

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 239/08
5104958

BETWEEN PATRICK O'HANLON
Applicant

AND VEHICLE ADAPTION
SERVICES LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Martyn Chambers, Counsel for Applicant
Wayne Brocket, Advocate for Respondent

Investigation Meeting: 18 February 2008 at Hamilton

Determination: 8 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks an order requiring the Respondent to comply with the terms of a settlement agreement he says was made verbally on 9 October 2007.

[2] The Respondent accepts it agreed to consider a proposal for settlement once it was put in writing but denies any terms of settlement were agreed in a discussion held at the Applicant's lawyers office earlier that day.

The investigation

[3] For the purposes of the investigation I received written witness statements from the Applicant, his solicitor Simon Scott and the Respondent's managing director Wayne Brocket. Each witness gave additional oral evidence under oath in response to questions from the Authority and representatives from each party. Each party provided an oral closing argument.

[4] The Applicant was an employee of the Respondent. He had not worked for several weeks and had raised a personal grievance. Both parties agreed that this determination need not canvas why the Applicant raised a grievance, or their strongly held and differing views on the circumstances that led to the Applicant not being at work. The matter presently for resolution is whether there has or has not been a settlement of their employment relationship problem.

[5] The issues for investigation are

- (i) whether an agreement was made; and
- (ii) if so, on what terms; and
- (iii) if there were agreement on certain terms, is such an agreement now enforceable by a compliance order?

The facts

[6] On 9 October Mr Brocket attended a meeting at the offices of the Applicant's solicitor with the Applicant, Mr Scott and Applicant counsel Mr Chambers. Mr Brocket attended the meeting in response to a written invitation from the Applicant's lawyers to meet "*to discuss [the Applicant's] employment situation with [the Respondent]*".

[7] Each witness gave an account of what they remember being said during a relatively short meeting. From that evidence I find the following facts.

[8] The meeting lasted round 10 to 15 minutes.

[9] Early in the meeting Mr Brocket expressed a willingness to resolve the issues with the Applicant and used words along the lines of "*let's get this over*" so that the Applicant could "*move on with his life*".

[10] Mr Scott talked of the elements of a settlement proposal, including wages, compensation and a reference. Mr Brocket did not follow all of what Mr Scott said as it included what he called "legal jargon" but did not appear to disagree with any element of it and said "*get it to me on paper*".

[11] Mr Scott asked Mr Brocket if he had any questions about the suggested terms of settlement and Mr Brocket replied: “*No, just get it to me on paper*”.

[12] The meeting ended with Mr Brocket shaking each other man’s hand and leaving. As Mr Brocket left the Applicant said to Mr Scott “*what about costs*” and Mr Scott replied that this would sorted out later.

[13] Notes made by Mr Chambers either during the meeting or shortly after include references to three months pay, part to be “broken down” as a hurt and humiliation payment, confidentiality, a positive reference, return of the Applicant’s tools, costs and this phrase: “*agreement (as above) to be emailed out to [Mr Brocket]*”.

[14] Following the meeting Mr Scott had Mr Chambers draft a written settlement agreement. The Applicant signed the agreement at his lawyers’ office the next day and it was sent by courier to Mr Brocket.

[15] The written agreement included provision for payment to the Applicant of one month’s wages (\$3,333) and \$6700 under s123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”), payment of those sums by 12 equal weekly automatic payments to the Applicant’s bank account, \$2000 legal fees to be paid to the Applicant’s lawyers, provision of a positive reference, arrangements to be made for the Applicant to pick up his tools and the settlement to be full, final and confidential.

[16] Mr Brocket did not sign the agreement. He wrote to the Applicant’s lawyers denying any terms were agreed in their meeting.

[17] After the parties were unable to resolve the issue between themselves, including by mediation, the Applicant applied to the Authority for the matter to be investigated and determined.

The parties’ positions

[18] The Applicant submits that the verbal agreement made in the meeting is accurately reflected in the terms set out in the written agreement provided. He says

the only real difference in his evidence and that of Mr Brocket is how the payment of three months wages would be split, with some in lieu of notice and some as compensation for hurt and humiliation. He points to Mr Chambers' notes, taken at the time, as supporting the fact that a discussion about such a split took place. He submits that the context of a formal meeting and the arrangements made to confirm the terms in writing supports the conclusion that a verbal agreement was reached and is enforceable.

[19] The Respondent submits that there is too much uncertainty as to whether anything was agreed, and if so, on what terms. The meeting was convened on the invitation of the Applicant's lawyers to discuss his "employment situation" without specific reference to settlement. Mr Brocket had agreed to consider a settlement proposal and it was only an assumption by the Applicant that there was agreement.

Discussion

[20] I have no hesitation in concluding that the totality of the terms set out in the written settlement agreement sent to Mr Brocket on 10 October was a proposal for settlement rather than a record of terms actually agreed in the discussion on 9 October.

[21] That is clear from the Applicant's own evidence. He says that he only mentioned the matter of legal costs when Mr Brocket was leaving and that without Mr Brocket saying anything on that subject Mr Scott said it was something that would be sorted out later. For that reason the figure of \$2000 for legal costs in the written agreement could not have been agreed with Mr Brocket at the meeting and were the suggestion of the Applicant (or at least his lawyers) on what costs the Respondent should meet in settling his grievance.

[22] Similarly, notes which Mr Scott said Mr Chambers made during the meeting make no reference to a term for wage and compensation payments to be made in 12 weekly instalments, yet such a term was included in the written agreement. That also was a proposed rather than an agreed term.

[23] However the matter does not end there. While the written agreement does not entirely represent what was actually agreed, it may be that there was a verbal agreement made in the meeting rather than simply Mr Brocket agreeing to consider the proposal presented. If that is so, the Applicant may still have an argument for that verbal agreement to be upheld against any subsequent change of heart by the Respondent.

[24] To do so requires an agreement to have actually been reached in that 9 October discussion and the terms of it to be certain from the evidence, both from what the witnesses remember and any reliable documentary evidence.

[25] Whether a binding agreement was made by the words and gestures exchanged in the Applicant's lawyers' offices on 9 October is to be decided on the basis of what an objective observer might have concluded if there on the day. It is not decided on the subsequent explanations by the participants of what they meant by what they said or meant by how they acted.

[26] There is no evidence from the Applicant and Mr Scott of Mr Brocket expressing unequivocal words of agreement. Rather their best evidence is that, while Mr Scott was presenting a proposal for settlement Mr Brocket said: "*yes, yes, yes – get it to me on paper*" and when Mr Scott asked if there were any questions, Mr Brocket is said to have replied: "*no, just get it to me on paper*".

[27] I consider that, to an objective observer in the particular circumstances, such a response can be taken to be no more than an agreement to consider a proposal. That Mr Brocket shook each man's hand as he left the room confirms nothing more than ordinary civility.

[28] In coming to this view, on the balance of probabilities, I also consider it unlikely that Mr Brocket, the owner and operator of a relatively small business, would have agreed to make the payments suggested without knowing more precisely the amounts involved and without taking the opportunity to take some advice before doing so. All this points to an agreement to consider a proposal, not a commitment to the terms of agreement contended by the Applicant.

Determination

[29] For the reasons given I find that there was no verbal agreement concluded between the parties on 9 October 2007 and consequently the Authority cannot make the orders sought by the Applicant. His application is dismissed.

[30] If the Applicant now wishes to continue to pursue a personal grievance against the Respondent, he will need to do so in the usual way.

Costs

[31] The Respondent was represented by Mr Brocket throughout the investigation. Accordingly I do not anticipate an application for legal costs from the Respondent. If however there are issues of costs between the parties that cannot be resolved between themselves, the Respondent may lodge an application if it wishes the Authority to determine the matter. That should be done no later than 28 days from the date of this determination. If such an application is lodged the Applicant will have 14 days to respond.

Robin Arthur
Member of the Employment Relations Authority