IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 19
3040971

	BETWEEN	XIE PLANS LIMITED Applicant
	AND	NI NI Respondent

Member of Authority:	Robin Arthur
Representatives:	Edwin Morrison and Julie Ding, counsel for the applicant Jay Park and Elaine Deng, counsel for the respondent
Investigation Meeting:	17 October 2019
Determination:	16 January 2020

DETERMINATION OF THE AUTHORITY

A. Ni Ni must comply, within 30 days of the date of issue of this determination, with the terms of her settlement agreement with Xie Plans Limited.

B. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.

Employment Relationship Problem

[1] This determination concerns a dispute between the parties over the validity and implementation of terms of a settlement agreement certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act 2000 (the Act).

[2] The agreement resolved an employment relationship problem Ni Ni had raised in a statement of problem lodged in the Authority on 3 April 2018.

[3] Ms Ni had worked as an architectural draughtsperson for Xie Plans Limited (XPL) from 20 May 2015 to 6 December 2017. She said XPL wrongly classified her as an independent contractor through her employment, not an employee, and had not paid her properly for all her work.

[4] XPL's statement in reply accepted it was "incorrect" in treating Ms Ni as if she was a contractor. It proposed remedying the situation by meeting with Ms Ni and appointing an accountant jointly to claim back from IRD all tax and levy payments such as GST, ACC levies and income tax Ms Ni had paid as an independent contractor since she was hired to work for XPL. It said the accountant would then calculate the PAYE and other payments required to be deducted from Ms Ni's pay. XPL would then pay those amounts with the funds from the taxes and levies Ms Ni had claimed back from IRD.

[5] The Authority referred the parties to mediation where terms of settlement were agreed and certified by the mediator under s 149 of the Act on 25 July 2018. Although those terms were agreed to be confidential, the following terms had to be disclosed for the purposes of this determination:

> 1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties except where the parties are required by this agreement to communicate with the Inland Revenue Department (IRD) and the parties' accountants.
>
> 2. XIE PLANS LIMITED shall, without admission of liability, pay Ni Ni's solicitor's trust account, within 7 working days of the date of this agreement, the sum of $30,000.00 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act (Settlement Sum). This amount will be paid by way of direct credit.
>
> 3. The parties agree that:
>
>   a) The sum of $5,000.00 will be deducted from the Settlement Sum on receipt of the Settlement Sum by Ni Ni's solicitor.
>
>   b) The sum of $15,000.00 will be released to Ni Ni upon receipt of the following:
>
>   i. Authorisation from Ni Ni to IRD to transfer her income tax paid on her income received from XIE PLANS LIMITED during her employment, and GST payments received from XIE PLANS LIMITED during her employment from Ni Ni to XIE PLANS LIMITED;

ii. XIE PLANS LIMITED's accountant confirming receipt of all information from Ni Ni required by IRD to assist with transfer of tax as set out in subparagraph i above; and

iii. Confirmation that Ni Ni has accounted to IRD for her income tax on income received from XIE PLANS LIMITED and GST received from XIE PLANS LIMITED during her employment accompanied by copies of statements from IRD as proof of that accounting.

c) The sum of $10,000.00 to be retained (Retention) in Ni Ni's solicitor's trust account under XIE PLANS LIMITED's accountant has completed the transfer of tax as set out in subparagraph b above and in the event that IRD concludes that Ni Ni's tax obligations have been underpaid, such underpayment shall be deducted from the Retention and the balance of the Retention shall be released to Ni.

4. The parties agree that any tax overpayment made by Ni Ni in excess of her tax obligations shall be either transferred back to Ni Ni's account if possible, or refunded to Ni Ni by XIE PLANS Limited.

5. XIE PLANS LIMITED agrees to use its reasonable endeavours to ensure the accounting and transfer of tax by IRD from Ni Ni to XIE PLANS LIMITED is completed as quickly as possible.

6. In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wage Act 1983 or the Holidays Act 2003) as specified in s 148A(3) of the Employment Relations Act 2000.

7. …

8. …

9. This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[6] The mediator's certificate included confirmation that he had explained the effect of the relevant sections of the Act and was satisfied the parties had understood their effects.

[7] Under s 149(3) of the Act, once the agreement was signed by the mediator, its effect regarding the agreed terms was threefold. Firstly, those terms are final and binding on, and enforceable by, the parties. Secondly, those terms may not be cancelled under the sections of the Contract and Commercial Law Act 2017 relating to misrepresentation or breach. And, thirdly, except for the purpose of enforcing its terms, no party may seek to bring those terms before the Authority or the Employment Court for action or review.

[8] The mediator's certificate, using a standard form, also included the following confirmation relating to s 148(2) of the Act:

> I confirm that the parties have advised me that no minimum entitlements (monies payable under the Minimum Wages Act 1983 or the Holidays Act 2003) have been foregone in the reaching of this settlement.

[9] Section 148(2) of the Act states that a mediator must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party's entitlements under those two statutes.

What happened following settlement?

[10] The day after the agreement was signed and certified in mediation Ms Ni's counsel at the time, John Hall, sent a two-line email to XPL's lawyers:

> Thank you very much for a very fruitful and firm settlement yesterday.
> Please see our account slip here attached.

[11] The account slip referred to was for the purpose of transferring the agreed settlement funds to the trust account of Ms Ni's lawyers. In the following week XPL's lawyers transferred the funds and forwarded to Mr Hall an email from XPL's chartered accountant, Jing Wu. Ms Wu's email attached what was described as an "engagement letter" for signature by Ms Ni. The letter referred to was a form with the heading "Client Authority to Act (Individual)" used by Ms Wu's firm of chartered accountants. The form provided identified Ms Wu as the person who would be Ms Ni's tax agent. Its wording authorised Ms Wu to act as Ms Ni's tax agent and "to obtain information from Inland Revenue about all tax types (except child support)".

[12] Ms Wu's email included an earlier email from XPL shareholder and office manager Sharon Liu setting out instructions on what Ms Wu was expected to do. These indicated the company's understanding of the steps agreed in their settlement with Ms Ni:

> 1. Obtain Ni Ni's tax information from IRD and confirm that her Tax and GST claim were correct.
>
> 2. Ni Ni must give you all the information you require for the tax and GST claim; Please let us know if there were anything wrong for her files;
>
> 3. If everything is all right on Ni Ni's side, please transfer all the income tax and GST from Ni Ni's IRD account to Xie Plan Ltd's account for the period 20th May 2015 to 6th Dec 2017;

4. Claim PAYE as you have calculated for Ni Ni as an employee for the period from May 2015 to December 2017 (Ni Ni said she was not a registered kiwisaver member, but if you think it is not the right situation please let us know). Please let us know if we need to pay more than what Ni Ni has paid, we need to tell her lawyer then we will use the retention money to pay the difference.

5. Please give an explanation to IRD and see if we can avoid the fine for the PAYE late payment.

[13] Ms Ni did not sign and return the authorisation form to Ms Wu. Around three weeks' later Mr Hall responded to a query from XPL's lawyers about the delay. His letter was the first indication that what Mr Hall had earlier described as a "fruitful and firm settlement" was about to unravel into an extended wrangle that would eventually result in XPL asking the Authority to issue a compliance order.

[14] Mr Hall's letter, dated 21 August 2018, said Ms Ni was concerned because certain parts of her income records with IRD related to income derived from sources other than XPL and she objected to XPL having access to that separate income information. He referred to the authority form Ms Ni was asked for complete for XPL's accountant and questioned the need for it. He said the only information Ms Ni had to provide under the settlement agreement was "information provided to or required by IRD".

[15] His letter also asked for copies of records "that should have been attached" to a letter sent to him on 23 July 2018. This referred to a letter XPL's lawyers sent to Mr Hall two days before the 25 July mediation. The letter expanded on the proposal in XPL's statement in reply to have Ms Ni reclaim money paid as GST and ACC levies and to recalculate payments made to her to properly identify the liabilities for PAYE deductions and holiday pay arising from her employment. The XPL letter referred to attaching a copy of a "calculation summary" and revised MYOB payroll records prepared by XPL's accountant.

[16] On 22 August Mr Hall sent a further letter explaining his request for copies of XPL's calculations:

> [Ms Ni] wishes me to clarify that what we are looking for a copy of is the calculations behind the sum that [XPL] arrived at. As you will remember, our client did not get enough time to inspect those before the mediation as they were only made fully available during the course of the mediation. Hopefully, these can then be used as a basis of separating the amount that [XPL] is entitled to have access to from the income records that [XPL] is not

> entitled to have access to because they relate to income not derived from [XPL].

[17] XPL's lawyers sent Mr Hall the requested copies. Those calculations, prepared by XPL's accountant before the 25 July mediation, were set out in two columns. One column tallied payments made on invoices from Ms Ni for each of the two complete years and one part-year she worked for XPL. These amounts included the GST paid by XPL on each invoice.

[18] A second column set out XPL's calculations of what should have been paid to Ms Ni as ordinary hours, holiday pay, public holidays, commission and bonuses if she had been classified as an employee. Deductions for PAYE and Kiwisaver employee deductions were then calculated to identify what net payment should have been made to her as an employee. This final net amount was compared with the gross amounts paid on her invoices, with the difference then being labelled as the amount "overpaid". That amount comprised $8,026.09 for the year to 31 March 2016, $18,634.69 for the year to 31 March 2017 and $12,914.85 for the year to 31 March 2018. The total of $39,575.63 for those three periods was labelled on a summary sheet as "overpaid to Ni Ni".

[19] The letter from XPL's lawyers providing further copies of those calculations also explained that the authority requested from Ms Ni was important because XPL's accountant needed it to arrange for IRD to transfer any tax credits from Ms Ni's account to XPL's account. They proposed amending the authority form so XPL's accountant would not disclose to XPL any information from Ms Ni about her income not derived from work for XPL. They said the accountant would be bound by her professional standards to keep such information confidential.

[20] No resolution was reached on those arrangements and Ms Ni did not provide any authority form.

[21] When XPL's lawyers again pressed for Ms Ni to assist in completing the steps set out in the settlement agreement Mr Hall said compliance required her "to meticulously calculate her sources of income over a two year period and separate that income received from [XPL] from income from other sources". Mr Hall then asked XPL's lawyers to provide the company's GST number so Ms Ni and her accountant could provide IRD with the correct identifier for XPL "when they come to present all

the correct calculations to the IRD as required by the agreement". This was the first reference in correspondence between the parties to Ms Ni having her own accountant and to providing information to IRD through that accountant. XPL's lawyers responded by saying that the intention of the agreement was that XPL's accountant would "act in relation to the transfer of taxes, not Ni Ni's accountant".

[22] A stand-off then developed between the parties about who should provide information to IRD, what information was required and whether XPL should provide its GST number to Ms Ni's accountant as part of that process. XPL sought to break that impasse by lodging a statement of problem in the Authority on 27 September 2018. It said Ms Ni had failed to comply with her obligations under the settlement agreement. It sought orders requiring her to comply and to pay IRD penalties and interest said to have been incurred by XPL as a result of Ms Ni's failure.

[23] Ms Ni lodged a statement in reply, on 15 October 2018, stating she was not required "to enter contractual relationships" with XPL's accountant and to do so would breach her privacy. Her reply said her accountant had "partially completed" the task of a thorough inspection of her accounts but she could not comply with the agreement because XPL refused to provide its IRD number to her. It also said IRD had told her accountant that XPL's accountant had not yet informed IRD that XPL had employed Ms Ni.

[24] Ms Ni's reply said completion of the terms of the agreement did not mean XPL had to receive information from her, rather IRD had to receive it and then XPL's accountant could receive it from IRD. Her reply said she "[did] not understand any part of the settlement agreement to require her to provide information directly to [XPL] or its agents or employees".

[25] The parties were then directed to mediation. The direction encouraged them to take a practical and problem-solving approach to sorting out this matter and made this comment:

> Both parties, and their lawyers, should be conscious they do not have much hope of recovering unnecessarily incurred legal costs over technical arguments if the matter is not resolved in mediation and then proceeds to an Authority investigation. Sorting this out now, directly and quickly, is the cost-effective and practical thing to do.

[26] Despite this clear encouragement the lawyers for both parties lodged memorandum cavilling at the direction. Mr Hall raised an alternative argument that the whole settlement agreement, while apparently conclusive at the time it was made, was now void for lack of certainty. XPL's lawyers complained that further mediation was giving Ms Ni an opportunity to renegotiate the terms. A Minute of the Authority, issued in response, advised the parties that the direction to attend mediation was for the purpose of resolving implementation of the agreed terms, not to change them.

[27] However mediation, held on 5 December 2018, failed to resolve the matter. XPL then lodged an amended statement of problem on 8 May 2019 with Ms Ni lodging an amended statement in reply on 7 June 2019.

[28] The changes in XPL's amended statement largely comprised updating the chronology of events since its initial application made seven months earlier.

[29] Ms Ni's amended reply however dropped her earlier concerns about privacy and added a new argument that she was "being denied her minimum entitlements". She said it was XPL, not her, who was refusing to comply with the agreement. She said that, if the agreement was understood as a full and final settlement, there was "significant risk that [she] will have foregone her holiday pay entitlements". She said she was not paid holiday pay and submitted that "s 149 does not apply because the mediator has not validly signed the agreement". Alternatively she said the agreement should be given "a broad and generous interpretation" allowing her to conduct her own calculations of what income tax she paid, what tax liability she had, what her net income was and what holiday pay she had received. She said she had completed those calculations and had submitted them to XPL in compliance with the agreement. She said the agreement only required her to provide those calculations, not "raw data". She said it had become clear to her that XPL intended to use the raw data to "construct calculations" that showed XPL had "overpaid" her. She said that those activities would be carried out under a settlement agreement that deprived her of the right to ensure her minimum entitlements would be provided.

[30] Attached to Ms Ni's amended statement in reply was a copy of a letter sent to XPL's lawyers in January 2019. The letter attached calculations prepared by her accountant of XPL's liability for payments of PAYE and KiwiSaver Employer contributions. Those calculations treated the payments she had received from XPL in

the 2016, 2017 and part-2018 years as net income. This differed from the analysis of XPL's accountant because Ms Wu's calculations were based on the payments made to Ms Ni in those periods being gross income, including the GST that XPL paid on her invoices. The resulting difference, under Ms Ni's analysis, would require XPL to pay around $30,000 more in PAYE and KiwiSaver contributions, without XPL getting the benefit of refunds for the GST it had paid on what XPL had, at the time, treated as services being provided to it by Ms Ni. For Ms Ni the outcome, if her calculations were accepted, would be that she would be credited with having paid a higher amount of tax through PAYE deductions. This higher amount could then assist her in meeting whatever other tax liabilities she might have on other income.

[31] In March 2019 Mr Hall sent IRD the calculations prepared by Ms Ni's accountant. And, on 8 May 2019, her accountant also sent IRD amended income tax returns for Ms Ni for the 2016 and 2017 year. The accountant's accompanying letter was dated 16 April 2019 but was sent late in the evening of 8 May. The latter date was the same day XPL had lodged its amended statement of problem in the Authority.

[32] Both amended returns reported a radically different amount as income Ms Ni earned as salary or wages from XPL. Her amended 2016 return said her gross earnings for work for XPL were $106,282. This contrasted with the figure of $42,210 for income earned (as payments to her as an independent contractor) used in the earlier and separate calculations for that year prepared by both XPL and Ms Ni's accountants. Similarly, the 2017 amended return said Ms Ni had gross earnings of $115,944 from XPL, compared to the earlier calculations based on income totalling $67,760.

