

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 404/07
5098439

BETWEEN BRYNYCE ANN OWEN
Applicant

AND YOU & ME LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Brynyce Owen in person
Mark Tolich, counsel for respondent

Investigation Meeting: 6 and 17 December 2007

Determination: 19 December 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Brynyce Owen, brought this matter to the Authority by lodging a statement of problem in which she named the respondent, You & Me Limited, as her former employer with whom she has a problem. There is no dispute that between March and June 2006, You & Me Limited employed Ms Owen as a supervisor at the Wee Wisdom Montessori Pre School, a facility then owned and operated by the respondent company.

[2] The employment relationship problem Ms Owen wishes the Authority to resolve was stated by her in full to be the following;

A hearing was finally heard on 17th April '07 – the full grievances from myself were never 'aired/discussed'.

[3] In the part of the statement of problem form where applicants are required to say how they would like the problem resolved, Ms Owen in full wrote;

As I have now attended two meetings with the respondents + have still not 'aired/voiced' my complaints I feel we must go to the Authority.

[4] The two meetings Ms Owen attended were held for the purposes of trying to resolve her employment relationship problems by using the process of mediation. There was a private mediation followed by a second meeting, on 17 April 2007, at which a Department of Labour mediator provided assistance to the parties.

[5] The parties are in dispute about whether, in that second mediation, a settlement was reached in such a way or to such an extent as to now preclude Ms Owen from pursuing her grievances/complaints further to the Authority.

[6] The position about this taken by You & Me Limited is set out in a statement in reply lodged by the company, as below;

This matter was resolved at mediation and the Applicant has refused to comply with the terms of settlement agreed upon at mediation on 17 April 2007. Particularly, the Applicant is in breach of clause 8 of the Record of Settlement where it was agreed that full and final settlement had been reached between the parties and no further action can be taken.

[7] Attached to the statement in reply and bearing the names of Ms Owen and You & Me Limited is a document headed Record of Settlement. A sub-heading of that Record reads; "Section 149 Employment Relations Act 2000".

[8] The Record of Settlement has been signed for the respondent "Anna Stowell, Managing Director," but there are no signatures of Ms Owen or the mediator in the space above their names where printed on the document.

[9] The account given by the respondent of the relevant facts is that the parties, in mediation on 17 April 2007, reached agreement orally as to terms of settlement but there was insufficient time left for the mediator to type up the Record of Settlement for execution by the parties and herself that day. The partially signed Record of Settlement bears the date of the following day, 18 April 2007.

[10] Further on in its account of the relevant facts, the respondent states that once it had been presented to the parties for signature, Ms Owen refused to sign the Record of Settlement until she had seen a licence permitting You & Me Limited to operate a pre school facility. The respondent says that it advised Ms Owen's representative that although production of the licence had not been an agreed term of settlement, the license would be produced to Ms Owen on condition she forwarded a copy of her New Zealand Qualification Authority examination results.

[11] Those conditions were not apparently met and as a consequence the Record of Settlement has not been signed by either Ms Owen or the mediator.

[12] The immediate question is whether, in the circumstances, there remains a live employment relationship problem for the Authority to investigate and determine. Counsel for the respondent, Mr Hood, has asked the Authority to answer that question as a preliminary matter.

[13] Expressly under s 157 of the Act, the Authority has the role of resolving employment relationship problems by establishing the facts and making a determination. It is implicit from this provision that if an employment relationship problem has already been resolved the Authority will have no need or ability to perform this role. The object of the Act is met when settlement has been reached between the parties themselves through the process of mediation, and intervention by the Authority then becomes unnecessary.

[14] As it seemed to be necessary to enquire into what happened at the mediation on 17 April 2007, the consent of Ms Owen and You & Me Limited was obtained to allow the Authority to receive statements and any other information that had been presented for the purposes of the mediation. The parties gave their consent, as contemplated under s 148(1) of the Employment Relations Act 2000, to waive confidentiality so that the Authority could gather evidence about what had occurred.

[15] The mediator also gave some evidence of this, although under s 148(6)(d) of the Act it was necessarily confined to the role or function that a mediator may perform pursuant to s 149(2) of the Act.

[16] At the mediation held on 17 April 2007, both parties were represented. Mr Hood took part as then counsel for You & Me Limited and Mr John Coyle, a professional employment advocate, represented Ms Owen.

[17] I am satisfied from the evidence that at the mediation on 17 April the terms of settlement contained in the written Record of Settlement were orally agreed to between Ms Owen and You & Me Limited, through their representatives. I find that the parties, through Mr Coyle and Mr Hood, relayed this agreement to the mediator and requested her to draw up the Record of Settlement containing those terms, for the parties to sign.

[18] An email shows that the mediator produced the document the following day and sent it to Mr Hood and Mr Coyle with the accompanying message;

Brynyce Owen & You & Me Limited.doc
Please read the attached document to ensure that it reflects the agreement reached. Should you have any concerns please raise them to me by email. Also please confirm with me if you accept that no changes are required. I look forward to progressing this matter quickly.

[19] Mr Coyle replied by email to the mediator on 23 April 2007, with the following advice;

I have discussed the document with Brynyce and she is happy with it. She will print and sign three copies today and send them back to you. Thanks again for your ever competent assistance.

[20] Mr Coyle and Ms Owen had been given an opportunity to point out any terms that were missing from the Record prepared by the mediator. If verification of the respondent's license had been a term required during the mediation on 17 April then it is likely the absence of that term from the Record would have been pointed out after Mr Coyle, and apparently Ms Owen as well, received the document and discussed its contents. Their silence about this would seem to confirm that the Record as sent by the mediator contained all the terms of settlement agreed to at the mediation.

[21] It could also reasonably be expected that the mediator in preparing the Record would have put in it the terms of settlement agreed to in her presence. She did not add any term about verifying the pre school licence.

[22] Despite the assurance given by Mr Coyle in his email, Ms Owen did not sign the Record of Settlement. Consequently the mediator has not completed the Record by adding her own signature. Ms Owen now seeks to have her complaints/grievances investigated and determined by the Authority. To remedy her contended employment relationship problem, she claims compensation from You & Me Limited.

[23] I find that Ms Owen did not sign the Record because, following the reaching of oral agreement at the mediation on 17 April, she wanted in effect to superimpose a further condition onto the already agreed terms of settlement. She wanted to make the signing of the Record conditional, even although she had agreed upon the terms of settlement contained in the Record. In my view that was not an act of good faith in mediation.

[24] The introductory words of s 149 suggest that there are two distinct phases of settlement available under that provision. First, there is a phase in which a problem is resolved with the active assistance of a mediator through the provision of mediation services, and second there is a phase in which the mediator, at the request of the parties, signs the agreed terms of settlement which then become final, binding and enforceable. Completion of the second phase after the first is not a statutory requirement of a settlement but is a step available at the option of the parties.

[25] I am satisfied in this case that the first phase was completed when the parties agreed, orally, on terms of settlement to resolve the employment relationship problem of Ms Owen. The second phase was not completed. This means that the agreed terms of settlement are not final and binding on the parties and neither are they enforceable by either party against the other. The remedy of a compliance order is therefore not available under s 137 of the Act.

[26] I find in this case that both Ms Owen and You & Me Limited must be taken to have intended that the resolution of the employment relationship problem would not be completed or perfected after the mediation on 17 April, until both phases under s 149 had been completed. That can reasonably be inferred from the parties' participation in mediation under s 149, in the absence of any express agreement to proceed differently.

[27] It is relevant that after undertaking private mediation without resolving their dispute, the parties then chose to participate in mediation provided by the statutory mediation service. In the absence of any agreement to the contrary it is a reasonable inference that in doing so they intended to become subject to the provisions of s 149 in the event they were able to agree upon terms of settlement. Their common goal was to execute a formal Record of Settlement evidencing the resolution by them of the employment problem, and until that was done the process was incomplete.

[28] Although Mr Coyle, as agent for Ms Owen, advised that she was happy with the contents of the Record of Settlement, the fact remains that she has not signed the document and has not thereby affirmed any request for the mediator to sign.

[29] For the respondent, Mr Hood submitted that this was a case where an accord and satisfaction between the parties prevented either of them from subsequently seeking resolution in the Authority. He referred to the decision of the Employment

Court in *Abernethy v. Dynea New Zealand Limited*, unreported, 12 July 2007, CC13A/07, a judgment of Travis J. The reasoning of the Court at [56], [57] and [58] of the judgment applies equally to this case I find. Ms Owen and You & Me Limited intended from the outset to submit any oral agreement they reached to the s 149 procedure, as they understood that to be from the mediator's description. As was clear from the draft form of the Record of Settlement, it required the signatures of the parties and the mediator to be placed on it before settlement was complete.

[30] Applying *Abernethy*, in this case I find that by their conduct in fully participating in a mediation process provided by the mediation service, the parties agreed to be subject to both phases of the process and that until both those phases had been completed there would be no binding accord.

[31] At the investigation meeting, the respondent undertook to comply with the terms of settlement that had been agreed in mediation. It performed one of those terms soon after signing the Record. Ms Owen was advised that if she signed the Record of Settlement the way would be clear for the mediator to sign it as well, making the settlement final, binding and enforceable, and delivering to her what she had agreed to receive in settlement.

[32] Ms Owen rejected this undertaking and has remained insistent that she will not execute the Record of Settlement.

[33] The Authority cannot compel Ms Owen to sign the Record. To the extent that I consider she has not acted in good faith, it is not a legal consequence that she is to be barred from having the Authority resolve her grievances or complaints by investigation and determination. Accordingly, I must find that Ms Owen is able to have her employment relationship problem investigated and determined by the Authority.

[34] Despite being professionally represented and having the assistance of an experienced mediator, Ms Owen did not make full and proper use of mediation to resolve her problems. In the circumstances there is nothing to be gained by directing the parties back to mediation, a course to which You & Me Limited is opposed in any event.

[35] The investigation of the grievances and complaints of Ms Owen will be conducted by another member of the Authority who will make the necessary arrangements with the parties. The Record of Settlement will be sealed and all reference to its contents will be removed from the Authority's file. That material has no relevance to a determination of the grievances and complaints on their merits.

[36] Any question as to costs arising out of this preliminary determination is reserved until the end of the investigation. Ms Owen was not represented before the Authority by counsel or a professional representative and in principle therefore is excluded from recovering legal costs.

A Dumbleton
Member of the Employment Relations Authority