New Zealand Employment Relations Authority Decisions

Doake v Juni Uni Limited (Auckland) [2011] NZERA 448; [2011] NZERA Auckland 282 (1 July 2011)

Last Updated: 15 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA AUCKLAND 282

5343214

BETWEEN PAMELA DOAKE

Applicant

AND JUNI UNI LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received: Determination:

Eleanor Robinson

David Martin, Counsel for Applicant Sam Gordon for Respondent

On the papers
17 June 2011 from Applicant and Respondent
1 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On22 September 2010 a Record of Settlement Agreement ("the Settlement Agreement") was signed under s 149 of the Employment Relations Act 2000 ("the Act"). The parties to the Settlement Agreement were the Applicant, Ms Pamela Doake, and the Respondent, Juni Uni Ltd ("Juni Uni"). The Settlement Agreement was signed by Ms Doake and Ms Sam Gordon, Owner Operator of Juni Uni. The Settlement Agreement was drawn up by the parties and submitted to a Mediator employed by the Department of Labour.

[2] The issue which had been brought before the Authority by Ms Doake was that Juni Uni had not complied fully with clause 5 of the Settlement Agreement, which states:

The Employer will pay to the Employee the compensatory sum of $2600 within seven days of the Mediator's signing of the memorandum. The payment will be made into the Employee's bank account.

[3] Ms Doake received an amount of $1,849.04 in respect of the payment under clause 5. This amount represented the payment of $2,600.00 after deductions for PAYE income tax, student loan repayments and Kiwisaver contributions

[4] Juni Uni claims that clause 5 of the Settlement Agreement referred to a payment to Ms Doake of 4 weeks' gross wages in respect of the contractual notice period, which it was agreed Ms Doake would not work. Although Ms Doake was not required to work the notice period, Juni Uni claims the payment was not intended to be a payment in lieu of notice and accordingly deductions were correctly made from $2,600.00, such that Ms Doake is not entitled to any further payment.

[5] The Settlement Agreement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted that they understood the agreed terms:

a. were final, binding and enforceable; and
b. could not be brought before the Authority or the court for review or appeal, except for the purposes

[6] Ms Doake now seeks the Authority to make a compliance order requiring Juni Uni to pay her $2,600.00 in full.

Issues

[7] The issue for determination is whether Juni Uni has complied with the requirement to pay Ms Doake a compensatory payment of $2,600.00 in accordance with clause 5 of the Settlement Agreement.

[8] The parties agreed to the Authority determining this issue based on the submissions from the parties.

Background Facts

[9] The parties entered into a Settlement Agreement under s 149 of the Act. From this it can be inferred that a problem had arisen in the employment relationship of the parties which the Settlement Agreement was intended to resolve.

[10] The Settlement Agreement was drafted by Mr Shane Wealleans of the New Zealand Educational Institute and emailed to the parties on 9 September 2010. In the email Mr Wealleans writes: *"Please find attached draft terms of Settlement. I think I am right in the figure and it represents 4 weeks gross pay as agreed".*

[11] Mr Wealleans also writes in the email: *"If you can please read it through and if there are any concerns please give me a call*

[12] The Settlement Agreement was signed by the parties and submitted to Mediator who signed it on 22 September 2010.

[13] The Settlement Agreement stipulated that payments would be made within seven days of the Mediator signing the Settlement Agreement. Payments were made to Ms Doake in respect of all wages and holiday pay due up to and including 8 September 2010 in accordance with clause 6 of the Settlement Agreement, and a payment was made of $1,849.04 in relation to clause 5 of the Settlement Agreement, being the sum of $2,600.00 after deductions.

Submissions for the Applicant

[14] Mr Martin for Ms Doake submits that:

i. the words used in the Settlement Agreement in respect of the payment are clear and unambiguous. The payment of $2,600.00 is to be paid as compensation and that had anything other than compensation been intended by the parties, for example 'to pay 4 weeks gross pay' this would have been clearly expressed in the words of the Settlement Agreement;
ii. such an interpretation is supported by the context of the document as a whole, which at clause 6 refers to the payment of all wages and holiday pay up to and including 8 September 2010, thus that the payment under clause 5 cannot constitute wages as these had been set out in another clause of the Settlement Agreement;
iii. the payment cannot constitute payment in lieu of notice since such a payment applies if the relationship is peremptorily brought to a close by the employer, which was not the case in Ms Doake's situation since she resigned as part of the Settlement Agreement; and

iv. the reference to a *"compensatory sum"* in clause 6 of the Settlement agreement is a reference to compensation under s 123(1)(c)(i) of the Act.

[15] Mr Martin further submits that the email from Mr Wealleans is evidence of pre-contractual negotiation, which on a conventional approach is both inadmissible and irrelevant, this remaining the case despite some willingness on the part of Blanchard and Tipping JJ in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[1] *to* consider some pre-contractual negotiations.

Submissions for the Respondent

[16] Ms Gordon for Juni Uni submits that:

i. the payment in clause 5 of the Settlement Agreement was intended to be payment for 4 weeks wages which Ms Doake was contractually obligated to work;
ii. Ms Doake's resignation was not an immediate end to her employment as the contractual notice period applied, however that it was agreed that she should not work the notice period;

iii. the payment was not made in lieu of notice, and as such it was 4 weeks gross pay from which the relevant deductions needed to be made; and
iv. there was an agreement to remove a previous draft reference to clause 123(1)(c)(i) of the Act, as a result of which the reference was deliberately excluded when the agreement was submitted to the Mediator for signing.

The Law

[17] The Settlement Agreement is a contractual document and as such the rules concerning interpretation of contracts applies. The fundamental principle is that if a contract is in writing, its interpretation is exclusively within the jurisdiction of the judge. In the exercise of this judicial function the judge has traditionally been bound by the 'parol evidence rule'. The rule applies to exclude extrinsic evidence to "add to, vary or contradict" a written document. However this rule "of *great antiquity though it may be, has been much attenuated over the years"*[2][18] One area in which the rule has been attenuated is to admit consideration of the factual matrix, or surrounding circumstances, for the purpose of aiding interpretation of the written agreement. However as Mr Martin points out, subjective evidence of the parties' intentions i.e. pre-contractual negotiations, is generally excluded.

[19] Lord Hoffman in *Investors Compensation Scheme Ltd v West Brunswick Building*

Society[3] encapsulated these two principles in his formulation at para 912-913:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way in which we would interpret utterances in ordinary life..

[20] The law has not been altered as regards pre-contractual negotiations since Lord Hoffman set out his formulation, although there are indications that the position may be reviewed at some stage[4].

Determination

[21] It can be reasonably inferred that there was an employment relationship problem, or personal grievance, between the parties which resulted in the Settlement Agreement.

[22] The Act provides for remedies to be awarded in relation to personal grievances at s123. These remedies fall under various heads and include reinstatement, reimbursement of lost wages and compensation.

Compensatory sum and wages

[23] There are two types of payment encompassed in the Settlement Agreement: the *compensatory sum* in clause 5, and the outstanding wages and holiday pay referred to in clause 6. These payments are reflected in the remedies outlined in s 123 of the Act under s 123 (1)(b) and (c).

[24] Ms Gordon contends that the *compensatory sum* is payment for wages in respect of the 4 week notice period which it was agreed Ms Doake would not actually work. Ms Gordon further argues that it was not intended to be payment in lieu and thereby non-taxable.

[25] Accepting that the payment was not intended to be paid on an 'in lieu' basis, the payment would be wages and would therefore fall under s 123 (1)(b) of the Act.

[26] I do not consider the *'compensatory sum'* as wages. Wages are a separate category of remedy to compensation under the Act, and the designation of the sum as *compensatory* I find removes it from this category.

[27] Moreover, the Settlement Agreement makes specific provision for the payment of lost wages at clause 6, and is quite specific on the period to which the payment applies.

[28] While Mr Wealleans's email makes reference to "4 *weeks gross pay"* there is no wording in clause 5 of the Settlement Agreement to reflect that the payment is intended for this purpose.

[29] I consider that it was open to the parties to have been as specific about the identification of the payment set out in clause 5 as intended to represent *"4 weeks gross pay"*, as they were about the payment of *"wages and holiday pay"* due in clause 6.

Compensatory sum and s123(1)(c

[30] Ms Gordon states that the reference to s 123(1)(c)(i) was deliberately omitted from the Settlement Agreement on the basis that it was a wage payment and not compensation under s 123(1)(c

[31] The payment is described as being 'compensatory'. Compensation in relation to a personal grievance arises under either s123(1)(c)(i) of the Act, being compensation in respect of humiliation, loss of dignity and injury to feelings, or under s 123(1)(c)(ii), being compensation *"for the loss of any benefit, whether or not of a monetary kind which the employee might reasonably have been expected to obtain if the personal grievance had not arisen."* Compensation under s 123(1)(c)(i) is not taxable, whereas compensation paid under s 123 (1)(c)(ii) is taxable.

[32] I have considered whether the *compensatory* sum might fall under s 123(1)(c)(ii) as 'loss of any benefit'; however I do not accept that the payment of wages in respect of a notice period, albeit one which the employee was not expected to work, is a contractual benefit.

[33] Examining the case law on the subject, I find examples of heads of compensatable loss arising under s123(1)(c)(ii) recognised by the Court to include employee share ownership plans[5], concessionary travel arrangements[6], and a petrol allowance[7]. There have been many others as noted extensively in *Mazengarb's Employment Law[8],* and indeed future loss of remuneration[8] is included in the examples. However, I am not persuaded that this head of compensatable loss was intended to cover a contractual notice period payment.

[34] I note that Mr Wealleans's email supports Ms Gordon's submission as to the intention behind the payment in clause 5, but the email relates to the parties' pre-contractual intentions, which according to the general rules of interpretation are inadmissible. I am consequently drawn back to the plain words of the Settlement Agreement signed by the parties.

[35] Moreover, while it was open to Ms Gordon to discuss any concerns she might have had with the draft wording as Mr Wealleans invited her to do in his email, there is no evidence either that she did so, or that she had any concerns. What evidence there is consists of the signed Settlement Agreement between the parties.

[36] While the reference to s123(1)(c)(i) of the Act is not included, I find the wording used clearly indicates a compensatory payment of this nature. The payment is specifically designated as a *'compensatory sum'.* A wage payment is not compensatory, it is not a contractual benefit, it is a contractual entitlement.

[37] The clause states that: "The *payment will be made into the Employees bank account".* There is no indication in this wording that it was intended by the parties that the payment was a gross payment from which tax would be deducted, rather the wording would infer to a reasonable person that it is the full amount of $2,600.00 which will be paid into Ms Doake's bank account.

[38] I determine that the *compensatory sum* referred to in the Settlement Agreement rightly falls under the provisions of s 123(1)(c)(i) of the Act and should therefore have been paid to Ms Doake without deduction.

[39] I am satisfied that Juni Uni has not complied with the terms of the Settlement Agreement of 22 September 2010. It is just in the circumstances for an order to be made requiring Juni Uni to comply with the Settlement Agreement.

[40] Juni Uni is ordered to pay Ms Doake $750.96, being the outstanding amount of the $2,600.00 payment, pursuant to s 123 (1)(c of the Act as I have determined it to be.

Costs

[41] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson

Member of the Employment Relations Authority

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[1] [2010] NZSC 5; [2010] 2 NZLR 444
[2] Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd edition, 2007) para [6.2.1 (a)]
[3] [1997] UKHL 28; [1998] 1 WLR 896
[4] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444
[5] *Trotter v Telecom Corporation of NZ Ltd* [1993] NZEmpC 152; [1993] 2 ERNZ 659
[6] Unkovich v Air New Zealand Ltd [1993] NZEmpC 63; [1993] 1 ERNZ 526
[7] *Madsen v Aotearoa International Ltd* [1995] 1 ERNZ 325
9 Chapter 11 at 11.35
[8] *NZ Insurance Guild IUW v Guardian Royal Exchange Assurance Co Ltd* [1978] ACJ 151
