New Zealand Employment Relations Authority Decisions

Godfrey and Company Limited v Price (Christchurch) [2016] NZERA 407; [2016] NZERA Christchurch 148 (1 September 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 148
5597541

BETWEEN GODFREY AND COMPANY LIMITED

Applicant

A N D DAVID PRICE Respondent

Member of Authority: Christine Hickey

Representatives: Carolyn Heaton, Counsel for Applicant

David Beck, Counsel for Respondent

Investigation Meeting: On the papers

Submissions: Received on 29 April 2016 and 20 May 2016, from the

Applicant

Received on 16 May 2016 and further information received on 15 August 2016, from the Respondent

Date of Determination: 1 September 2016

DETERMINATION OF THE AUTHORITY

A. Godfrey and Company Limited's claim is dismissed for want of

jurisdiction.

B. **I have reserved the issue of costs and set a timetable for submissions.**

Employment relationship problem

[1] David Price worked for Godfrey and Company Limited (Godfreys) as a loss adjuster from 1 August 2013 to 25 September 2015. Godfreys claims that Mr Price has breached clause 18(iv) of his individual employment agreement (IEA). As a result, Godfreys says that Mr Price must pay it pro rata relocation expenses incurred

by it when he came to New Zealand from the United Kingdom to work for Godfreys. It also claims he has breached later agreed Terms and seeks the $12,500.00 relocation costs it paid to him, under those Terms, to return to the UK after he finished working for it.

[2] Mr Beck submits that because the agreement between the parties to end

Mr Price's employment was not made under s 149 of the Employment Relations Act

2000 (the Act) the Authority does not have jurisdiction to consider whether there has been a breach of that agreement.

[3] I held a case management conference with the parties on 30 March 2016. I directed the parties to mediation. I set dates for exchange of submissions if the mediation did not resolve the claim. The parties agreed this question of jurisdiction could be determined on the papers. Mediation did not resolve the claim and the parties filed written submissions.

Relevant facts

[4] There are a few disputes of fact. They are:

(a) What was nature or purpose of the "Travel Allowance" referred to in

the 8 September 2015 offer?

(b) Whether Mr Price commenced work in Christchurch in October 2016 in contravention of clause 18(iv) of his IEA; and

(c) Whether any personal grievance re redundancy that Mr Price may wish to pursue was raised within 90-day of the purported cause of action accruing.

[5] For the purposes of this preliminary determination, I do not have to resolve the factual disputes.

[6] Godfreys recruited Mr Price while he lived in the UK. Clause 18 of his IEA

says:

18. Leaving our employment

i. Either party may termination this agreement by giving one

month's notice in writing. ...

iv. An exceptional item specific to your employment is the sizeable relocation costs incurred by Godfreys to bring you to

NZ. If you left our employment at your choice, to continue loss adjusting or related services within New Zealand or another country other than the UK, we would require you to replay the relocation expenses back to Godfreys. The amount to be repaid would amortise on a straightline monthly basis over three years. After three years, this item would no longer apply.

[7] In a letter dated 8 September 2015, Mr Price refers to various discussions over the past few weeks about his ongoing employment. He refers to a meeting earlier that day and the email sent to him by Godfreys which included proposed terms, including a final payment of $27,500.00 based on the following offer:

Termination of Employment Terms

Should you choose to resign from Godfreys effective 2 weeks Friday (25 Sept) to return to the UK, a full and final payment of $27,500 is on offer, broken down as:

• 2x pay cycles at p.a. drawing rate of $101,377 = $7,798

• Annual Leave of $7,202 (adding back the 2 "in lieu" days we'd

not accounted for)

• A travel allowance of $12,500 to assist your return home, paid where possible directly to suppliers for travel/removal costs, with the balance to you for miscellaneous travel costs

...

[8] In his written response, also dated 8 September 2015, Mr Price accepted the

Terms offered and wrote:

... I confirm my intention to resign my position in accordance with those terms. As detailed my last day in the office will be Friday 25th September 2015.

The only caveat to this is that as advised previously, subject to my returning to the UK, there will be no request for the

proportional re- imbursement of the original re-location costs of $25,000.

It is presumed that the holiday entitlement detailed will be included in the 28th September 2015 "pay date", and that the "Travel Allowance" will be paid on presentation of invoices etc. Any non-payment of the amounts detailed will constitute a breach of this agreement and I reserve my legal rights to take this matter further should I so decide.

[9] As I understand it, these documents were not drawn up into a single contractual document. More to the point for this determination, the parties did not make the agreement pursuant to s 149 of the Act. That is, it was not an *"agreed terms of settlement"* that was signed by a mediator designated by MBIE's chief executive to undertake that statutory role.

[10] The effects of a s 149 agreed terms of settlement are:

(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by persons empowered to do so, -

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under section 7 of the

Contractual Remedies Act 1979; and

(b) except for enforcement purposes, no party may seek to bring these terms before the Authority or the court, whether by

action, appeal, application for review otherwise.

...

[11] The important effect in this case is that if an agreement is made under s 149 of the Act it may be enforced by the Authority or the Employment Court.

[12] I understand that Godfreys paid the amounts referred to in its 8 September

2015 letter. I further understand that Mr Price flew back to the UK on 30 September

2015. However, he returned to New Zealand and on about 12 October 2015 began working for a business Godfreys identifies as a competitor in loss adjusting services.

[13] It is Mr Price's return to NZ and his work in the loss adjusting business that

Godfreys says triggers:

- its right to have Mr Price pay back the $7,500.00 pro rata amount covered by clause 18(iv) of his IEA, and

• its right to have the $12,500.00 it paid for Mr Price's relocation to the UK in

September 2015 under the agreed Terms, paid back.

The issue

[14] I need to consider whether the Terms entered into by the parties on

8 September 2015 amounted to a variation of the IEA, so that it was operative only by reference to and alongside the IEA, or was a stand-alone agreement, which could be sued upon in its own right.

The relevant law

[15] The submission that the Authority lacks jurisdiction relies on the Court of Appeal case of *JP Morgan Chase Bank NA v Robert Lewis*1. The Court examined the issue of the enforceability in the Authority and the Employment Court of a settlement agreement that did not satisfy the requirements of s 149 of the Act.

[16] Here is a succinct summary of the *Lewis* case from *Association of Professional*

*& Executive Employees v West Coast District Health Board:*2

[67] ... The Court of Appeal discussed the difference between the rescission of an employment agreement and the variation of one3. In the first case, there is the complete extinguishment of all the rights and obligations under the employment agreement by way of a bilateral discharge (which can be effected orally or in writing). In the second case, whilst some rights and obligations may be discharged, others will continue to exist, so that the original agreement can be said to have been

varied.

[68] The Court of Appeal referred in *Lewis* to a statement of Lord Dunedin given in the UK House of Lords case *Morris v Baron & Co:*4

... The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

The judgment in *Lewis* also cited Lord Sumner in *British and Beningtons Ltd v North Western Cachar Tea Co Ltd*5 as follows:

... The question is whether the common intention of the parties ... was to "abrogate", "rescind", "supersede" or "extinguish" the old contracts by a "substitution" of a "completely new" and "self- contained" or "self-subsisting" agreement ...

Adopting these statements of the law, the Court of Appeal in *Lewis* found that the settlement agreement under consideration, which provided that Mr Lewis would resign from his employment with the bank the following day, was a new arrangement as its purpose was to end Mr Lewis' employment. Secondly, the agreement contained provisions that were plainly intended not

1 [2015] NZCA 255.

2 [2015] NZERA Christchurch 135, Member Appleton.

3 *Lewis,* above n 1, from [59] onwards.

4 [1918] AC 1 (HL) at 19.

5 [1923] AC 48 (HL) at 62.

to operate as terms of employment, but as terms that were to apply once the employment agreement was ended. Third, the settlement agreement could be sued upon alone. Finally, once the settlement agreement had been executed, it could not be said that it was possible for both agreements to be performed.

These findings amounted to the conclusion that the settlement agreement entered into by Mr Lewis was not a variation of his employment agreement, but replaced it, governing, on its own, the relationship of the parties after the cessation of Mr Lewis' employment. Having reached this conclusion, the Court of Appeal found that the settlement agreement therefore could not be regarded as an employment agreement for the purposes of s 5 of the Act. In turn, this meant that the Authority did not have the jurisdiction to deal with the dispute under s 161(1)(a) or (b) of the Act.

The Court went on to find that the Authority also did not have jurisdiction under s 161(1)(n) of the Act, as it could not have issued a compliance order under s 137(2) or any other provision of s 137 of the Act.6

The parties' submissions

The respondent's submissions

[17] The primary submission is that the Authority lacks jurisdiction to hear and determine this matter. In the alternative, if I determine that the Authority does have jurisdiction Mr Beck has signalled Mr Price's intention to counter-claim that his position with Godfreys was redundant and to seek redundancy compensation of five months' salary, under clause 17(iv) if his IEA.

[18] Mr Beck submits that the agreed Terms effectively replace Mr Price's IEA, although not the confidentiality obligations contained in the IEA. Therefore, any attempt to seek to base a cause of action upon breach of clause 18(iv) in the Authority is not viable as no terms of the individual employment agreement survive, in the new agreement.

[19] Mr Beck further submits that:

(a) The expression "Travel Allowance" was used as an expedient vehicle for making the final payment. The amount due was agreed to as a compromise. The payment was approximately the amount due given what Mr Price's chargeable hours had been since the beginning of August 2015 to the date of his departure;

(b) Mr Price disputes that the company with whom he has a contract until

31 August 2015 is a direct competitor of Godfreys. He says that he is

6 At paragraphs [67] to [72].

engaged to work in process claims in the domestic market and that Godfreys had declined to be involved when invited by a large insurer to participate in early 2015. He says he plans to return permanently to the UK after this contract terminates. He flies out for the UK on 2

September 2016.

[20] Mr Beck further submits that if I deem that the Authority has jurisdiction, Godfreys is estopped from pursuing any action based on the agreed Terms. That is because clause 18(iv) is a form of restraint of trade clause, although no wider restraint clause exists.

The applicant's submissions

[21] Godfreys submits that the Authority has jurisdiction for the following reasons:

• Clause 20 of the IEA states that *"except where legally varied by this contract, the terms of the* [Employment Relations Act 2000] *are honoured in all respects"*. However, there is no explicit requirement for any variation of the IEA to be in writing and signed. Because there was clear correspondence between the parties about the Terms, it is artificial to suggest those Terms were not agreed and enforceable between the parties from 8 September 2015;

• There is no evidence to suggest that Mr Price did anything other than resign from his employment. He did not do so after raising a personal grievance and he did not raise any personal grievance within 90 days of the termination of his employment. It is not clear what Mr Price means by suggesting that there was a mutually agreed termination. Godfreys would not have stood in the way of his resigning if that was what he wanted to do;

• There was no settlement agreement. Instead, Mr Price indicated an intention to resign and the parties discussed when and how that would be effected and what final payment he would receive. Therefore, there was no need for a stand-alone settlement agreement;

• The document entitled "Termination of Employment Terms" did not need to include post-employment obligations because they were already understood by both parties to be in the IEA;

• Mr Price admits that the confidentiality obligations of the IEA survive the termination of the employment relationship. Clause 18(iv) likewise survives the termination of the employment relationship because the further Terms agreed between the parties did not replace, rescind or supersede the employment agreement in this case;

• Clause 18(iv) was not included by reference in the Terms offered because they did not rescind the employment agreement;

• Mr Price himself confirmed his intention to resign in accordance with the offered terms and in addition referred to the terms of clause 18(iv), referring to his obligation to return to the UK otherwise there would be a request by Godfreys for the pro rata reimbursement of the original relocation costs. Mr Price simply restated that if he left Godfreys at his choice to continue loss adjusting or related services within New Zealand or any other country than the UK, then Godfreys would require him to repay a proportion of his relocation expenses.

• Therefore, both parties can be taken to have understood that clause

18(iv) continued unvaried to govern them both after his resignation. However, Mr Price's use of the word "caveat" was unnecessary because as long as he returned to the UK, and otherwise complied with clause 18(iv), Godfreys could not seek any proportional reimbursement;

• The further Terms are not the same as the full and final settlement agreement in the *Lewis* case. No personal grievance had been raised by Mr Price and there was no extinguishment of the IEA by a self- contained or completely new agreement that was entered into to resolve a grievance;

• The applicant does not seek to sue on the Terms alone here; they survive alongside the contractual force of clause 18(iv) in the IEA;

• This situation is distinguishable from that in *Lewis* because in that case all matters related to the termination of the relationship were incorporated into the settlement agreement, which was expressed to be in full and final settlement of a personal grievance. It was also expressed to supersede all previous employment agreements;

• Therefore, the Authority has jurisdiction under s 161(1)(a) or (b) of the Act to deal with the current claims of breach. The Authority also has jurisdiction under s 161(1)(n) of the Act to consider issuing a compliance order under s 137(2) of the Act because there was non- compliance with a provision of an employment agreement.

Determination

Was the agreement entered into on 8 September 2015 a new agreement, intended by the parties to replace the IEA and operate as a stand-alone agreement?

[22] To work through the question of what kind of agreement the parties entered into when the Terms were agreed; I consider below each aspect weighed up by the Court of Appeal in *Lewis.*

[23] The fact that Mr Price was clear that clause 18(iv) remained enforceable if he did not return to the UK ("subject to my returning to the UK") arguably weighs against considering that the Terms were in and of themselves a replacement for the IEA. On the other hand, applying the Court of Appeal's analysis in the *Lewis* case the provision was incorporated by Mr Price's reference to it into the new agreement, the Terms, by way of that reference, making it a part of the new and enforceable contract.

[24] The fact that Mr Price acknowledges that his confidentiality obligations (in clause 5 of the IEA) remain in force is a neutral factor as the clause arguably does not go further than the post-employment common law obligation of confidentiality would.

[25] The Terms set out what was to happen when Mr Price's employment was terminated. The Terms were offered only on the basis that Mr Price proffered his resignation and that his employment would end two weeks from the proffering of his resignation. That makes it somewhat artificial to say the Terms were merely a variation of the IEA.

[26] Godfreys' obligations arose out of and only after Mr Price's resignation and the "Travel Allowance" was to be paid to the providers of Mr Price's travel and return to the UK.

[27] The fact that Mr Price reserved his legal rights to take "this matter further" if the amounts agreed in the Terms were not paid is evidence he considered he could sue on the Terms alone. I consider the Terms could be sued on alone and without reference to the IEA. If Godfreys had not made the payments it offered in the Terms Mr Price could have enforced the Terms.

[28] Once the Terms were agreed upon it was not possible for both agreements to be performed alongside each other, at least after the two week notice period had expired. The payment of leave and two weeks' of pay cycles (drawings) was due as a full and final payment and was to be paid after Mr Price's last day of work. The Travel Allowance was payable upon Mr Price providing invoices proving his imminent return to the UK from where he could not carry out most of the terms and conditions of his IEA.

[29] However, there are also material differences between the settlement agreement in *Lewis* and Mr Price and Godfreys' agreed Terms.

[30] In the *Lewis* case, the parties agreed that the settlement agreement constituted the entire agreement between the parties and superseded all and any prior agreements. The Terms do not say that they consist of the entire agreement between the parties. That may at least in part be because the parties intended clause 18(iv) to be incorporated into their agreement. Mr Price referred to it because he represented that he intended to "return" to the UK, despite doing so before the three-year term referred to in clause 18 was up.

[31] On balance, I conclude that the Terms incorporate clause 18(iv) of the IEA. The Terms amount to a separate and stand-alone agreement that can be sued on. That being the case, the Terms do not constitute an "employment agreement" under s 5 of the Act, which ousts the Authority's jurisdiction under s 161(a) and s 161(b) of the Act. In addition, the Authority does not have jurisdiction to make an order for compliance with the agreement, under ss 137 and 161(n).

[32] The practical effect of the determination is that I dismiss Godfreys' application

to the Authority. However, Godfreys may now proceed with its claim in either the

Disputes Tribunal, if it chooses to limit its claim to $15,000.007, or in the District

Court. Direct negotiation or further mediation8 may also be effective.

Costs

[33] Costs are reserved. I encourage the parties to agree on these between themselves, perhaps as part of their further negotiations. However, if Mr Price seeks an award of costs, I expect an application for costs within 3 months from the date of this determination, with submissions in response within a further 14 days.

Christine Hickey

Member of the Employment Relations Authority

7 Section 10, Disputes Tribunal Act 1988. Alternatively, up to $20,000 if both parties agree.

8 The parties may wish to enquire whether the chief executive of the Ministry of Business, Innovation and Employment

considers this dispute to fall under the category of “work-related relationships” referred to in s 144A of the Act. If so, further mediation may be possible through the Mediation

Service.
