IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 56
5558749

	BETWEEN	ANGELA WATSON Applicant
	AND	CAPITAL & COAST DISTRICT HEALTH BOARD Respondent

Member of Authority:	Michele Ryan
Representatives:	David Beck and Andrew McKenzie, Counsel for the Applicant Paul White, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	Furnished consecutively on 28 May 2015 from the applicant and then from the respondent
Determination:	29 May 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 4 May 2015 I issued a determination: *Watson v Capital & Coast District Health Board* [2015] NZERA Wellington 47 (the substantive determination).

[2] Para. [141] of the substantive determination provides the following:

> ***"Orders***
>
> *(a) Capital and Coast District Health Board is to reinstate Ms Watson to its payroll from the date of this determination.*
>
> *(b) I recommend the parties attend mediation within 2 weeks of this determination to discuss what arrangements are required to have Ms Watson return to Ward 2, or to reach agreement on an alternative position. Should the parties agree to an alternative role within the DHB Ms Watson must comply with the DHB's health assessment policy regarding internal transfer.*

> *(c) Pursuant to s.128 Capital and Coast District Health Board is ordered to reimburse Ms Watson the sum equal to ordinary time lost wages for the period between 6 September 2013 and 20 January 2014*
>
> *(d) Pursuant to s.123(1)(c)(i) Capital and Coast District Health Board is ordered to pay Ms Watson a total sum of $9,000 as compensation for humiliation, loss of dignity and injury to feelings associated with her two personal grievance claims."*

[3] Through her counsel, on 25 May 2015 the applicant, Ms Watson, lodged a statement of problem asking the Authority to urgently resolve the following matters:

> "*Compliance Order – section 137(1)(b)*
> *..Unjustified disadvantage (including interim reinstatement)"*

[4] As to the allegation of an "*unjustified disadvantage (including interim reinstatement)"*, that claim appears to have been made prospectively, in apprehension that Ms Watson would be dismissed on 26 May. I understand that event did not occur.

[5] On 27 May 2015 during a telephone conference I advised I would deal with the request for a compliance order immediately and that issue is the subject of this determination.

[6] There is no suggestion that the DHB has not complied with para. [141] (a), (c) and (d). It has returned Ms Watson to its payroll, reimbursed wages owed, and paid the ordered sum of compensation. The focus of Ms Watson's claim in this application is firstly on para. [141](b) of the substantive determination. She submits that the order to be returned to the payroll carries a concomitant that the parties must engage in facilitated counselling. She refers to para. [128] of the substantive determination as follows:

> *[128] I order the DHB to return Ms Watson to the payroll with immediate effect. <u>The parties each accept facilitated counselling will be necessary to restore a working relationship</u>. I recommend the parties attend mediation within 2 weeks of this determination to discuss what arrangements are required to have Ms Watson return to Ward 2, or to reach agreement on an alternative position.*
>
> *[emphasis added]*

[7] I do not accept the proposition that that facilitated counselling is allied to reinstatement to the payroll. Para. [141] sets out three specific orders and further recommends at [141](b) that the parties attend mediation. The words used at para. [141](a), (c), and (d) emphatically direct or order the DHB to undertake a particular

action. In contrast, para. [141](b) opens with the phrase "*I recommend…".* Those words clearly indicate that the remedy is not compulsory. In any event there is no reference to "*facilitated counselling"* at all in para [141](b).

[8] I agree with counsel for the DHB that s.137(1)(b) requires a person to have not observed or complied with "*any order, determination, direction or requirement made or given…by the Authority…*" There are no words at s.137(1)(b) that require a person to comply with a recommendation. Accordingly there are no grounds on which an order for compliance could be imposed to enforce the recommendation at para. [141](b). It follows that the DHB is under no obligation to comply with para.[141](b). I note however that the parties did attend mediation on 20 May 2015. That discussion is confidential and I can take the matter no further.

[9] Next, pursuant to s.137(2) Ms Watson requests the Authority order the DHB to:

- *Immediately cease from a course of dismissal for incompatibility and withdraw its threat of dismissal of the applicant.*
- *Re-engage constructively whether by further mediation or by meeting to develop a properly collaborative and structured return to work programme involving an agreed reintegration process that builds on previous consensus and has as a central theme early facilitation between the applicant and Ms Slade and anyone else to return the applicant to a safe working environment.*
- *If the respondent has no intention of the above then direct them to constructively explore alternative placement options that utilise the applicant's speciality as a children's nurse beyond a current single focus on NICU.*

[10] The requested order at the first bullet above appears to relate to the apprehension referred to at para. [4]. The Authority cannot issue an order in response to an apprehension of future non-compliance with orders in the substantive determination without evidence of previous non-compliance with those orders. In this respect s.137(2) does not provide the Authority with jurisdiction to make additional orders to ensure compliance or observance (of a matter listed at s.137(1)) without first establishing that there has been either non-compliance or non-observance with that matter. As noted there is no evidence that the DHB has not complied with the orders set out in [141]. I have no ability to make the orders requested by Ms Watson at bullet points 1 to 3 of her submissions.

[11] Ms Watson's application for a compliance order is dismissed.

Costs

[12] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority