

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 501/10  
5296284**

BETWEEN                      MARTIN ROUND  
   Applicant  
  
AND                                EMPLOYERS ASSISTANCE  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Applicant in Person  
   Michael McFadden, Counsel for Respondent  
  
Investigation Meeting:        12 October 2010 at Auckland  
  
Witness Interview              16 November 2010  
  
Submissions received:        12 October 2010 from Applicant  
   12 October 2010 from Respondent  
  
Determination:                 30 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     A settlement agreement (“the Settlement Agreement”) pursuant to clause 149 of the Employment Relations Act 2000 (“the Act”) was entered into by the applicant, Dr Martin Round, and the respondent, Employers Assistance Limited (“EAL”), on 10 December 2009, with the intention of resolving an employment relationship problem that had arisen between them. The terms of settlement have been brought before the Authority for enforcement pursuant to s 149 of the Act.

[2]     Dr Round claims that EAL has breached of the terms contained in clauses 1, 4, 5, and 12 of the Settlement Agreement, and he is seeking compliance orders and a penalty against EAL for breaching these terms.

[3] Under s137(1)(a)(iii) of the Act, the Authority may order compliance where any person has not observed or complied with any term of settlement, and under s 149(4) a person who breaches a settlement is liable to a penalty imposed by the Authority.

[4] EAL denies any breach of the terms of the Settlement Agreement.

## **Background Facts**

### **Clause 4**

[5] Dr Round claims that EAL has breached clause 4 of the Settlement Agreement. Clause 4 states:

*The Employer shall provide to the Employee a certificate of service on or before 20 December 2009 detailing the employee's position, duties, and length of service. The Employer agrees to confirm the content of this document when contacted by prospective employers.*

[6] The Certificate of Service supplied to Dr Round, and dated 17 December 2009, made reference to EAL having “*some 40,000 clients*”. Dr Round says that the reference to 40,000 clients was a false statement and a breach of Clause 4 of the Settlement Agreement.

[7] Mr Tim de Lautour, Managing Director of EAL, explained that he had checked the number of clients with the company IT department prior to insertion of the number of 40,000 clients in the Certificate of Service and believed it to be correct. By way of affidavit, Mr Christopher Bowden, IT Manager of EAL, confirmed that EAL had at the date of the Certificate of Service (17 December 2009), and at 20 September 2010, in excess of 40,000 clients.

[8] Mr de Lautour stated that his reason for including the reference to the number of clients in the Certificate of Service was to add credibility to Dr Round's position with EAL, and to assist him in his endeavours to find new employment.

[9] A draft of the Certificate of Service was emailed to Dr Round by Mr de Lautour on 17 December 2009 for checking. Dr Round had emailed Mr de Lautour that same day in response with the brief message “*Thanks Tim*”.

[10] It was common ground between the parties that Dr Round and another employee, Ms Justine Foden, whom Dr Round had asked to assist him to check the draft, had made some grammatical and stylistic changes to the draft Certificate of Service. Dr Round stated that although he had considered this reference to 40,000 clients to have been a false statement, he had not made any objection to it at the time. Dr Round explained that the reason for this was that he had not wanted to accuse Mr de Lautour of lying in respect of the number of clients, and that he had not considered there to have been any alternative way of addressing the issue.

[11] Mr de Lautour said that, following receipt of Dr Round’s suggested grammatical and stylistic changes to the draft, he had accordingly altered the draft to incorporate these, and that had Dr Round objected to the inclusion of the reference to 40,000 clients, he would have altered or omitted the reference to the number of clients. However no such request had been made to him.

[12] Mr de Lautour further stated that he had believed, by reason of the email from Dr Round on 17 December 2009 which said “*Thanks Tim*”, that, other than for the grammatical and stylistic changes, Dr Round was satisfied with the draft version of the Certificate of Service.

### **Clause 5**

[13] Dr Round claims that EAL has breached clause 5 of the Settlement Agreement. Clause 5 states:

*The parties agree not to make any disparaging remarks about the other.*

[14] Dr Round stated that he had believed remarks made in an email sent by Mr de Lautour to Mr Robert Gordon, an EAL employee, on 16 December 2009, were disparaging remarks about him, attributable to, and made by, Mr de Lautour.

[15] The subject matter of the email dated 16 December 2009 and addressed to 'Robert', is in the nature of a response to a prior discussion between Mr Gordon and Mr de Lautour about a salary review for Mr Gordon.

[16] The relevant section of the email states:

*You have continually complained that Martin did nothing and was ineffective –that you have had to cover for him etc., -assuming you are correct – then why on earth would that be a basis for more wages in taking on 'all his responsibilities' as if your workload has just trebled.*

[17] Dr Round stated that he had believed Mr Gordon when he (Mr Gordon) had told him that these remarks were not a quotation of what he (Mr Gordon) had said, but that these were Mr de Lautour's own words.

[18] Mr de Lautour denied that he personally had made any disparaging comments about Dr Round and certainly not those quoted in the email. Mr de Lautour stated that these were the expressions Mr Gordon had used to him in the context of an application by Mr Gordon for a salary increase, and that he was merely quoting what Mr Gordon had said to him.

[19] The credibility of this statement by Mr de Lautour was supported by the affidavit of Mr Bowden in which Mr Bowden stated: "...*Robert Gordon on a number of occasions complained to me personally in regard to his working situation in comparison to Martin Round*".

[20] When he was interviewed on 16 November 2010 Mr Gordon explained to the Authority that the email had arisen within a context of repeated requests for a salary increase which he had made to Mr de Lautour. Mr Gordon said that as Dr Round had been absent on several occasions, he had had to step in and cover Dr Round's workload. This was the basis for his request for a salary increase.

[21] Mr Gordon stated that he could have made comments about Dr Round's effectiveness, but was unable to confirm the assertion by Dr Round that Mr de Lautour had personally made these disparaging remarks about Dr Round.

**Clause 12**

[22] Dr Round claims that EAL has breached clause 12 of the Settlement Agreement. Clause 12 states:

*The parties agree to communicate the Employee's departure to staff in accordance with the following statement:*

*"I regret to advise that Martin Round has resigned from his current role as Senior Legal Consultant of Employers Assistance Ltd with effect from 31 January 2010.*

*We wish Martin every success with his future endeavours".*

[23] Dr Round said that this email had not been seen either by Ms Foden or Mr Gordon. Dr Round also stated that there had been a change of email address on or about 30 January 2010, which may have resulted in the staff at EAL not having received the email.

[24] Mr de Lautour stated that he had, in accordance with clause 12, made the agreed communication by email on Saturday 30 January 2010. A copy of the email, which was submitted in evidence, shows that it was sent at 12.13 p.m. It was addressed to 'SMTP: EMPLOYERS@employers.co.nz

[25] Mr de Lautour explained that he had checked that he had the correct email address for the recipients, being the staff members at EAL, with Mr Bowden prior to sending the email. Mr de Lautour had subsequently checked with Mr Bowden after it had been sent to establish that Mr Bowden had received it. Mr Bowden confirmed that he had received it.

[26] Mr de Lautour stated that he personally, as a recipient of the SMTP: EMPLOYERS@employers.co.nz address, had also received the email.

[27] Mr Gordon said that whilst he could not recall receiving the email, he could not unequivocally state that he had not done so. Mr Gordon observed that such a communication was in any event unnecessary as he, together with most of the other employees in what was a small close-knit team, were already aware of the terms of the Settlement Agreement.

**Clause 1**

[28] Dr Round claims that EAL has breached clause 1 of the Settlement Agreement. Clause 1 states:

*The Employee's employment shall cease by way of resignation on 31 January 2010 ("the termination date"). The Employee agrees, if requested to do so by the employer at its sole discretion to either:*

*a. take garden leave at anytime during the remaining period of his employment; or,*

*b. Take annual holidays at anytime during the remaining period of his employment.*

[29] Dr Round stated that he had been required by Mr de Lautour to take annual holiday leave with effect from 21 December 2009, and that upon expiry of his annual holiday leave entitlement, to take garden leave until the termination date of his employment on 31 January 2010. Dr Round says that there had been a prior verbal agreement between himself and Mr de Lautour that he would work until the end of January.

[30] Dr Round agreed that he understood that the Settlement Agreement made pursuant to s149 of the Act was in accordance with the provisions of the Act. Dr Round also agreed that he had understood at the time of signing the Settlement Agreement that the terms were full and binding on the parties.

**Determination***Clause 4*

[31] I find that there was a technical breach of Clause 4 of the Settlement Agreement, but that this was in the nature of a minor breach, in that it was not necessary to itemise the number of clients. I take note of the fact that Dr Round had the opportunity to address the issue prior to the finalisation of the Certificate of Service, but that he chose not to do so. I do not accept that this was on the basis that Dr Round was too concerned not to cause offence to Mr de Lautour, as by his own admission at the Investigation Meeting, he described himself as being 'vociferous' when he felt the occasion called for this.

[32] I further note that a Certificate of Service omitting reference to a specific number of clients has since been provided to Dr Round. I determine that there is no requirement therefore for me to order compliance.

[33] I further find that the breach of clause 4 was neither flagrant nor deliberate<sup>1</sup>. It was of the nature of a technical breach only and I award no penalty.

#### *Clauses 5 and 12*

[34] I conclude that in respect of clause 5, relating to the comments in the email of 16 December 2009, there is no evidence, other than Dr Round's assertion, to support the contention by Dr Round that Mr de Lautour was not quoting Mr Gordon's opinion (as clearly indicated in the context of the email), but rather stating his own disparaging remarks. This conclusion is supported by the affidavit evidence of Mr Bowden and the interview evidence of Mr Gordon.

[35] In respect of clause 12, relating to the requirement to communicate Dr Round's departure to EAL staff members, I find that Mr de Lautour had undertaken all practicable steps to ensure the agreed communication was distributed to staff members as required, and there is evidence that this communication was successful to some staff members. There is no evidence to support the view that Ms Foden and Mr Gordon would not have received the email sent to all EAL staff members using the correct email address. I further accept the submission made by Mr McFadden that since, as stated by Dr Round in his evidence, Ms Foden and Mr Gordon were familiar with the terms of the Settlement Agreement; they had in effect been made cognizant of the agreed communication.

[36] I find that there is no evidence that EAL has not complied with the terms of the Settlement Agreement in respect of clauses 5 and 12. I therefore determine that there have been no breaches of clauses 5 and 12.

#### *Clause 1*

[37] In respect of clause 1, relating to the termination of employment details, Dr Round agreed, by signing the Settlement Agreement, to take annual or garden leave, if so required by EAL, at its '*sole discretion*'. The EAL letter dated 18 December 2009

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<sup>1</sup> *Xu v McIntosh* [2004] 2 ERNZ 448, per Goddard J at para 48

addressed to Dr Round required him to take annual leave, and when the annual leave expired, to take garden leave. The terms of the Settlement Agreement supersede any prior verbal agreements that may have been made and are (clause 11), ‘in *full and final settlement of all matters between the parties*’.

[38] However, the wording of the Settlement Agreement gave the Employer the right to make the Employee take either garden leave or annual leave during the remaining period of the employment, but did not give the Employer the right to make the Employee take both. Dr Round was consequently entitled to return to work following the expiration of his annual leave entitlement period. I determine therefore that there was a breach of clause 1.

[39] I believe neither Mr de Lautour or Dr Round were aware that this was the effect of the clause at the time EAL invoked their rights under the clause, and this was not the basis of Dr Round’s claim in respect a breach of this clause.

[40] An order for compliance with the terms of clause 1 would be redundant at this date. I find that the breach of this clause was not deliberate, and I note that Dr Round has suffered no financial loss as a result of what I believe to be a misinterpretation of the clause. I consequently award no penalty in respect of the breach.

[41] Dr Round has claimed that he suffered hurt, humiliation and injury to feelings. I accept that being made to take garden leave when Dr Round was entitled to return to work following the taking of annual leave may have caused him injury to feelings. EAL is to pay Dr Round the sum of \$1,000.00 pursuant to s 123 (1) (c) (i).

#### *Contribution*

[42] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[43] Mr de Lautour explained when questioned by the Authority that he had expected Dr Round to work until the end of January 2010. However it was the behaviour of Dr Round during a meeting on 18 December 2009 between Mr de Lautour and Dr Round which influenced Mr de Lautour’s decision to invoke clause 1 of the Settlement Agreement and to ask Dr Round to leave immediately. Mr de

Lautour said that Dr Round had become loudly abusive to him, such that he was able to be clearly heard by other employees. Dr Round did not deny Mr de Lautour's account of the meeting on 18 December 2009.

[44] I find contributory fault on the part of Dr Round and reduce the figure awarded in respect of the breach of clause 1, being the requirement to wrongly take garden leave, by 50%.

### **Costs**

[45] 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**