

Attention is drawn to paragraph 7 prohibiting publication of certain information contained in this determination

Determination Number: CA 148/06
File Number: 5030506

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN Craig Isherwood
AND Apex Car Rentals Ltd
REPRESENTATIVES Craig Isherwood Applicant
Dean Kilpatrick for Respondent
MEMBER OF AUTHORITY Helen Doyle
STATEMENT OF PROBLEM AND ATTACHED DOCUMENTS
STATEMENT IN REPLY AND ATTACHED DOCUMENTS
LETTER 31 January 2006 from Duncan Cotterill
TELEPHONE CONFERENCE 24 August 2006
TELEPHONE CONFERENCE 15 September 2006
DATE OF DETERMINATION 12 October 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Craig Isherwood, and the respondent, Apex Car Rentals Limited, ("Apex") entered into a record of settlement under section 149 of the Employment Relations Act 2000. The record of settlement was signed by a case settlement facilitator employed by the Chief Executive of the Department of Labour on 10 February 2006.

[2] Mr Isherwood says that the settlement agreement was not fully complied with by Apex. He seeks an order that Apex pay holiday and lieu day payments to him.

[3] Apex says that it had complied with all the terms of the settlement agreement and denies that it owes holiday and/or lieu day payments to Mr Isherwood. Apex also says by way of counterclaim that Mr Isherwood in making a claim on already settled matters is in breach of good faith and that by raising the claim he is misleading the Authority.

[4] Apex initially sought by way of relief for its counterclaim, exemplary damages in the sum of \$10,000.00, penalties and an award of full solicitor and client costs.

[5] It was agreed by Mr Isherwood and Mr Kilpatrick that I could determine the matter on the basis of the papers filed, one additional letter supplied by the respondent and two telephone conferences on 24 August 2006 and 15 September 2006 with Mr Isherwood and

Mr Kilpatrick. After the final telephone conference Mr Kilpatrick agreed that he would take further instructions from Apex with respect to remedies it sought.

[6] By letter dated 21 September 2006, sent to the Authority and Mr Isherwood, Mr Kilpatrick advised that Apex was no longer seeking exemplary damages, but was still seeking penalties and full solicitor/client costs.

Prohibition from publication

[7] For the purposes of this determination I am only required to refer to two clauses, 3 and 6, in the settlement agreement. To preserve the confidentiality that the parties agreed at the time the settlement agreement was entered into I prohibit from publication all the remaining terms of settlement in the record of settlement.

The Issues

[8] The issues for determination in this case are:

- (i) What was Mr Isherwood to receive in terms of the settlement agreement?
- (ii) Has there been compliance by Apex with the settlement agreement?
- (iii) Is Mr Isherwood entitled to a compliance order?
- (iv) If the settlement agreement has been complied with by Apex should penalties be awarded against Mr Isherwood for a breach of good faith and an attempt to mislead the Authority?

What was Mr Isherwood to receive in terms of the settlement agreement?

[9] Mr Isherwood says that he is entitled under clause 3 of the settlement agreement to holiday and lieu day payments and has not received payment of these amounts.

Clause 3 provides that:

3. The Respondent will pay the salary due and owing to the Applicant up to and including 27 January 2006.

Clause 6 provides that:

6. Subject to payment of the amounts referred to at clauses 3 and 4 above, the Applicant acknowledges and agrees that all amounts due and owing to him, including but not limited to salary, holiday pay and days in lieu have been paid and that no further amounts are due and payable to him.

[10] Mr Isherwood says that the word *salary* in clause 3 includes holiday and days in lieu. It is not clear, I accept, from clause 3 what amount Mr Isherwood is to be paid and how that amount is to be made up.

[11] Prior to the signing of the settlement agreement there had been a series of without prejudice communications between Mr Isherwood's solicitor at that time, Mr Beck, and Apex's solicitor, Ms Titchener, with respect to settling the matter.

[12] The without prejudice protection that attaches to such communication continues even after settlement of an employment relationship problem. In this case I believe that consideration of without prejudice communications dated 30 January 2006 and 31 January 2006 is necessary for me to determine whether there was agreement as to what Mr Isherwood

was to be paid under clause 3. Without consideration of the communications there is a risk the Authority could be misled about what was to be paid in terms of clause 3.

