Attention is drawn to the order prohibiting publication of the names of the parties and witnesses referred to in this determination.

Determination Number: AA 445/05
File Number: AEA 829/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	"V" (Applicant)
AND	"B" (Respondent)
REPRESENTATIVES	Margaret Matthew, Counsel for Applicant Respondent in person
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	31 October 2005
SUBMISSIONS	31 October and 8 November 2005
DATE OF DETERMINATION	18 November 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant, a limited company, seeks recovery of wages paid to the respondent, its former employee, on 15 July 2005 for the month of July, after allowing for deduction of certain amounts it accepts are owed to the respondent. The applicant says a payment made to the respondent under a settlement agreement on 22 July mistakenly again paid her wages for part of July. It says that amounted to a double payment and a mistake. However it does not seek return of any of the settlement sum. Rather it says it is entitled to recover the wages paid earlier.

[2] The respondent says she is entitled to keep the wages paid on 15 July; that she and the company knew when she was paid the settlement agreement funds on 22 July that she had already been paid for the whole month of July; that the settlement agreement was really for a global sum in addition to wages paid earlier; that she accepted that global sum in return for agreeing to leave the job and forego any further claims against the company; and that she should not have the total amount paid to her reduced because of its mistake. Further the respondent counterclaims for damages, costs and a penalty for the applicant's breach of the settlement agreement in not supplying her with a suitable reference by the agreed date.

[3] The 22 July settlement agreement was certified on 5 August by an authorised representative of the Mediation Service under s149 of the Employment Relations Act 2000 ("the Act"). The parties accept that they understood that certification of the agreement confirmed its terms as final, binding, enforceable, and not open to review by the Authority.

[4] Mediation assistance was provided to the parties some weeks before the Authority's investigation meeting but they were unable to resolve the issues between them.

Preliminary issues

[5] The respondent's counterclaims sought an order requiring the company to make a severance or redundancy payment provided under the terms of her former employment agreement. That counterclaim has not been considered further because the 22 July settlement agreement provided for "full and final settlement of any claims" which the respondent might have in relation to her employment with the applicant. At the investigation meeting both parties confirmed that from early June to 22 July they had discussed matters relating to the severance or redundancy of the respondent. These matters were clearly in contemplation and encompassed by the agreement's finality. Any redundancy entitlement was extinguished by the "full and final" settlement.

[6] The respondent also raised a question regarding the settlement agreement's confidentiality provision. The parties had agreed to keep confidential the terms and fact of the settlement agreement. An Authority determination naming the parties and witnesses would remove that confidentiality. While there is a public interest in the open administration of justice, there is a competing public interest in having settlement agreements of this type upheld according to their terms, in this case including the parties' agreement to confidentiality. By consent of the parties I made an order – recorded here – under the provisions of clause 10(1) of Schedule 2 of the Employment Relations Act 2000 prohibiting publication of the names of the parties and witnesses. The other facts and reasoning of this determination, of course, remain on the public record.

Issues for determination

[7] The investigation meeting heard evidence from the applicant's chief executive ("Mr M"), and the respondent ("Ms B"). Counsel for the applicant provided additional written submissions. Both parties gave brief oral closing submissions. Following the meeting I was concerned that applicant's submissions had not specifically addressed liability to a penalty should it be found to have breached a term of the settlement agreement regarding a reference for the respondent. By minute to the parties I provided a further opportunity for written submissions from the applicant on that point.

[8] Issues for determination in this matter include:

- Whether the applicant is entitled to an order for recovery of wages paid on 15 July?
- And, if so, what is the appropriate amount of recovery?
- Whether the respondent is entitled to remedies in relation to breach of the agreed settlement term to provide a reference by a specified date?
- Whether costs should be awarded?

Recovery of wages

[9] From early June the parties were in discussions about the redundancy of the respondent's position, redeployment prospects and whether she might leave the company she had worked for over the previous 12 years. In early July the parties met – Mr M accompanied by an experienced human resources consultant ("the applicant's consultant") and Ms B accompanied by an experienced employment lawyer ("the respondent's lawyer").

[10] No agreement had been reached by mid July and Mr M took steps to ensure that Ms B was paid as usual on 15 July. The applicant, a software development and service company, has around 22 staff. Most are employees, paid monthly, two weeks in advance and two weeks in arrears.

[11] Discussions continued resulting in a settlement agreement signed on 22 July 2005. The agreement provided nett payments to Ms B for "wages to 22nd July 2005", "six weeks notice", an amount of compensation under s123 of the Act, and "outstanding holiday pay".

[12] The agreement also provided that the employment relationship would end "with effect from 29 August 2005". The parties agree that this term was to assist Ms B in seeking a new job as she could say she was a current employee of the applicant. In fact Ms B left the applicant's offices on 22 July and was not expected to perform any further duties.

[13] The applicant's consultant and the respondent's lawyer were involved in drafting the agreement – an earlier version dated 20 July and the 22 July final version. The agreement expressly acknowledges that "both parties … have had the opportunity to take legal advice before signing this agreement". The respondent told me she took legal advice on 21 July and based her decision to enter the agreement on that advice.

[14] On 22 July the respondent was given a company cheque for $35,029.71 signed by Mr M and another senior executive of the applicant.

[15] Mr M also confirmed separately that the company would continue to pay Ms B's medical insurance policy until the end of the year and also pay, in August, her expenses for July ($103.42).

- **"Overpayment" identified**

[16] On 25 July Mr M sent Ms B an email saying that the company has "*inadvertently over paid the settlement as agreed*". He provided calculations which deducted the amount of wages previously paid to the end of the month ($5959.16). However the payment labelled "wages to 22nd July" of $3,300.21 was "*underpaid by four days*". Wages for those four days amounted to $1100.07. He deducted that figure from the amount sought for "*wages already paid*" and asked Ms B to provide a cheque for the balance, being $4859.09.

[17] Mr M told me that an earlier draft of the agreement had provided for payment of wages to 18 July in the amount of $3300.21. When the final version of the settlement document was agreed on 22 July, the date in that line was changed to the day's date but the amount owing for wages was not adjusted.

[18] He explained that the mistakes regarding wage payments occurred because he made the agreement with Ms B on 22 July without the benefit of imput from the company's part-time accountant, who was away that week. The accountant identified the "double payment" on his return to work on 25 July – the next working day after the 22 July payment – and Mr M promptly notified Ms B by email.

[19] Ms B refused to repay the amount sought as she considered the settlement agreement provided a "global sum" to end her employment without making any further claims on the company.

- **Authority's approach**

[20] The Authority's role is to determine employment relationship problems according to the substantial merits of the case without regard to technicalities. It must act as it thinks fit in equity and good conscience but not inconsistently with the Act or relevant employment agreements.

[21] The 15 July payment of wages and the 22 July settlement agreement occurred within the employment relationship. The relationship existed, by express term of the 22 July agreement, until 29 August. I am satisfied that the Authority has jurisdiction to determine this employment relationship problem.

[22] This application is not a matter covered by the Wages Protection Act 1983 ("WPA") provisions for recovery of overpayments in certain circumstances. Section 6 of that Act applies to circumstances of ongoing employment, and payment of wages, where there are further regular payments from which overpayments may be deducted. In this present matter, the payment of wages on 15 July was made under a term of the respondent's employment agreement for monthly payment of wages. The payment of wages to 22 July and the subsequent weeks of notices were in the settlement agreement, a subsequent employment agreement. However there were no further payments of wages to be made from which overpayments could otherwise have been recovered so s6 of the WPA does not assist.

- **What was the respondent entitled to under the settlement agreement?**

[23] Taking the words used in the settlement agreement, I am satisfied that a reasonable person in the field of interpreting employment agreements would take the natural meaning of the words regarding "wages to 22nd July" as providing for a single payment for the days of July up to that date and no further. I find no ambiguity which would allow me to ignore that meaning and consider whether the parties' intentions differed from the clearly expressed words drafted and discussed by the applicant's consultant and the respondent's lawyer. This objective approach, according to the meaning of the words as they appear on the agreement, must be preferred to Ms B's suggestion that they were intended to have no real meaning as only the global figure was relevant.

[24] The combined effect of the 15 July payments and the payment made by the company on 22 July under the settlement agreement was that the respondent was:

- paid twice for the period from 1 July to 22 July.
- paid for the days from 25 to 29 July (the remaining working days of the month) when her pay was, according to the plain meaning of the settlement agreement, meant to stop from 22 July.

[25] For that reason I find the applicant is entitled to recover wages paid to the applicant on 15 July, subject to the following considerations as to the appropriate amount of recovery.

Appropriate amount of recovery

[26] The applicant, by counsel's submissions, seeks relief under section 6 of the Contractual Mistakes Act 1977 ("the CMA"). Section 162 of the Employment Relations Act 2000 allows the Authority to make orders under the CMA.

[27] After hearing from the applicant's chief executive I accept that the applicant was influenced by a mistake of fact in entering the settlement agreement on 22 July, namely that Ms B had not already received wages up to the date of the agreement (and beyond to the end of the month). Ms B does not deny that she knew she had already been paid for July but did not see any need to raise this as she thought only the total sum provided in the agreement was important rather than how it was described. That was more than what the parties had bargained for, as recorded in their agreement. It resulted in, I find, a substantially disproportionate benefit to the respondent. There were no express or implied terms of the agreement obliging the applicant to assume the risk of mistake. Having satisfied, I find, the criteria for relief under s6 of the CMA, the applicant may be granted relief under s7.

[28] However the applicant's errors were not limited to making a "double payment". Three other items must be considered before establishing the appropriate measure of relief.

[29] Firstly, the settlement amount stated as being for wages to 22 July was also mistakenly only enough for wages to 18 July – as explained at paragraph [17] above.

[30] Secondly, in the course of preparation for the Authority's investigation, the applicant identified that the settlement agreement mistakenly did not include the correct amount for outstanding holiday pay due to the respondent on 22 July. She was entitled to holiday pay for a further 1.3 days worth $523.69 gross. This amounted to an entitlement to a further $357.52 nett due to the respondent (and a corresponding obligation on the applicant to pay to IRD the tax of $166.17).

[31] Thirdly, the applicant did not pay the respondent's July expenses as promised. It withheld payment of those expenses as part of the overpayment dispute with the respondent. It accepts the expenses should be deducted from the repayment amount being sought.

[32] Consequently the repayment amount must be reduced to allow for a further four days wages ($1100.07 nett), additional holiday pay ($357.52) and the unpaid July expenses ($103.42). The remaining amount totals $4231.98.

- **Relief**

[33] In considering whether to grant relief under the CMA s7 the Authority may take into account the extent to which the party seeking relief caused the mistake. In this case the applicant was entirely responsible for its own mistake.

[34] The respondent correctly points out that the applicant's chief executive knew that she had been paid in full for the month of July. The chief executive had taken the specific and proper step of ensuring on 15 July that the respondent was paid in full and as usual because discussions about her future with the company were ongoing at that time. Further 15 July was the day that all other staff were paid for the month, including the chief executive. He accepts responsibility for the error on 22 July rests with him and the other senior executive who signed the cheque for the respondent that day. His explanation is that:

(i) the applicant's consultant who drafted the agreement may not have been aware of the 15 July salary payment, and;
(ii) he simply overlooked it himself in signing the agreement on 22 July, and;
(iii) the company accountant who might have picked up the mistake was away that day.

[35] Other errors or shortcomings identified at paragraphs [29], [30] and [31] were also within the control of the applicant company, its officers and its representatives.

[36] In exercising the statutory discretion under CMA s7 to make an order of relief, I take into account the fact that the mistakes in payment were by the applicant's own hand and could have been avoided with reasonable care. There were no relevant external factors beyond its control. For this reason I consider it just to limit the grant of relief to the applicant by ordering the respondent to pay 80 per cent of the amount owed (after allowing for the conceded deductions), that is the amount of $3385.58. I consider this is also consistent with the Judicature Act 1908 s94B provision for partial relief for payments made under mistake of fact. **The respondent is ordered to pay the applicant the amount of $3385.58.**

[37] The respondent confirmed at the investigation meeting that she has the money available to pay if ordered to do so. I also take into account that she has been on notice since 25 July that a repayment might be necessary – that is from the next working day after receiving her settlement cheque.

Breach of term regarding reference

[38] The 22 July agreement provided that the applicant would supply the respondent "*with a written reference on terms and in a format which will be agreed between the parties prior to Friday 29th July 2005*" ("the reference").

[39] On 28 July, when it was apparent that the parties were in dispute over repayment of wages, the applicant advised the respondent's lawyer that it would "*not incur additional expense in provide* (sic) *written or verbal references*".

[40] On 8 August the applicant's lawyers were more direct. In a letter to the respondent's lawyer they advised: "*We are instructed that our client will provide the reference referred to in the settlement agreement in exchange for the refund of the overpayment …*"

[41] The respondent's lawyer replied that withholding the reference was a breach of an employment agreement and the applicant's good faith obligations. He suggested that the respondent could seek a compliance order and costs.

[42] The binding nature of the settlement agreement and its terms was confirmed by the parties having completed the certification procedures under s149 of the Employment Relations Act 2000. The agreement was certified on 5 August 2005.

[43] The applicant's chief executive had confirmed to the Labour Department officer authorised to certify the agreement that he understood the effect of s149(3) in making the 22 July agreement final, binding and enforceable.

[44] He told me in the investigation meeting that he had taken legal advice before giving his confirmation to the Labour Department officer. He also told me that he had seen refusing to provide the reference "*as a possible lever*" to get the money back.

[45] On 9 August the applicant did provide a draft reference to the respondent's lawyer. He replied the next day with some corrections suggested by the respondent. The applicant provided an amended draft reference on 12 August. The respondent remained dissatisfied with its contents which she regarded as "*not actually a reference as it makes no mention of my achievements or work ethic*". However, in light of the dispute over the overpayment of wages, she took no further steps to seek a reference from the applicant written in terms acceptable to her.

