IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 317
5455269

	BETWEEN	GAYLEEN ANDERSON Applicant
	A N D	TRANSMAX LIMITED Respondent
Member of Authority:	James Crichton	
Representatives:	Dave Vinnicombe, Advocate for the Applicant David Renwick, Advocate for the Respondent	
Investigation Meeting:	14 July 2014 at Auckland	
Date of Determination:	21 July 2014	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Anderson) alleges there has been a breach of a record of settlement dated 25 February 2014 in that the respondent (Transmax) have failed to pay the holiday pay due and owing as part of the settlement agreement.

[2] Transmax allege that Ms Anderson has breached the terms of the settlement agreement by erroneously calculating the holiday pay that she is due, by failing to conduct a proper handover as required in the settlement agreement and by failing generally to act in good faith towards the employer.

[3] Ms Anderson was employed by Transmax as administrator for over a decade. She resigned her employment on 21 February 2014.

[4] The settlement agreement between the parties had two relevant provisions in it for the purposes of the current employment relationship problem. These were:

> 5. *The employer has requested that the employee provide a handover of no more than 15 working hours to the employee's successor once appointed on condition that this appointment is made before 7 March 2014. The employee has agreed to a handover on these terms. The payment of these handover hours will be in addition to the payment … above.*
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> 6. *By reason of the employee having had the responsibility of the payroll, she will calculate her holiday pay due to her during handover period. In the event the handover period does not take place for any reason, the employer agrees to allow the employee access to the premises and the payroll system for the purposes of calculating the holiday pay. The employer and employee will sign off on the holiday pay and if not agreed, an inspector from the Ministry of Business Innovation and Employment will determine the amount.*

[5] When I convened a telephone conference to make arrangements for an investigation meeting on this matter, it was decided that it would be helpful for a Labour Inspector to be identified to assess the material available in respect to the calculation of holiday pay.

[6] I arranged for Dave Myatt, a Labour Inspector with the Ministry of Business, Innovation and Employment to assess the material and to attend the Authority's investigation meeting in order to give evidence on the matter.

Issues

[7] It is apparent that there are two matters in dispute between the parties relating to the terms of the settlement agreement and those two matters respectively concern the correct interpretation of the two clauses of the settlement agreement that I recited above.

[8] Accordingly, the Authority needs to address two questions as under:

(a) What amount of holiday pay is due and owing to Ms Anderson; and

(b) Has Ms Anderson dealt appropriately with the handover?

[9] When the Labour Inspector gave evidence at my investigation meeting, it was apparent that, first the information that he had at his disposal in order to reach definitive conclusions was not complete, and second the extensive work that he had undertaken to reach the provisional conclusions he had, needed to be digested by the

parties in order that they could properly consider the Labour Inspector's findings and respond to them as appropriate.

[10] Accordingly, I decided that the only proper course was first to ask the Labour Inspector to engage with both parties to establish if either held any further information that would assist him to finalise his conclusions, and second to give both parties the opportunity of making submissions both to the Labour Inspector to inform his final conclusion and to me before I determined the holiday pay issue.

[11] To that end, this determination deals only with the question of whether the handover was properly attended to and also considers associated issues such as Transmax's decision to engage outside assistance to assist in training up the new administrator, given Transmax's complaints about the handover provided by Ms Anderson.

[12] Issues relating to the holiday pay question will be dealt with in a subsequent determination.

Has Ms Anderson fulfilled her obligations in terms of the handover?

[13] The starting point for the consideration of this matter must be the relevant clause in the settlement agreement which I have already recited. I observe first that the clause clearly is inserted for the benefit of the employer Transmax. It says as much in the opening phrase.

[14] Then it goes on to require Ms Anderson to *provide a handover of no more than 15 working hours* to the person who was replacing Ms Anderson as administrator.

[15] Transmax maintain that the handover they had in mind was effectively a process whereby Ms Anderson's extensive knowledge of the role could be imparted to her successor during that handover process. They say Ms Anderson had the benefit of a two day handover when she commenced her employment with them. Conversely, Ms Anderson told me in her evidence that a handover was not *training* and that she was not there to *train* the successor in her role.

[16] The parties argued about the meaning of the word *handover* with Ms Anderson offering a minimalist interpretation and Transmax referring to *the*

handing over of all relevant local knowledge and procedures, (which) should involve showing the successor in detail how tasks are carried out and what procedures to follow.

[17] What actually happened according to Ms Anderson's successor, who gave evidence at my investigation meeting, was that Ms Anderson turned up on 26 February, spent the first 40 minutes calculating her holiday pay (about which more in the next determination) and then remained with her successor for a further one hour and 40 minutes.

[18] It is common ground that the employer had provided a hand-written list of what amounted to an aid memoir for Ms Anderson's successor and he was to give that to Ms Anderson.

[19] It is also common ground that he did in fact pass this to Ms Anderson but that she variously indicated her refusal to deal with some matters or her alleged inability to deal with others. In the result, a fair summary of the position is that Ms Anderson dealt with less than half of the matters identified by Transmax in the hand-written list.

[20] At the end of this session, Mr Bob Thomas, Ms Anderson's successor in the role, says that he sought Ms Anderson's agreement to recording the amount of time that she attended at the workplace for handover as two and a half hours. The purpose of that record was so that Transmax could identify how much of the total of 15 hours that was provided for in the record of settlement, had been expended.

[21] It is unchallenged evidence that Ms Anderson indicated that she was not coming back because she regarded the handover as having been completed.

[22] It is difficult not to see this as a breach of good faith by Ms Anderson. Based on the evidence of Mr Thomas, it would have been self-evident to Ms Anderson that what she had imparted to Mr Thomas was woefully inadequate in terms of getting him up to speed with the role. In my opinion, the argument between the parties about what constituted *a handover* misses the point. It is a practical matter. The purpose of the handover is self-evident; Ms Anderson had a wealth of experience, the employer sought to have the benefit of that as she departed the role, at least to the extent of having her assist her successor by showing him some basic routines. It cannot have been lost on Ms Anderson that what she did in the short time that she allowed was grossly insufficient to provide any reasonable handover to the new incumbent and the

suggestion made on Ms Anderson's behalf that Mr Thomas ought to have been able to work out what to do misses the point that Ms Anderson had accepted a contractual obligation to provide a handover and at least by refusing to come back again after the initial session, she was making it painfully clear that she was not interested in fulfilling her obligations.

[23] Transmax quite rightly pointed to the allocation of 15 hours as evidence for the view that some reasonable time commitment was contemplated. Mr Renwick in giving evidence for Transmax said that he thought that Ms Anderson would attend at the workplace for say five mornings in order to get her successor up to speed, and that that was the kind of calculation that he had made when he stipulated a maximum of 15 hours in the settlement agreement.

[24] But Mr Renwick did not share that consideration with Ms Anderson and of course he should have. He thought that stipulating 15 hours was sufficient indication about what his expectations were.

[25] As soon as there was a failure by Transmax to pay the holiday pay, Ms Anderson sought advice and her able advocate Mr Vinnicombe wrote to Transmax on 28 February (two days after the abortive handover) and indicated that if there were a problem with the handover (which was not conceded) then Ms Anderson would return to the workplace, meet with Mr Renwick and Mr Thomas and deal with the matter. I am satisfied that that is not only a handsome offer but also effectively remedies Ms Anderson's previous default; the law is clear that a party in default in this jurisdiction may put right their wrongdoing and that, I am satisfied, is the effective of Mr Vinnicombe's 28 February 2014 letter.

[26] In that letter, Mr Vinnicombe made a number of other important observations. First he referred to the fact that Mr Renwick was not physically present during the handover on 26 February 2014. Mr Renwick told me that the reason he was not there was partly because he had another pressing commitment but also because the relationship between himself and Ms Anderson had deteriorated and he thought it best that he was not there.

[27] Of course the difficulty with him not being present is that given that the handover did not achieve any satisfactory resolution so far as Mr Thomas was concerned, there was nobody for either Mr Thomas or indeed Ms Anderson to engage

with to try to resolve matters on a party to party basis and so that opportunity was lost as well.

[28] Moreover, Mr Vinnicombe referred to the juxtaposition between the hand-written list that Mr Renwick had developed of the things that he expected Ms Anderson and Mr Thomas to talk about, with observations in correspondence from Mr Renwick which raised a whole raft of other issues that were not on the hand-written list, and which it appeared that Mr Renwick expected Ms Anderson to also deal with. Mr Vinnicombe made the entirely understandable point that if Ms Anderson did not know about what was required of her, it was difficult to complain when she did not deliver.

[29] That point is well made but I stand by my original conclusion that Ms Anderson ought to have known full well that the time that she spent with Mr Thomas and the extent to which she provided him with assistance is manifestly inadequate for the purposes of the handover on an important role in an employer's organisation.

[30] That said, as I have already made clear, Mr Vinnicombe's letter of 28 February 2014 remedies that default by offering to have Ms Anderson back so that the matter can be addressed with Mr Renwick present. Mr Renwick did not take up that offer and I asked him about that at the investigation meeting. He said simply that Ms Anderson tended to be emotional and that he could not wait to deal with the matter and accordingly he incurred additional cost in getting Mr Thomas provided with the skills that he needed to deal with the particular challenges of this workplace; and for our purposes, more importantly, Transmax seeks to recover those additional costs from Ms Anderson.

Determination

[31] I am satisfied on the evidence I heard that Ms Anderson's handover was manifestly inadequate and that she knew or ought to have known that that was the position simply from the responses that she got from Mr Thomas as well as from the handover she herself experienced. Having done the job for over a decade, she would have had a wealth of experience and knowledge about the peculiarities of that workplace and her obligation, as part of good faith behaviour, was to impart that knowledge to Mr Thomas and she failed to do so.

[32] However, by making the offer that she did through her advocate Mr Vinnicombe in his letter of 28 February 2014, she remedied that earlier default thereby putting matters right. In saying that she would attend at the workplace and fix what was broken in effect she was legally making things right.

[33] However, Mr Renwick failed to pick up that offer and chose instead to incur cost in providing the necessary information to Mr Thomas via other sources and Transmax now seek to recover the costs of those various other sources of information, from Ms Anderson by way of a counterclaim.

[34] There can be no entitlement to a counterclaim here; Transmax ought to have accepted Ms Anderson's offer but in the absence of the acceptance of that offer, they cannot now invite her to pick up the tab for a decision that they made.

[35] My conclusions then are:

(a) Ms Anderson did not provide a proper handover and so was initially in breach of the settlement agreement;

(b) However, she remedied that default by offering to do it again; and

(c) Transmax refused her proposal; and therefore

(d) Transmax cannot look to Ms Anderson to pay for the costs they incurred after the failure of the handover because Ms Anderson offered to come back and do the job properly.

[36] A final disposition of this matter will have to await the resolution of the outstanding holiday pay claim, which will be the subject of another determination.

Costs

[37] Costs are reserved.

James Crichton
Member of the Employment Relations Authority