[13] What is clear from the exchanges between the representatives is that on 30 January 2006 there was acceptance of the terms of settlement by the parties. The settlement agreement was then signed by the Manager of Apex, Phil Lennon. Under cover of letter dated 31 January 2006 Ms Titchener forwarded the record of settlement in triplicate, signed by Mr Lennon on behalf of Apex, to Mr Beck. She asked in her letter that Mr Beck attend to having the settlement signed at the Mediation Service.

[14] Amongst other matters Ms Titchener's covering letter provides:

For the avoidance of doubt and sake of completeness we confirm that following the execution of the Record of Settlement by a Mediator:

1. *Our client will pay your client's salary up to and including 27 January 2006 (which amounts to 3 days salary). This will be paid into your client's bank account within 7 days of the Record of Settlement being signed by a Mediator.*

[15] Mr Isherwood said that he did not receive a copy of the letter of 31 January 2006 before he signed the settlement agreement in triplicate. The responsibility for that though cannot rest with Apex. The letter of 31 January 2006 is very clear as to the payment that Mr Isherwood will receive in terms of clause 3 of the record of settlement. It is Mr Isherwood's salary up to and including 27 January 2006 which amounts to three days salary.

[16] Once that amount and the amount referred to in clause 4 of the agreement are paid then clause 6 of the settlement agreement provides that Mr Isherwood acknowledges and agrees that all amounts due and owing to him, including but not limited to salary, holiday pay and days in lieu have been paid and that no further amounts are due and payable to him.

[17] Mr Isherwood has claimed that additional amounts are owed on the basis that the definition of the word salary in clause 3 is wider than just ordinary salary and includes these other entitlements. The additional amounts Mr Isherwood claims are substantial.

[18] I am of the view that to approach this matter simply as an interpretation issue is misconceived. Ms Titchener's letter of 31 January 2006 made it clear what payment was to be made to Mr Isherwood under clause 3 within seven days of the record of settlement being signed by a mediator. The letter was sent before Mr Isherwood had signed the record of settlement and before it had been signed off by the case settlement facilitator. Apex was entitled, in the absence of rejection, counter offer or other response to the letter of 31 January 2006, to rely on a concluded settlement on the basis of the payments set out in the letter.

[19] I find in conclusion that Mr Isherwood was to receive a payment of three days salary in terms of clause 3 of the record of settlement. Clause 3 does not provide for the payment of holiday and/or lieu day payments to Mr Isherwood in addition to that payment of three days salary.

Has there been compliance by Apex with the settlement agreement?

[20] Mr Isherwood has been paid three days salary. There has been compliance with the settlement agreement.

Is Mr Isherwood entitled to a compliance order?

[21] Mr Isherwood is not entitled to a compliance order as Apex has complied with the terms of the settlement agreement it entered into with Mr Isherwood.

Should penalties be awarded against Mr Isherwood for a breach of good faith and an attempt to mislead the Authority?

[22] There could be an issue in my view as to whether the duty of good faith in section 4 (1) of the Employment Relations Act 2000 applies to this matter (section 4(4)). I did not hear any submissions on that and do not propose to make a finding because Mr Isherwood said that he did not receive or know of the letter of 31 January 2006. In those circumstances I think it unlikely I would have found a breach for which I would have awarded a penalty.

[23] I do not conclude that there should be an award of a penalty against Mr Isherwood.

Determination

[24] Craig Isherwood's application for compliance is dismissed. Apex has complied with the terms of the settlement agreement and there is no further payment required to be paid to Mr Isherwood in terms of the record of settlement.

[25] I have not found in favour of Apex Car Rentals Limited in terms of its counterclaim that there should be an award of penalties against Mr Isherwood.

Costs

[26] I reserve the issue of costs.

[27] Mr Kilpatrick has two weeks from the date of this determination to provide written submissions with respect to costs to the Authority and Mr Isherwood has a further two weeks from receipt of Mr Kilpatrick's submissions to provide a written response to the Authority and to Mr Kilpatrick.

Helen Doyle
Member of Employment Relations Authority