Determination Number: CA 129/03
File Number: CEA 102/03

Attention is drawn to paragraph 26 prohibiting publication of certain information contained in this determination.

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	CN (Applicant)
AND	H, a duly incorporated company (Respondent)
REPRESENTATIVES	Rob Davidson, Counsel for Applicant Jeff Goldstein, Counsel for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	4 November 2003
INTERVIEW	18 November 2003
DATE OF DETERMINATION	28 November 2003

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] CN was employed by H. After that employment ended, CN and LH (H's principal) participated in mediation over an employment relationship problem. On 23 May 2002, they signed a record of settlement pursuant to section 149 of the Employment Relations Act 2000.

[2] The present problem is CN's claim that H breached the terms of the settlement. CN says that she then validly cancelled the settlement agreement in reliance on the Contractual Remedies Act 1979. She claims general damages for her distress caused by the alleged breach of the settlement agreement.

[3] H says that CN is not entitled to cancel the settlement agreement, that it did not breach the agreement, and that CN suffered no damages. H also alleges that CN herself breached the confidentiality provision in the agreement entitling it to enforce the liquidated damages term in the agreement.

Background

[4] It is a term of the settlement agreement that H would *provide CN with a reference in respect of her employment with the company and agree if contacted to speak of her only in positive or neutral terms.*

[5] The reference itself simply records CN's length of service and briefly outlines the nature of her duties.

[6] Sometime after 23 May 2002, CN became aware of some comments written by LH on an ACC form. CN was offended by the comments which she says are untrue. There is no reason to doubt that evidence.

[7] Around the same time, CN applied for another position and in reliance on the settlement agreement she authorised that prospective employer to contact LH to confirm details of her reference. CN's evidence is that the prospective employer was keen to employ her subject to a satisfactory reference check.

[8] Some days later, when she had not heard further from the prospective employer, CN phoned her. CN says that the prospective employer was abrupt and rude and said she would get back to CN. The same thing happened a second time. CN's mother (Mrs N) phoned the prospective employer (without identifying herself as CN's mother) who confirmed that the position was still open.

[9] As a result of the changed attitude of the prospective employer and LH's remarks on the ACC form, CN became concerned about what LH was saying about her.

[10] CN and Mrs N decided to get someone to ring LH pretending to be reference checking on CN to see what LH might say. They decided that CN's brother might do that and Mrs N made the arrangements with her son to tape record the phone call.

[11] Mrs N was present at the mediation when the record of settlement was entered into but her son (Mr N) was not. H's counterclaim rests on whatever was said to Mr N about the terms of settlement in order to get him to tape record his phone conversation with LH. An unsworn statement of evidence for Mr N was provided but he was not present at the investigation meeting because he is currently working in England. CN's evidence is that all she told her brother was that she was concerned that LH was not giving her a fair reference and she needed to know if it was safe for her to use LH in the future as a referee. That evidence must be incorrect because Mrs N was adamant that she (not CN) made the arrangements with Mr N. Counsel for H urged me to accept the inference that some detail of the settlement agreement must have been disclosed to Mr N as part of getting him to make the phone call. I am not prepared to make that inference even though the state of the evidence against the inference remains unsatisfactory.

[12] On 5 November 2002, Mr N (under the name Brian Harker) made the phone call and taped the conversation with LH. It went as follows:

> *Good afternoon, Karen speaking*
> Brian Harker: *LH please*
> *I'll try his line for you*
> LH: *LH*
> Brian Harker: *Hello LH, this is Brian Harker I'm a researcher and putting together a documentary on New Zealand artists. Now um I'm currently employing an assistant to help me and somebody I have short listed has got you as a previous employer.*
> LH: *Yep*
> Brian Harker: *Her name is CN*
> LH: *Yep, she did work for me*
> Brian Harker: *She worked for you?*
> LH: *Yep*
> Brian Harker: *And she worked between May 2000 and April 22,*

LH: *Something like that*
Brian Harker: *to April 2002*
LH: *Yep, something like that*
Brian Harker: *Okay, and she did retail sales and photo processing*
LH: *And to answer your question, no I wouldn't employ her again and that's probably all I really want to say about CN.*
Brian Harker: *Why is that?*
LH: *No, not prepared to discuss her any further.*
Brian Harker: *Okay*
LH: *Thanks*
Brian Harker: *Thanks, bye*

[13] CN's solicitor wrote to LH on 6 December 2002. The letter asserts that LH's comments during the phone call breached clause 5 of the settlement agreement and amount to a breach of a fundamental term of the agreement. The letter advised that CN was cancelling the agreement pursuant to section 6 of the Contractual Remedies Act 1979. In a second letter, CN's solicitor asserted that LH had said *And to answer your question, I would not employ CN ever again. That's all I've got to say about CN.*

[14] LH wrote a letter dated 9 January 2003 in which he said that he recalled receiving a phone call from a person asking about CN to which his response was *no comment*. He said the caller was persistent but that his comments could only be seen as *neutral*. That genuinely reflected LH's recollection at the time.

[15] CN's solicitor then revealed that the phone call had been recorded. In response, H's solicitor claimed the undisclosed recording was a breach of privacy and that any attempt to use it to *extract settlement funds* would be resisted. They also questioned the genuineness of the caller's motives.

[16] We now know that CN's brother made the call under a different name pretending to be a prospective employer.

Issues

[17] I admitted the recording in evidence, despite the subterfuge involved, because it answered what would otherwise have been the subject of disputed evidence.

[18] In *Hunt v Forklift Specialists Ltd* [2000] 1 ERNZ 553 the Employment Court accepted that where there was a breach of a term of a mediated agreement made under section 88 (2) of the Employment Contracts Act 1991, the innocent party could either seek compliance with the mediated agreement or cancel it (if entitled to) under the Contractual Remedies Act 1979. In *Hunt*, the employee was not estopped from bringing a wrongful dismissal claim by the mediated settlement of an unjustified dismissal personal grievance. The alternative cause of action used in *Hunt* is now not available because a personal grievance claim is the only way to challenge a dismissal but that statutory exclusion does not affect what the Court said about the right to cancel a mediated agreement. Applying *Hunt*, in *House v Samuel Miller Films Ltd* (17/7/02, CA 71/02) I accepted that an employee had validly cancelled agreed terms of settlement entered into pursuant to section 149 of the Employment Relations Act 2000. Mr House was therefore entitled to recover arrears of wages payable under his employment agreement pursuant to section 131 of the Act. In those cases, the subsequent action in the Court or the Authority was founded on something other than the agreed terms of settlement. In the present case, CN is relying on the settlement agreement.

[19] CN says that she validly cancelled the settlement agreement for either serious breach of a term (section 7 (4) (b) of the Contractual Remedies Act 1979) or breach of an essential term (section 7 (4) (a) of the Contractual Remedies Act 1979). CN wants a payment pursuant to section 9 of the Contractual Remedies Act 1979 and/or damages at common law as allowed under section 10 of the Contractual Remedies Act 1979. There is only jurisdiction to consider an order under section 9 if a contract is validly cancelled by a party to that contract. The common law claim requires proof of a breach and proof of damage.

[20] If there was a breach and sections 9 and 10 are applicable, I would then need to be satisfied that making orders thereunder is included in the *enforcement purposes* referred to in section 149 (3) (b) of the Employment Relations Act 2000 which declares that *except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether by action, …, or otherwise*.

[21] The settlement agreement included words similar to section 149 (3) (b). That raises a question whether the settlement agreement expressly provided for a remedy for breach so as to bring into play section 5 of the Contractual Remedies Act 1979 which allows parties to modify the effects of sections 6 to 10 of that Act. However, it would still be necessary first to determine whether LH breached the settlement agreement.

[22] Turning to CN's rights under the Contractual Remedies Act 1979, I find that LH's comments to the caller were contrary to his obligations under clause 5 of the record of settlement. I reach that conclusion having regard to LH volunteering the answer to an unasked question, the actual words used by him and the tone of that answer. All of that contributed to him speaking negatively rather than positively or in neutral terms about CN. In evidence, LH said that *it was a dumb thing to say, [I] agree not positive, pushing it to say it's neutral*.

[23] Counsel for H submitted that LH's conversation with the caller should be treated as if it was a conversation with CN herself, as the caller was her agent. Conversely, counsel for CN urged me to focus on what LH said when he wrongly believed the caller was a prospective employer. In my view, neither CN nor LH displayed the sort of good faith behaviour that should have informed their actions towards one another under the settlement agreement while, LH did not comply with his obligations, CN set about securing evidence rather than attempting to ensure that LH complied with the settlement agreement. Given that, it would be inconsistent with notions of equity and good conscience to treat the caller as anything other than CN's agent. A principal by using an agent cannot put themselves in a better legal position than if they had dealt with the matter personally. Hence LH's conversation with the caller should be treated as if it was with CN personally. As a result, there was no breach of the settlement agreement on the facts as now known of LH's conversation with Mr N.

[24] CN also believes that LH breached the settlement agreement by speaking in negative terms about her to the prospective employer mentioned above. CN acknowledged that she had drawn that conclusion because she thought the prospective employer's attitude to her had changed after the interview. I heard evidence from Pauline Lee, the prospective employer. There is no reason to doubt her evidence that she did not personally know of and had never spoken to LH. Mrs Lee could not recall interviewing CN but that is not surprising as about 20 or 25 people were interviewed by her at the time. I also accept Mrs Lee's evidence that she would not have done any reference checking (if at all) until after a second interview. CN was interviewed only once. Mrs Lee also said that no-one else would have done the interviews but her. From all this, I conclude that LH did not have any discussion with Mrs Lee and could not have breached H obligations under the settlement agreement.

[25] There being no breach of the settlement agreement, CN was not entitled to cancel it. Section 9 of the Contractual Remedies Act 1979 is not applicable, nor do the questions of common law damages, the effect of section 149 (3) (b) Employment Relations Act 2000 or section 5 of the Contractual Remedies Act 1979 arise.

Conclusion

[26] Neither CN nor H is entitled to any remedy. Both parties remain bound by the settlement agreement. To support the term in that agreement about confidentiality, I make an order prohibiting the publication of any evidence identifying the parties.

[27] It might be thought that each party should bear their own costs but I will reserve costs in the meantime to be decided after an exchange of memoranda if necessary.

Philip Cheyne
Member of Employment Relations Authority