

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 500
5517482

BETWEEN	EWEN GROVES Applicant
A N D	BALLANCE AGRI- NUTRIENTS LIMITED First Respondent
A N D	RUSSELL McVEAGH Second Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Paul Wicks QC, Counsel for First Respondent
Richard McIlraith, Counsel for Second Respondent

Investigation Meeting: On the papers

Date of Determination: 5 December 2014

DETERMINATION OF THE AUTHORITY

History

[1] By Statement of Problem filed in the Authority on 10 October 2008 (the first statement of problem), the applicant (Mr Groves), raised a personal grievance about the propriety of his dismissal for redundancy by the first respondent in this present proceeding (Ballance).

[2] A full settlement of all matters relating to the 2008 claim was achieved in mediation on 22 October 2008 and duly signed by a mediator pursuant to s.149 of the Employment Relations Act 2000 (the Act) on 13 November 2008.

[3] That mediated settlement contained the usual provision whereby the parties bound themselves to “*settle all claims*” as between Mr Groves and the other parties

and that performance of the settlement agreed was “*in full and final settlement of all issues raised in the proceeding Mr Groves commenced in the Employment Relations Authority and all matters relating to Mr Groves’ employment relationship ... and the termination of that employment relationship*”. A subsequent provision recorded that Mr Groves agreed to discontinue that proceeding in consequence of the settlement.

[4] At the relevant time, Mr Groves was represented by counsel from a well-known employment law firm in Auckland and the particular counsel from that firm who acted for Mr Groves was a very experienced employment lawyer.

[5] Then by initiating correspondence dated 14 May 2014, and addressed to the Employment Relations Authority in Auckland, Mr Groves sought to raise issues to do with the 2008 settlement I have just described.

[6] Amongst other things, Mr Groves refers to a letter he wrote to the Chief Executive of the Ministry of Business, Innovation and Employment dated 7 August 2012, which remained unanswered. The thrust of that letter, and subsequent material traversing the same issues from Mr Groves, is to seek a “*review by the Employment Relations Authority*” of the basis of the settlement reached between the parties in 2008.

[7] The parties that Mr Groves directs his complaints at are respectively the first and second respondents in the present proceeding.

[8] After an exchange of correspondence between the Authority’s support officer and Mr Groves and a letter from Mr Groves to the Hon Simon Bridges MP, then Minister of Labour, Mr Groves filed a fresh application in the Authority (the second statement of problem) on 5 September 2014.

[9] Statements in reply were subsequently filed and served by both the indicated respondents, with Russell McVeagh indicating their protest to jurisdiction on the footing they were not and had never been in an employment relationship with Mr Groves.

[10] The matter went onto the list of my colleague Member Campbell and she conducted a telephone conference with the parties on 15 October 2014 wherein a timetable was agreed for the proceeding to be dealt with by the Authority on the papers.

[11] In that telephone conference, Member Campbell identified a number of barriers to the claims made by Mr Groves and because they are highly pertinent to this proceeding, I set out in full the relevant section from Member Campbell's Minute on the subject:

- [3] *During the conference call I raised the following matters which may prove to be barriers to the applicant's claims:*
- (a) *Whether he had an employment relationship with the second respondent;*
 - (b) *That a penalty is an appropriate remedy for breaches of good faith and that penalty actions must be commenced within 12 months of the actions giving rise to the breach;*
 - (c) *The Statement of Problem does not seek the remedy of a penalty;*
 - (d) *Issues raised in the Statement of Problem appear to mirror those raised in the applicant's previous proceedings lodged in the Authority in 2008 and which were settled in mediation."*

[12] The same Minute from Member Campbell also records the parties' agreement to the preliminary matter, the application by the first respondent for the proceedings to be struck-out pursuant to s.12A of the Act, being dealt with first as a preliminary matter. The logic of that approach is, of course, inescapable; if the Authority finds there is no basis on which it can consider Mr Groves' claims, then the matter cannot proceed any further to a substantive hearing.

[13] I note that the question whether Mr Groves had any right of action against Russell McVeagh was not specifically addressed in Member Campbell's Minute but it seems to me implicit from the file that that issue also is a preliminary matter which I ought to address in fairness to all parties. A failure to deal with it simply leaves parties uncertain about the Authority's position on the matter and deprives them of challenge rights on that issue anyway, in the Employment Court.

[14] Finally from the issues relating to the telephone conference convened by Member Campbell, I note that the file came onto my list as a consequence of my colleague declaring that she had previously performed some consulting work for the first respondent some 14 years ago and as a consequence Mr Groves expressed a preference for the matter to be dealt with by another member.

Issues

[15] The two issues that the Authority needs to address are as follows:

- (a) Should the first respondent's application for strike-out under s.12A be granted; and
- (b) Does Mr Groves have a right of action against Russell McVeagh?

Ought the Authority strike-out Mr Groves' proceedings in terms of s.12A?

[16] It is apparent on the extensive material filed in the Authority by Mr Groves that he has gone to a great deal of time and trouble to prepare material in support of his very strongly held conviction that he has been wronged by the process which led to him entering into a settlement agreement with, amongst others, Ballance, in 2008. Amongst those that he holds culpable for that alleged wrongdoing is Russell McVeagh but I address that firm's involvement in this matter in the next section of this determination.

[17] I begin my analysis of this first question by the observation that the Authority is a creature of statute. Put another way, the Authority only has the legal power to make decisions about matters that it is specifically granted the power to consider by the statute.

[18] The Employment Relations Act 2000 is a code which gives the Authority legal power to do certain things but not others.

[19] As Member Campbell correctly observed in the Minute that she drafted after the telephone conference on 15 October 2014, the matters traversed in Mr Groves' second statement of problem are the same matters that were subject to a full and final settlement reached after his first statement of problem was filed in the Authority. As such, put shortly, there is no legal basis on which the Authority can unravel the decision already arrived at.

[20] This is principally, but not exclusively, because of the effect of s. 149 of the Act. When a mediator employed to provide mediation services under the Act, signs a mediated settlement, whether or not the parties actually mediated before that mediator, the mediator is certifying that they explained to the parties the effect of s.149(3) of the Act. That sub section, in simple terms, says that the terms of settlement are final and binding, that they may not be cancelled under the Contractual Remedies Act 1979 and that they may not be brought before a Court or the Authority, except to enforce the terms of the agreement. In *Young v Board of Trustees of Aorere*

College [2013] NZEmpC 111 the Employment Court concluded that once a settlement agreement had passed through the statutory process in s 149 it could not be challenged or set aside except for duress or public policy considerations. Neither of those considerations applies here.

[21] It is also the case that, at common law, an agreement to end litigation on certain terms and conditions allows a party to that agreement to resist an attempt by the other party to unpick the agreement on the basis of what the law calls the principle of accord and satisfaction. As Chief Judge Goddard observed in *Harris v. Birchwood Farm Holdings Ltd* [2002] 2 ERNZ 392, this phrase is simply an old form of words which means nothing more or less than a settlement.

[22] In 2008, Mr Groves raised a personal grievance protesting his dismissal for redundancy. He was represented at the time by able counsel. There were various engagements between the parties. Ultimately a settlement agreement was drafted, signed, witnessed by a mediator employed by the Department of Labour (as it then was) and then actioned.

[23] That settlement agreement, as I have already noted earlier in this determination, contained the usual provision about being in full and final settlement of all matters between the parties. Those words mean what they say. They are designed to prevent precisely the sort of claim Mr Groves is making in the second statement of problem because in the second statement of problem, he is seeking to reopen issues which, as a matter of law, have been closed certainly because of the effect of s. 149 and probably because there was a settlement on all matters between the parties.

[24] Closure was effected by a number of provisions in the settlement agreement including a significant payment to Mr Groves.

[25] Whatever Mr Groves' apprehensions about the basis of the termination for redundancy and the circumstances of it, and whether or not he has subsequently learned about matters which he thinks changes the position as he understood it at the point settlement was reached in 2008, the fact of the matter is that the law on this point seeks to promote the virtue of certainty so that parties can conclude arrangements definitively bringing threatened litigation to an end. That is the whole point of and the virtue of the certainty which, on this particular point, the law puts primacy on.

[26] It seems to me clear that in the present circumstances, the parties (including Mr Groves) signed the settlement agreement and Mr Groves then accepted the sum he was paid in “*satisfaction*” of the claim, there being “*accord*” between them on all matters at that point.

[27] In those circumstances, the law does not allow Mr Groves to seek to unravel the accord which he reached with the other parties in the 2008 claim and the satisfaction which was paid to him in settlement of that claim.

[28] However, I express the view tentatively, without having to decide the point in the present proceeding, that the decided cases do suggest that where a s 149 agreement is not in play, there may well be circumstances where, what on the face of it is a concluded settlement, can in fact be re considered: see for instance *Marlow v Yorkshire New Zealand Ltd* [2000] 1ERNZ 206, followed in *Rickards v Ruapehu District Council* [2003] 1 ERNZ 400.

[29] But in the present case, the agreement Mr Groves is seeking to effectively set aside was made in terms of s. 149 of the Act and so the observations I have just made cannot apply to the present situation.

[30] There is now a clear statutory provision which, according to the explanatory note to the Bill promoting the legislative change, creates a provision allowing the Authority to dismiss claims with little or no merit without needing to fully investigate them. That provision is Clause 12A in the Second Schedule to the Act.

[31] This is just such a case where, to prevent the parties from the considerable expense and time and energy associated with a fully fledged investigation, there is an ability for the Authority to deal with the matter shortly using the clause 12A process.

[32] I am satisfied that Mr Groves entered into a full and final settlement with parties in 2008 including Ballance, that that settlement was processed through s.149(3) of the Act, and in consequence, cannot now be overturned or inquired into especially because the terms of the agreement reached in mediation have been performed, Mr Groves was represented by experienced counsel at the time, and the matter now seeking to be unravelled was settled some six years ago.

[33] The Employment Court has long had an ability to determine that an application before it can be dismissed on the grounds that it is either frivolous or

vexatious. The leading case on a frivolous application remains *STAMS v. MM Metals Ltd* [1993] 1 ERNZ 115 where Judge Finnigan defined “*frivolous*” as futile and then went on to say:

Clearly on the facts of the present case an agreement was reached to compromise the cause of action and both parties moved to implement. The agreement was contractual. ... Offer acceptance and consideration all existed.

[34] In the succeeding paragraph, the learned Judge goes on to observe that once those conditions of offer, acceptance and consideration existed “*an attempt to continue with the litigation had no foundation. The right to do so had been surrendered*”. That is precisely the situation in the present case. Mr Groves has surrendered his right to continue with the litigation by settling or compromising his claim in 2008 and to allow him to proceed now would be frivolous in the sense of being futile.

[35] Put another way, if the Authority were to erroneously allow Mr Groves to persevere with this action, his claim would be futile because Ballance would be in a position to comprehensively defend its stance by virtue of the relevant provisions in law that I have already referred to.

[36] I am satisfied then that I must conclude that Mr Groves’ action is frivolous in the sense of being futile, because Mr Groves has already surrendered his right to continue with his proceedings, which have long since been discontinued, as a consequence of Mr Groves’ settlement with the other parties some six years ago, and accordingly, pursuant to clause 12A of the Second Schedule to the Employment Relations Act 2000, I dismiss Mr Groves’ claim as frivolous.

Can Mr Groves claim against Russell McVeagh?

[37] This question can be dealt with very shortly. Notwithstanding Mr Groves’ efforts to interest the Authority in the proposition that somehow there is standing for him to bring such a claim, the Authority must again refer to its statutory basis.

[38] What that statutory basis requires for a claim to be entertained in the Authority is that there be an employment relationship between the claimant and the responder and however the matter is looked at, Mr Groves was never an employee of Russell McVeagh and on that basis alone, as my colleague Member Campbell

correctly observed in her Minute dated 16 October 2014, Mr Groves' proceeding against Russell McVeagh cannot be entertained.

Determination

[39] I have determined that the application made by Ballance for Mr Groves' proceeding against it to be struck-out under clause 12A of the Second Schedule to the Employment Relations Act 2000 ought to be granted on the footing that Mr Groves' claim against Ballance is frivolous.

[40] I have also concluded that the Authority has no power to entertain any claim by Mr Groves against Russell McVeagh as there is no evidence that there is or was an employment relationship between Mr Groves and Russell McVeagh.

Costs

[41] Costs are sought by Ballance. Ballance has been successful in its application to have the application of Mr Groves struck-out. Ballance may think it appropriate to waive its rights to seek a contribution to its costs in consideration of Mr Groves' accepting this decision of the Authority.

[42] Otherwise, costs are reserved.

James Crichton
Member of the Employment Relations Authority