New Zealand Employment Relations Authority Decisions

Dr X v A District Health Board (Christchurch) [2012] NZERA 1245; [2012] NZERA Christchurch 245 (7 November 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

Attention is drawn to the order preventing publication of certain information

[2012] NZERA Christchurch 245
5383293

BETWEEN DR X Applicant

A N D A DISTRICT HEALTH BOARD Respondent

Member of Authority: David Appleton

Representatives: Tim Jeffcott, Counsel for Applicant

Paul McBride, Counsel for Respondent

Investigation Meeting: 5 October 2012 by telephone

Submissions Received: 5 October 2012 from Applicant and Respondent

Date of Determination: 7 November 2012

DETERMINATION OF THE AUTHORITY (No. 2)

A. A permanent non publication order is made in the terms set out below.

B. The DHB has not breached the terms of the settlement agreement between the parties, and accordingly the compliance order, penalty and damages sought are declined.

C. The Authority does not have the jurisdiction to vary the terms of the settlement agreement.

D. Costs are reserved.

Prohibition from publication

[1] By way of a determination dated 29 June 2012 the Authority declined an application by Dr X for injunctive relief and prohibited the publication of the parties' names and identifying information. Dr X challenged the Authority's determination in the Employment Court on a *de novo* basis. On 18 July 2012 the Employment Court

directed the parties to mediation and made an interim order that there be no publication of the names or other information identifying either party in the case until the hearing and determination of Dr X's application for non-publication orders. On

23 July 2012 a settlement was reached between the parties (the settlement agreement)

and on 24 July 2012 Dr X filed a notice of discontinuance in the Employment Court.

[2] By memorandum of counsel to the Employment Court dated 25 July 2012 (the first memorandum), the District Health Board (the DHB) stated that the Employment Court needed to finalise the issue of any permanent prohibition from

publication and submitted that there were good reasons for the open administration of justice, including the lifting of the interim orders as to prohibition. By way of a further memorandum dated 8 August 2012 (the second memorandum), filed in advance of a telephone conference with Her Honour Judge Inglis the following day, Mr McBride on behalf of the respondent made more detailed submissions for the lifting of the Employment Court's interim name suppression order.

[3] On 11 September 2012 Dr X lodged a statement of problem with the Authority alleging that the DHB's action in instructing its counsel to file the memoranda constituted a breach of the settlement agreement and sought, inter alia, a compliance order and damages. (Dr X's counsel subsequently lodged amended and further amended statements of problem, the latest dated 19 September). The Employment Court has, in the meantime, adjourned the matter of the lifting of its interim non- publication order *sine die* in order for Dr X to file a memorandum in the Employment Court addressing the involvement in this matter of the Medical Council and to await the determination of Dr X's application to the Authority.

[4] During the course of Mr Jeffcott's submissions during the Authority's investigation meeting, Mr Jeffcott applied for a non-publication order in relation to this application. Mr McBride on behalf of the DHB opposed it, although did not rigorously argue against it.

[5] My reasons for granting a non-publication order in respect of my determination dated 29 June 2012 were, in essence, that Dr X's reputation and standing as a doctor could have been seriously damaged before she had had an opportunity to fully address the respondent's concerns and that the interests of justice required her identity to be withheld. The DHB did not conclude its investigations into

the allegations of Dr X's clinical practice because she resigned under the terms of the

settlement agreement before the investigations were concluded.

[6] I understand that the matter of Dr X's clinical practice has now come before the Medical Council and that it will assess the issues (or some of the essential issues) that concerned the DHB. However, that has not occurred as at the date of this determination to my knowledge and so the same reasoning for ordering non publication applies with respect to the current determination, namely that to publish Dr X's identity prior to the Medical Council's assessment risks unfairly damaging Dr X's reputation and standing as a doctor.

[7] In addition, by way of an interlocutory judgment of Her Honour Judge Inglis dated 17 September 2012, Her Honour held as follows:

[5] I have had regard to the factors identified on the defendant's behalf, including the public interest in open justice. However, I consider that it is in the broader interests of justice that the hearing of the defendant's application be adjourned. The Medical Council is to consider whether or not the plaintiff's name and identifying details ought to be suppressed in the context of its inquiry. Lifting the interim orders made in this Court would effectively undermine any such determination. Further, the Authority is to consider the ambit of the parties' settlement discussions and agreement, and (in particular) whether the defendant agreed not to advance an application to lift the interim orders made. The outcome of the Authority's investigation may have some bearing on the defendant's application. I note, for completeness, that Mr Jeffcott indicated that his client was not practising and was not intending to practise pending the outcome of the Medical Council's deliberations.

...

[7] The hearing currently set down for 1 October 2012 is adjourned sine die. The non-publication orders currently in force are to continue in the interim pending further order of the Court.

[8] For the Authority to publish the name of Dr X and any other information that could identify her would be to cut across the interim order of the Employment Court.

[9] For these reasons I order prohibition from publication on a permanent basis of the identities of Dr X and the DHB, and any other information that may lead to the identification of Dr X arising out of this investigation meeting.

The issues

[10] Dr X has applied for the following:

a. A compliance order restraining the respondent from taking any further steps against the applicant in the Employment Court or otherwise;

Or alternatively:

b. An order under section 7(3)(c) of the Contractual Mistakes Act 1977 varying the settlement agreement to specifically provide that the DHB consents to permanent non-publication orders being made by the Authority in the Employment Court; and

c. An order making the Authority's interim non-publication order of

29 June 2012 final;

d. Damages consisting of:

i. Legal costs in the Employment Court; and

ii. General damages for humiliation, loss of dignity, mental anxiety and distress and injury to feelings in the sum of

$30,000;

e. A penalty pursuant to s.149(4) of the Employment relations Act 2000;

and

f. An award of indemnity costs against the respondent. [11] The following are the issues that the Authority must determine:

a. Whether the lodging of the memoranda constitutes a breach of the settlement agreement;

b. If so, whether the Authority should order compliance with the settlement agreement in the terms requested by Dr X;

c. Whether the Authority has the jurisdiction to make an order under section 7(3)(c) of the Contractual Mistakes Act 1977;

d. If the Authority has such jurisdiction, whether it should make the order requested by Dr X;

e. Whether the Authority has the jurisdiction to make its non-publication order of 29 June 2012 final;

f. Whether damages should be awarded to Dr X;

g. Whether a penalty should be ordered against the respondent; and

h. Whether indemnity costs should be awarded against the respondent.

Did the memoranda filed in the Employment Court on behalf of the DHB

constitute a breach of the settlement agreement?

[12] The material terms of the settlement agreement were as follows:

i. *These terms of settlement and all matters discussed in mediation shall remain strictly confidential to the parties.*
ii. *Dr X shall resign from her employment with the DHB with immediate effect. (v) The DHB agrees not to advance its disciplinary process relating to Dr X.*

The DHB confirms that no disciplinary outcome resulted from this process.

(vi) The parties agree that a statement will be provided to all relevant staff that

Dr X has elected to resign and goes with the DHB's best wishes.

(x) Dr X shall forthwith withdraw:

A. The Employment Relations Authority proceedings; and

B. The Employment Court proceedings.

(xi) All matters relating to the employment relationship problem to date in respect to Dr X will remain private and confidential. That shall not prevent the DHB from providing information to any external body such information as might be required by or under any statute.

(xii) Subject to clause (xi), the parties agree that neither of them will speak ill of the other.

(xv) These terms are in full and final settlement of all claims that either party might have or have had against the DHB arising out of or relating to this employment relationship and its termination.

[13] The settlement agreement was signed by both parties on 23 July 2012 and countersigned by a mediator employed by the Ministry of Business, Innovation and Employment on the same day. (Although the mediator's signature was erroneously

dated 23 June 2012).

[14] The first memorandum of Mr McBride to the Employment Court dated

25 July 2012 contained the following statements:

(1) In its judgment dated 18 July 2012 [2012] NZEMPC 115, Your Honour made interim non-publication orders pending making of application and determination of such application for substantive orders.

(2) As noted at that point, and as recorded on the face of the Authority's determination, the Defendant opposed the making of any permanent order on grounds including:

(a) The public interest in open administration of justice; (b) The public interest in the identity of medical

practitioners and their conduct, so that those matters can be considered alongside patient rights, including the rights of patients to information including in terms of the Health and Disability Commissioner's Code of Rights, and particularly Rights 6(1) and

6(2): RIGHT 6

Right to be Fully Informed

(1) Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including: ...

(e) Any other information required by legal, professional, ethical and other relevant standards; and

(2) Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent.

(c) Publicity that has been given to the Authority's Determination in this case, in combination with the very limited number of alcohol and drug practitioners in New Zealand, has led to suspicion unfairly being cast upon third parties.

(3) Subsequent to the judgment of 18 July 2012, the Plaintiff has resigned from the employment with immediate effect, and has filed a Notice of Discontinuance of these proceedings.

(4) In those circumstances, the Defendant apprehends that the Court will need to finalise the issue of any permanent prohibition on publication.

(5) It is submitted that there are good reasons for the open administration of justice, including the lifting of the interim orders as to prohibition.

(6) In all of the circumstances, this memorandum is filed in lieu of a formal notice of opposition (although its contents reflect what such a notice of opposition would say).

(7) Subject to other fixtures, counsel will make himself available to be heard should the Court so require.

[15] The second memorandum contained the following statement:

After a full and fair investigation, substantial clinical failings, as well as substantial interpersonal issues and serious issues of reliability were determined, by an independent external medical reviewer and by an internal investigation panel respectively, as against the Plaintiff.

[16] The concern expressed by Mr Jeffcott on behalf of Dr X is that, were the Employment Court to grant the lifting of its interim non-publication order, that would enable the world at large to make a link between Dr X and the facts as set out in the Authority's determination dated 29 June 2012 and that the identity of Dr X becoming known would undermine the investigation of the Medical Council.

[17] Mr Jeffcott argues that several terms of the settlement agreement have been breached.

Clause 5

[18] Clause 5 of the settlement agreement recorded an agreement by the DHB not to advance its disciplinary process relating to Dr X. Mr Jeffcott argues that the disciplinary issues are part of the employment relationship problem that have been settled between the parties and that the request for a lifting of the non-publication order by the Employment Court is a continued punishment of her as the identification of Dr X would mean that she would not be able to practise in the future. In other words, Mr Jeffcott argues that the DHB are taking a punitive approach to Dr X. Mr McBride asserts that the DHB is not punishing or disciplining Dr X but that it is merely a question of whether the Employment Court is convinced by Dr X that the presumption of open administration of justice ought to be departed from because of some special circumstances applying to her.

[19] In my view, to claim that clause 5 has been breached by Mr McBride's memoranda strains the meaning of clause 5 beyond any reasonable point. Clause 5 records that the DHB has agreed *not to advance its disciplinary process* relating to Dr X. The words *its disciplinary process* refers to the process that was in train up to the point when Dr X resigned. This was an internal process investigating specific allegations against Dr X. I cannot see how the memoranda from Mr McBride to the Employment Court can possibly constitute the advancing of the DHB's internal

disciplinary process in question. I therefore do not agree that the sending of the memoranda to the Employment Court constitutes a breach of clause 5.

Clause 6

[20] Mr Jeffcott argues that the statement that Dr X *goes with the DHB's best wishes* implies that the *hatchet has been buried*, and that there would be no ongoing effects or actions. Going to the Employment Court asking for the non-publication order to be lifted does not show the DHB's best wishes he says.

[21] I understand that Mr Jeffcott is not arguing that the promised statement to staff was not provided or that it did not state that Dr X had elected to resign and went with the DHB's best wishes. That is the sum total of what is promised in clause 6 and there is no evidence that it has not been fully discharged. I do not read clause 6 as promising anything further on the part of the DHB and certainly do not read it as implying that the *good wishes* being expressed in the statement have to be sincerely held (as it would be impossible to police such an obligation and hard to co nceive how an entity such as a DHB can collectively hold such feelings). Furthermore, I do not see in this clause any promise by the respondent, express or implied, not to contact the Employment Court in the terms of the memoranda. Accordingly, I do not agree that clause 6 has been breached by the respondent.

Clause 11

[22] Mr Jeffcott submits that Mr McBride's memoranda on behalf of the DHB constitute a breach of the DHB's privacy obligations as the memoranda talk about Dr X being *unsafe* (although they do not use that specific word) and actively advocate for orders to be lifted on the basis of Dr X being an unsafe doctor. Mr Jeffcott also argues that, if granted, an order of the Employment Court lifting the non-publication order would negate the effect of clause 11.

