NOTE: Attention is drawn to an order prohibiting publication of certain information in this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2023] NZERA 685
3225219

	BETWEEN	GXQ Applicant
	AND	TWD Respondent

Member of Authority:	David G Beck
Representatives:	Andrew Shaw and Gwen Drewitt counsel for the Applicant Janet Copeland counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	22 September and 26 October 2023 from the Applicant 19 October 2023 from the Respondent
Date of Determination:	20 November 2023

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] As set out in a preliminary determination, GXQ is seeking a compliance order, a penalty and costs relating to an alleged breach of a record of a settlement agreement made by the parties, pursuant to s 149 of the Employment Relations Act 2000 (the Act).[1]

[1] *GXQ v TWD* [2023] NZERA 429.

[2] The disputed matter involves a specific term of the settlement agreement that GXQ be paid a sum of remuneration up to a specified termination date as "an ex-gratia payment from which PAYE will be deducted" after completing what was effectively a lengthy notice period initially envisaged as being up to 25 July 2023. In the event, during the notice period GXQ resigned with their last day of employment being 17 March 2023, after they had found alternative employment. TWD determined GXQ's ongoing remuneration ceased upon the expiry of GXQ's employment and deemed that the balance of their salary could only be paid up to that date (effectively, the quantum of the ex-gratia payment).

[3] Pursuant to s 10(1) Schedule 2 of the Act, the preliminary determination imposed a permanent non-publication order of the parties' names and dispute location "on the basis that the specific disputed issue warrants a continuing cloak of confidentiality as originally agreed".[2]

The Authority's investigation

[4] I received and carefully considered helpful and comprehensive submissions from both parties' counsel. As permitted by s 174E of the Act, I have not set out a full record of every event or matter in dispute between the parties or submissions. This determination is confined to making findings to resolve the disputed interpretation issue.

The issue

[5] The issue in dispute is: should the 'ex-gratia' payment be calculated up to GXQ's last day of employment with TWD or the later envisaged "Termination Date" in the settlement agreement?

What caused the employment relationship problem?

[6] An agreed statement of facts provided useful context to the executed settlement agreement. This revealed GXQ occupied a position of responsibility and had been the subject of complaints advanced by a co-worker. The complaints were investigated over a prolonged period while GXQ was placed on special paid leave. The scope, timeliness and findings of the investigation and a subsequent disciplinary process were contested by GXQ. Both parties

[2] Ibid at [11].

were represented throughout by experienced counsel. TWD, although accepting the investigation's findings, did not conclude the disciplinary process. The parties as an alternative, immediately negotiated for several weeks before they concluded the settlement agreement now in dispute on 25 November 2022.

[7] The settlement agreement made pursuant to s 149 of the Act and subsequently signed by a Ministry of Business, Innovation and Employment mediator on 29 November 2022, alludes to an employment relationship problem and an agreement to end such on the following terms (identifying details are redacted and underlined emphasis added):

> (a) [GXQ] will remain employed by [TWD] for a period of 8 months from 25 November 2022. His termination date being 25 July 2023 (Termination Date). During this period:
>
> (i) It will be communicated internally to [TWD] employees that [GXQ] is undertaking a special project … and that he will continue to work remotely whilst undertaking this project;
>
> (ii) From 25 November 2022 [TWD] shall be entitled to advertise and recruit for [GXQ's] substantive role;
>
> (iii) [GXQ] may choose whether or not he undertakes any work for [TWD] as …;
>
> (iv) [GXQ] will endeavour to find alternative employment.
>
> (b) In the event that [GXQ] secures alternative employment before the Termination Date:
>
> (i) [GXQ] will provide [TWD] with one week's notice;
>
> (ii) An agreed announcement regarding [GXQ's] resignation and wishing him well will be circulated to [TWD] employees;
>
> (iii) The termination date of [GXQ's] employment will be bought [sic] forward to coincide with the expiry of the one week's notice;
>
> (iv) [GXQ] will be paid the balance of his salary up to the Termination Date as an ex-gratia payment from which PAYE will be deducted; and
>
> (v) [GXQ] will arrange the return of [TWD] property and equipment and agreement will be reached regarding him collecting his personal belongings.
>
> (c) [GXQ] will be paid out for all accrued leave entitlements as at the Termination Date or the final date of employment if this is earlier.

[8] The remainder of the settlement agreement provided for: retention of a TWD provided vehicle including the transfer of ownership to GXQ at the point he ceased being an

employee; a significant sum of legal costs paid to GXQ; career outplacement fees; a positive, agreed written reference; a procedure to follow should there be media interest; "sanitisation' of GXQ's personal file; a mutual non disparaging provision; a confidentiality provision and: a declaration that all terms are binding, full and final of all claims except for enforcement purposes.

[9] In March 2023, GXQ resigned by email and provided the notice required in the settlement agreement. GXQ obtained alternative employment in a similarly senior role, which commenced on 20 March 2023. GXQ was paid his final pay from TWD up to 29 March 2023.

[10] GXQ subsequently disputed the application of clause 2(b)(iv) of the settlement agreement asserting they be remunerated by TWD up to 25 July 2023.

[11] TWD's response was that clause 2(b)(iv) had been met and no further payment was due, as GXQ had been paid up to his termination date, being in their view, the end of the actual employment period – brought forward in accord with clause 2(b)(iii).

GXQ's submission

[12] Counsel for GXQ asserts TWD has breached the settlement agreement and that a shortfall in the 'ex-gratia' payment of $72,692.22 gross remuneration is due. In advocating GXQ's position, counsel suggested that the settlement agreement provided that GXQ would "remain in paid employment" with TWD until 25 July 2023, being a defined period. Counsel then suggested an interpretation that if GXQ found alternative employment during the defined period the employment relationship would end, on notice, but GXQ would still be paid out "the balance of …. salary up to 25 July 2023 as an ex-gratia payment".

[13] In support of the above interpretation, counsel suggested an approach based on contractual interpretation principles as enunciated by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Limited* applied; being an objective one that takes context into account, with the aim of ascertaining:

> … the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[3]

[3] *Firm PI 1 Ltd v Zurich Australian Insurance Limited* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] – [63].

[14] In following the above leading authority suggesting an objective meaning "is taken to be that which the parties intended" I observe that the Employment Court recently noted:

> While the meaning of a clause in an agreement may appear clear, meaning is informed by context. A provisional conclusion as to meaning is to be cross checked against the context provided by the agreement as a whole, and any relevant background.[4]

[15] GXQ's counsel, in urging the Authority to ascertain the "natural and ordinary meaning of the words in context", suggests the use of "Termination Date" for calculating final remuneration is first "defined clearly by the parties use of capitalisation in clause 2(a) … as being the 25th of July 2023 - this was the clear intention of the parties" and that if a different interpretation was applied this "would completely overlook the effect of defining the 25th July 2023 as the Termination Date". Further, counsel pointed to three separate clauses where 'Termination Date' is purposively used as an aid to interpret expressed terms: these being:

(1) Clause 2(b) "In the event that [GXQ] secures alternative employment before the Termination Date".
(2) Clause 2(b)(iv) "[GXQ] will be paid the balance of his salary up to the Termination Date as an ex-gratia payment from which PAYE will be deducted".
(3) Clause 2(c) "[GXQ] will be paid out all accrued leave entitlements as at the Termination Date or the final date of employment if this is earlier".

[16] Counsel then suggests that if the Authority adopted TWD's interpretation of clause 2(b), it would have to be read in isolation and this would ignore the settlement as a whole and "the interplay between its clauses, in particular the effect of defining 25th July as the Termination Date", thus rendering clause 2(b)(iv) as superfluous.

[17] Overall, I take counsel's submission to be that regardless of the unilateral ending of the employment relationship by GXQ, the period of up to the agreed 'Termination Date' is to be used as a separate yardstick to assess the 'ex-gratia' compensation agreed to end the employment relationship. In support of this premise, counsel cited the wording of clause 2(b)(iii), placing significance on the fact that the defined wording 'Termination Date' was eschewed in favour of: "The termination date of [GXQ's] employment" asserting that the use of non-capitalisation was deliberate and there was a "material difference between the two uses of these words".

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[4] *Adrian Le Gros v Fonterra Co-operative Group Limited* [2023] NZEmpC 193. See also *Crossen v Yangs House Limited* [2021] NZEmpC 102 a decision involving an interpretation of a s149 settlement agreement provision.

TWD's Submission

[18] TWD's counsel submission was no breach is apparent as the terms of the agreement had been met, with GXQ being paid all entitlements due up to a termination date that had been brought forward in accordance with an expectation in the settlement agreement that GXQ endeavour to seek alternative employment.

[19] While acknowledging clauses 2(a) and (b) above are in contention, TWD's counsel asserted a plain and ordinary reading of the agreement was that GXQ would remain in paid employment up to 25 July 2023, without an obligation to undertake any work, unless they found alternative employment which they had committed by agreement to "endeavour to find". TWD submitted this was a 'contingent' agreement with the ex-gratia payment of remuneration being subject to a reduction in quantum if the resignation date was brought forward.

[20] In citing case law, TWD's counsel emphasised the approach the Supreme Court adopted in *Firm PI 1 Ltd* dealing with a commercial contract was affirmed in the context of a collective employment agreement disputed provision in *New Zealand Airline Pilots' Association v Air New Zealand Ltd* [5] and the same principles should apply.

[21] TWD's counsel asserts nothing turns on the non-capitalisation of termination date in clause 2(b)(iii) and suggests it was merely a drafting error.

Initial observations

[22] The settlement agreement, while seeking to end the employment relationship, did not do so in a timely fashion and was on terms that maintained interim employment. This was potentially problematic; it was not a 'clean break.'

[23] The first premise of the settlement agreement was GXQ vacated his role and by agreement, allowed his employer to immediately begin recruiting his replacement. The agreement created a 'construct' that GXQ was working from home on a special project that had an agreed or envisaged, duration up to 25 July 2023. This situation was not at the time communicated to co-workers although the specific nature of the project was specified. The

[5] *New Zealand Airline Pilots' Association v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

agreement also provided GXQ the choice of not undertaking the project work and still being paid (an option he chose).

[24] During GXQ's period of extended employment, the settlement agreement also created an obligation or expressed expectation, that GXQ would "endeavour" to seek alternative employment and consistent with this expectation, it provided a contribution to the cost of outplacement support. If GXQ found alternative work, the reduced notice period they were required to give was specified in the settlement agreement as one week.

[25] In definitional terms, the period up to GXQ's termination date was awkwardly described as an "ex-gratia" payment, albeit with tax deducted. An ex-gratia payment is normally a discretionary fixed lump sum payment made in the absence of any legal obligation with the purpose of addressing a moral obligation or it is made as a gesture of goodwill rather than a payment to settle a legal claim. However, such payments may be recorded as part of a settlement agreement that may acknowledge the purpose of the payment or reason for it.[6] Whereas what was apparent is GXQ had chosen to remain on 'garden leave' - a colloquial term, that involves the payment of ongoing remuneration for someone to remain employed during a period of inactivity that typically is defined.

Plain and ordinary meaning

[26] A 'step through' reading of the terms of the settlement agreement is that while it initially in clause 2(a) indicates GXQ will "remain employed for a period of 8 months", the immediate next sentence defines the period of that employment as up to 25 July 2023 and uses "Termination Date" in brackets to denote this as the envisaged ending of the employment relationship.

[27] However, the following provisions (i)-(iv), logically govern what shall occur during the period GXQ 'remains' employed. These terms include at (iv), an express obligation that during the period of extended employment GXQ "will endeavour to find alternative employment".

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[6] See advice guidelines for the New Zealand state sector: *What you need to know about ex gratia payments – Summary for decision-makers*, Te Tari Ture o te Karauna-Crown Law, November 2021.

[28] Clause 2(b) then explicitly and plainly references what will occur should GXQ secure alternative employment – this includes an obligation to give notice and an obligation placed upon TWD to announce the resignation in affirming terms.

[29] The next crucial sub clause (2(b) (iii)) references the possibility of the termination date being brought forward and the following sub clause (iv), indicates GXQ will be paid the "balance of his salary" up to the Termination Date.

[30] Given counsel for GXQ has conceded that the employment came to an end on the expiry of GXQ's notice, it is plainly untenable to interpret the wording of the agreement to mean an extended payment be made. If that was the case, then logically clause (iv) would have reflected this to distinguish it from the whole of clause 2(b) by making it explicit that despite what was effectively a chosen early exit, GXQ would still be paid up until 25 July 2023 even though he was not 'employed' by TWD.

[31] I have carefully assessed the suggestion that the capitalisation of termination date being absent at clause 2(b)(iii) is significant but can not depart from the plain expression regardless. The usage of the term "termination date" and it being brought forward is unambiguous in meaning. It logically follows that the balance of salary owed is up to the actual termination date (being the end of the employment relationship) even though this is described as an ex-gratia payment. I consider it more likely than not, that the one instance of non-capitalisation of 'termination date' was simply a drafting error. In reinforcing this view, I note that the header in clause 2(b), is explicit in describing the contingency that: "In the event [GXQ] secures alternative employment before the Termination Date" using capitalisation.

[32] I have also assessed the claim by GXQ's counsel, that clause 2(c) providing the option of accrued leave being paid at the "Termination Date" or the "final date of employment if this is earlier", is indicative of two contemplated separate and distinct events (or terms in conflict), to be less than convincing. Plainly, all this provision contemplates is that the accrued leave could be (and was) paid out earlier if GXQ found alternative employment and it is implicitly consistent with a reduced final remuneration figure being paid in such a circumstance as the earlier final date of employment logically became the termination date brought forward.

Contextual cross check

[33] From the agreed statement of facts, I draw an evident view there was a mutual desire of the parties to bring the relationship to an end and that the plain and ordinary construction I have accepted above, is consistent with the contextual background. This includes that rather than abruptly end GXQ's employment, TWD allowed them an extended period of paid employment while protecting dignity and confidence in assisting GXQ to transition to alternative employment. In the event, although I accept there would be a degree of stress and uncertainty for GXQ, there was a period of some four months (with additional accumulated holiday pay) when they were paid with no obligation to undertake work for TWD in the knowledge this was a full and final agreement of all issues. The alternative was a negative conclusion of the disciplinary process.

[34] In contrast, to their benefit, TWD avoided the inevitable disruption of lengthy and potentially public litigation and ongoing legal costs (as did GXQ). I find nothing in the contextual cross check that assists an interpretation of the settlement agreement's application or that would persuade me to depart from a plain and ordinary meaning approach.

Finding

[35] I find TWD has not breached the s 149 settlement agreement in dispute.

Costs

[36] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party seeking costs has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timetable unless prior leave is sought and granted by the Authority.

[37] The parties can expect the Authority to determine costs on its usual "daily tariff" basis unless specific circumstances or factors, require an adjustment upward or downward. [7]

David G Beck
Member of the Employment Relations Authority

[7] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*