

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 355
5318156

BETWEEN	ROBERT WADE LEWIS Applicant
A N D	J P MORGAN CHASE BANK, N.A. Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Rob Towner, Counsel for Respondent
Investigation meeting:	On the papers
Submissions Received	18 August 2012 from Applicant 23 August 2012 from Respondent
Date of Determination:	11 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 6 September 2010, the applicant (Mr Lewis) filed a statement of problem alleging a breach of a settlement agreement with his former employer the respondent (the Bank). That was denied in a statement in reply received from the Bank and dated 21 September 2010.

[2] The matter came before Member King in the Authority and mediation was directed. Mediation was unsuccessful and the first of two conference calls with Member King took place on 17 February 2011 in which, amongst other things, Mr Lewis was directed to file an amended statement of problem.

[3] An amended statement in reply was eventually filed on 6 July 2011 after a number of exchanges between the parties in the interim and a further telephone conference with Member King on 10 June 2011. The matter then seems to have

languished somewhat until it came on to the present Member's list in July 2012. A further conference call with the Authority took place on 10 August 2012 at which the parties agreed that the matter (as amended) should be dealt with by the Authority on the papers, and a timetable was agreed for the filing of submissions in that regard.

[4] In the amended statement of problem filed by Mr Lewis, he alleges a breach of the settlement agreement, maintaining that the Bank has *refused to confirm (his) role as CEO* of the Bank and seeks an Authority investigation to see if there has been a breach of the settlement agreement and *damages* if a breach is found.

Issues

[5] In effect, Mr Lewis's claim before the Authority raises a preliminary issue about the availability of the relief that he seeks. Certainly, claims before the Authority about the breach of a settlement agreement are not unusual but the relief sought by Mr Lewis in the present case is.

[6] It follows that the Authority must consider the following questions:

- (a) what relief does the law provide for breaches of settlement agreements;
and
- (b) how does that assist Mr Lewis?

What relief is available for breach of settlement agreements?

[7] The Authority is a creature of statute. It has no inherent jurisdiction. It follows that the Authority cannot do anything which the statutory framework does not explicitly provide for. The judgement of the Full Court in *South Tranz Ltd v. Straight Freight Ltd* [2007] ERNZ 704 referred to by the Bank makes the point clearly:

“ The Employment Relations Authority is a statutory tribunal. It has no inherent jurisdiction and can only carry out functions and exercise powers to the extent that they are conferred on it by statute. Whether the Authority had jurisdiction to make the orders in question, therefore, must be answered by an analysis of the relevant statutory provision. “

[8] The remedy usually offered by the Employment Relations Act 2000 (the Act) for breaches of settlement agreements brought before the Authority, is the remedy of compliance pursuant to s. 151 of the Act. However, that provision applies only to the terms of settlement reached in particular circumstances, generally where the terms of settlement are witnessed by a mediator employed by the Department of Labour (as the Act expresses it).

[9] The practical effect of this provision is typically to give the Authority power to require the erring party to complete its part of the bargain entered into by the settlement agreement. Looked at in a simplistic way, what the law seeks to achieve is to compel parties to perform the agreements that they have undertaken to perform.

[10] But that provision is not available in the present case because the settlement agreement between the parties did not fall within the terms of s. 151 of the Act. The Authority does have a wide power to order compliance with *any provision of any employment agreement* pursuant to s. 137 (1) (a) (i) of the Act. But a settlement agreement is not a provision of an employment agreement but rather relates to an employment agreement. It follows that the Authority has no jurisdiction to make a compliance order in the present case.

[11] In any event, Mr Lewis seeks damages for breach. The Authority is satisfied there is no jurisdiction to grant damages; nothing in the Act contemplates that and by virtue of the fact that the Authority is a creature of statute, in the absence of that power, the relief cannot be even contemplated.

How does that process assist Mr Lewis?

[12] Mr Lewis alleges that the Bank has failed to refer to his by the correct job title in relation to his period of service with the Bank and, as a consequence, has caused him damage particularly in terms of the acquisition of subsequent employment opportunities within the banking industry.

[13] The Bank resist Mr Lewis's claim in this regard. In essence they say that Mr Lewis's claim proceeds on the misconception that the Bank was under any obligation to provide references for Mr Lewis. That is apparent from the terms of the settlement agreement. Apparently, the Bank does not provide references but issues certificates of service only. And, it is said on behalf of the Bank that it made an exception to assist

Mr Lewis such that any future requests for a certificate of service would include reference to his role as chief executive officer.

[14] The short point is that there is no evidence before the Authority that the settlement agreement has been breached. In particular, as to the suggestion that the Bank has disparaged Mr Lewis, that allegation is vigorously denied.

[15] Mr Lewis's concern about being described as the Chief Executive Officer is that that position has particular significance within the banking industry. He draws the Authority's attention to the fact that that role is of particular importance especially in terms of the relationship between the Bank and the Reserve Bank of New Zealand. The latter, has a statutory obligation to satisfy itself, pursuant to its own statute, that a person holding the position of Chief Executive Officer of a registered bank trading in New Zealand, is, put loosely, a fit and proper person to hold that role.

[16] In respect to the particular dispute between these parties, Mr Lewis pleads that he was the Chief Executive Officer of the Bank in New Zealand during his tenure there, that he was approved by the Reserve Bank as a fit and proper person. That is accepted, as far as it goes but the submission fails to identify the breach. There simply is no evidence that there has been one. Aside entirely from the observations already made as to the Bank's obligation in the settlement agreement there is a further factor that bears on the situation.

[17] The settlement agreement includes an agreed statement. That statement was to be issued in the public domain concerning the circumstances in which Mr Lewis left the Bank's service. The statement, in common with other statements of the same kind, is characteristically bland but, for present purposes, what is important is that it describes Mr Lewis as the Chief Executive Officer of the Bank. That being the position, it is difficult to see how Mr Lewis can succeed in his contention that he is being represented in the marketplace in an inaccurate fashion. Indeed, on the basis of the settlement agreement itself, the reverse would appear to be the case.

[18] The Authority feels obliged to point out as well that as soon as the Bank became aware of Mr Lewis's concerns, it promptly wrote to him and set out a basis on which it thought matters could be resolved by agreement. In particular, it dealt with the original claim made by Mr Lewis that his out-placement costs had been short paid (for the avoidance of doubt a claim that the Bank denied but in any event it made a

payment to increase the total cost in any event) and the Bank sought to deal with the more significant allegation that it had failed to describe Mr Lewis properly.

[19] The Authority is not persuaded that the Bank is in breach, not persuaded that even if it were in breach the Authority could grant the remedy sought and on that basis, it is unable to take Mr Lewis's claim any further.

Determination

[20] For reasons just advanced, Mr Lewis's claim fails in its entirety.

Costs

[21] Costs are reserved.

James Crichton
Member of the Employment Relations Authority