

**ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF THE  
CONTENTS OF THE TERMS OF SETTLEMENT  
REFERRED TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 187/10  
5294885

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|---------|--|
| BETWEEN | PAUL EVANS-MCLEOD<br>Applicant                     |
| AND     | TELECOM NEW ZEALAND<br>LIMITED<br>First Respondent |
| AND     | BRIDGETTE DALZELL<br>Second Respondent             |
| AND     | MICHELLE YOUNG<br>Third Respondent                 |
| AND     | SHAUN HOULT<br>Fourth Respondent                   |

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|------------------------|--|
| Member of Authority:   | Vicki Campbell                                     |
| Representatives:       | Applicant in Person<br>John Rooney for Respondents |
| Investigation Meeting: | 1 April 2010 at Hamilton                           |
| Determination:         | 26 April 2010                                      |

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**DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTERS**

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[1] By consent of the parties it was agreed that the Authority would investigate and determine two preliminary matters in the first instance. The two issues before the Authority are:

- The correct identity of the employer; and
- Whether the Authority has jurisdiction to investigate Mr Evans-McLeod's personal grievances.

[2] This determination deals with those two preliminary matters only and does not make any determinations on the substantive issues. For the purposes of preserving the confidentiality of the Record of Settlement between Mr Evans-McLeod and Telecom New Zealand Limited (Telecom), I order, pursuant to clause 10 of the Second Schedule of the Employment Relations Act (“the Act”), that except as may be necessary for the determination of this matter, publication of the contents of the Record of Settlement is prohibited.

### **The correct identity of Mr Evans-McLeod’s employer**

[3] Mr Evans-McLeod has named, in addition to Telecom, a number of individuals as respondents to this matter. It was Mr Evans-McLeod’s submission that Ms Dalzell, Ms Young and Mr Hoult were, along with Telecom, his employers.

[4] The Act defines employment relationships as one between an employer and an employee employed by the employer. Section 5 of the Act defines employer as being a person employing any employee.

[5] Section 103 of the Act (“The Act”) defines a personal grievance as being:

...any grievance that an employee may have against the employee’s employer or former employer. [my emphasis]

[6] Mr Evans-McLeod has lodged a statement of problem which identifies a number of claims, all of which are claims of personal grievance.

[7] I am satisfied that Ms Dalzell, Ms Young and Mr Hoult, while being senior managers within Telecom, were not Mr Evans-McLeod’s employers. All the documentation produced to the Authority including the letter of offer when Mr Evans-McLeod was promoted in 1994 together with the 1993 Collective Employment Contract which was applicable to Mr Evans’ McLeod’s employment all identify Telecom as being Mr Evans-McLeod’s employer.

[8] Finally, the second preliminary matter relates to a signed Record of Settlement entered into by Mr Evans-McLeod. The Record of Settlement identifies the Respondent as being Telecom and no other persons are cited.

[9] I am satisfied Mr Evans-McLeod’s employer was the first respondent only and not the second, third or fourth respondents.

## **Jurisdiction**

[10] On 21 August 2009 Mr Evans-McLeod attended mediation with Telecom. At the mediation meeting, Mr Evans-McLeod was represented by Mr Peter Cooper-Davies, a union organiser employed by the Engineering, Printing and Manufacturing Union (“EPMU”). The mediation meeting resulted in a Record of Settlement being signed by both parties. The agreement states that the settlement is

...in full and final settlement of all matters between the applicant and respondent arising out of their employment relationship and its termination.

[11] As part of the agreed settlement of Mr Evans-McLeod’s employment relationship problems, he agreed to resign from his position with Telecom with immediate effect and was paid a sum of money by way of compensation.

[12] Mr Evans-McLeod has lodged a statement of problem claiming he was unjustifiably (constructively) dismissed, that he was discriminated against in that he was not offered the same terms of employment, conditions of work and was made to resign, in circumstances where other employees with the same or similar qualifications were not required to.

[13] Mr Evans-McLeod claims he was micro-managed out of his position and that the micro-management was akin to workplace bullying. Finally, Mr Evans-McLeod claims Telecom is in breach of the Health and Safety in Employment Act in that it failed to control the hazard of stress in the workplace.

[14] For its part, Telecom denies the allegations made by Mr Evans-McLeod and says that he is prohibited from taking his claims any further as he is subject to the signed Record of Settlement agreement.

[15] The starting point for resolving this issue is section 149 of the Act which provides that where a problem is resolved by use of mediation services or otherwise, a mediator may, at the request of the parties to the problem sign the agreed terms of settlement. The terms become final and binding on, and enforceable by the parties, once a Mediator has explained to them that the terms are final and binding on, and enforceable by the parties and the parties affirm their request and the mediator signs the Record of Settlement.

[16] Section 149(3) prohibits the parties from seeking to bring the terms of settlement before the Authority or Court, except for enforcement purposes. This section is founded on clear policy to give greater certainty of outcomes in mediated settlements.<sup>1</sup>

[17] I am satisfied the Record of Settlement complies with the requirements of section 149 in that the Record of Settlement was signed by a mediator and endorsed to the effect that the mediator had explained to the parties that the settlement was final, binding and enforceable. Mr Evans-McLeod along with Telecom, also signed the Record of Settlement.

[18] Section 149(3) is uncompromising not only so as to discourage an aggrieved party for seeking perceived better resolution on enforcement but also because the prospect of cancellation would render such settlements largely redundant.<sup>2</sup>

[19] Mr Evans-McLeod seeks to have the Record of Settlement set aside on the basis that he disputes the legality of the actions which preceded and led him to being forced to mediation and forced to resign under duress.

[20] As settlement agreements will generally be interpreted as limited to claims that both parties were aware of at the time the agreement was entered into<sup>3</sup> the Authority investigated the issues which were known to the parties at the time they attended mediation on 18 August 2009.

[21] Mr Cooper-Davies told the Authority that prior to mediation he discussed with Mr Evans-McLeod issues relating to bullying, not being offered the same terms of employment or conditions of work, and concerns that Telecom was acting illegally by acting outside the Employment Relations Act and the Health and Safety in Employment Act.

[22] Mr Evans-McLeod confirmed that these issues together with concerns relating to the allegations of being micro-managed were raised before the parties attended mediation. Further, Mr Evans-McLeod confirmed that he raised the issues relating to

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<sup>1</sup>*McRae v The \$2 Shop Limited*, unreported, Employment Relations Authority, Member Robinson, 2 July 2007, AA 132A/07.

<sup>2</sup>*Clark v Sal's Trading Company Ltd*, unreported, Employment Relations Authority, Member, Member Campbell, 3 December 2007, AA 378/07.

<sup>3</sup>*Marlow v Yorkshire NZ Ltd* [2000] 1 ERNZ 206.

stress at a meeting with Telecom on 27 July 2007 and that he advised those at the meeting that he was suffering from stress.

[23] It is clear from the evidence that all the claims in Mr Evans-McLeod's statement of problem were in contemplation of the parties prior to and during mediation. There is no evidence Mr Evans-McLeod did not freely enter into the Record of Settlement dated 21 August.

[24] I find both parties freely entered into the final and binding Record of Settlement in which they agreed, among other things, that Mr Evans-McLeod would resign and Telecom would pay him a sum of money.

[25] Further there is no evidence that Mr Evans-McLeod's resignation resulted from any inappropriate or unlawful action on Telecom's part or by anybody else. Mr Evans-McLeod was represented by an experienced officer of the EPMU and entered into the Record of Settlement after mediation and subsequent negotiation with the ongoing assistance of the mediator.

[26] I find Mr Evans-McLeod is statute barred by section 149(3) of the Act from pursuing a personal grievance.

### **Costs**

[27] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Telecom may file and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority