

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 272
5439330

BETWEEN DR HASSAN SALIH
Applicant

A N D AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
Andrea Pazin, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 8 May 2014 from the Applicant
18 June 2014 from the Respondent

Date of Determination: 30 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Dr Salih) applies to the Authority seeking “*reinstatement to my previous job at Auckland City Hospital*” and alleges that the respondent Board (the Board) which runs Auckland City Hospital is not complying with the terms of a mediated settlement reached between the parties on 19 April 2012.

[2] The Board maintains that Dr Salih has no legal basis for his claim, noting that the parties reached a full and final settlement of all matters touching on the former employment relationship between Dr Salih and the Board and that the Board had fulfilled its obligations under the terms of that settlement.

[3] In particular, the Board maintains that reinstatement is not available to Dr Salih because it was not an agreed term of the settlement and so there is no basis on which he can seek reinstatement.

[4] When the file came onto my list, I proposed to deal with the matter on the papers but Dr Salih wished to address me before I considered the matter further. Accordingly, I convened a telephone conference between the parties at which Dr Salih made certain allegations against the Board which I considered the Board needed to have a formal opportunity of responding to.

[5] Accordingly, I subsequently issued a Minute in which I referred to the allegation made by Dr Salih, sought further information from the parties, and invited them, amongst other things, to propose, if they chose, a different process for the Authority to address the employment relationship problem between them.

[6] The material I requested in my Minute has now come to hand and accordingly I am able to complete the Authority's determination in this matter.

[7] Dr Salih was engaged in the provision of medical services at Auckland City Hospital. Whether he was an employee or a contractor in status was an issue between the parties.

[8] Either way, unhappy differences developed between Dr Salih and the Board and a mediation on 19 April 2012 provided by the Mediation Service of the Department of Labour resulted in a full and final settlement between the parties. It is essentially the terms of that mediated settlement which are now in contention.

Issues

[9] The Authority needs to consider the following questions:

- (a) What are the agreed terms of settlement;
- (b) What were the allegations made by Dr Salih;
- (c) What was the response from the Board?

What were the terms of settlement?

[10] The terms of settlement need not be recited in full here. Suffice it to say that they recite that Dr Salih had raised a claim against the Board, that without admission of liability the parties reached a settlement and, critically for our purposes, the Board undertook to advise the entity responsible for managing locum services at all three Auckland District Health Boards that Dr Salih was available as a locum. To facilitate that, the Board was to provide a letter indicating the services that Dr Salih had previously provided to the Board.

What was the allegation made by Dr Salih?

[11] In the telephone conference that I convened between the parties, Dr Salih told me that, contrary to the Board's obligations under the record of settlement entered into by the parties on 19 April 2012, the Board had effectively "*blacklisted*" him so as to ensure that, notwithstanding his placement on the list of locums available for work at the three Auckland District Health Boards, he was effectively precluded from obtaining any work because of the existence of that "*blacklist*".

[12] Because it seemed to me it would be impossible to produce a determination on Dr Salih's claim without referring to this allegation, I thought the only fair thing to do was to give the Board the opportunity to respond to it and to that end, I issued the Minute that I have already referred to dated 7 May 2014 in which I sought further information from Dr Salih about his allegation and comments and responses from the Board on that allegation.

The Board's response

[13] The short point is that the Board denied absolutely any suggestion that Dr Salih had been blacklisted. It maintained its position that it had fulfilled its obligations under the record of settlement entered into by the parties on 19 April 2012 which of course does not guarantee Dr Salih any work. It simply guarantees that his name will be added to the list of locum practitioners who are available to relieve on an as-and-when basis.

[14] Moreover, the Board commented on the additional material that Dr Salih had supplied at my request to support his allegation. Dr Salih referred to two named persons who he says confirmed his suspicions; the Board observed that both of the

incidents referred to pre-dated the mediation and therefore were irrelevant to the situation post the mediated settlement.

[15] Moreover, it is apparent that first there is not a huge amount of locum work available year-to-year with the average number of vacant positions seemingly ranging from around 6.5 full time equivalents to around 8.5 full time equivalents in medicine for instance. There is no breakdown available within specialities except for the current year where the total number of vacancies may be slightly more than was the case in previous years.

[16] Also provided at my request is the number of medical practitioners available as locum to fill the available vacancies. That number as at 9 May 2014 for instance discloses that there were 15 emergency medicine registrars available, nine emergency medicine house officers, 15 medicine registrars, and 18 medicine house officers.

[17] A further issue raised by Dr Salih in his submissions to the Authority was the contention that the Board had failed to provide an appropriate referee for him. The Board says this is simply not true; in order to register for locum work, Dr Salih was required to give referees, he did so, and three referees from the Board provided written references.

[18] Moreover, Dr Salih identified particular medical practitioners he had worked with who he thought were potential referees. One of those potential referees has been contacted by the Board and would provide a reference if Dr Salih asked for it.

Determination

[19] I am satisfied that a proper construction of Dr Salih's Statement of Problem is that he effectively seeks a compliance order with the terms of settlement reached between the parties on 19 April 2012. In effect, he says that the Board has failed in its obligations in terms of providing him with ongoing work.

[20] But that is not what the Board promised to do in the settlement agreement of 19 April 2012. What the Board promised to do was to advise the relevant entity that Dr Salih was available for locum work at all three Auckland District Health Boards and to provide information to that entity about the various roles that Dr Salih had performed at Auckland City Hospital. I am satisfied on the material before me that

that is what the Board has done and as a consequence, it has fulfilled its legal obligations.

[21] Moreover, I must emphasise that Dr Salih has no right to seek to be re-employed with the Board beyond the terms of the mediated settlement. He expresses this request in his Statement of Problem as a claim for "*reinstatement*", but there is no basis on which he can claim reinstatement.

[22] All he is entitled to is the implementation of the terms of the settlement reached on 19 April 2012 and I am satisfied that he has had that already.

[23] If the implementation of that agreement has not provided him with work opportunities, that is obviously unfortunate from his perspective but not a breach of the law; I emphasise again that the Board did not promise to reinstate Dr Salih, it promised to arrange for him to be put on a locum roster and it has done that.

[24] Dr Salih says that he has been blacklisted and that is why he has not received any work. This is a very serious allegation which I took seriously but I have to say that I have not been provided with any evidence of it save for Dr Salih's claim that that is what has happened. The Board flatly denies it and, in response to some of the material that I requested of it, has confirmed that there are a modest number of locum roles available on average each year and on a snapshot taken in early May this year, a reasonably extensive pool of medical practitioners available to fulfil those roles.

[25] It goes without saying that the employer board will seek to match the role to the potential applicants available and will appoint the best person for the job.

[26] If that results in medical practitioners other than Dr Salih being appointed, that obviously is unhelpful from his perspective but is not justiciable.

[27] Dr Salih is not entitled to reinstatement; there is no legal basis on which he can pursue such a claim. The only claim he can make is that the Board has not fulfilled its obligations under the terms of settlement and I am satisfied that he is mistaken in making that claim also. In my considered judgment, the Board has fulfilled its obligations under the terms of settlement and there is nothing further that the Authority can do to assist Dr Salih.

Costs

[28] The Board has been completely successful in defending Dr Salih's claim. On normal principles, the Board would be entitled to look to Dr Salih for a contribution to its costs. In the particular circumstances of this case, the Board may think it appropriate not to pursue costs in this instance.

[29] Should that not be the decision the Board takes and the parties are unable to resolve costs on their own terms, the Board should file and serve its application for costs in the Authority and Dr Salih will have 14 days after his receipt of those submissions to file any submissions in response.

[30] I will then fix costs on the papers.

James Crichton
Member of the Employment Relations Authority