 27 January 2009 but I do not find that the agreement reached on 27 January 2009 was intended by the parties to be subject to the terms being put in writing.

[22] I am satisfied that, as at 27 January 2009, the parties, V and Dr W and X Limited, intended there to be a binding agreement in terms of the employment relationship problem between them. The agreement was that there would be a discontinuance of the proceedings before the Authority by V in return for a payment of \$24,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 together with an agreed reference and payment of legal costs.

[23] Mr Martin said that legal costs increased beyond the estimate in his letter of 26 January 2009 of \$2900 and he issued an invoice on 29 January 2009 in the sum of \$3069.37. Mr Martin then submitted that as a direct result of the behaviour of Dr W and X Limited in not adhering to the agreement a further invoice was issued to V for legal costs from 29 January 2009 to 27 February 2009 in the sum of \$1237.50. This included the cost of drafting the amended statement of problem and an affidavit for the compliance order. Mr Martin submits that the agreement was intended to make Dr W and X Limited responsible for additional costs. I find that the intention of the

parties was that the legal costs would be those invoiced for work performed as at 27 January 2009. An estimate was provided of the likely cost of work which had not been invoiced at that date. V was invoiced for legal work completed in the sum of \$6749.37 on 19 September 2008 and 29 January 2009. I do not find any additional cost for legal work performed was part of the binding agreement reached between the parties on 27 January 2009.

[24] The Authority having found that the parties did have an intention to enter into a binding agreement to settle an employment relationship problem, should do its best to give effect to that intention. I find that it can be implied into the agreement that it was intended by the parties that settlement should occur within a reasonable time after 27 January 2009, bearing in mind the scheduled investigation meeting for 17 and 18 February 2009.

[25] In conclusion, I find that there was an intention by the parties in this case to be immediately bound to the agreement reached on 27 January 2009. I am satisfied that there was agreement reached on the essential terms and that a term can be implied into the agreement that settlement should occur within a reasonable time after 27 January 2009. The agreement has not been complied with in any respect by Dr W and X Limited.

Does the Authority have jurisdiction to make an order for compliance under s.137 of the Employment Relations Act 2000?

[26] I do not consider I need to determine the jurisdictional point about whether or not the Authority can make a compliance order. I have found that there was an agreement on the resolution of V's employment relationship problem reached by the parties on 27 January 2009. There was no agreement to payment over time. I want to give Dr W and X Limited an opportunity to comply with the agreement I have found was entered into.

[27] I make an order that a binding agreement between V and Dr W and X Limited was entered into on 27 January 2009. The agreement provided that Dr W and X Limited are to pay to V the sum of \$24000 under s 123 (1)(c) (i) of the Employment Relations Act 2000, legal costs in the sum of \$6 749.37 and are to provide an agreed reference. V in return is to discontinue her claim against Dr W and

X Limited which is set out in the statement of problem and complaint lodged on 20 June 2008 with the Employment Relations Authority.

[28] I adjourn the application for a compliance order for a period of two weeks from the date of this determination and reserve leave for Mr Martin to ask the Authority to investigate that application if necessary after that time.

Costs

[29] I reserve the issue of costs. They will either be dealt with after the Authority has dealt with the application for a compliance order or, if that is not required, I would encourage the parties to talk about costs. If agreement cannot be reached then the Authority will at the applicant's request set a timetable for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority