IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 437/10
5303153

	BETWEEN	MARTIN ROUND Applicant
	AND	EMPLOYER'S ASSISTANCE LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in Person Michael McFadden, Counsel for Respondent
Investigation	On the Papers
Submissions received:	2 August 2010 from Applicant 11 August 2010 from Respondent
Determination:	11 October 2010

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The applicant, Dr Martin Round, is seeking arrears of salary and holiday pay in respect of an alleged salary increase, which the Applicant says he was promised but which he did not receive. Dr Round says it was a term of his employment agreement that his salary would increase from $66,000.00 to $92,250.00 per annum after 6 month's service, and is seeking arrears of salary and holiday pay in relation to the alleged increase.

[2] The respondent, Employer's Assistance Limited ("EAL"), says that at the time he was employed, Dr Round was given and signed an individual employment agreement specifying a salary of $66,000.00 per annum, and denies that it was a term of employment that Dr Round would be paid a salary of $92,250.00 after 6 months service.

[3] EAL further says that the parties have settled all employment related matters between them in accordance with a settlement agreement ("the Settlement Agreement") pursuant to section 149 of the Employment Relations Act 2000 ("the Act"), and that the Settlement Agreement prevents Dr Round pursuing his claim..

Issues

[4] This determination addresses the preliminary issue of whether the settlement pursuant to s149 of the Employment Relations Act 2000 ("the Act") bars the claim of Dr Round for salary and holiday pay arrears against EAL.

[5] The parties agreed to the Authority determining this issue based on the submissions from the parties.

Background Facts

[6] Dr Round was employed as a senior legal consultant by EAL from 9 July 2007 until 31 January 2010. EAL is a company providing an advisory service to employers, specialising in the areas of employment law and health and safety.

[7] On 10 December 2010 the parties entered into the Settlement Agreement. The substantive content of the Settlement Agreement was, as far as I can ascertain from the papers, reached by the parties as between themselves. They subsequently arranged to have the terms of settlement recorded by a mediator. The mediator signed the Settlement Agreement on 15 December 2009.

[8] The employment of Dr Round with EAL terminated on 31 January 2010. On 7 February 2010 Dr Round wrote to Mr Walter de Lautour, Managing Director of EAL, stating that there had been an agreement between the parties that his (Dr Round's) salary would increase to $92,250.00 after 6 months service, and requesting payment of arrears of salary in respect of this increase.

[9] As evidence of such an agreement, Dr Round relies upon an email from Mr de Lautour dated 14 June 2007, sent prior to Dr Round commencing employment with

EAL, and on his handwritten contemporaneous notes from a telephone conversation he claims to have had with Mr de Lautour on 18 June 2007

[10] Dr Round says that he did not pursue payment of the increased salary amount following his reaching the 6 month stage of his employment, as he understood the company to be in financial difficulties, but that he held an expectation that such arrears would be paid to him either at a time when EAL was in a better financial position, or upon termination of his employment.

[11] Mr de Lautour responded to the letter of 7 February 2010 on 12 February 2010. Mr de Lautour denied that there was any arrangement as claimed and referred Dr Round to the provisions of the Settlement Agreement of 10 December 2009, in particular to clauses D and 11.

[12] Mr de Lautour stated that it was not a term of Dr Round's employment agreement that he be paid a salary other than $66,000.00, and further stated that the first time the issue of arrears in respect of a salary increase was raised by Dr Round was in the letter dated 7 February 2010.

Submissions for the Applicant

[13] Dr Round submits that payment of his salary arrears did not form part of the negotiations which resulted in the Settlement Agreement, as at that time there was no disagreement between the parties on this matter.

[14] Dr Rounds submits that the matter of arrears of salary was not within his contemplation at the time the Settlement Agreement was signed and cannot be read into the general words of clause 11.

[15] Dr Round submits that it was never the intention of the parties for the Settlement Agreement to cover payment of his salary arrears, and further that he would not have signed the Settlement Agreement had he believed that it also encompassed the non-payment of his salary arrears.

Submissions for the Respondent

[16] EAL submit that the Settlement Agreement was a binding settlement in terms of s149 of the Act. The intention of the parties in entering into it was to prevent all (including potential claims) claims by either party, and that this would have included any alleged arrears in salary.

[17] EAL submits that Dr Round, having admitted that the alleged arrears of salary claim was known to him as early as 2007, must not only be taken to have settled that claim but ought to have specifically reserved that matter from the terms of settlement if he had not intended it to be included.

[18] EAL submits that the purpose of the Settlement Agreement was for the parties to achieve closure.

Determination

[19] The Settlement Agreement includes the following clauses:

> *D. The parties, after having taken the opportunity to obtain independent legal advice, have agreed to settle the above personal grievance claim and all other employment related matters on the terms and conditions set out in this Agreement.*
>
> *11. The Employer will pay and the Employee shall accept the payments and benefits referred to in this Agreement, in full and final settlement of all matters between the parties and/or any of its directors, officers or employees, including but not limited to the personal grievance claim and all matters arising out of the cessation of his employment.*
>
> *13. The parties further irrevocably agree that they shall request a Mediator from the Department of Labour to sign these terms because the employment problems between them have been resolved and they wish them to be final, binding and enforceable on them.*

The signatures of the parties follow this final clause.

[20] The Settlement Agreement concludes:

> *I [name of mediator] of Auckland, Mediator, certify:*
>
> *I am employed by the Chief Executive of the Department of Labour to provide mediation services under the Employment Relations Act 2000; and*

> *I hold a current general authority from the Chief Executive to sign, for purposes of section 149 of the Act agreed terms of settlement; and*
>
> *I have been requested by the parties to sign the attached agreed terms of settlement; and*
>
> *Before I sign the agreed terms of settlement I explained to them the effect of s149 (3); and*
>
> *I am satisfied that the parties understood the effect of the subsection and have affirmed their request that I should sign the agreed terms of settlement; and*
>
> *I now sign the agreed terms of settlement pursuant to s149(1) and (3) of the Employment relations Act 2000.*
>
> *Dated at Auckland this 15th day of December 2009.*
>
> *Name of Mediator*
> *Mediator*

[21] I note that there is no challenge to the Settlement Agreement pursuant to s152 (2) (a) of the Act. I find that this is a settlement agreement concluded and signed by the mediator in accordance with the provisions of the Act.

[22] There are clear statements relating to the intention of the parties contained within the terms of the Settlement Agreement. Specifically at Clause D it is stated: "*The parties …to settle the above personal grievance claim and all other employment related matters …".* Arrears of salary arise within the context of an employment relationship and are therefore an employment related matter.

[23] At Clause 11 it is stated: *" … in full and final settlement of all matters between the parties……including but not limited to … all matters arising out of the cessation of his employment."* I find this statement to be quite unequivocal. The question of arrears of wages crystallised at the cessation of Dr Round's employment and was therefore a matter arising out of the cessation of this employment to which the intention of full and final settlement applies.

[24] At Clause 13 it is stated that the parties will request a mediator to sign off the terms of settlement between them "*because the employment problems between them have been resolved and they wish them to be final, binding and enforceable on them."* Again I find this statement to be clear and unequivocal.

[25] I consider it pertinent that Dr Round was, by virtue of his experience and knowledge, capable of comprehending the import of the terms he agreed and signed. Additionally Dr Round had access to legal representation and it was open to him to have reserved any matters which he wished to exclude from the ambit of the Settlement Agreement. He did not do so.

[26] I determine that the terms of the Settlement Agreement cover the issue of salary and holiday pay arrears. Section 149 (3) (b) of the Act contains very clear words which I believe address the issue of whether the settlement under s 149 of the Act bars the claim of Dr Round, against EAL. Section 149 states:

> *except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review or otherwise*
>
> .

[27] The words of this subsection are clear that, other than for enforcement, the parties may not challenge the terms of a s149 agreement. I determine that s149 provides an absolute bar to the Authority hearing and determining Dr Round's application.

Costs

[29] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority