

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 214
5407463

BETWEEN MARGARET HALLIDAY
Applicant

A N D THE FARMERS' TRADING
COMPANY LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Shayne Boyce and Kevin Murray, Advocates for
Applicant
Penny Swarbrick, Counsel for Respondent

Investigation meeting: 23 August 2013 at Nelson

Submissions Received: 30 August and 11 September 2013 for Applicant
6 September 2013 for Respondent

Date of Determination: 15 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Margaret Halliday, claims she was unjustifiably dismissed by the respondent, The Farmers' Trading Company Limited (Farmers').

[2] There are additional claims concerning an alleged unjustified disadvantage and a breach of the duty of good faith. Both claims emanate from the same facts which give rise to the dismissal claim.

[3] Farmers' response comes in two parts. First, Ms Halliday resigned of her own volition in the course of a disciplinary process. Second, she cannot pursue the grievance as she and Farmers' entered into a settlement recording her resignation and

with terms and conditions upon which Farmers' acted. In essence, she is estopped from proceeding further.

[4] The parties agree the estoppel argument should be considered as a separate preliminary issue.

Background

[5] Ms Halliday was employed by Farmers' as a loss prevention officer in its store at Richmond Mall, Nelson. She commenced in September 2011 having left a similar role with Pak-n-Save in the same Mall.

[6] On 1 December 2012, and while on her way to work, she entered the Pak-n-Save. Her activities concerned the store's management and their concerns were exacerbated by her interaction with staff who challenged her.

[7] Pak-n-Save's concerns were relayed to Farmers', whose managers questioned whether the events of 1 December raised doubts about Ms Halliday's ability to perform her duties with them. Farmers' concerns grew after further discussions with Pak-n-Save over the next week and a half and the fact Pak-n-Save issued a trespass notice against Ms Halliday on 13 December 2012.

[8] The following day, 14 December 2012, Mr Deon de Clercq, Farmers' Richmond store manager, advised Ms Halliday of a disciplinary investigation. That was followed by a letter dated 17 December which requested Ms Halliday's attendance at a meeting on 20 December. The letter, which was detailed, outlined Farmers' concerns and the facts giving rise to them. It advised dismissal could result and suggested Ms Halliday obtain representation.

[9] The meeting of 20 December proceeded after a short delay occasioned by discussion over the appropriateness of Ms Halliday's chosen representative. The meeting, which took some 50 minutes, canvassed Farmers' concerns and Ms Halliday's responses. The meeting then adjourned to allow Farmers' to make inquiries emanating from the responses and there was agreement they reconvene the following day.

[10] Unlike the day before Ms Halliday was unaccompanied at the meeting of 21 December. Farmers' were concerned about that but after discussing the issue

accepted Ms Halliday's advice she wished to proceed. Again the meeting took approximately 50 minutes and covered the inquiries which followed the previous days meeting. The meeting was again adjourned and reconvened after approximately 2 hours.

[11] Mr de Clercq opened by asking whether Ms Halliday had anything to add, to which she answered *no*. He then summarised his deliberations before advising he no longer had confidence Ms Halliday could perform her role and had reached a preliminary decision to dismiss. He went on to advise they would now adjourn and Ms Halliday should consider whether she had anything to add which may give him cause to change his decision. Ms Halliday's response was she didn't want a break but wished to accept the dismissal. Mr de Clercq would not accept that and a short adjournment followed.

[12] Mr de Clercq claims that upon reconvening Ms Halliday asked *what about if I resign*. He says he had not considered the possibility and passed leadership of the discussion to Ms Pania Tapara, Farmers' Regional Loss Prevention Officer who had been accompanying him.

[13] Ms Tapara says she advised she would accept the resignation but only on a full and final basis. She says she was conscious Ms Halliday might not know what she meant and *walked her through that* and the consequences of a settlement in some detail.

[14] Ms Tapara goes on to say Ms Halliday's response was to ask if the settlement would see her get both a certificate of service and a reference. The answer was yes.

[15] Ms Tapara goes on to say:

I asked Margaret if she was sure that she understood what a full and final settlement meant. Margaret said she did. She said it was important to her that she could resign and get a reference.

[16] Ms Tapara says she then described the process of having the settlement signed by a mediator at the Ministry of Business, Innovation and Employment (MBIE) before confirming Ms Halliday was happy to conclude a settlement.

[17] Ms Tapara says she had her laptop and it contained a template for such settlement agreements and she proceeded to prepare one for Ms Halliday. It confirmed a resignation effective 21 December and Ms Halliday was to return all

company property immediately. Farmers' would pay all outstanding monies within seven days and Mr de Clercq was to provide the certificate of service and a reference. The parties would not make disparaging remarks and

...This settlement is in full and final settlement of all claims and personal grievances either party may have against the other arising out of Miss Halliday's employment with the Company and the termination thereof. Both parties acknowledge that they have taken advice to the meaning and implication of this agreement.

[18] Ms Tapara says Ms Halliday was relaxed, laughing and engaged in banter while the document was being prepared. She says Ms Halliday said she was sorry they had had to go through the process and relieved it was over and she was able to get a reference.

[19] Ms Halliday has a very different view of the final meeting. She says she was shocked by advice of the preliminary decision and the instruction *go and take a 15 minute break to consider one good reason Mr de Clercq should change his mind.*

[20] She goes on to say:

When I came back in I said to Mr de Clercq that I could not give him a reason because I felt that he had already made up his mind anyway to sack me.

Ms Tapara then said to me "I can't spell it out for you". She said in a clear audible voice you can "re" and then in a whisper "sign".

I replied that I saw resignation as being as being an admission of guilt.

Ms Tapara stated that it would look better for me if I resigned; that they would give me a service letter and a reference and that would look better than having to put that I had been sacked on my CV.

I was then given a letter I understood was something from a Government Department and that it was about me getting a benefit.

I was instructed by Mr de Clercq to sign the document. I didn't read this document at all. What I thought I was signing is what I believed to be papers for the locker keys, uniform and work security tag.

Nothing was explained to me and all I thought was that I was sacked.

[21] Farmers' subsequently acted on the resignation, made the final payment and provided the references. They also sent a copy of the settlement to MBIE's Mediation Service and requested a mediator sign in accordance with s.149 of the Act.

[22] On 14 January 2013 a mediator rang Mr de Clercq and advised Ms Halliday would not sign the agreement. Therefore the mediator could not sign. Mr de Clercq's response was to prepare a letter which he sent to Ms Halliday on 16 January 2013 with assistance from Farmers' Head Office.

[23] The letter records he presented his preliminary decision to dismiss at the meeting of 21 December and:

... At this stage you offered your resignation from Farmers Trading Company, which I accepted under the condition that a Full and Final Settlement Agreement was signed by both parties and finally signed off by the Department of Business Innovation and Employment.

The settlement document was duly signed by you only after you were given the opportunity to seek independent advice as to the contents of this agreement. Once signed the document was sent to a mediator for final sign off.

On Monday, 14th January 2013, I received a phone call from a Mediator at the Department of Business Innovation and Employment, advising me that they would not sign off the Full and Final settlement agreement, as you did not agree to the terms outlined in the document.

As a result of your decision not to accept the terms of the Full and Final Settlement, my preliminary decision to terminate your employment stands. Should you wish to make representation or provide further feedback, please do so on or before close of business Thursday, 24th January 2013.

[24] Ms Halliday's response was to commence the personal grievance action via a letter from her advocate dated 7 February 2013.

Determination

[25] There are two questions to be determined. They are:

- (a) Was there an agreed cessation; and
- (b) If so, is Ms Halliday precluded from proceeding with her claim.

[26] There are very different views as to whether or not there was an agreed cessation. Farmers' say there was. Ms Halliday says *no*.

[27] In determining the issue I have recourse to the evidence and the way it was presented. In doing so I note Ms Swarbrick's submission:

There are a number of differences between the versions of events of the Applicant and the Respondent's witnesses. The Authority will need to resolve those matters. It is respectfully invited to, where there is conflict, prefer the evidence for the Respondent. The Authority is entitled to take into account the Applicant's demeanour, avoidance of questions, purported inability to remember key points, and changing of answers, to find that the Applicant's evidence is unreliable in material respects. For example (and this list is not exhaustive)...

[28] Ten examples follow.

[29] I agree, and in doing so note the examples along with other illustrations of what is being asserted. As Ms Swarbrick says, Ms Halliday was reticent in answering a number of questions and when she did there were significant inconsistencies and contradictions. In addition some of her oral answers were simply implausible and the one which glaringly comes to mind was an assertion she never signed the settlement agreement. It is obvious she did given her acceptance the signature on the document was hers, but when asked to explain she resorted to explanations which were again confused and contradictory.

[30] Farmers' evidence did not suffer similar deficiencies and remained consistent throughout. The preference for Farmers' evidence leads to a conclusion there was an agreement. That, in turn, raises the question of whether or not the agreement has validity and, in particular and as referred to by both parties, whether or not there was a genuine dispute between the parties. If so, was there accord and satisfaction in the way it was resolved.

[31] Ms Halliday says there was no dispute as she had never raised a grievance. With respect to accord and satisfaction, she says the agreement only benefited Farmers' who *instigated the proposed settlement to their sole benefit.*

[32] Farmers' position is as follows:

The Respondent was conducting a disciplinary process that had led to a preliminary decision to dismiss her. The Applicant did not wish to be dismissed. There was then a meeting of the parties' minds that there would be no dismissal but a resignation instead.

The Applicant's contention that there needed to be a personal grievance in existence before an agreement could be reached is not correct. It is sufficient that there was a difference in views between the parties and that they then each agreed to provide the other with valuable consideration to resolve that difference...

The Applicant asked for the opportunity to resign and the Respondent accepted that resignation. This was valuable consideration for the Applicant as she would not have a dismissal on her employment record. As further consideration, the Applicant was provided with a reference and certificate of service... For the Respondent's part it discontinued the disciplinary process which it would otherwise have been entitled to conclude. (see closing submission).

[33] Again I agree. This is not a similar situation to that considered by the Court in *Bayliss Sharr & Hansen v McDonald* [2006] ERNZ 1058 where the discussion leading to cessation was initiated in the early stages of the disciplinary process. Here the preliminary decision had already been delivered. That provides fertile ground for dispute and avoiding the black mark of dismissal is something which can benefit an employee in such a situation. This is especially so where the benefit is enhanced with an agreement to provide a positive reference and not undermine it by speaking ill of the now ex-employee.

[34] Having concluded there was both a settlement and it was consensual I turn to the question of whether or not Ms Halliday is estopped from pursuing her grievance.

[35] In the normal course of events the answer would undoubtedly be yes as both parties acted on the agreement forthwith. As agreed, Ms Halliday departed immediately and Farmers' fulfilled their obligations with alacrity. They had made out the final pay and forwarded both the certificate of service and reference.

[36] Difficulties, however, arise given the involvement of a mediator and s.149 of the Employment Relations Act 2000. Relying on *Abernethy v Dynea New Zealand Ltd (No.2)* 2007 ERNZ 462 Ms Halliday contends that once the parties agreed to use the s.149 procedure there could be no binding accord until the process was completed. As it was not completed, there could be no agreement and therefore she cannot be precluded from proceeding with the substantive grievance.

[37] Farmers' response is *Abernethy* is distinguishable as:

In Abernethy it was found as a fact that the parties' intention was that their agreement should be recorded in writing, so [an] oral agreement was not sufficient. In this case, the parties acted on their agreement promptly on its execution.

[38] Again there is an argument the case relied upon (in this instance *Abernethy*) is distinguishable. *Abernethy* involved a situation where the agreement was oral and the

parties disagreed about its terms. The disagreement could be addressed by reducing the agreement to writing through the s.149 process. There is no such difficulty here. The terms were clear, in writing and acted upon. That said, I consider the argument *Abernethy* is distinguishable is undermined by the Court's findings.

[39] In *Abernethy* the Court concluded:

- (1) *the parties intended from the outset to submit any oral agreement reached to the s 149 ERA procedure, as they understood it from the plaintiff's representative's description. This meant that any agreement reached between the negotiating parties was subject to the plaintiff's representative reducing the terms to a written record of settlement, which would then be sent to the parties for their approval. It would then go to the mediation service. The mediator would get in touch with each party to confirm that they understood the terms and were happy with them, and that once the mediator signed the record off there was a binding contract. Although this process is not contained in s 149, it was the process agreed upon by the parties. (para 56)*
- (2) *Where the parties have agreed to such a process, there is no binding accord until that process has been completed. The agreed process was not completed because the plaintiff did not approve the record of settlement, and did not submit it to the mediation service for completion of the process as the parties understood it. Unlike *Graham v Crestline* (cited below) the parties agreed to their understanding of the s 149 ERA process in advance, and the orally agreed terms were subject to the due completion of that process. There was no binding accord and the challenge must succeed. (paras 57, 58)*

[40] The situation here is, I conclude, similar. The parties agreed, at Farmers' behest, the s.149 process be adopted. I find Farmers' must, therefore, live with the consequences especially given Ms Tapara's evidence about forwarding the agreement to the mediation service of MBIE (though she still refers to its previous location within the Department of Labour (DoL)). In particular I note paragraph 38 of her brief. It reads:

... I told Margaret that we would sign an agreement and then it would be sent to the DOL for them to sign as well. I said that the DOL representative calls both of us to confirm that we understand what we are signing. I told Margaret she can either say yes or no. As soon as the DOL have got sign off from both parties, it is then lodged with the DOL. Then the matter is over and done with.

[41] That implies the matter is not over until the mediator has signed. Ms Tapara also said Ms Halliday had the choice of saying *yes or no* and she reiterated that when answering questions. While there is again some disagreement between the parties

about exactly what she said, my notes record that when asked whether this meant Ms Halliday had a safety net if she didn't want to sign, the answer was *absolutely*.

[42] In other words Ms Halliday was given the choice of saying *yes or no*. She was provided an opportunity to change her mind and resile and, according to Ms Tapara, was also told so. Ultimately she took advantage of the opportunity. Farmers' must now accept the consequences and the situation cannot be altered by virtue of the fact both parties acted on the agreement before the process was concluded in accordance with the procedure it, Farmers', acquired Ms Halliday's agreement to.

[43] For the above reasons I conclude Farmers' was of the view the matter was not over till a mediator signed and advised Ms Halliday accordingly. The mediator did not sign and, according to *Abernethy*, the bargain was not concluded.

[44] Ms Halliday is not estopped from pursuing her grievance.

[45] As a result, and given the remedies Ms Halliday seeks, the parties are ordered to mediation and attempt to resolve the differences between them.

[46] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority