

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 503  
5336579

BETWEEN ADAM RAPHAEL  
GREENBAUM  
Applicant

AND WAIKATO DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: R A Monaghan

Representatives: M O'Neill, counsel for applicant  
A Russell, counsel for respondent

Investigation Meeting: 3 November 2011

Determination: 28 November 2011

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Adam Greenbaum and his former employer, the Waikato District Health Board (WDHB) reached an agreement resolving an employment relationship problem, and the settlement was recorded by a mediator under s 149 of the Employment Relations Act 2000 (the settlement). Dr Greenbaum says terms of the settlement were breached.

[2] Clauses 2 and 7 of the settlement read:

*2. Waikato DHB will employ Dr Greenbaum on a further period of one year fixed term employment. The agreement will expire on 10 January 2012 or on his receiving vocational registration as a plastic surgeon, whichever is the earliest. ...*

...

*7. Waikato DHB will pay the remainder of the fixed term period of one year, if Dr Greenbaum obtains vocational registration before the one year is completed and correspondingly his employment is terminated pursuant to the agreement at that time.*

[3] The settlement was silent on a timeframe for, or a date by which any payment owed under clause 7 would be made and on how the payment would be made.

[4] Dr Greenbaum obtained vocational registration as a plastic surgeon on 23 February 2011, triggering both the termination of his employment and the obligation to pay under clause 7.

[5] He says clause 7 was breached in that:

- (a) the following amounts were owed to him but not paid, -
  - . continuing medical education expenses in the sum of \$16,000,
  - . work-related expenses in the sum of \$11,283.69, and
  - . \$3,087 (net) as four days' sick leave; and
  
- (b) the implied term of reasonableness was not met in that the WDHB, -
  - . refused to make the payment required under the clause until 14 March 2011,
  - . refused to pay 'the balance' of the entitlement, and
  - . refused to provide the calculation in support of the 14 March payment until 1 April 2011.

[6] The remedies he seeks are:

- . an order that the WDHB comply with clause 7 by paying the amounts specified in (a) above;
- . penalties for breach of settlement in respect of the matters raised in (a) and (b) above; and
- . a penalty for breach of good faith, with particular reference to the matters raised in (b) above.

### **Was there a breach of clause 7**

1. Continuing medical education (CME) expenses

[7] Clause 36 of the New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement (the cea) - which the parties accepted was applicable during the relevant period of Dr Greenbaum's employment - provides in part:

*36.2 Continuing Medical Education*

- a) The employer requires employees to be fully informed, and where possible practised in developments within their profession. ...*
- b) Employees shall be reimbursed actual and reasonable expenses of up to \$8,000 per annum (GST exclusive) increasing to \$12,000 per annum (GST exclusive) from 1 January 2008 increasing to a maximum of \$16,000 from 1 January 2009 ...*

*36.3 Calculation of an individual employee's entitlement to the expenses shall be on the following basis:*

- a) Full-timers shall be entitled to the full amount;*

...

*Note: CME expenses will not exceed 100% of entitlement*

[8] The expenses referred to include expenses of attendance at relevant conferences. Dr Greenbaum says he is entitled to the payment of CME expenses in the full amount of \$16,000 in respect of the period from 23 February 2011 to 10 January 2012, being the balance of the one-year fixed term employment. The payment would be for the purpose of attendance at conferences.

[9] Dr Greenbaum has not registered for, paid for or attended any conferences during this period. In support of his claim he nominated an upcoming conference he said he would have attended although for personal reasons he will not now do so, and to conferences in 2012 to which he said the expense payment could be put.

[10] The claim amounts to a claim for payment as if the payment was a standard entitlement to \$16,000 per annum incorporated in his remuneration in any event. However in principle the payment is owed only if the expense is incurred. That is the basis on which payment was made to Dr Greenbaum in previous years. No further such expense has been incurred, and nor is there any real likelihood that such expense will be incurred prior to what would otherwise have been the termination of the fixed term arrangement on 10 January 2012.

[11] Moreover, the assessment of payment owed in respect of the balance of the fixed term arrangement was to be carried out from the standpoint of the date of termination of employment. As at that date no expense had actually been incurred in respect of any upcoming conference, and it was not open to Dr Greenbaum to make the general statement that, once in possession of the payment, he would apply the funds to attendance at an unspecified conference. The uncertainty of that approach is illustrated by the fact that he now says he cannot attend a particular conference for personal reasons. Hence, even if the genuineness of such an intention was accepted and the payment was of a kind that would otherwise have fallen within the scope of clause 7, the detail of the expenditure to be incurred was too uncertain to create an obligation to make the payment.

