IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 242
5535494

	BETWEEN	DAVID LUMSDEN Applicant
	A N D	SKYCITY MANAGEMENT LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Applicant in person Kylie Dunn, Counsel for Respondent
Investigation Meeting:	On the papers
Date of Determination:	19 July 2016

DETERMINATION OF THE AUTHORITY

A. The claims of Mr David Lumsden under File No 5535494 are removed to the Employment Court pursuant to s.178(1) of the Employment Relations Act 2000 (the Act).

Employment relationship problem

[1] Mr Lumsden was employed by SkyCity Management Limited (Sky City) from 20 February 2013 until 25 November 2014. A dispute arose and the parties attended mediation. A settlement agreement was entered into which was signed by a mediator pursuant to s149 of the Act. One of the agreed terms of settlement was that Mr Lumsden would resign.

[2] On 19 December 2014, Mr Lumsden filed a statement of problem in the Authority. Sky City applied to the Authority under clause 12A of Schedule 2 of the

the Act to have parts of Mr Lumsden's statement of problem dismissed on the basis that they were frivolous and/or vexatious. Mr Lumsden opposed the application.

[3] The Authority dismissed the paragraphs in the statement of problem identified by Sky City as being either frivolous and/or vexatious[1].

[4] Mr Lumsden challenged the Authority's decision to the Employment Court[2]. At para [1] of the Court's decision, Judge Inglis stated:

> The challenge raises issues about the scope and proper application of cl 12A of sch 2 of the Employment Relations Act 2000 (the Act), not previously examined by the Court.

[5] At para [21], the Court concluded that the Authority has no power under clause 12 A to dismiss part of a matter before it.

[6] The Court then considered whether the dismissed paragraphs in the statement of problem were frivolous and/or vexatious and concluded that they were not[3].

[7] The Court stated that the Authority must proceed with its investigation.

Mr Lumsden's claims in the Authority

[8] Mr Lumsden claims that:

(a) Sky City has breached the settlement agreement signed by the parties on 25 November 2014 (the settlement agreement); and

(b) Sky City breached its obligation of good faith by inducing him to sign the settlement agreement, which it then breached.

[9] During the argument before the Court, issues were raised about the interrelationship between s.149 and s.238 of the Act.

[10] Section 149 states:

> (3) Where, …. the agreed terms of settlement … is signed by the person empowered to do so –
>
> (a) Those terms are final and binding on, and enforceable by, the parties; and

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1 *Lumsden v SkyCity Management Limited* [2015] NZERA Auckland 141
2 [2015] NZEmpC 225
3 Ibid para.[40] of the Court's decision

> (ab) The terms may not be cancelled under s 7 of the Contractual Remedies Act 1979; and
>
> (b) Except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise …
>
> (4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[11] Section 238 of the Act states:

> **No contracting out**
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[12] Mr Lumsden advanced the argument in the Court that s.149 must be read subject to s.238. Counsel for Sky City accepted that the two provisions did not sit together comfortably and that there may be room for argument about their interrelationship, although the Court had not yet had the opportunity to do so[4] This view is reiterated in para [42] of the Court's judgement.

…

[13] At para.[46], Judge Inglis states:

> Mr Lumsden's contention that he was effectively duped into resigning during the course of the mediation process and as an agreed term of settlement, raises issues about the scope of s238 and the circumstances in which an employer can seek to protect itself against future claims (including via a s 149 agreement). As I have said, the scope of this provision and its interrelationship with s238 is unsettled…

Authority's Investigation

[14] In the course of the Authority's resumed investigation, in a memorandum filed in the Authority, Mr Lumsden suggests that the question of the relationship between ss.149 and 238 of the Act is an important question of law and should be removed to the Court for determination.

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4 Ibid para.[41]

[15] Mr Lumsden claims that s.238 of the Act applies and Sky City argues that s.149 of the Act applies. Mr Lumsden states in his memorandum that an appeal to the Authority's determination is inevitable given the importance of the question of law.

[16] In her memorandum to the Authority, Counsel for Sky City submits that the Authority has jurisdiction to hear Mr Lumsden's claim that Sky City has allegedly breached the settlement agreement. However, submits that the Authority is barred by s.149(3) of the Act to investigate the allegation by Mr Lumsden that Sky City breached its obligation of good faith.

Removal to the Court

[17] Section 178(1) of the Act enables the Authority to:

> … on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the Court to hear and determine the matter without the Authority investigating it.

[18] Section 178(2) of the Act sets out the grounds for removal which include:

(a) An important question of law;

(b) The case being of such a nature and of such urgency that it is in the public interest that it be removed;

(c) The Court already having before it proceedings which are between the same parties and which involve the same or similar or related issues;

(d) The Authority being of the opinion that in all the circumstances the Court should determine the matter.

Important question of law

[19] This is a matter which involves an important question of law in respect of the interrelationship between s.149 and s.238 of the Act which has not been fully explored by the Court. This was recognised by the Court in its decision[5].

[20] The object of the Act includes a provision that mediation is the primary problem-solving mechanism in the employment environment and in respect of

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5 Paragraphs [41], [42] and [46]

employment relationships[6]. The provision of mediation services to parties and the ability to conclude settlement agreements which are final and binding and (except for enforcement purposes) the terms of which cannot be brought before the Authority or the Court, are specifically provided for in the Act[7]. Mediation has an important focus under the Act.

[21] The questions which arise as a result of Mr Lumsden's claim before the Authority, in particular the interrelationship between s.149 and s.238 of the Act, raise important questions of law in respect of mediation and resulting settlement agreements.

[22] I am of the opinion that in all the circumstances the Court should determine the matter.

Order

[23] Pursuant to s.178(1) of the Act, the Authority orders the removal of this matter to the Employment Court.

Anna Fitzgibbon
Member of the Employment Relations Authority

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6 Section 3(a)(v)
7 Sections 143-148, 149, 151, 152