

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 506/10
5323117

BETWEEN ADAM RAPHAEL
 GREENBAUM
 Applicant

AND THE WAIKATO DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: David O'Neill, counsel for Applicant
 Andrew Steele, counsel for Respondent

Determination: 10 December 2010 (on papers)

DETERMINATION OF THE AUTHORITY

[1] Before substantive claims are investigated in only three days time, a determination is required of a preliminary issue that has suddenly arisen between the parties.

[2] The issue was raised with the Authority on 3 December 2010 by counsel Mrs Melanie O'Neill. She has been acting for the applicant Dr Adam Greenbaum whose claims against his employer, the respondent Waikato District Health Board, have been set down to be investigated over several days and determined by the Authority, commencing on 13 December 2010.

[3] Mrs O'Neill advised the Authority on 3 December that the applicant considered his claims had been resolved with the Board through an exchange of emails which took place with a view to settling the employment dispute. Mrs O'Neill advised that after the applicant thought he had accepted an offer of settlement from the Board, its counsel, Mr Anthony Russell, advised that the offer had been made in error.

[4] The applicant has contended that notwithstanding any error there had been offer and acceptance such that a binding accord and satisfaction of his claims against the Board was constituted. The accord, or meeting of minds, was argued to have occurred when the applicant purported to accept the terms of an offer clearly set out in the communication claimed by the respondent to have been sent mistakenly to the applicant's counsel Mrs O'Neill.

[5] In accordance with the timetable fixed with counsel submissions have been made on the issue by Mr David O'Neill for the applicant and Mr Andrew Steele for the respondent. Privilege has been waived in respect of letters marked 'without prejudice' to enable me to consider that correspondence in determining this preliminary issue. A different Authority Member is to determine the substantive claims and she will do so without any knowledge of what is in that correspondence.

[6] The first item of correspondence produced to the Authority is a letter written by Mrs O'Neil to Mr Russell on 29 November 2010. It bears the email address of Mr Russell and appears to have been sent to him by email. The letter is on the headed paper of "Melanie O'Neill Barrister" and has her signature over her name which is printed at the foot of it. The letter, headed "WITHOUT PREJUDICE SAVE AS TO COSTS," contains the terms of an offer of settlement made on behalf of Dr Greenbaum to the Waikato District Health Board. The terms are set out over nine paragraphs.

[7] On 30 November, after receiving the letter, Mr Russell emailed Mr Greg Peplow, the Board's HR manager. Under the subject heading "Greenbaum – without prejudice" was the following message addressed to Mr Peplow:

Hello Greg,

I attach a proposed letter of response.

Please get back to me on this tomorrow.

[8] On 1 December Mr Russell sent a further email, joining to it that of 30 November addressed to Mr Peplow. At the top of it was the following:

To: Melanie O'Neill

[9] The "Subject" of it was "Greenbaum – without prejudice." The letters "FW" immediately before the subject description show that the email was compiled by

forwarding Mr Russell's email to Mr Peploe of 30 November. Mr Russell's second email (1 December) reads as follows:

Hello Greg,

They are chasing me up on a response.

If you consider the offer below appropriate, let me know, preferably this morning (as I am in mediation all afternoon).

Also, I note you are away next week. I will probably need someone to step into your shoe, as my first point of contact, as there will undoubtedly be things that will be needed. Amy H perhaps? Please let me know and bring the person up to speed (as much as possible).

[10] In an attachment to the email there was a letter dated 30 November 2010 addressed to Melanie O'Neill, barrister of Hamilton and headed "WITHOUT PREJUDICE." It referred expressly to Mrs O'Neill's letter of 29 November 2010 and in nine separate paragraphs gave a response to the offer made on behalf of Dr Greenbaum, also in 9 paragraphs. Against four of the paragraphs, "Agreed" simply appears. In other paragraphs there is some elaboration given on acceptance of the particular term. In one paragraph part of a term offered by the applicant is rejected.

[11] The attachment to Mr Russell's email is not on paper headed with the name Martelli McKegg Wells & Cormack, Lawyers, although that name appears at the foot of the second page in small print. While Mr Russell's name is printed at the end of the letter, no signature is on it.

[12] Taking an objective view of the dealings between the parties and their legal representatives, the Authority is quite satisfied that receipt of Mr Russell's email of 30 November with the letter attached could not reasonably have been regarded as the receipt of an offer or counter offer that had been made to Dr Greenbaum or Mrs O'Neill. It was plainly a proposed offer intended for consideration by Mr Peploe or other representative of the Board, before being communicated to the applicant or his counsel if the Board approved it as a response to the applicant's offer.

[13] I do not consider that an objectively reasonable recipient of the attachment "Without Prejudice" letter, reading it in context or in conjunction with the message in the email, would take the letter as a communication of an offer to the applicant, Dr Greenbaum.

[14] While the electronic communication itself was transmitted to “Melanie O’Neil,” the message contained in it was addressed to “Greg.” It included a forwarded email of 30 November, also to “Greg,” which referred to “a proposed letter of response.” In that earlier email Mr Peplow had been asked to get back to Mr Russell by “tomorrow” (1 December). The message to “Greg” tends to indicate that Mr Peplow had not yet returned to Mr Russell who was therefore “chasing” him up for a response.

[15] The message that follows the greeting to “Greg” is clearly a request for the Board’s instructions from its legal advisers. The attachment without prejudice letter cannot reasonably be isolated from the message in the body of the email referring to it, and cannot be separated as an independent communication to Mrs O’Neill as Dr Greenbaum’s lawyer.

[16] Mr David O’Neill has submitted that although the content of the 1 December email sent to Mrs Melanie O’Neill suggested it was intended for Mr Peplow, there was nothing to indicate to Mrs O’Neill that she was not merely being sent the email after Mr Peplow had approved the letter of offer attached to it. What Mrs O’Neill knew is not in evidence. If she was examined it might also be relevant to ask what Mrs O’Neill made of an email sent to her email address but without any greeting of her as a normal professional courtesy and with one email simply clipped “FW” to an earlier one which had obviously been sent to a third person “Greg.”

[17] The document Mrs O’Neill regarded as an offer made on behalf of the Board was not under letterhead and was not signed by Mr Russell. By contrast she sent the applicant’s offer under her letterhead and she signed that letter. It may be assumed that was done in accordance with best professional practice when a letter of this nature has been approved by the client and is intended then to be sent to and received by the person it has been addressed to.

[18] I consider that a recipient of Mr Russell’s email of 1 December, with the “Without Prejudice” letter attached, could not reasonably have regarded it as being intended for anyone except Mr Peplow, or other representative of the Board, who was involved or was going to become involved in the investigation or resolution of Dr Greenbaum’s claims.

Determination of preliminary issue

[19] I find that while the applicant purported to accept an offer, it was not an offer made to him. Objectively, neither Dr Greenbaum nor his agents could reasonably have thought it had been. Therefore I find there was no contract of accord and satisfaction and Dr Greenbaum's claims have not been settled. I reject Mr O'Neill's submissions in that regard.

[20] Time has prevented me from addressing the arguments addressed by Mr Steele to privilege under the Evidence Act 2006 and by both counsel to mistake and counter-offer. In the few hours left before the start of the investigation the parties should continue their efforts to settle Dr Greenbaum's claims.

Costs

[21] Costs are reserved. Counsel should confer as to whether any question of costs should be dealt with by this Member on a separate basis from the substantive investigation, or whether it can be dealt with in conjunction with the overall costs question by my colleague conducting the investigation.