[12] Since there was no entitlement to the payment, the non-payment does not amount to a breach of the settlement.

## 2. Work-related expenses

[13] Clause 21.1 of the cea provides:

*21.1 The employer shall meet the cost of or reimburse employees for work-related expenses including those listed in clause 21.2 ...*

[14] Clause 21.2 sets out various membership, professional registration or other fees associated with the requirements of the relevant arm of the medical profession.

[15] Dr Greenbaum appeared to have incorporated in his claim for payment under clause 7 of the settlement a claim for the payment of certain expenses incurred during his employment and not reimbursed. However there was no precision in the evidence regarding what expenses are said to be owed in respect of this period and in what amount.

[16] The parties are to resolve any outstanding issues in that respect themselves. Leave is reserved to seek further orders of the Authority if they are unable to do so. The grant of leave will lapse if the Authority has not been approached within 28 days of the date of this determination.

[17] With more specific reference to clause 7, Dr Greenbaum sought the following payments in respect of expenses incurred during the period between the termination of employment and 10 January 2012:

. \$840	UK GMC registration
. \$150	RCS England fees
. \$1,350	BAAPS membership fee
. \$1,058.57	ASAPS membership fee
. \$600	ASPS membership fee
. \$60	BBA membership fee
. \$1,100	UKAAPS membership fee
\$5,138.57	TOTAL

[18] Expenses of this kind are within the scope of clause 21.2, but the dispute concerns whether they were payable in respect of the period after the termination of employment.

[19] Clause 7 of the settlement provided that the WDHB '*pay the remainder of the fixed term period of one year*' if employment ended before that time. The parties have different views of the correct construction of this provision, namely:

(i) the WDHB says the payment must be calculated with reference to entitlements under the cea, and as clause 21 provides for the payment of work-related expenses Dr Greenbaum cannot have incurred any work-related expenses after 23 February 2011 when his employment had terminated;

(ii) Dr Greenbaum says he is entitled to the payments he would have received had his employment continued to 10 January 2012, and these include the reimbursement of the expenses he seeks.

[20] Up to a point both are correct. Dr Greenbaum is entitled to payments he would have received had his employment continued to 10 January 2012, but those payments must be calculated with reference to the underlying entitlements contained

in the cea. In order to determine whether the amounts sought here are owed, it is necessary to consider the nature of the payments.

[21] In some circumstances it is clear that the termination of employment would mean particular work-related expenses could not be incurred at all.

[22] For example clause 21.4 and following in the cea provide for the reimbursement of: travel for out-of-town meetings or other business or medical duties; work-related toll calls; car parking; and use of a personal motor vehicle for specified work-related travel. None of these activities would occur at all if the employment relationship had ceased, no associated cost would be incurred, there would be nothing to reimburse and no loss would be suffered as a result of the lack of payment. Dr Greenbaum could not say he would have received any reimbursing payments in respect of those matters without also having carried out the activity and incurred the expenses in question.

[23] The payment or reimbursement of membership fees for relevant professional organisations does not depend on carrying out work-related activity, unlike travelling to a meeting to conduct work-related business in a private motor vehicle. In that sense - and in a damages context which is in effect the context here - entitlement to the payment does not require the actual continuation of the employment relationship.

[24] A second feature of maintaining membership of relevant professional associations, and of meeting relevant professional licensing requirements, is that there is a benefit to the employee in having the associated fees met or reimbursed by the employer. Such membership serves the wider purposes both of the employer and the employee, hence they incorporate a beneficial element beyond mere reimbursement. In comparison there is no additional element of benefit to the employee when, for example, the cost of travel on work-related business or the cost of a work-related toll call is reimbursed.

[25] Thirdly, because payments of this kind tend to fall due annually the due date for payment can be identified in advance and the organisation imposing the fee is likely to publicise the amount payable in advance of payment falling due. It is

therefore likely that as at the date of termination of employment any qualifying payment can be identified and quantified.

[26] For these reasons I conclude that payments in respect of the fees cited in this part of the claim, if the fees themselves fell due for payment before 10 January 2012, were payable to Dr Greenbaum under clause 7 of the settlement.

### 3. Sick leave

[27] This matter was resolved when Dr Greenbaum was reminded and accepted during the investigation meeting that he was absent on domestic leave on one occasion when an absence on sick leave was recorded. The claim was withdrawn.

### 4. Conclusions

[28] For the above reasons I find there was no breach of the settlement in respect of CME expenses and sick leave.

[29] Regarding the claim for work-related expenses incurred prior to the termination of employment, if any payments remain owing under clause 21.2 of the cea Dr Greenbaum is entitled to them, but has an obligation of his own to ensure the relevant invoices or receipts are presented in support of payment.

[30] As for expenses in respect of the balance of the fixed term employment period, I have found Dr Greenbaum was entitled to payment in respect of the membership fees he has cited, in the sum of \$5,138.57.

## **The implied term of reasonableness**

### 1. Background

[31] Dr Greenbaum is an immigrant to New Zealand, and was obliged to obtain vocational registration from the New Zealand Medical Council before he could practise in his medical specialty fully in New Zealand.

[32] By emailed message dated Wednesday 23 February 2011, sent at 15.33, Dr Greenbaum advised his solicitor and certain WDHB managers, although not the employee relations manager, that he had received his vocational registration 'effective immediately'. He also stated: *Pursuant to the binding agreement of 13 December 2010 I am no longer employed by the DHB and will leave immediately i.e. today.* He completed that day's work shortly afterwards and did not report for work again.

[33] There had been issues between the parties as well as some discussion with the Medical Council regarding the progress of, and the WDHB's role in, Dr Greenbaum's efforts to obtain vocational registration. These matters caused the WDHB to expect it would take longer for Dr Greenbaum to obtain vocational registration than proved to be the case. Accordingly the information in the message dated 23 February 2011 came as a surprise to it.

[34] In a letter dated 24 February 2011 counsel for Dr Greenbaum advised the WDHB's solicitors of the registration and of the view that Dr Greenbaum's employment 'expires immediately'. She requested the calculations supporting the payment to be made, and gave the name of the bank account to which payment was to be made. The account was not the account to which Dr Greenbaum's salary was usually paid, rather it was the account of counsel's instructing solicitors. The account number was not provided. The 24 February letter was copied to the WDHB's employee relations manager, Greg Peplow.

[35] In a further similarly-directed letter dated 25 February 2011, counsel sought a reply to her request and expressed the view that the matter should be capable of being concluded that day. She said the matter would be referred to the Employment Relations Authority if this did not occur.

[36] Mr Peplow responded in an emailed message of the same date, sent at 16.22, asking for evidence of receipt of vocational registration, or written confirmation of registration from the Medical Council. That information was provided by letter dated 27 February 2011, a Sunday, and presumably received on Monday 28 February.

[37] On Tuesday 1 March 2011 a statement of problem seeking a compliance order, penalties and costs was filed in the Authority. More specifically, immediate payment

was sought of the money due to be paid under clause 7 of the settlement, together with a penalty for the failure to make the payment to date, and costs.

[38] Mr Peplow reacted with a very unfortunate message to counsel – copied to others including the Authority – for which he has since issued a written apology.

[39] Counsel replied to the WDHB and its solicitors in a letter dated 3 March 2011. Among other things she repeated her concern about the absence of calculations in support of the payment owed, and provided a copy of a deposit slip for the bank account into which payment was to be made.

[40] Dr Greenbaum received a payment of \$126,078.25 (nett) on Monday 14 March 2011, although the payment was actioned on Friday 11 March.

[41] The WDHB considered the sum it paid satisfied the requirements of clause 7, but still it did not provide details of the calculation. Following a further request those details were provided in a letter from the WDHB's solicitors dated 1 April 2011.

## 2. Whether implied term of reasonableness breached

### (i) Delay in payment

[42] While it may be that on a strict interpretation of clause 2 of the settlement the grant of vocational registration operated to extinguish the employment agreement, I do not accept there was an associated requirement that the WDHB act immediately to process the termination of employment in accordance with Dr Greenbaum's instruction. It was entitled to:

- . seek formal confirmation of the grant of registration;
- . seek confirmation and details of the manner in which final payment was to be effected, particularly as this was to differ from the usual procedure for payment; and
- . take a reasonable amount of time to prepare the necessary calculations and make the payment, particularly given the lack of notice and the range of contractual entitlements to payment which would have to be addressed in the

calculations.

[43] Moreover, payment was not the only matter to which the WDHB was obliged to attend. For example Dr Greenbaum's employment terminated on approximately an hour's notice, and there were rostering and staffing implications resulting from the termination.

[44] In the light of the above I do not consider it reasonable - nor is it within the problem-solving approach to employment relationships which underlies the Employment Relations Act - for Dr Greenbaum to threaten litigation less than two full working days after the WDHB had received what I consider to be incomplete advice of the grant of registration.

[45] A weekend then followed, and the necessary confirmation of the grant of registration was received the following Monday. It was premature - and again not in accordance with the approach expected and encouraged by the scheme of the Employment Relations Act - to file a statement of problem in the Employment Relations Authority the next day. Further, the contents of the statement of problem as then drafted amounted to no more than a demand for the immediate payment of an unspecified sum, and no other dispute was disclosed.

[46] The payment was processed some 8 working days later. Although this is longer than desirable for the completion of an employee's final payment when employment has terminated, the nature of Dr Greenbaum's position and of his contractual entitlements meant the final calculation was likely to be time-consuming. The necessary focus on preparing the calculation and completing payment was diverted by the filing of the statement of problem in the Authority and the escalation of the matter by what should have been an unnecessary involvement of lawyers on both sides. Overall I do not accept that the delay in payment was unreasonable, and I do not accept the circumstances can be construed as a refusal to pay.

(ii) Refusal to pay 'the balance'

[47] I do not accept there has been an unreasonable refusal on the part of the WDHB to pay 'the balance' of the amount Dr Greenbaum says he is owed. Instead

there was a disputed entitlement to certain payments, now resolved as set out in this determination.

(iii) Refusal to provide calculations in support of payment

[48] There was no refusal to provide calculations in support of the final payment, rather a delay in doing so.

[49] The calculations should have been provided sooner than they were. However in all of the circumstances I do not accept that the further delay of some two weeks before they were provided was sufficiently serious to amount to a breach of any implied term of reasonableness in respect of clause 7 of the settlement.

(iv) Additional comment

[50] Dr Greenbaum accused the WDHB of deliberate delaying tactics, and has also pointed to Mr Peploe's message of 1 March in support of his view that the WDHB has acted unreasonably. I do not accept that the facts to which he pointed amounted to evidence of deliberate delaying tactics.

[51] Further, while I have described Mr Peploe's 1 March message as unfortunate, he has apologised. I do not believe there is anything in the message to support the wider accusations of deliberate delay and unreasonable conduct.

### **The duty of good faith**

[52] The duty of good faith has statutory expression in s 4 of the Employment Relations Act. Section 4A provides that a penalty for failure to comply with the duty set out in that section is payable if: -

- (a) the failure was deliberate, serious and sustained; or*
- (b) the failure was intended to undermine –*
  - (i) ...*
  - (ii) an individual employment agreement ...; or*
  - (iii) an employment relationship; or ...*

[53] I do not accept that anything in the above circumstances falls within s 4A, and there will be no order for payment of a penalty.

[54] Additional allegations of difficulty with a payment under clause 8, and breaches of clauses 6 and 10 of the settlement were made in the submissions in support of the claim for a penalty for breach of good faith. Following my earlier request for specificity in the claim for penalties, the claim had been framed with reference to the aspects of the alleged breaches of clause 7 addressed in this determination. The additional allegations of breach of settlement concerned matters unrelated to the matters before me and I was advised that references to them were included as a matter of background. For those reasons I do not address whether there was any merit in those allegations and in turn do not take them into account.

### **Orders for compliance**

[55] Further to the request for compliance orders I order as follows:

- (i) in respect of expenses for the period between the termination of employment and 10 January 2012, the WDHB is to comply with clause 7 of the settlement by paying to Dr Greenbaum the sum of \$5,138.57; and
- (ii) the WDHB is to make the payment within 28 days of the date of this determination.

[56] Interest is to be paid at the rate of 5% from the date of termination of employment to the date of payment.

### **Penalties**

[57] There will be no order for the payment of a penalty.

### **Costs**

[58] Costs are reserved.

[59] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority