

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 324/08
5112258

BETWEEN George Hoffman
AND AJ & MR Symthe

Member of Authority: Janet Scott
Representatives: Alan Taylor for applicant
 Ed Haakma respondent
Investigation Meeting: 15 August 2008 in Hamilton
Submissions Received 15 August 2008 for applicant
 15 August 2008 for respondent
Determination: 16 September 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has commenced action in the Authority alleging the respondents unjustifiably dismissed him. He seeks remedies to compensate him for his alleged grievance.

[2] The respondent replies that a final binding and enforceable settlement of Mr Hoffman's employment relationship problem was reached through mediation with a Department of Labour Mediator on 7 January 2008.

The Role of the Authority

[3] S. 157 of the Act describes the role of the Authority. It is an investigative body that has the role "*of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities*". It follows from this description that there must be a live issue between the parties for the Authority to have jurisdiction. If the employment relationship problem lodged by Mr Hoffman has already been resolved then the

Authority has no role to play in the matter. It is this preliminary issue that is to be determined here and that has been my only focus. If Mr Hoffman's substantive claims are to be considered and determined that will be done in a separate Investigation Meeting set for the purpose.

[4] The parties have agreed to assist the Authority by waiving the confidentiality that attaches to mediation. I have restricted my enquiries to the matters that are necessary to determine whether or not a resolution was reached between the parties on 7 January 2008 such that Mr Hoffman is barred from having his claims heard and determined by the Authority. I have also had regard to evidence provided by the Mediator that is permitted pursuant to s.148 (6) (d), in relation to the function performed by him under s.149 (2) of the Act¹.

Issue for Determination

- Has the employment relationship problem that arose between Mr Hoffman and his former employers, Aaron and Miriam Smythe been resolved?

Background

[5] Mr Hoffman was employed by the respondent in a senior farm worker role. He and his family lived in accommodation on the farm. In late December 2007 an employment relationship problem arose between the parties and representatives of the parties agreed to seek assistance to resolve the employment relationship problem through the Department of Labour's Mediation Service

[6] Mediation was convened with a Mediator on the afternoon of 7 January 2008. Present at that mediation with the Mediator was Mr Hoffman and his partner, Megan Sayer, their representative Alan Taylor and Ed Haakma who was there to represent the Smythes. Mr Haakma is Mrs Smythe's father. Mr Haakma's authority to act for the respondent's was accepted by the other participants in the mediation and the mediation proceeded on that basis.

[7] The evidence reveals that the mediation was a lengthy one. It is clear, however, that significant progress towards resolution was made between the parties with the Mediator's assistance. However, by 9pm that evening the Hoffman's had arrived at the position that they could continue the discussions no longer – they had a significant

¹ Explanation to the parties of the effect of his signing the agreement i.e. that it is final binding and enforceable.

distance to travel to collect their children and to return home and Mr Hoffman had early milking on another property the following day.

[8] This was discussed between the parties and Mr Taylor suggested that in accordance with the signed Authorisation to Act given by Mr Hoffman to Mr Taylor (pursuant to 236 of the Act), he was authorised by Mr Hoffman to “sign papers” on his behalf and that he could continue the negotiations in Mr Hoffman’s absence, conclude an agreement on his behalf and sign any settlement terms. This suggestion was discussed and Mr Hoffman agreed that Mr Taylor could continue the negotiations and conclude a settlement and sign on his behalf. Mr Taylor also gave an undertaking to Mr Hoffman that he would consult him by cellphone in respect of any new issues that arose in the discussions.

[9] Mr Hoffman and Ms Sayer left the mediation and there is no dispute that the Mediation continued on the basis that Mr Taylor had authority to conclude a settlement and to sign settlement terms on Mr Hoffman’s behalf.

[10] The evidence discloses that Mr Taylor rang Mr Hoffman on at least two occasions during the continuing discussions in mediation.

[11] Eventually a settlement was arrived at and the Mediator reduced the terms of the settlement to writing.

The Agreement

[12] The agreement reached at Mediation was recorded by the Mediator in the standard format adopted by Mediator’s employed by the Department.

[13] It is headed Record of Settlement, s.149 Employment Relations Act 2000.

[14] The parties are identified (George Hoffman & Aaron and Miriam Smythe) and the date is recorded (7 January 2008).

[15] Twelve terms of settlement are recorded under the heading “Agreed Terms of Settlement to Employment Relationship Problems”

[16] Among the terms of settlement are included an agreement that the terms of settlement and matters discussed at mediation will remain confidential to the parties and the settlement is described as full and final settlement of all matters between the applicant and respondent arising out of the employment relationship. Most of the remaining terms set out the agreement between the parties to resolve the employment relationship problem between the parties and it is only necessary to record that it provided for the continuation of the employment relationship and the eventual termination of the relationship and the ongoing obligations each party had to the other

in relation to the continuation and the termination of the relationship. Some of those obligations were to be performed the next day e.g. payments made to Mr Hoffman and he was to resume work on the Smythe's farm early the next morning "*straight after milking for a friend*"

[17] The agreement is also notable for two other terms:

- That the parties will co-operate with each other up to the termination of the employment and that should new matters arise in the interim the parties will co-operate to address those matters and that both parties will comply with the employment agreement.
- A statement that the representatives "*have full and legal authority to sign this agreement on behalf of the parties*".

[18] Set out beneath the terms of settlement is the following statement:

" We request a Mediator from the Department of Labour to sign these terms of settlement because the employment relationship problem(s) between us have been resolved and we wish them to be final binding and enforceable on us.

Dated at Hamilton this 7th day of January 2008". (Emphasis mine).

[19] Beneath this statement Mr Taylor and Mr Haakma have affixed their signatures.

[20] Following this is another statement (standard to the format for recording s.149 settlements).

"We also confirm that before the Mediator signed the settlement agreement the mediator explained to us that:

1. *The matter in issue is final and binding on and enforceable by us: and*
2. *Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal and application for review, or otherwise.*

We confirmed to the Mediator that we understood that explanation and affirm our agreement².

[21] Beneath this statement Mr Taylor and Mr Haakma have affixed their signatures.

[22] The evidence discloses that after the terms of the settlement had been recorded in the standard format used by the Mediation Service the terms were discussed and considered by Mr Taylor, Mr Haakma and the Mediator prior to signing. The evidence confirms that the Mediator explained to Mr Taylor and Mr Haakma the effect of his signing the agreement at their request i.e. that it would be final binding and enforceable and that other than for enforcement purposes the terms could not be

² To conform to the provisions of s149 (2), this should read "and affirm our *request*" i.e. the request that the mediator sign the terms of settlement.

brought before the Authority or Court by action, appeal or review³. (s.149 (2)). However, in addition to this explanation - and at the same time - the Mediator advised the representatives that he would not sign the Terms of Settlement that night because he wanted to contact the principal parties to ensure they “*understood the terms of settlement and agreed with them*”. He expected to have that conversation with the parties first thing the next day.

[23] Mr Taylor’s evidence was that he accepted this approach by the Mediator. Mr Haakma however was extremely concerned that the Mediator did not sign the terms of settlement that night and he sought assurances that the settlement was in fact final and binding on the parties. He says he received assurances to that effect from Mr Taylor and the Mediator. The next morning he went to the home of the Smythe’s to await Mr Hoffman’s arrival and he requested his daughter to make a payment in accordance with the agreement reached - one of two payments due to be paid under the agreement on 8 January - in order to consummate the agreement reached.

[24] In the event and before the Mediator spoke to the parties the next morning, Mr Taylor advised the Mediator that there had been a miscommunication between himself and his client Mr Hoffman in their last telephone conversation on the previous night and that Mr Hoffman did not agree there was a settlement.

[25] As I understand the evidence the Mediator made efforts through ongoing discussions with Mr Taylor and Mr Haakma to get a resolution in the matter but this was unsuccessful and the Mediator did not sign the terms of settlement.

[26] Mr Hoffman did not resume work on the Smythe’s property. He and his partner and family packed up and left the Smythe’s property immediately.

[27] On 18 February Mr Taylor lodged a claim with the Authority on Mr Hoffman’s behalf seeking remedies for his alleged grievance.

Discussion & Findings

[28] In deciding this matter I have had regard to the evidence, the submissions of the parties and relevant case law. I have also had regard to the statutory framework governing the resolution of employment relationship problems and in particular s.149 and the objects of the Act that confirm that mediation is the primary problem solving mechanism (S.3 (a) (5)) and that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties

³ I am not aware that the Mediator referred to the fact that the terms of the settlement could not be cancelled pursuant to the Contractual Remedies Act (S.149 (3)(ab))

themselves with the expert assistance of Department of Labour Mediators available for that purpose.

Findings

[29] Mr Hoffman was present for the bulk of the negotiations between the parties on 7 January 2007 and a large measure of agreement was reached in respect to the employment relationship problem that existed between the parties. Prior to Mr Hoffman and his partner leaving that night there was a transparent discussion between the participants to this mediation as a result of which a clear agreement was reached that Mr Taylor had the authority to continue the negotiations on Mr Hoffman's behalf and to conclude and sign off on a settlement on his behalf.

[30] I find that a settlement was reached to resolve the employment relationship problems between the parties. That settlement has all the characteristics of a valid accord and satisfaction – there was a genuine dispute between the parties, there was a meeting of the minds in settling that dispute and valuable consideration to accompany the settlement. It is not a requirement that such a settlement in accord and satisfaction be executed. The mutual promises make it enforceable.

[31] Transferring this concept to the resolution of employment relationship problems⁴ I find there was an employment relationship problem between the parties and a settlement of that problem involving promises given to each other of ongoing co-operation and valuable benefits to be given and received including payment to Mr Hoffman for time he had not worked and agreement that Mr Hoffman's personal grievance would go no further. The settlement was recorded in writing and signed by the authorised representatives. On a plain reading of the words of that recorded settlement it is stated to be a "*full and final settlement of all matters between the applicant and respondent arising out of the employment relationship*".

[32] On the matter of the apparent miscommunication between Mr Hoffman and his representative that emerged after the settlement was reached and signed off by the parties I am not in fact satisfied that there was a miscommunication. I accept that Mr Taylor has genuinely tried to understand how this went so wrong and he has arrived at an explanation as to how this happened but Mr Hoffman's evidence was confused and equivocal on the point and I find he became angry on being advised he would no longer have authority over the other farm worker and just decided to abandon his job. If I am wrong on this point I must say that in any event a miscommunication between Mr Hoffman and Mr Taylor does not invalidate the agreement reached. Mr Taylor had

⁴ See *Fredricson v Northland Districts Aero Club Inc* AC 30/1

express authority to represent Mr Hoffman in these settlement negotiations and to conclude an agreement on his behalf.

[33] It is not in question that once the settlement was arrived at it was reduced to writing on the understanding it would be signed off by the mediator under s.149 of the Act to ensure it was final binding and enforceable pursuant to s.151. The parties through their representatives took the steps required to present the settlement agreement to the Mediator for sign off. The Mediator did not sign the settlement agreement and it is not therefore enforceable pursuant to s.151 of the Act.

Is the agreement otherwise enforceable?

[34] There is no question that it is not possible to now enforce those parts of the settlement that called for specific performance and were dependent upon it. The horse has bolted on that. It is however possible to determine that the employment relationship problem between the parties was resolved by the settlement reached. That determination can be made by the Authority pursuant to its powers under s.161 (1) (r) of the Act. Further, while I am cognisant of the statement of Shaw J in *Kerr v Associated Aviation (Wellington) Ltd* [2005] 1 ERNZ 632 that there is no necessity for the artificial categorisation of a settlement that does not conform to s.149 as an employment agreement or the variation of an employment agreement, it is clear on the facts of this case that the settlement arrived at can be described as a variation of the employment agreement between the parties. The settlement arrived at was to guide the relationship between the parties in the near term and it provided for the termination of that relationship on terms acceptable to both parties. As such it is enforceable by way of a compliance order pursuant to s. 137 (a) (i) of the Act.

[35] In arriving at the line I am taking in respect of this case I am have considered the effect the findings in *Stephen Abernathy v Dynea New Zealand Ltd* CC 12A/07. This case differs to the situation in *Abernathy* cited above. The Court there gave effect to the party's agreement from the outset to a process whereby the terms of settlement would not be final and binding until the parties had reviewed the settlement and declared themselves to be happy with it. In this case the parties agreed to let their representatives conclude and sign off on the settlement reached.

Determination

[36] Pursuant to s 161(1) (r) I determine that the employment relationship problem submitted to the Authority by Mr Hoffman for investigation and determination was resolved by the parties on 7 January this year. Given this there is no live dispute between the parties for the Authority to resolve and the Authority can be of no further assistance to Mr Hoffman.

Costs

The Smythes were not legally represented in this matter so no issue of costs arises.

Janet Scott

Member of the Employment Relations Authority