

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 175  
3042093

BETWEEN                    KATRINA COLE  
Applicant

AND                            TRADE DEPOT LIMITED  
Respondent

Member of Authority:    Nicola Craig

Representatives:         The Applicant in person  
Bridget Smith, Counsel for the Respondent

Investigation Meeting:    On the papers

Submissions and Further Information Received:    22 January, 12 February and 1 March 2019 from the Applicant  
5 February and 1 March 2019 from the Respondent

Date of Determination:    25 March 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Katrina Cole was employed by Trade Depot Limited (Trade Depot or the company), a home improvement store.

[2] The parties attended mediation and reached agreed terms of settlement (the settlement agreement) to resolve issues between them.

[3] A question has since arisen about whether Trade Depot complied with the requirements of the settlement agreement, in terms of providing Ms Cole with a certificate of service.

[4] Ms Cole claims that Trade Depot has not provided her with an accurate certificate of service. Trade Depot says that after initially providing a certificate which did not mention one of the items required, it then rectified that by sending a revised certificate.

[5] The parties agreed that this matter could be considered and decided on the papers. I received submissions from both parties. As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded everything received from the parties but have stated findings in fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Issues**

[6] The issues for determination are:

- (a) Has Trade Depot complied with its obligations under the settlement agreement regarding Ms Cole's certificate of service?
- (b) If not, should a compliance order be issued?
- (c) Should Ms Cole receive compensation or damages for her time, stress and further humiliation in regards to any failure by Trade Depot to comply with the settlement agreement?
- (d) Should either party be required to contribute towards the other's legal costs?

[7] Trade Depot sought to have this claim struck out as frivolous and vexatious on the basis that it considered Ms Cole cannot seek damages for an alleged breach of a settlement agreement under s 149 of the Act.

[8] In her closing submissions in reply Ms Cole referred for the first time to seeking a penalty for a breach of the duty of good faith by Trade Depot. At the time of the relevant Trade Depot actions Ms Cole was no longer an employee and so the duty of good faith had ceased.<sup>1</sup>

### **The settlement agreement**

[9] The settlement agreement was signed by both parties and the mediator on 16 July 2018. Clause 4 of that agreement specified:

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<sup>1</sup> *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112

TDL<sup>2</sup> will provide Katrina with a certificate of service within seven (7) days of the date of this agreement. The certificate of service will outline the role Katrina held at TDL, the duties she performed, the length of her employment and the reason for her leaving as 'resignation'.

### **Attempts at resolution prior to filing in the Authority**

[10] Ms Cole was represented by a lawyer at the time the settlement agreement was reached. After he made an inquiry on her behalf, a certificate of service was provided on 24 July 2018. Ms Cole raised with him a number of concerns about that certificate. These related to items being included, such as cleaning, which Ms Cole said she did not do at Trade Depot. There were also tasks which she said she did do but which were not included.

[11] At her lawyer's suggestion, Ms Cole drafted a revised certificate of service. Her lawyer noted that her draft contained comments about how she performed her duties and her personal qualities, which he did not consider were what was specified by the settlement agreement.

[12] It was then identified that the certificate of service did not contain an item specified in clause 4 of the settlement agreement, namely that Ms Cole resigned from her employment.

[13] On 23 August 2018 Trade Depot's lawyer provided an amended certificate of service (the second certificate) which referred to resignation. There was no agreement to include other changes suggested by Ms Cole.

### **Attempts at resolution after the matter was filed in the Authority**

[14] After the claim was filed in the Authority, a case management conference was held. The conference included discussion about what Ms Cole's difficulties were with the second certificate. Ms Cole stated that it concerned the description of her duties. She said that she was only given the position description, from which the certificate's duties' list was taken, shortly before her employment with Trade Depot finished and that her actual tasks were somewhat different.

[15] The Authority directed the parties to have further discussion between them to see if wording could be agreed. On 15 November 2018 Trade Depot made an open offer of an

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<sup>2</sup> Trade Depot Limited

amended certificate conditional on her withdrawing her claim in the Authority. Ms Cole did not accept the offer.

[16] Submissions were then sought and received from the parties. The Authority subsequently sought from Ms Cole confirmation of the wording which she was seeking for the purposes of the compliance order.

### **Breach of the settlement agreement**

[17] Trade Depot did breach the settlement agreement even aside from the issues which Ms Cole currently has concerns about. It was required by the settlement agreement which is dated 16 July 2018 to provide a certificate of service within seven days of the date of the agreement. The first version of the certificate of service was filed slightly outside the seven-day window, on 24 July 2017. Additionally, the certificate provided at that stage did not refer to Ms Cole's reason for leaving as being resignation, which is clearly a requirement of clause 4 of the settlement agreement. Trade Depot describes this as an oversight which it rectified.

[18] Had a compliance order been sought just on that issue I would not have issued one as Trade Depot has already complied. The more difficult question however is whether the second certificate of service outlined "the duties she performed" as required by the settlement agreement.

[19] I am satisfied that the second certificate of service does not accurately describe Ms Cole's duties. For example, she did not undertake general cleaning duties. Some of Ms Cole's concerns appear to be questions of detail, for example, her assisting the warehouse team related only to new orders, rather than assisting with everything. I am however satisfied that the second certificate signed by Trade Depot did not meet the requirement of outlining the duties which Ms Cole undertook and Trade Depot therefore remains in breach of the settlement agreement.

### **Compliance order**

[20] Under s 137 of the Act the Authority has the power to order compliance with any provision of a settlement signed by a mediator.<sup>3</sup>

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<sup>3</sup> Section 137(1)(iii) of the Act.

[21] Ms Cole was asked by the Authority in March 2019 to provide confirmation regarding which wording she sought Trade Depot to comply with or alternatively, to provide new wording. Ms Cole advised that she sought to have a compliance order relate to a draft certificate which she wrote in August 2018.

[22] The difficulty with that document is that it contains a number of comments which go beyond what is required from a certificate of service. These include for example, that she had an excellent telephone manner, displayed a high level of emotional intelligence and thus could empathise with customers. Trade Depot is not required by the settlement agreement to include positive descriptions of Ms Cole's attributes, such as would be found in a reference. Despite this it was willing to include some positive comments in the certificate of service but not all of those sought by Ms Cole.

[23] In order to resolve this dispute, I order that Trade Depot Ltd provide Ms Cole within seven days of the date of this determination, a certificate of service containing the wording from the letter attached to Trade Depot's representative's email of 15 November 2018 at 1.27pm, with track changes accepted, on letterhead and signed. This was the email containing the open offer.

### **Damages**

[24] Ms Cole seeks damages or compensation of \$1,000 for her time, stress and further humiliation of having to deal with the certificate of service issue. She also claims that she had to withdraw without getting a full refund from a paper she was doing at university, although the date on the receipts provided is from before the mediated settlement was entered into. Ms Cole also seeks payment of legal expenses incurred in pursuing her concerns, however I will deal with that matter with the costs issue.

[25] As the Authority indicated to Ms Cole during the process, her claim for damages faces the difficulty of the decision of the Full Bench of the Employment Court in *South Tranz Limited v Strait Freight Limited*.<sup>4</sup> In that case a damages award was sought for an alleged breach of the restraint of trade clause in a mediated settlement agreement. The Court stated:

We find the scheme of the Employment Relations Act 2000 as it applies to this case to be clear. Where parties have concluded an agreement which is enforceable under s 149(3), the only means of enforcement available are those

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<sup>4</sup> [2007] ERNZ 704.

provided for in s 151. Where, as in this case, the term of the agreement which is found to have been broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question. No other remedies are permitted under s 151 and the effect of s 149(3)(b) is that the agreement may not be the subject of any form of proceedings other than enforcement proceedings. A compliance order is made under s 137 and is limited to an order of the type specifically provided for in s 137(2). It cannot be made to include any order for damages or any order related to an order for damage such as an account of profits.<sup>5</sup>

[26] Ms Cole suggested that recent changes in statutory employment law may make some difference. Although the Employment Relations Amendment Act 2018 makes a number of changes to the Act, none have an impact on the provisions which the *South Tranz* case considered. I therefore remain bound by the *South Tranz* decision to find that Ms Cole cannot pursue her claim for damages or compensation for breach of the settlement agreement.

### **Costs**

[27] Both parties have had some success in this determination, although Ms Cole had the earlier opportunity to accept the open offer. There also remains the matter of Ms Cole's claim for reimbursement of her earlier legal costs. Trade Depot suggests that these were not reasonably incurred as she engaged in what is described as lengthy and irrelevant correspondence with her lawyer. There were a number of email exchanges. However, some of the expense appears to have been incurred in Ms Cole's lawyer contacting Trade Depot's representative to get original certificate and also regarding the failure to mention resignation.

[1] I will deal with consider the costs matter after hearing any further submissions from the parties. The parties are invited to try and resolve the costs issue. If they are unable to do so, Trade Depot shall have 7 days from the date of this determination to file and serve a memorandum on the matter. Ms Cole shall have a further 7 days in which to file and serve a memorandum in reply. All submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence, unless that evidence has already been filed in the Authority.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>5</sup> Ibid [38].