

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 384
5359705

BETWEEN

PRATIMA NAND
Applicant

AND

RICHMOND NZ TRUST LTD
Respondent

Member of Authority: R A Monaghan
Representatives: P Nand in person
P Shaw, counsel for respondent
Investigation meeting: On the papers
Determination: 26 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pratima Nand was employed by the Richmond New Zealand Trust Limited. (the trust). Her employment relationship problem, which addressed various matters including a concern about a failure to roster her for duty over a 7-week period and a personal grievance on the ground of unjustified dismissal, was scheduled for an investigation meeting in the Authority on 6, 7 and 8 August 2012. On 26 July 2012 the parties' representatives advised the Authority that the matter had settled and that the hearing dates could be vacated. The dates were vacated accordingly.

[2] On 6 August 2012 Ms Nand advised the Authority that she wished to proceed with her claims. The trust advised the Authority on 7 August that it believed a binding settlement had been entered into and that Ms Nand could not proceed.

[3] This determination addresses whether the parties have entered into a binding settlement of Ms Nand's employment relationship problem. By agreement, the matter was heard on the papers.

[4] The issues are whether:

- the settlement agreement was required to be in writing and signed by both parties before it became binding; and
- Ms Nand was thinking clearly, or as she put it was ‘of sound mind’.

Background

[5] The parties provided affidavits in which accounts of the negotiations preceding the settlement were given. Although this information would usually be treated as ‘without prejudice’ and therefore not admissible, in the present circumstances it was necessary that the information be available so the Authority could determine whether a binding settlement was reached.¹ The following account is based on the contents of the affidavits.

[6] Ms Nand had lodged her own statement of problem and had represented herself before the Authority during the preparatory phase of the investigation meeting, but she approached an employment advocacy service for assistance in or about July 2012. She was referred to an advocate, Rowland Ingram, on 13 July 2012. Mr Ingram and Ms Nand had a preliminary meeting on 14 July 2012. After perusing the material Ms Nand had given him in respect of her employment relationship problem, Mr Ingram subsequently advised Ms Nand on 21 July that he was not willing to represent her if she wished to continue to an investigation meeting but that he would attempt to negotiate a settlement with the trust on her behalf.

[7] Ms Nand agreed with this course of action, and authorised Mr Ingram to try to settle her case within a range of figures which she specified. Mr Ingram contacted Ms Shaw on 23 July to discuss a settlement. Mr Ingram reported the resulting exchanges to Ms Nand, who then instructed him to seek a settlement in a sum which she specified. The sum was within the range she had previously advised to Mr Ingram. Mr Ingram deposed that:

The applicant reiterated to me that she wanted to settle rather than proceed to an investigation meeting, she was feeling very stressed about the prospect, and she wanted to put the whole matter behind her and focus on the future. She advised me

¹ Ref: *Abernethy v Dynea New Zealand Ltd (No 2)* [2007] ERNZ 462.

that if I could achieve a settlement for her in the amount of [the specified sum] she would accept that.

I explained to her that if the respondent accepted the offer of [the specified sum] that would mean her personal grievance would be settled on a full and final basis, and I would need to draft documentation recording the agreed terms i e payment of [the specified sum] by the respondent to the applicant. The applicant told me she understood what was proposed and should the respondent accept, her grievance would be finally settled.

[8] By email message dated 24 July 2012 Mr Ingram conveyed to Ms Shaw an offer to settle for the specified sum in full and final settlement of all matters arising out of the employment relationship. Ms Shaw replied in a message dated 25 July 2012 accepting the offer, adding that the settlement sum would be paid under s 123(1)(c)(i) of the Employment Relations Act 2000 and that the terms of settlement would remain confidential.

[9] According to Mr Ingram, when he advised Ms Nand of this she told him she was relieved and was happy to move on from a stressful situation. Mr Ingram explained that he would prepare a document to formalise the agreement to settle, and explained a procedure under which the document would be put before a mediator for certifying in order to preserve Ms Nand's position for the purposes of any enforcement action that might be necessary. He was referring to the procedure under s 149 of the Act. Ms Nand replied that she understood, and would sign the record of settlement.

[10] Mr Ingram duly prepared a record of settlement and forwarded it to Ms Shaw and Ms Nand on 26 and 27 July respectively. During a conversation with Ms Nand on 31 July Mr Ingram confirmed that the settlement meant she would not be obliged to attend the investigation meeting, and Ms Nand expressed her relief.

[11] The trust signed and returned a copy of the record of settlement to Mr Ingram, who received it on 6 August 2012.

