

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 376  
3131361

BETWEEN                      BKC  
   Applicant  
  
AND                                DAH  
   Respondent

Member of Authority:        Philip Cheyne  
  
Representatives:              Josh Lucas, counsel for the Applicant  
   DAH, the Respondent  
  
Investigation Meeting:        17 August 2021 at Christchurch  
  
Date of Determination:        25 August 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Pursuant to s 138(5) of the Employment Relations Act 2000, final determination of the matter is adjourned.**
- B. Pursuant to s 137 of the Employment Relations Act 2000, but subject to (A.) above, there is an order against DAH as set at paragraph [31] below.**
- C. Pursuant to clause 10 of Schedule 2 to the Employment Relations Act 2000, I prohibit from publication the names of the parties.**
- D. Costs are reserved.**

## **Employment relationship problem**

[1] BKC and DAH entered into a record of settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act) on 6 June 2019.

[2] BKC says that DAH has not complied with the record of settlement, as he did not return property or arrange for access so BKC could uplift other property. BKC also says that DAH breached the record of settlement when a company lodged a claim against it in the Disputes Tribunal, claiming payment on company invoices for work performed by DAH, under an arrangement between BKC and the claimant company.

[3] BKC seeks a compliance order requiring DAH to return all its property. BKC seeks compensation for costs and lease payments it has continued to pay in respect of one item of that property (a photocopier). BKC also seeks a penalty against DAH in respect of the breaches of the record of settlement.

[4] DAH says that the property referred to in this claim was in the possession and control of BKC. If it abandoned, disregarded or disposed of the property, those steps were not related to his employment. DAH says that he is not a director or shareholder of the claimant company. He has made no personal claims in the Disputes Tribunal. His view is that this application should be dismissed.

[5] The following issues arise:

- (a) Does the Authority have power to order DAH to pay compensation to BKC?
- (b) Has DAH observed clause 4.1 or 4.2 of the record of settlement?
- (c) Has DAH breached clause 7 of the record of settlement?
- (d) If yes to either (b) or (c), should DAH be ordered to comply with the record of settlement?
- (e) If yes to either (b) or (c), what if any penalty should be imposed?

## **Non-publication**

[6] BKC and DAH expressly agreed as part of their record of settlement that the matters in dispute, negotiations and terms of settlement would be confidential. Confidentiality of mediation also arose: see s 148 of the Act. To preserve confidentiality, I will make a non-publication order covering the parties' names.

## **Record of settlement**

[7] Under clause 4 of the record of settlement DAH undertook he would:

... without undue delay:

4.1 return all soft copy [BKC] property he holds and further he will delete the same from his computer records/system such that he will retain no copies.

4.2 arrange access for [BKC] to uplift all other company property held by him including but not limited to computer printer and security system.

[8] Under clause 7 it was agreed:

This is a full and final settlement of all claims and issues (whether or not yet known or contemplated) [DAH] and [BKC] have or may have now or in the future relating to or arising from their employment/contracting relationship and its termination or otherwise, except any future proceedings undertaken for the purposes of enforcing the terms of this agreement.

## **Does the Authority have power to order DAH to pay compensation to BKC?**

[9] At the case management conference, I raised the point about the Authority's power to award compensation. BKC was asked to consider the point. It was left open for BKC to amend the claim. I anticipated that BKC would withdraw that part of its claim. That did not happen. It was only during submissions as part of the investigation meeting that counsel accepted that the Authority had no power to award compensation. I will set out the reasons for the view I had expressed.

[10] BKC claimed compensation for its costs and for the continued expense of the operating lease it paid to the supplier company under the lease agreement for the photocopier. The compensation claim in effect is for damages for breach by DAH of legal obligations owed to BKC.

[11] A claim in damages for breach of a term of an employment agreement is no longer open to BKC. The record of settlement was a full and final settlement of all issues (present and future) arising from any employment agreement. The record of settlement only left open the possibility of proceedings to enforce the terms of the record of settlement.

[12] Except for enforcement purposes, a party cannot bring the terms of a record of settlement before the Authority.<sup>1</sup> Enforcement options are set out in s 151 of the Act. In the present matter, enforcement by compliance order would be available on proof of the necessary ingredients. Additionally, s 149(4) together with s 133(1)(b) of the Act, creates liability for a penalty if a party breaches a term of a record of settlement. These powers do not extend to awarding damages or compensation for breach of a record of settlement.<sup>2</sup>

[13] The claim for compensation must be dismissed.

**Has DAH observed clause 4.1 or 4.2 of the record of settlement?**

[14] During the investigation meeting, the matters of concern reduced to a photocopier and CCTV security cameras.

[15] Clause 4.2 includes a “security system”. The system is CCTV cameras purchased by BKC and installed at its cost at premises owned by a company of which DAH is a director.

[16] DAH submitted that it was not a matter within the Authority’s jurisdiction, as it was a tenancy or property matter. I do not accept that argument. The record of settlement included a promise by DAH that he would arrange access for BKC to uplift the security system. Including that promise within the record of settlement means a claim to enforce compliance with it is within the Authority’s exclusive jurisdiction.

[17] DAH also submitted that BKC had abandoned both the CCTV cameras and the photocopier by leaving them at the premises, after the working relationship ended in about December 2018. Again, DAH referred to property law principles. The inclusion in the record of settlement of the promise by DAH that he would arrange access to the premises for BKC to uplift its property, brings the present dispute within the Authority’s exclusive jurisdiction. I

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<sup>1</sup> Employment Relations Act 2000, s149 (3)(b).

<sup>2</sup> *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704.

do not accept that BKC abandoned or otherwise relinquished its legal right to possession and control of the CCTV cameras and the photocopier.

[18] The record of settlement specifically lists a “computer printer” but not a “photocopier”. It is common ground that BKC never supplied a “computer printer” to DAH, but did provide a leased “photocopier”. If it had been necessary to interpret the record of settlement, I would have found that “computer printer” as used in the record of settlement was intended as a reference to the leased “photocopier”. However, it is not necessary to interpret those words. The record of settlement covers “all other company property”. Those general words include the leased “photocopier”.

[19] DAH says he took steps to “arrange access”, as required. I am referred to a text message on 4 July 2019, in response to a query from BKC about arranging a time. DAH said “Yes, I need to arrange with tenant a time. Next week ok?” DAH says that BKC did not respond.

[20] Subsequent messages do not record specific arrangements or follow up about the photocopier and the cameras.

[21] The next documented request for the photocopier and the cameras was in counsel’s correspondence dated 25 November 2020. DAH says he never received the correspondence. I note that it appears to have been sent to an incorrect email address. There is no reason to doubt DAH’s evidence on this point. However, DAH was served with a copy of the statement of problem. DAH has not done anything in the face of these proceedings to “without undue delay ... arrange access” for BKC to uplift its property. I find that DAH has not observed or complied with clause 4.2 of the record of settlement, as a result.

### **Has DAH breached clause 7 of the record of settlement?**

[22] In about July 2020, a company, of which DAH is neither a director nor a shareholder, lodged a claim in the Disputes Tribunal. The company claimed payment on four invoices for work performed by it for BKC between March 2017 and January 2018. The Tribunal heard and dismissed the claim in September 2020. In its order, the Tribunal identified DAH as the

claimant's manager. Before the Tribunal, DAH claimed his services had been contracted by the company to BKC, prior to his employment by BKC.

[23] In dismissing the claim, the Tribunal found that the record of settlement extended to settlement of the company's claim being made before it for payment on the March 2017 – January 2018 invoices. The claimant company applied for a rehearing, but in early November 2020 the Tribunal declined that application, so its earlier order dismissing the claim remained in place.

[24] In support of the claim for a penalty, counsel refers me to several cases. I need only mention one of them.<sup>3</sup> The Employment Tribunal's decision was overturned on appeal to the Employment Court.<sup>4</sup> The point was not about legal principles, but their application in the particular case, based on a proper interpretation of the words included in the parties' settlement. In the present case, I cannot say that clause 7 amounted to a promise by DAH that a company he was neither a director or a shareholder of would not commence proceedings against BKC in the Disputes Tribunal. I do not accept that the Disputes Tribunal claim constituted a breach of the record of settlement by DAH. This part of the claim must be dismissed.

### **Should DAH be ordered to comply with the record of settlement?**

[25] At the conclusion of the investigation meeting, I reserved the determination as I wanted to give further consideration to whether DAH had acted in breach of clause 7 of the record of settlement. However, I indicated that a compliance order was likely and a determination would be issued shortly, given the view I had formed about the photocopier, the CCTV cameras and that DAH had not "without undue delay ... arrange[d] access for [BKC] to uplift ... company property". I indicated that 14 days might be allowed for DAH to comply.

[26] After the investigation meeting, New Zealand entered a Covid-19 Level 4 lockdown. This prevents BKC from uplifting its property. Subsequently, the Authority has been copied

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<sup>3</sup> *Richards v Ruapehu District Council* Employment Tribunal Hamilton, 25/06/02 Stephenson (Member), HT 40/02.

<sup>4</sup> *Rickards v Ruapehu District Council* [2003] 1 ERNZ 400.

into correspondence between DAH and counsel which suggests that property access can be arranged, perhaps to both parties' satisfaction, once that is possible.

[27] These circumstances make it appropriate to exercise the Authority's power under s 138(5) to adjourn the matter, without imposing a penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.<sup>5</sup> I anticipate that 28 days should be enough time for the Covid-19 restrictions to be eased to allow for the property to be returned. The parties can apply to enlarge this time if restrictions have not eased.

### **What, if any, penalty should be imposed?**

[28] Submissions by counsel for BKC were principally centred on a penalty for the claimed breach of clause 7 of the record of settlement. Given the earlier finding, DAH is not liable for a penalty on that basis. However, there is a finding that DAH has not complied with clause 4.2 of the record of settlement. I will assume that this finding extends to a finding that DAH breached clause 4.2 of the record of settlement, so will be liable for a penalty by effect of s 149(4) and s 133(1)(b) of the Act.

[29] However, in light of the application of s 138(5) for the reasons given above, it is not necessary at present to determine what (if any) penalty should be fixed, having regard to relevant matters, including those listed in s 133A of the Act. I will adjourn this issue.

### **Summary**

[30] Subject to what follows at [31], DAH is to comply with clause 4.2 of the record of settlement by arranging access for BKC to uplift the photocopier and the security system. DAH must comply with this order within 14 days.

[31] Final determination of the application for a compliance order and the imposition of a penalty is adjourned for 28 days, to enable DAH to comply with clause 4.2 of the record of settlement.

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<sup>5</sup> *Northern Local Government Officers Union Inc v Auckland City* [1992] 1 ERNZ 1109.

[32] I also reserve costs. Once DAH has complied with clause 4.2 of the record of settlement, or after 28 days if DAH has not complied, BKC is to report to the Authority setting out the details of its and DAH's access arrangements. BKC should also provide any submissions in support of its costs application. BKC is to copy this material to DAH. DAH may lodge and serve a submission in reply within a further 7 days.

Philip Cheyne  
Member of the Employment Relations Authority