[33] In an accompanying letter to IRD Ms Ni's accountant said the reason for filing amended returns was due to an error noticed "after solve it in Employment Tribunal and Mediation (*sic*)". A reply from an IRD representative to this correspondence noted that the salary and wages shown in Ms Ni's amended returns for 2016 and 2017 did not match IRD records and asked him to contact the employer about updating its PAYE schedule. The IRD representative also asked why the amended returns showed a substantial drop in Ms Ni's "business income" (which was mostly the money she had been paid as an independent contractor). The IRD representative also suggested another option was to "send all the documents of Employment Tribunal and Mediation that shows Ni Ni correct salary/wages for 2016 and 2017 financial years".

The Authority's investigation

[34] Against that extensive background the Authority investigation considered written and oral evidence from Ms Liu, Ms Wu, Ms Ni and Caesar Dai.

[35] Mr Dai holds the position of senior manager at Red Star Enterprises Limited. He said the company acted Ms Ni's accountant and tax agent and he had provided accounting services since 2012. Mr Dai is the person referred to in this determination as Ms Ni's accountant.

[36] All four witnesses attended the investigation meeting and, under oath or affirmation, answered questions from me and the parties' representatives. The representatives also provided closing submissions on the issues for determination.

[37] Those issues were:

(i) Was the settlement agreement of 25 July 2019 invalid or unenforceable as a result of a prospective breach of s 148A(2) of the Act?

(ii) If not, had Ms Ni complied with the terms of the settlement agreement?

(iii) If not, what orders should be made regarding compliance?

(iv) If non-compliance was established, was Ms Ni liable to reimburse Xie Plans Limited (XPL) for any penalties or interest that IRD required XPL to pay as a result of her not complying with the agreed settlement terms?

(v) Should either party contribute to the costs of representation of the other party?

[38] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The validity of the agreement

[39] The issue regarding the validity of the agreement arose from Ms Ni's assertion that she had worked more hours for XPL than accounted for in the invoices Ms Wu used to calculate what payments were due to Ms Ni. On this basis Ms Ni said XPL's calculations of what she should have been paid as an employee did not provide all her minimum entitlements for all hours worked and all holiday pay due to her.

[40] The next step in that argument was that the Act forbade a mediator from certifying a settlement agreement where a party agreed to forgo such minimum entitlements under the Minimum Wages Act 1983 and the Holidays Act 2003. Accordingly, on that argument, the mediator could not have validly certified the agreement so its term regarding a full and final settlement of all matters arising out of the employment relationship did not apply. On that argument Ms Ni could disregard the agreed term on finality and the effect of provisions in s 149(3) that such terms were final and binding and could not be cancelled due to misrepresentation or breach of contract. She could then pursue further payments for such alleged entitlements.

[41] For the following reasons, none of those arguments withstood scrutiny on the basis of the facts of Ms Ni's particular case or applicable legal principle.

[42] In *TUV v WXY* the Employment Court analysed the application of s 149(3) where a party seeks to challenge the validity of an agreement certified by a mediator under s 149 or revisit the terms of such an agreement.[1] The Court held that s 149(3) was not directed at deeming validity of the agreement itself, including whether the fundamentals of contract formation existed in a particular case. Rather, where no legitimate challenge to the validity of the agreement arose, the subsection was intended to limit inquiry into the terms of that agreement. This limit barred further action being pursued due to what have been called "instances of settlor remorse". Cases where the fundamentals of contractual formation were not made out, so there was no agreement to which s 149(3) could properly apply, were "likely to be rare because of the hurdles that must be overcome in establishing, for example, lack of mental capacity, knowledge and unconscionability".[2]

[43] The relevant principles regarding unconscionable dealing, which the Authority or the Court may apply in exercising their respective equitable jurisdictions, are not intended to relieve parties from hard bargains and are unlikely to apply where a weaker party received independent legal advice before entering a settlement agreement.[3]

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[1] [2018] NZEmpC 154.
[2] At [45]-[46].
[3] *Gustav & Co Limited v Macfield Limited* [2007] NZCA 205 at [29] and [31] (approved by the Supreme Court in *Gustav & Co Limited v Macfield Limited* [2008] NZSC 47 at [6]).

[44] In those situations the general principle is that further litigation is not available "as a means of enabling parties who say - we wish we had gone about things differently and been more careful and insistent - to get a second bite at the cherry".[4]

[45] In Ms Ni's case there was no compelling evidence in support of an argument that the fundamentals of contract formation or essential knowledge of the nature of the bargain was missing. Rather, the evidence of Ms Ni and Mr Dai established that some 'settlor remorse' had arisen due to a conversation she had with him on the day after the settlement agreement was signed and certified.

[46] There was no element of unconscionability established about what happened before or during the mediation. Ms Ni was represented by legal counsel in the exchanges with XPL before the mediation and during it. XPL's proposal for resolution, involving the arrangements for reallocation of tax credits, was clearly signalled in its statement in reply to Ms Ni's application and in its letter to her counsel, Mr Hall, sent two days before the mediation with copies of its calculations. Although evidence about the content of what was said in mediation is not generally admissible, the documents provided by agreement for this investigation included correspondence between Mr Hall and XPL's lawyers. Those documents included an email Mr Hall sent on 22 August 2018 where he described those calculations as being "fully available" during the course of mediation. And, as already noted Mr Hall had, on 26 July 2018, unequivocally described the outcome achieved in mediation as "very fruitful and firm".

[47] However the evidence of Ms Ni and Mr Dai revealed that Ms Ni's commitment to the agreement had changed substantially by the end of a conversation she had with Mr Dai on 26 July 2018. She telephoned him after the mediation and sent him a copy of the settlement agreement. Ms Ni said Mr Dai told her that the agreement was "not processable" and that "the money I had received should have been recognised as net income and not gross income because I was an employee". She said Mr Dai told her that "whenever an employee received money it is always net income and the employer must deduct PAYE before making payment".

[48] Mr Dai had not attended the mediation. What he said to Ms Ni about the settlement agreement misunderstood that payments to her while she worked for XPL

[4] *Hildred v Strong* [2007] NZCA 475 at [46] cited in *Roy v Board of Trustees of Tamaki College* [2016] NZEmpC 20 at [173].

were made on the basis that she was an independent contractor, not an employee, and were gross amounts including the element required for GST. His assertion that the payments had to be treated as net amounts was incorrect and inconsistent with the basis of the agreement made.

[49] Her argument that she was entitled to pursue further payments for minimum entitlements was similarly misconceived.

[50] A certified agreement is not made invalid or limited in the scope of its terms merely by a subsequent declaration by a party that minimum entitlements were due to but not paid to that party. The limit under s 148(2) of the Act on a mediator certifying agreed terms concerns what is apparent from the face of the agreement. It refers to whether a party has agreed to forgo entitlements. This is clear from the form of certification routinely used by the mediator which confirms that "the parties have advised me that no minimum entitlements (monies payable under the Minimum Wage Act 1983 or the Holidays Act 2003) have been foregone in the reaching of this settlement". A party cannot, with the knowledge that they do or may have such entitlements, advise the mediator that they have not foregone entitlements and later seek to overturn the full, final and binding nature of their agreement to pursue those entitlements.

[51] Ms Ni, in the closing submissions of her counsel, sought to rely on an earlier Authority determination in support of the principle that minimum entitlements could be pursued notwithstanding a 'full and final' clause in a settlement agreement certified under s 149 of the Act.[5] However the rationale applied in that other case arose from circumstances different to those of Ms Ni. The agreement in that other case was made before a subsequent decision in an Employment Court case opened the possibility of a wage arrears claim for duties carried out by a certain category of worker that were not paid duties at the time the agreement was made. Simply put, the law changed. In that particular case the finality of the agreement in respect of any further claims did not apply because payment to such workers for carrying out those duties was not in the contemplation of the parties at the time. This logic did not apply to Ms Ni's circumstances because her later argument about minimum entitlements concerned hours that she said she had worked. If she had an argument that the full extent of her work was not covered by the calculations provided by XPL, it was open

[5] *Cleverley v Selwyn House School Trust Board* [2016] NZERA Christchurch 43.

for her to raise and pursue it at the mediation. The extent to which that was or was not done ultimately did not matter in circumstances where she was represented throughout and there was no evidence of any real concerns regarding mental capacity, knowledge, unconscionable conduct by a party or a representative, criminal behaviour or duress in respect of the agreement reached.

[52] Rather, on the basis of her own evidence, what most likely happened was that Ms Ni's head was turned on the basis of her conversation with Mr Dai, who had misapprehended the intention and effect of the agreement in resolving employment status and tax matters. This resulted in some 'settlor remorse' on Ms Ni's part. Mr Dai's comments led her to believe that she could and should have got a better financial outcome in the overall balance of the agreed terms. Her subsequent argument regarding minimum entitlements and the validity of the finality term in the agreement was, bluntly put, seeking a second bite of the cherry. It was not a sufficient basis to accept that the agreement reached was not valid and enforceable, that she was not bound the finality term of the agreement and that she could engage in further litigation about a supposed "risk" that she had been denied minimum entitlements.

Had Ms Ni complied with the agreed terms?

[53] The effect of the mistaken view held by Ms Ni and Mr Dai only really became clear from their written witness statements and answer to questions in the Authority investigation meeting. This cast a new light on Ms Ni's earlier refusal to provide an authority for XPL's accountant to contact IRD about transfer of tax credits.

[54] It also became apparent that, as she later reviewed the calculations XPL had provided prior to the mediation, Ms Ni became concerned about the reference in them to her being "overpaid". This was a 'short hand' reference Ms Wu used in preparing that material for XPL. It referred to the notion that payments made to Ms Ni had included payment of GST which were to be claimed back from IRD in the accounting process to move credits from Ms Ni's account to the account of XPL as an offset to the correct PAYE deductions XPL should have made and submitted to IRD if it had correctly dealt with her as an employee throughout the time that Ms Ni worked for the company.

[55] Ms Ni had become offended by the notion that she was 'overpaid' rather than, as she saw it, not fully compensated for the real value of her work for the company.

This was, in part, the motivation for directions she gave Mr Dai to file the amended tax returns for 2016 and 2017 that suggested she was, in fact, paid almost twice as much in gross earnings from XPL as she actually was over that two year period. The reality that she had thereby deliberately provided incorrect information to IRD about the amounts XPL actually paid her only dawned on Ms Ni during the Authority investigation meeting.

[56] The effect of those various activities by Ms Ni meant that she had not diligently followed the steps contemplated in her settlement agreement with XPL, certainly in respect of the order of events. This, in turn, was due to advice from Mr Dai who, on his view of the requirements of the agreement, told her that she should not provide information to XPL's accountant and that she need not do anything until XPL had provided its account to IRD of the company's liability for PAYE deductions on payments made to Ms Ni.

[57] Ms Ni's argument that she had complied relied on the notion that she had, through Mr Dai, provided information directly to IRD, including her own different calculation regarding payments received. This was said to be consistent with the reference in clause 3b)i of the settlement agreement to "authorisation from Ni Ni to IRD" and in clause 3b)ii to "all information from Ni Ni required by IRD to assist with the transfer of tax as set out in subparagraph i above".

[58] However, taken in the context of the whole agreement, an ordinary and objective reading of the terms indicated Ms Ni was supposed to provide information to both XPL and IRD. This is apparent from the reference in the first line of clause 3 b) which refers to compensation funds being released to her "upon receipt" of various items, including the authorisation to IRD to transfer tax credits from her to XPL, and XPL's accountant "confirming receipt of all information from Ni Ni". The terms clearly intended XPL to be the party in "receipt" of that information.

[59] The resulting conclusion is that Ms Ni had not yet, by the time of the Authority investigation meeting, fully completed the steps required of her to assist XPL in carrying its obligation at clause 5 of the agreed terms to use its reasonable endeavours to ensure the accounting and transfer of tax by IRD from Ms Ni to XPL was completed as quickly as possible.

[60] There was some discussion during the evidence of both Ms Wu and Mr Dai about the desirability of arrangements with IRD being made through XPL's accountant. However it did not appear that Ms Ni or her representative had sought to have her accountant involved prior to or during the mediation. XPL's proposal for settlement, set out in its statement in reply in April 2018, had referred to appointing "an accountant jointly". When there was a subsequent concern about the confidentiality of Ms Ni's information about other income, a sensible proposal was made for its protection. There were however some technical reasons, concerning the intricacies of calculating tax liabilities across various forms of income that did mean XPL's accountant could legitimately need accurate information about that other income. In Ms Ni's case this concerned some rental income she had received in the relevant years, apparently worth some thousands of dollars. Such income might have allowed her to write off some personal tax liability but that write off or reduction would not apply to tax credits to be transferred to XPL's account with IRD.

What orders for compliance could and should be made?

[61] XPL's application to the Authority sought an order requiring Ms Ni "to comply with the Record of Settlement, and in particular clause 3". Its subsequent evidence and submissions did not specify how such an order should be worded or what particular requirements it might make. This was understandable given various events during the course of the proceedings, now regrettably extended over more than 15 months since XPL first lodged its application for such an order.

[62] Matters such as the inaccurate amended tax returns for 2016 and 2017 that Mr Dai had lodged on Ms Ni's behalf could not be remedied merely by an order for her to comply with clause 3 of her agreement with XPL. That was a matter that Ms Ni and XPL would need to address and resolve with IRD.

[63] Meanwhile it was appropriate to make an order under s 137(1)(a) and (2) of the Act requiring Ms Ni to comply with clause 3 of her certified settlement agreement with XPL. Specifically, but not exclusively, this requires Ms Ni to co-operate with XPL and its accountant in ensuring IRD is appropriately informed of her wish and authority for the credit of some income tax and GST payments she made at relevant times to be transferred to the credit of XPL.

[64] It also requires Ms Ni to provide XPL's accountant with information that IRD may require to assist with the transfer of those tax credits. The information that may be provided to XPL's accountant under that requirement is subject to the obligation of confidentiality, as understood under the relevant professional standards, that XPL's accountant has already offered.

[65] It further requires Ms Ni to review and, where necessary, amend her calculations of relevant information to accurately reflect the gross nature of payments received.

[66] Under s 137(3) of the Act the time specified for obeying this order for compliance is 30 calendar days from the date of issue of this determination. Should a longer period prove necessary, the parties may jointly lodge a memorandum explaining the need for an extension and the appropriate additional length of time needed.

No order for damages

[67] XPL also sought an order requiring Ms Ni to pay IRD tax penalties and interest incurred by XPL as a result of Ms Ni failing to comply with the settlement agreement. This request was really a claim for damages. It had to be declined for two reasons.

[68] Firstly, the remedy for a breach of a term of a certified settlement agreement is a penalty, not damages.[6]

[69] Secondly, even if such an order for damages was open for the Authority to grant, the actual cost or damage to XPL as a result of the delays caused by Ms Ni's non-compliance was presently uncertain. At XPL's request Ms Wu had calculated the possible level of penalties and interest IRD might apply when the necessary paperwork to rectify PAYE deductions for Ms Ni was filed. For the period up to October 2019 Ms Wu estimated this could total as much as $34,000. However the penalties and interest XPL could be required to pay could vary once the relevant IRD officials considered information about XPL's attempts to rectify the situation since 25 July 2018, including the contents of this determination. However, as already noted, the costs to XPL in IRD penalties and interest, once quantified, is not recoverable in

[6] Employment Relations Act 2000, s 149(4) and s 151; *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 at [38] and *Employment Law* (online looseleaf ed, Thompson Reuters) ER 149.06.

the employment jurisdiction as damages arising from a breach of a term of a certified settlement agreement.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[71] If they are not able to do so and an Authority determination on costs is needed, XPL may lodge, and then should serve, a memorandum on costs. In light of the time set for the compliance order, the period for seeking costs is extended to the much-longer-than-usual period of 40 days from the date of issue of the written determination. From the date of service of that memorandum Ms Ni would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[7]

[73] Prior to and during the Authority investigation meeting the parties and their representatives were reminded that the issues regarding implementation of the settlement agreement should have been approached and resolved practically. They were advised that unnecessarily incurred legal costs over technical arguments were not likely to be recovered.

Robin Arthur
Member of the Employment Relations Authority

[7] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].