[46] I accept the applicant's explanation that from 12 August the issue of the terms of the reference was in the respondent hands. Hearing nothing further from her on it, the applicant did nothing further. That however does not deal with the period from 29 July to 12 August when the applicant was in breach of the term of the settlement agreement to provide an agreed written reference.

[47] The respondent's evidence was that she began looking for a new job from 21 July. In the following week she contacted recruiting agents specialising in her field of employment. She was disadvantaged in the process of applying for jobs and being interviewed by not having the benefit of a reference from her employer of the last 12 years. Because of the opaque nature of recruitment processes the respondent could not provide evidence of the exact effect on her job prospects of not having had the reference to include with her applications and discuss in interviews. She told me she had to make arrangements for potential employers to confirm her experience and attributes with people outside of her former employer. She was eventually offered a satisfactory position and started a new job on 3 October.

[48] In the course of preparing for the Authority's investigation, the applicant did provide the respondent with a final copy of its reference, on its letterhead and signed. The respondent's view is this was of no use to her by that stage, was still not on agreed terms, and was still in breach of the settlement agreement.

- **Compensation**

[49] Although I accept not having the reference was a handicap, I am not prepared to grant the respondent's claim for a further one month's salary as compensation for the applicant's breach of the settlement agreement term to provide a reference. From 12 August the respondent gave up trying to get an acceptable reference, and, although this was past the agreement's date of 29 July, she made the decision not to keep trying to mitigate the damage from the applicant's breach. Compensation is also intended to put the wronged party in the position, as best money can, she or he would otherwise have been but for the wrongdoer's breach. In this case the breach occurred in the period of paid notice which was effectively a job search period paid for by the company. From the information available, I cannot properly assess how much the absence of an acceptable reference extended her job search beyond the paid notice period.

- **Legal expenses**

[50] The respondent claim for her legal expenses on the reference issue is granted. The expenses arise directly from the applicant's breach. I was shown an invoice from the respondent's lawyer for $239.63 (inc GST). I am satisfied that the items on that invoice relate solely to correspondence and discussions with the applicant's representatives about the provisions of the reference and not prior negotiations about the settlement agreement. Those costs are modest and I consider it reasonable in these circumstances for the applicant to meet them in full. **The applicant is ordered to pay the respondent the amount of $239.63 in reimbursement of her legal costs regarding the applicant's breach of the term regarding the reference.**

- **Penalty**

[51] The applicant's breach of the terms of settlement regarding the reference is also liable to a penalty under the Employment Relations Act 2000.

[52] The settlement agreement was an employment agreement. A party breaching an employment agreement is liable to a penalty under s134.

[53] From 5 August 2005 the settlement agreement was also an agreement certified under s149 of the Act. Section 149(4) provides that a person breaching an agreed term of settlement is liable to a penalty imposed by the Authority.

[54] The respondent's claim for a penalty is brought within the required 12 month period of the breach. The applicant's breach harmed the respondent's ability to seek a new job – the very reason for the term providing for an agreed reference. The applicant's breach was deliberate and the evidence of its occurrence is admitted – it was a "*lever*" used to seek repayment of money. It was made after the applicant's chief executive confirmed under s149 that he understood that the agreement was final, binding and enforceable. It would not be just to allow the applicant to enforce the terms of the settlement agreement regarding the amount of money it was required to pay if its deliberate breach of the term regarding the reference went unpunished. For this reason, **the applicant is ordered to pay a penalty of $1000 under s134 and s149(4) of the Act.** The Act allows for the Authority to order the whole or part of the penalty to be paid to a person. **I order**

that $500 of the penalty ordered be paid by the applicant to the respondent and the remaining $500 be paid by the applicant into the Authority, that latter amount to be paid by the Authority into the Crown Bank Account.

Summary of orders

[55] **The respondent is ordered to pay to the applicant $3385.58.**

[56] **The applicant is ordered to pay**:

- **to the respondent the amount of $239.63 in reimbursement of her legal costs regarding the applicant's breach of the term regarding the reference.**

- **a penalty of $1000 ordered under s134 and 149(4) of the Act – $500 to be paid directly to the respondent and $500 to be paid into the Authority, that latter amount to be paid by the Authority into the Crown Bank Account.**

Costs

[57] The applicant has sought costs on a solicitor-client basis. The respondent has sought her costs. The parties are invited to agree costs. In the event that they are unable to do so, leave is reserved to the parties to apply for a determination on costs. Given the nature of this issue and the orders made, this may be a matter where it is appropriate that costs should lie where they fall.

Robin Arthur
Member of Employment Relations Authority