[23] Mr McBride submits that clause 11 of the settlement agreement recognises Dr X's continued right to privacy of her confidential information. Material she had placed in the public domain by commencing Court proceedings was not however of that character. Even if it had been, the caveat of clause 11 (that the DHB would not be prevented from providing information to any external bodies, such information as might be required *by or under any statute*) enabled the DHB to provide information to the Employment Court. The words *by or under* have an extremely broad meaning and

both the DHB and its counsel have duties to the Employment Court, including under

the Court's directions.

[24] Mr McBride argues that those duties also included not allowing the Employment Court to be misled and ensuring that the Employment Court could consider whether to maintain an interim order, made on specific terms, where the expressed basis of those terms no longer applied. Mr McBride argues that the first memorandum initially filed in the Employment Court did not breach clause 11 and that his submissions subsequently filed with the Employment Court in the second memorandum were absolutely privileged.

[25] I do not agree with Mr McBride's additional submission, made orally, that the term *all matters related to the employment relationship problem to date in respect of Dr X* does not include the Authority's determination dated 29 June 2012. For example, if the DHB had sent copies of the determination to its staff along with a copy of the statement in relation to Dr X's resignation, that would have been a breach of that clause in my view.

[26] However, I am satisfied that the action by Mr McBride in sending the memoranda to the Employment Court did not result in any confidential information relating to Dr X's employment relationship problem becoming in any way public. The Employment Court already knew the details of Dr X's employment relationship problem because Dr X's counsel of the time sent a copy of the Authority's determination (as he was obliged to do) along with its *de novo* challenge which identified Dr X by name. Mr McBride's memorandum disclosed nothing that the Employment Court did not already know.

[27] If the Employment Court subsequently agrees to lift its interim non- publication order, then there is little doubt that aspects of Dr X's employment relationship problem would become known to the world at large. However, such a decision lies squarely within the jurisdiction of the Employment Court and it will make its decision on the basis of respective arguments of the parties and the law. It would also not be bound by a private agreement between the parties about the non publication order. In addition, the Employment Court could equally well decline to lift the non-publication order, in which case the matters relating to the employment relationship problem to date in respect of Dr X would continue to remain private and

confidential. I cannot see, therefore, how Mr McBride's memoranda constitute a

breach of clause 11.

[28] Accordingly, for all these reasons I do not agree that clause 11 was breached

by Mr McBride's memoranda.

Clause 12

[29] Clause 12 states that, subject to clause 11, the parties agree that neither of them will *speak ill* of the other. This is a slightly unusual expression in the context of a settlement agreement, and the current online edition of the Oxford English Dictionary defines the phrase as speaking of someone *with unfavourable estimation* or *blamefully.*

[30] Mr Jeffcott's submission was that the same arguments apply with respect to clause 12 as applied to clause 11. However, I cannot find that the text of the first memorandum in any way spoke ill of Dr X. Once again, the Employment Court was fully aware of the contents of the Authority's determination and Dr X's own de novo challenge identified her. The first memorandum could not, therefore, have possibly spoken ill of Dr X to the Employment Court.

[31] The terms of the second memorandum do make reference to *substantial clinical failings, substantial interpersonal issues* and *serious issues of reliability* in respect of Dr X. These statements, taken literally, could be said to speak of Dr X with unfavourable estimation or blamefully. However, the second memorandum is a document whose sole purpose was to make submissions to a court in judicial proceedings and, as such, attracts absolute privilege. It would be contrary to public policy for the respondent to be found to have breached the settlement agreement by way of statements made to the Employment Court by its counsel in the co ntext of an interim order which he seeks to have reviewed.

[32] Therefore, in the light of these factors, I do not find that clause 12 has been breached by the sending of the memoranda to the Employment Court.

Clause 15

[33] Clause 15 appears to contain an error in the drafting as it purports that the terms of the settlement agreement are in full and final settlement of all claims that

either party might have or have had against the DHB. On its face, such an obligation by the DHB makes no sense. It is probable that this error has arisen through an incomplete amendment to a standard form settlement agreement which was made during the negotiations.

[34] It would appear that the clause originally stated that the terms were in full and final settlement of all claims that Dr X might have or have had against the DHB, that the words *either party* were substituted for the words *Dr X*, but that the words *the DHB* were not amended by the substitution of the words *each other*, or similar wording. However, this is speculation on my part and there was a conflict of evidence as between Dr X on the one hand, and a senior manager from the DHB, on the other. (It was agreed that evidence could be given by Dr X and the DHB by way of sworn affidavits). Dr X deposes that she would not have agreed to resign or to bring to an end her request to have her name cleared unless there had been a full and final settlement. She states that clause 15 should have read:

The terms are in full and final settlement of all claims that either party might have against each other arising out of or relating to this employment relationship and its termination.

[35] The manager, on behalf of the DHB, however, deposes that the DHB considered that what it was signing (without the benefit of having a lawyer present to represent it) was an agreement that any claim that Dr X might have against the DHB was resolved.

[36] Section 148 of the Employment Relations Act 2000 (the Act) provides that, except with the consent of the parties or the relevant party, the person to whom mediation services are provided must keep confidential any statement, admission or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

[37] Section 148(3) provides that no evidence is admissible in any Court, or before any person acting judicially, of any statement, admission document or information, that, by subsection (1), is required to be kept confidential. The respondent does not consent to information that was disclosed during the course of the mediation being put before the Authority. Accordingly, it is not possible for the Authority to enquire further as to what was said during negotiations with respect to the drafting of, or possible pre contractual amendment of clause 15 of the settlement agreement. (Pre

contractual negotiations are generally excluded by the courts in interpreting a contract, although it may be adduced to show that a written document misstates the actual agreement between the parties, if it shows misrepresentations by a party or if the agreement appears not to be the whole agreement – see Burrows, Finn & Todd,

Law of Contract in New Zealand, 4th edition, page 200).

[38] However, due to the effect of s.148(3), the Authority is unable to take further the conflict in the evidence set out in the affidavits of Dr X and the senior manager. It is therefore restricted to interpreting clause 15 on its own terms. Whilst one can surmise how the drafting came about, it would not be safe for the Authority to conclude that the intention of the parties was for all claims that either party might have against each other to be fully and finally settled. It is possible, for example, that there was an attempt by Dr X's counsel of the time to effect an amendment that would prevent the DHB from pursuing claims against her, but that that attempt was rejected by the DHB without the amendment being deleted from the final settlement agreement.

[39] Accordingly, the Authority must try to construe clause 15 the best way it can from the words alone, applying the *plain meaning* rule. The least strained interpretation I can make of the clause is that the applicant compromises her claims against the DHB rather than the DHB also compromising its claims against t he applicant, as that latter sense is not plain on the face of the words.

[40] The former sense is also strained a little but, as *either party* clearly includes the Applicant, and as it is clear from the overall purpose and tenor of the settlement agreement that Dr X was compromising her claims by signing the agreement, this is the less strained interpretation that can be reached without amending the wording of the clause (which I do not believe the Authority has the jurisdiction to do, as I examine below). If I am right in this, then Dr X has no right under clause 15 to protection from claims by the DHB.

[41] Even if I am wrong in this, I do not accept that the word *claims* encompasses the action taken by Mr McBride on behalf of the DHB by sending in a memorandum in the terms that he did to the Court. The term *claim* is defined in the New Zealand Oxford Dictionary (2005) as a *demand or request for something considered one's due*. The ordinary meaning of the word therefore connotes a demand or request for some relief of some kind, usually, but not always, monetary. The nature of Mr McBride's

memorandum was, however, more in the nature of an administrative act seeking the Court's direction on what was intended to be an interim order, rather than the commencement of a new claim. Therefore, I do not believe that Mr McBride's first memorandum amounts to *a claim* and therefore I do not accept that clause 15 has been breached by him sending in that memorandum to the Employment Court.

Has there been a breach of an implied term that the DHB would not pursue name publication?

[42] Mr Jeffcott argued that a term must be implied into the settlement agreement that the DHB would not pursue name publication. I understand that Mr Jeffcott argues that, in the absence of an express term prohibiting the DHB from applying to the Employment Court to have the non-publication order lifted, the whole purpose of the settlement agreement has been thwarted unless such a term is implied. That purpose is to settle all issues between the parties. Mr Jeffcott argues that, by the respondent making an application to lift the non-publication order, all issues are clearly not finalised.

[43] The Privy Council laid down a five point test for the implication of terms in the case of *BP Refinery (Western Port) Pty Limited v Shire of Hastings (1977)* 16

ALR 363 at 376. The five point test for a term to be implied is that the following conditions (which may overlap) must be satisfied:

1. It must be reasonable and equitable;

2. It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

3. It must be so obvious that "it goes without saying";

4. It must be capable of clear expression;

5. It must not contradict any express term of the contract.

[44] The Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127 noted that the list of five criteria expressed in the *BP Refinery* case are best regarded, not as a series of independent tests each of which must be surmounted, but *rather as a collection of different ways in which Judges have tried to express the central idea that a proposed implied term must spell out what the*

contract actually means or in which they have explained why they did not think that it did.

[45] In *Attorney General of Belize* Lord Hoffman said that the use of the word *necessary* in the phrase *necessary for business*

efficacy conveys that *it is not enough for a Court to consider that the implied term expresses what it would have been reasonable for the parties to agree to*. It must be satisfied that it is what the contract actually means.

[46] In *Burroughs, Finn and Todd, Law of Contract in New Zealand, 4th Edition* (page 223) it is stated that the significance of the *Attorney General of Belize* case is that it emphasises that the five elements in the *BP Refinery* formulation do not operate cumulatively so that each has to be individually examined and satisfied. The *Berlize* formulation has been adopted in New Zealand (in, for example, *Hickman v Turn and Wave Limited* [2011] NZCA 100, [2011] 3 NZLR 318).

[47] It is my view that the test has not been satisfied when considering whether it was an implied term of the settlement agreement that the respondent would not seek to lift the Employment Court's interim name non-publication order. It must be emphasised that the memoranda do no more than seek the Employment Court's judgment on the matter. The memoranda do not do anything to identify Dr X to the outside world. If the Employment Court declines to lift the non-publication order, then the positions of the parties with respect to its full and final settlement will not have changed. I do not accept that, *what the contract actually means* is that the respondent would not make what I believe is an administrative application to the Employment Court. Therefore, I do not accept that the DHB has breached an implied term of the settlement agreement.

Is the DHB estopped from applying to have the non-publication order lifted?

[48] Mr Jeffcott argues that the settlement agreement created an accord and satisfaction between the parties and that the DHB is therefore estopped from taking further steps against Dr X in relation to what was a central issue between the parties. He also asserts that, if the DHB had wanted to pursue the issue of name publication, it ought to have expressly reserved the right to do so at mediation.

[49] I do not accept, however, that the terms of the settlement agreement mean that the respondent is estopped from making an application to the Employment Court to

seek the lifting of the interim non publication order. Furthermore, rather than the respondent having failed to have expressly reserved the right to apply to the Employment Court with respect to the non-publication order, it is my clear view that Dr X, who was legally represented during the mediation, ought to have expressly dealt with the issue of non-publication in the terms of the settlement agreement. As I have found above, the term *claims* in the settlement agreement does not encompass the application made by the respondent and I do not accept that the respondent agreed to settle all its claims against Dr X in any event. The case of *Gawthorne v Attorney General* [1996] ERNZ 68 does not assist Dr X therefore.

[50] It was quite clear from Her Honour Judge Inglis' Minute following a telephone conference dated 18 July 2012 that she was making interim non-publication orders *pending determination of the application for non-publication to be advanced on behalf of the plaintiff* [Dr X]. Her Honour Judge Inglis recorded an agreement that any application for non-publication, together with supporting material, was to be filed and served by 12 noon Monday 23 July 2012, with any opposition to be filed and served no later than 4pm Wednesday 25 July 2012. In the light of the clearly interim nature of the non-publication order and the purported importance of it (it being described as a central issue by Mr Jeffcott), one would have expected the issue of non-publication to have been expressly provided for in terms of the settlement agreement. As it was not, I cannot accept that the respondent is estopped by the terms of the agreement from making the application it has.

[51] Counsel for Dr X also argues that the respondent failed to participate in the mediation in good faith and in the spirit of mutual trust and confidence and fair dealing, when it knew that it would subsequently approach the Employment Court for lifting of the non publication order. I accept that *parties to an employment relationship engaging in mediation with a view to .....settling the terms of a former relationship, are engaging in a process that requires engaging in good faith behaviour*. *Jesudhass v Just Hotel* unreported, 24 June 2009, WC6A/09 WRC28/05. I also accept that, if the respondent had deliberately misled Dr X dur ing mediation into thinking that it would not seek to persuade the Employment Court to lift its interim non publication order, that act would have been a breach of good faith.

[52] However, it would be unsafe for me to conclude that this is what the respondent did. The contents of the mediation remain confidential and the face of the

settlement agreement does not suggest any such promise was made. I cannot, therefore, conclude that the respondent failed to participate in the mediation in good faith and in the spirit of mutual trust and confidence and fair dealing, as it is perfectly possible that the respondent never believed or led Dr X to believe that a full and final settlement precluded it from asking the non publication order to be lifted.

[53] As for the argument that, if the Authority were to find in the DHB's favour, it would undermine the mediation process and the role that it plays in the resolution of employment disputes, that argument is predicated on the assumption that the parties intended that the respondent would not seek to lift the Employment Court's non publication order. I cannot find that to be the case.

Has the DHB a legitimate interest in the issue of name publication?

[54] Mr Jeffcott on behalf of Dr X argues that the DHB has no legitimate int erest in the issue of name publication and that the approach by the DHB to the Employment Court to lift its non-publication order is a breach of the Employment Court's process. Mr Jeffcott refers me to a letter from the Employment Court dated 24 July 2012 acknowledging the notice of discontinuance from the then counsel for Dr X which states that the Court hearing was cancelled and that *no further action will be taken by this Court*.

[55] With respect, it is entirely for the Employment Court to decide whether t he DHB has a legitimate interest in making an application for the lifting of a non-publication order and whether Mr McBride's memorandum is in breach of the Employment Court's process. I do not see that anything more need, or should be said, in respect of this submission by Mr Jeffcott.

Would lifting the non publication order undermine the Medical Council's

process?

[56] Similarly, it is entirely for the Employment Court to decide whether the lifting of the non publication order would undermine the process currently being undertaken by the Medical Council in relation to Dr X's competence to practise, as is also asserted by Mr Jeffcott. That argument, and the helpful detailed information provided by Mr Jeffcott in his submissions to the Authority about the performance assessment process that Dr X is likely to be required to submit to, will no doubt be vigorously deployed before the Employment Court when the DHB's application is considered.

Should the Authority order compliance of the settlement agreement in the terms requested?

[57] Mr Jeffcott asks in the statement of problem for a compliance order restraining the respondent from taking any further steps against the applicant in the Employment Court or otherwise. Mr McBride submits that the provisions of section 137 of the Act, which sets out the power of the Authority to order compliance, have not been made out.

[58] Pursuant to section 137(1) of the Act, a compliance order is available only where a person has not observed or complied with any of the specified obligations. As I have found above, it is not my view that the filing in the Employment Court of the memoranda by Mr McBride on behalf of the DHB constitutes a breach of the settlement agreement. Therefore, section 137 cannot apply and the Authority therefore cannot award a compliance order.

[59] However, even if I am wrong on this, I cannot accept that it would be appropriate for the Authority to make an order which restrained the DHB from *taking any further steps against the applicant in the Employment Court or otherwise*. This would have the effect of constraining the respondent from making an application to the Employment Court which would have the direct effect of ousting the Employment Court's jurisdiction. Mr Jeffcott was adamant that his client's application to the Authority does not have the effect of interfering with the Employment Court's jurisdiction. It is my view that that would be the practical outcome. If the Authority were to grant a compliance order restraining the respondent from taking any further steps against the applicant in the Employment Court, that could have the effect of forcing the respondent to disobey an order that the Employment Court might make. It is my view that it would be wholly inappropriate for the Authority to put a party in a position where it would either be in breach of an order of the Authority or an order of the Court.

[60] Therefore, I decline to issue the compliance order requested by Dr X.

Does the Authority have the jurisdiction to make an order under section 7 of the

Contractual Mistakes Act varying the settlement agreement?

[61] Section 149(3) of the Act provides as follows:

Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so, -

(a) those terms are final and binding on and enforceable by the parties; and

(ab) the terms may not be cancelled under section 7 of the

Contractual Remedies Act 1979; and

(b) except for enforcement purposes no party may seek to bring those terms before the authority of the Court, whether by action, appeal, application for review or otherwise.

[62] It is clear from the face of the wording of section 149(3) that the power of the

Authority with respect to a settlement agreement falling within the terms of section

149 are limited to enforcing those terms. Enforcement cannot possibly encompass the concept of varying the terms. Furthermore, the fact that those terms are *final and binding on ... the parties,* reinforces my view that the Authority simply

does not have jurisdiction to vary the terms of the settlement agreement. Accordingly, I decline to vary the terms of the settlement agreement as requested by Dr X.

Does the Authority have the jurisdiction to make its non-publication order of

29 June 2012 final?

[63] The salient terms of the Authority's determination dated 29 June 2012 was to order prohibition from publication of the identities of the applicant, the respondent and its key managers, together with the applicant's area of clinical practice. The determination of 29 June 2012 was to decline to grant an interim injunction prohibiting the DHB from continuing to suspend Dr X from her work as well as prohibiting the respondent from preventing her taking leave to visit her daughter in Australia.

[64] My order of non-publication did not specify whether it was interim or permanent. However, there was to be no substantive investigation meeting following the investigation into the applications for relief and, if I had granted the applications, the DHB would have lifted the suspension and no further actions would have foreseeably been necessary in respect of the application. Therefore, it is my view that the prohibition was a permanent prohibition and so I agree with Mr McBride that the Authority is *functus officio* in relation to its previous final non-publication order.

Should damages be awarded to Dr X as requested?

[65] Having found that there has been no breach of the settlement agreement, it is therefore clear that no damages can flow.

[66] Mr McBride also argues that the Authority has no jurisdiction to award damages for a purported breach of the settlement agreement. He relies on the decision of the full Employment Court in *South Tranz Ltd v Strait Freight* [2007] ERNZ 704 which stated expressly that, where parties have concluded an agreement which is enforceable under section 149(3), the only means of enforcement available are those provided for in section 151.

[67] Section 151(2) makes clear that a matter may be enforced by a compliance order under section 137 or, in the case of a monetary settlement, by a compliance order under section 137 or by using the procedure applicable under section 141. Section 141 states that any order or judgment given under the Act by the Authority may be filed in any District Court and is then enforceable in the same manner as an order made or a judgment given by the District Court.

[68] Mr Jeffcott submits that the Authority has the jurisdiction under section 137(2) and section 162 of the Act to award damages in Dr X's favour. Mr Jeffcott relies on the phrase *in addition to any other power it may exercise* in section 137(2). However, it is clear from the *South Tranz* case that the wording *in addition to any other power it may exercise* does not confer in the Authority additional jurisdiction over and above that conferred by the balance of section 137(2).

[69] In conclusion, therefore, I decline to award any damages to Dr X. I also decline to order a penalty as no breach of the settlement agreement has occurred.

Summary

[70] I do have sympathy with Dr X's position, and accept that she believed that her signing of the settlement agreement was the end of the matter as far as the Authority and the Employment Court were concerned. However, the correct forum for her to challenge the DHB's application to lift the Employment Court's interim non publication order is the Employment Court. Stepping back from the detail of Dr X's application to the Authority and the submissions of counsel, any order given in favour of Dr X in respect of the respondent's memoranda to the Employment Court would

have the practical effect of encroaching on the jurisdiction of the Court. I do not accept that it is appropriate for that to occur.

Costs

[71] Both parties have asked for indemnity costs on the basis that their respective positions are misconceived and an abuse of the process. However, I believe it is appropriate to reserve costs. Accordingly, if the parties are unable to reach an agreement between themselves as to how the costs of this matter should be disposed of between them, the respondent may, within 28 days of the date of the determination, file a memorandum by way of its counsel seeking a contribution to its costs. Dr X will then have a further 28 days within which to file a memorandum via her counsel in opposition.

David Appleton

Member of the Employment Relations Authority