IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA102A /08
5113739

	BETWEEN	NEIL CURTIS Applicant
	AND	COMPUTER ENGINEERING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Katherine Burson, Counsel for Applicant Jo Douglas, Counsel for Respondent
Investigation Meeting:	21 April 2008
Determination:	8 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns whether an enforceable settlement agreement was made during a meeting between the parties and their representatives on 29 November 2007 or whether any terms agreed were intended to be enforceable only if a written agreement were subsequently approved and signed by the parties and certified by a mediator under s149 of the Employment Relations Act 2000 ("the Act").

[2] The Applicant says an enforceable agreement was made and seeks an order directing the Respondent to comply with its terms, pay a penalty for breach of good faith, and pay interest on sums owed.

[3] The Respondent says the parties agreed that terms of settlement would only come into effect if and when signed and certified. Before this happened the Respondent resolved not to sign the settlement agreement, for what it regards as good reasons, and says there was consequently no agreement with which it can be made to

comply.

The background

[4] In July 2007 the Applicant, a British subject and then resident in England, signed an employment agreement to work as a project manager for the Respondent. He moved to New Zealand to take up the job and began work on 3 September 2007.

[5] On 23 November 2007 he was advised in writing that his employment was suspended and his employment would end on 2 December 2007, at the end of the expiry of a three month probationary period.

[6] With the permission of the Respondent's managing director Jason Kyle the Applicant then took some days of leave. On 26 November the Applicant sent Mr Kyle a letter advising that he had taken legal advice and considered the Respondent's actions were "*in clear breach of New Zealand employment law*". That same day Mr Kyle rang the Applicant and said that he had spoken to his lawyer and wanted to find an "*amicable solution*". On 27 November Mr Kyle gave the Applicant a written invitation to meet at the Respondent's offices and discuss his employment.

[7] On 29 November 2007 the Applicant, accompanied by his lawyer Terri Witters – at that time a staff solicitor of the firm Simpson Grierson – met with Mr Kyle and the Respondent's lawyer Susan Christmas.

[8] The meeting was held on a without prejudice basis. In a preliminary determination (AA102/08, 18 March 2008) the Authority ruled that oral and written evidence of the content of the 29 November discussions was admissible for the purposes of the present investigation.

[9] During that meeting each party made a number of proposals to settle the issues between them and by the close of the meeting they agreed terms of settlement.

[10] These were for:

(i) the Applicant's employment to end from the next day (which he would take as a day of annual leave and therefore not return to

work); and

(ii) the Applicant to receive, within 10 days of the parties signing the settlement agreement, $1500 for legal costs, four weeks salary in lieu of notice, a positive reference, and $25,000 in compensation under s123(1)(c)(i) of the Act; and

(iii) neither party to make disparaging remarks of the other; and

(iv) the settlement to be full, final, and confidential.

[11] The parties also agreed that they would have record the settlement in a written agreement and arrange "sign off" by a mediator from the Department of Labour acting under s149 of the Act.

[12] It is here that there is a conflict of evidence between the parties as to what was said about – and meant by – those arrangements.

[13] This became important because the written agreement prepared by the Applicant's solicitors and sent to the Respondent contained an additional term which was not agreed in the 29 November meeting. That term concerned what should happen with personal computer files of the Applicant stored on the Respondent's system and files of the Respondent held on the Applicant's personal laptop computer. This resulted in the Respondent questioning the inclusion of such a term and refusing to such an agreement or to make any of the payments to the Applicant that were verbally agreed in the 29 November meeting. Whether it was entitled to do so is what is at issue.

The investigation

[14] For the purposes of the investigation I was provided with written witness statements from the Applicant, Ms Witters, Mr Kyle and Ms Christmas. There was also an agreed bundle of background documents comprising the Applicant's employment agreement, relevant correspondence between the parties and their representatives and copies of notes made by them during meetings and telephone calls. At the investigation meeting the witnesses answered questions from the Authority and counsel and the parties presented closing submissions.

[15] The questions for resolution are:

(i) Whether the parties intended no contractual effect to be given to terms agreed orally on 29 November unless the parties had signed a written agreement and a mediator had certified it?

(ii) Whether having rejected the written agreement as drafted by the Applicant's solicitor, the Respondent could, in light of what it considered changed circumstances, resile from meeting all earlier terms agreed verbally?

(iii) If an agreement was made with the Applicant, was it of a type with which the Authority is entitled to order compliance?

The 29 November meeting and aftermath

[16] Notes taken by Ms Witters and Ms Christmas during the meeting show a series of proposals and counterproposals for settlement which ended with agreement on the terms outlined earlier in this determination. Ms Witters' notes include the phrases "*confirmed settlement*" and "*mediator sign off*". The notes of Ms Christmas include the phrase "*mediation sign off*".

[17] Ms Witters evidence was that after confirming the elements of the agreement with Ms Christmas she had raised the possibility of having the agreement signed off by a mediator. She says that she emphasised this was for enforcement purposes only and would not change the fact that the parties had entered into a full and final settlement at the meeting.

[18] She says she was particularly conscious of making this point as it had been at issue in a case decided only four months earlier by the Employment Court. A senior colleague of Ms Witters had acted for the unsuccessful party in that case. It was *Abernethy v Dynea New Zealand Limited (No 2)* [2007] 1 ERNZ 462 (EC, Travis J). In the particular circumstances of that case, the Court found the parties had agreed the settlement agreement need to be signed by a mediator before it would have contractual effect.

[19] The Applicant's evidence was that he recalled Ms Witter saying mediator sign off was for enforcement purposes only and did not change the fact there was an

agreement ‘there and then’.

[20] Ms Christmas, to the contrary, says the parties agreed the terms discussed “*were subject to both parties’ agreement to the written terms of settlement*”.

[21] Mr Kyle’s evidence was that he understood settlement “*would be subject to receiving and approving the terms in a written document*”. He agrees Ms Witters proposed mediator sign off and says: “*She suggested at the meeting that this was purely a technical issue*”.

[22] All witnesses agree that arrangements were made for the Applicant’s lawyer to draft the written agreement and send it to the Respondent’s lawyer.

[23] Immediately following the meeting Ms Witters drafted the agreement and sent it by email to the Applicant to check. As she was going on leave for a few days she arranged for another solicitor to send the agreement through to Ms Christmas once the Applicant had approved it.

[24] The Applicant approved the agreement but asked the Simpson Grierson solicitor to add a term regarding computer files. This was done and the additional term read:

> *THE Company agrees to delete any personal data files from the Employee’s desktop and not retain any copies of such files. The Employee agrees to delete any Company data files from his personal laptop and not retain any copies of such files.*

[25] When he received the draft agreement Mr Kyle was concerned about the implications of this clause as it had not been agreed in the 29 November meeting. He subsequently refused to sign the agreement. His evidence in the Authority’s investigation was that he believed the Applicant may have taken the files from a previous employer without its knowledge and he did not want to assist the Applicant in respect of those files. He was also concerned that the Applicant had some of the Respondent’s files on his personal laptop. Mr Kyle wanted those files – which he said were “*the only copies*” – returned and not deleted.

[26] Mr Kyle then took advice from the Employers and Manufacturers Association who advised the Applicant’s lawyer that the Respondent considered no agreement had

been reached on settlement. The Respondent then presented a counterproposal for settlement.

[27] The Applicant lodged an application in the Authority for a compliance order. The matter was directed to mediation but not resolved and arrangements for an investigation meeting were made.

The parties' views

[28] The Applicant submits that a binding oral agreement was made on 29 November and its enforceability was not conditional on subsequent signing and certification of a written record. He accepts the additional clause regarding the computer files is not enforceable but says it was merely administrative or 'house keeping' and cannot be used as an excuse to resile from the substantive terms agreed on 29 November.

[29] He submits the s149 certification process is to confirm finality and enforceability not the fact of agreement. Neither does it provide an opportunity for a party to negate the fact of settlement by refusing to confirm to the mediator that the party understands the effect of certification under that section.

[30] While the Applicant accepts there are cases where the parties have agreed that an agreement is of no effect unless a written agreement is subsequently accepted and signed by the parties and then certified by a mediator. However he insists that was not the agreed intention of the parties here. To the contrary, the evidence of Ms Witters and the Applicant was that there was an express understanding at the 29 November meeting that the subsequent written confirmation and certification of agreement was for enforcement purposes only.

[31] The Applicant says the immediate binding effect of the verbal agreement was demonstrated by his actions in clearing his desk and leaving the office on 29 November before the written agreement could have been signed.

[32] He submits that Mr Kyle's concern about the computer files were was simply a convenient excuse when Mr Kyle began to have second thoughts about the

agreement reached on 29 November. Ms Witters' notes show Mr Kyle had mentioned during the meeting that the Applicant had some personal files stored on the Respondent's computer system. However that concern did not feature in the elements of the verbal agreement reached that day.

[33] The Respondent submits that while "*broad terms were agreed generally*" on 29 November, these were "*conditional on the terms being agreed and written up into a settlement agreement*". It suggests negotiations were "*ongoing*" rather than settled because the draft written agreement included a term regarding computer files that had not been agreed in discussion.

[34] It also submits that the Authority lacks power to order compliance by the Respondent with the agreement that the Applicant says was made because such as agreement was not of the type for which compliance orders may be issued under s137 of the Act. It was neither a settlement agreement made under s149 and enforceable under s151 of the Act nor an employment agreement.

Discussion

[35] Having heard from the witnesses and closely reviewed both their written and oral statements and the relevant background documents I am satisfied that the Applicant is entitled to succeed in his claim for an order requiring the Respondent to comply with the terms agreed in the meeting of 29 November.

[36] It is clear from Mr Kyle's evidence that he expected to enter into a settlement agreement in the meeting. He had suspended the Applicant on 23 November and, after taking some legal advice, clearly anticipated some potential legal difficulties with his actions. This is evident from his request for the Applicant to attend a meeting and this description in his written witness statement:

> *The purpose of the meeting was to consider the way forward. This may have included options for continuing to employ [the Applicant] if he was prepared to consider redeployment. Alternatively, I anticipated entering into an arrangement where I would pay a sum of money to [the Applicant]. In return he would not raise a personal grievance or other employment related claims in the future.*

[37] It is also clear that early in the meeting Mr Kyle raised his concern about the

nature of personal computer files that the Applicant had on the Respondent's system. However the focus of the meeting quickly turned to the terms of an 'exit' agreement with the Applicant. What would be done about the computer files was not one of those terms.

[38] In response to questions during the Authority investigation Mr Kyle said his concern was that as the Applicant appeared to have brought files with him from a previous employer, so too might some of the Respondent's files end up on the system of the Applicant's next employer.

[39] He also said that after the 29 November meeting he found a further two CDs at the back of the Applicant's former work desk. Opening these he found various archived email files. These included an earlier version of the Applicant's curriculum vitae ("CV") than that submitted to the Respondent. According to a subsequent letter from the Respondent's EMA counsel – and which Mr Kyle confirmed had been written on his instructions – the Respondent would not have employed the Applicant if Mr Kyle had seen that earlier version of the Applicant's CV.

[40] I am satisfied from the totality of the evidence that, having initiated the meeting, the Respondent found out nothing after it that it could not have discovered beforehand and raised with the Applicant. The issue of computer files was discussed but nothing was agreed on what should happen with those on the Respondent's system or any of the Respondent's files transferred for work purposes by the Applicant to his personal laptop.

[41] The Respondent was entitled to reject the term regarding computer files added unilaterally by the Applicant's solicitors at the Applicant's request to the draft written agreement. However this was not, I find on the balance of probabilities, not the predominant reason for the Respondent's subsequent change of heart.

[42] Mr Kyle had been disappointed with the Applicant's work and, through looking at another undisclosed version of the Applicant's CV, confirmed his view that the Respondent should never have employed the Applicant at all. He regretted having agreed to an exit package to terminate the Applicant's employment and the amount that the Respondent had agreed to pay.

[43] Regret alone, however, is not a sufficient reason to resile from an agreement.

[44] I am satisfied that there was a real agreement made in that meeting on 29 November. It was made through a careful process of proposal and counterproposal with each party being legally represented and taking adjournments to consider their position before both coming to a set of terms which were certain, complete and intended to be binding immediately. In reaching that conclusion I also rely on and prefer the evidence of Ms Witters that Ms Christmas said after both lawyers checked the terms agreed on that they had a "*confirmed settlement*", a phrase Ms Witters recorded in her notes.

[45] Mr Kyle also gave evidence that he understood throughout the 29 November meeting that he would have time after it to take further advice before committing to a final settlement. During the Authority investigation Ms Christmas was asked whether at any stage during that meeting Mr Kyle had shared that view about taking further advice with the Applicant or Ms Witters. Her answer was plain. It was no.

[46] A party's evidence on what was intended by words and gestures exchanged in such a meeting is to be assessed on the basis of what would have been apparent to an objective observer there on the day. It is not decided on the subsequent explanations of a participant of what she or he meant by what they said or how they acted.

[47] It is clear to me, particularly from the evidence of Mr Kyle and his lawyer on that day, that he gave no outward indication that the agreement reached verbally on 29 November was tentative or subject to him having the opportunity to take further advice on its terms.

[48] Mr Kyle's own evidence was that Ms Witters' proposal for s149 certification was made after agreement on other terms was reached and was what he recalled being described – in his own words – as "*purely a technical issue*".

Jurisdiction for compliance orders

[49] I am satisfied that the Authority has jurisdiction under s137 of the Act to make

a compliance order in respect of the verbal agreement made between the Applicant and the Respondent on the terms recorded in the notes of Ms Witters and Ms Christmas made at the 29 November meeting

[50] As observed in *Kerr v Associated Aviation (Wellington) Limited* [2005] 1 ERNZ 632 (EC, Shaw J) at [31] there is no need for artificial categorisation of such agreements as being settlement agreements or employment agreements as the Authority has jurisdiction under s161(1)(r) of the Act.

[51] If it were nevertheless necessary to categorise this agreement for the purposes of a compliance order under s137 I find that it is an employment agreement or rather a variation to an employment agreement. Accordingly under s137(1)(a)(i) of the Act it may be the subject of a compliance order.

[52] I come to that conclusion on the basis described in *Shaffer v Gisborne Boys High School Board of Trustees* [1995] 1 ERNZ 94 at 101-2 (CA, Cooke P), after adjusting the references to "employment contracts" of the time for today's "employment agreements". In that case the Court suggested that an agreed settlement of differences between parties to an employment agreement may be seen as an addition to the terms of that agreement. From that point onwards the original employment agreement and the settlement terms must be taken together to ascertain the full terms governing the employment relationship.

[53] The situation in that case differed, as does the present case, from the circumstance described in the earlier case of *Majestic Horse Floats v Goninon* [1993] 1 ERNZ 323 (EC, Castle J) where a worker failed to have a settlement agreement enforced by compliance order. The situation in that case would not arise today because the process of certification by a mediator would result in a s149 settlement enforceable by way of compliance order under s137(1)(a)(iii). Another difference is that the settlement agreement at issue in the *Majestic Horse Floats* case was made after the termination of the employment agreement. At that point the employment relationship was already what the Court called "*water under the bridge*". That differs from the present situation where the Applicant made an agreement while the employment relationship remained on foot.

[54] On whichever analysis is applied, the Applicant is entitled to an order for compliance with the terms agreed, albeit that those terms were about the basis on which the employment relationship itself would come to an end.

[55] The present case – on the evidence as I have found it – also differs from the situation in the *Abernethy* case referred to earlier. In that case the Court found that the parties had agreed from the outset to a process whereby any terms agreed orally would not be binding until the parties reviewed a written agreement, approved the terms it contained and had confirmed to a mediator they were "happy" with the terms.

[56] Rather the present case is more similar to that found in *Graham v Crestline Pty Limited* [2006] 1 ERNZ 848, 862 (EC, Colgan CJ) where the evidence did not show an intention only to be bound upon execution of an agreement in writing.

Determination

[57] For the reasons given I find that the parties made an enforceable oral agreement on 29 November 2007 on the terms set out at paragraph [10] of this determination. The Respondent was not entitled to resile from the agreement. Its terms may be enforced by a compliance order.

[58] Under ss 137 and 138 of the Act the Respondent is ordered to comply with those agreed terms within 28 days of the date of this determination.

Penalty

[59] I decline to award a penalty against the Respondent for breaching good faith by failing to honour the terms of settlement reached on 29 November. While its actions were misconceived I am not satisfied they were motivated by a lack of good faith.

Interest

[60] The Applicant seeks interest on the amounts owed to him. Exercising the discretion to award interest under clause 11 of Schedule 2 of the Act I think it fit to

order the Respondent to pay to the Applicant interest at the rate of 10.6 per cent on the sums agreed for legal costs, four weeks salary and s123(1)(c)(i) for the period of 168 days. The rate of interest is the 90-day bill rate at the date of this determination plus two percent. The period to which interest applies are the days between the Applicant lodging his application in the Authority and the date of this determination. Interest is not awarded for the full period since 29 November 2007 as the parties had agreed that the amounts would be payable only once the agreement was certified under s149 and the Applicant and his solicitors were responsible for some of the ensuing delay by seeking to include a term that had not been agreed.

Observation

[61] Concerns regarding computer files were something of a 'red herring' throughout this matter. On termination of his employment the Applicant was bound by a term of his employment agreement to return all documents and other materials that were the property of the Respondent. That clearly included files of the Respondent on his personal laptop. The Applicant elected to put personal files on his employer's computer system and was not entitled to insist these be deleted.

Costs

[62] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so within 28 days, the Applicant may apply by way of memorandum of counsel for the Authority to determine costs. The Respondent will have 14 days to lodge a reply memorandum. The parties may be assisted in resolving costs by the following preliminary view. This case was of the type where costs would, in the absence of any special unknown circumstances, likely be set by applying the approach and principles summarised in *PBO v Da Cruz* [2005] ERNZ 808 at [43]-[47].

Robin Arthur
Member of the Employment Relations Authority