[12] Ms Nand had not signed the record of settlement. Also on 6 August 2012 she contacted Mr Ingram to advise she had a 'change of mind' and wanted an increased settlement because her bank had pressured her regarding loan repayments. Mr Ingram reminded her she had accepted an offer in the specified sum, and she replied that she had made a wrong decision because she was 'of unsound mind'. Mr Ingram deposed

that Ms Nand had seemed to him to be sentient, cogent and able to think intelligently and coherently. She had not expressed any doubts or concerns until 6 August.

[13] Ms Nand accepted Mr Ingram's account of events except that: she had a different view from his about why he was not willing to represent her in an investigation meeting; and she maintained that when she spoke to Mr Ingram on 6 August she was confused, mentally unsound, and unhappy about the amount of money she was to receive. She said that was when she decided not to accept the offer, and that she wanted to see justice done for the suffering she had experienced.

Was it necessary that the agreement be in writing and signed by both parties

[14] Ms Nand asserted strongly that an agreement is not binding until it has been signed by both parties. Until that time any party can and should be given the opportunity to withdraw. She took that opportunity.

[15] In deciding that point the Authority must apply the law. The Employment Court has summarised the law regarding agreements in settlement of litigation as follows:

[47] An agreement between parties to settle litigation is called an accord and satisfaction. It is, to use the words of Scrutton LJ in 1993:

The purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

[48] It is unnecessary for the agreement to be executed: the mutual promises make it enforceable.

[49] More recently, and in this Court, the constituents of accord and satisfaction have been reaffirmed. There must first be a genuine dispute between the parties. Secondly, whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds ...²

[16] To express at its most basic the underlying law regarding what makes a binding and enforceable agreement, the requirement is only that there be evidence of: the making of an offer, the terms of which were accepted; communication of the

² *Graham v Crestline Pty Limited* [2006] ERNZ 858

acceptance; sufficient certainty of terms; consideration in the form of a mutual exchange of promises; and an intention that the agreement have contractual force.

[17] It is, in general, preferable in the interests of recording and providing evidence of the existence and terms of an agreement that the agreement be reduced to writing and signed by the parties, but it is not a requirement.

[18] There are exceptions. One such exception could arise if, for example, the parties had agreed on a procedure to be followed before an agreement to settle became effective, and the procedure required the execution of a written record of settlement, but that did not occur here. Unlike in *Abernethy v Dynea* for example - where there was evidence the parties intended there to be a binding settlement only after a mediator had signed a record of settlement under s 149 - the parties agreed on the terms of the settlement in their exchanges on 24 and 25 July. Their agreement in respect of s 149 was only that a record of the settlement would be forwarded to a mediator under that procedure, and did not extend to a requirement that the procedure be completed before the settlement became effective.

[19] I consider the present matter to be more comparable with the circumstances in *Graham v Crestline*, where the parties had recognised the desirability of a written record but the evidence did not show an intention to be bound only on the execution of a written agreement. Similarly the court found in *Penney v Fonterra Co-operative Group Limited*³ that it was not a term of the relevant settlement that it be effective only if signed by a mediator.

[20] I find that, as Ms Nand's agent and acting within the scope of his authority, Mr Ingram reached an agreement with Ms Shaw on a settlement the terms of which were:

- derived from offers, the acceptance of which was communicated;
- were certain;
- were supported by consideration in that a sum of money would be paid, in return for which Ms Nand would not pursue her employment relationship problem; and
- were intended to create a legal relationship between the parties.

³ [2011] NZEmpC 151, at [44]

[21] There was no term of the settlement requiring the execution of a written record of settlement before the settlement became binding.

[22] In turn I find the terms of the settlement were final and binding.

Was Ms Nand ‘thinking clearly’

[23] When Ms Nand said she was not thinking clearly and asserted elsewhere that she was of unsound mind, she was referring to no more than the fact that, when the settlement was being negotiated, the pending investigation meeting was causing her stress and worry, and that she was under financial pressure.

[24] The law applicable to this attempt to have any agreement set aside was summarised in *Penney* as follows:

[37] Such a submission can only succeed where it is established on the evidence that the person seeking to avoid the agreement was deprived of reason to the point of mental incapacity. Such incapacity may be the result of mental illness, dementia or, in rare cases, the effect of alcohol or other drugs. It must also be established that the other party knew or ought to have known of the incapacity ...

[25] Mr Ingram’s account indicates Ms Nand was capable of making a decision about whether to settle and for how much, and she made such a decision. Later, she decided she wanted a higher sum and changed her mind. She was too late. As with Ms Penney’s, Ms Nand’s circumstances fell far short of establishing the factors necessary to set aside any agreement.

Conclusion

[26] For the above reasons I conclude a final and binding settlement agreement was reached, and that there are no grounds on which to set it aside.

[27] Ms Nand cannot proceed with her employment relationship problem.

Costs

[28] Costs are reserved.

[29] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority