

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 131/10
5155776

BETWEEN

NICOLA PENNEY
Applicant

A N D

FONTERRA COOPERATIVE
GROUP LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Katherine Burson, Counsel for Respondent

Investigation Meeting: 21 June 2010 at Christchurch

Determination: 23 June 2010

DETERMINATION OF THE AUTHORITY

Background

[1] The applicant (Ms Penney) brings an application to reopen the Authority's investigation pursuant to clause 4 Schedule 2 of the Employment Relations Act 2000. The respondent (Fonterra) resists that application.

[2] Ms Penney was employed as a milk tanker driver by Fonterra until her dismissal on 19 March 2009. Ms Penney then brought an application to the Authority alleging that she had been unjustifiably dismissed, sought the usual remedies, but in addition sought interim reinstatement to her position pending the Authority's determination of the substantive application.

[3] The interim reinstatement application was heard on 22 May 2009 and a determination issued on 25 May 2009. In that determination, I declined to award interim reinstatement and, in the course of giving the determination the Authority opined that Ms Penney had failed to grasp the reality that the persistent lateness for

which she was dismissed was not a matter that could be minimised or ignored by Fonterra but by virtue of its persistence and significance, went to the root of the employment relationship. I noted in the course of the determination that Ms Penney had, over a 6½ month employment, been late for duty more often than she had been on time and that it was unreasonable to expect Fonterra to simply put up with that. In concluding that the application ought to be rejected, I observed that Ms Penney had a weak case for permanent reinstatement. I refer to those observations now because Ms Penney, in her application to reopen, makes much of her wish to be permanently reinstated to her original position at Fonterra. It follows that the impressions that the Authority formed at an early stage in the progress of the whole matter through the Authority's process are relevant matters in the context of the present application.

[4] After the interim determination of the Authority on the reinstatement application issue, the substantive application was promptly set down. A month after the issue of the interim determination, counsel for Ms Penney sought leave to withdraw and the substantive hearing was subsequently adjourned for a new date to be found. In the meantime, it became clear that the parties were talking and on 13 August 2009 counsel for Ms Penney (who by this point had been reinstated by Ms Penney), advised that the matter could be permanently withdrawn because it had been resolved. Attached to that advice was a letter to the Authority from Ms Penney herself dated 7 August 2009 in which she confirmed that the matter was settled, that she wished to permanently withdraw the proceeding and that she had instructed her lawyer to deal with the matter on that basis.

[5] A settlement agreement between the parties was prepared and was signed by Ms Penney on 12 August 2009 and by Fonterra on 14 August 2009. That settlement agreement has been partially performed. The agreement provides, inter alia, for a payment of legal fees to Ms Penney's counsel. That payment has been made. The agreement also provides for the proceedings before the Authority to be withdrawn. As I have already noted, that matter has been dealt with as well. However, the compensatory payment to be made to Ms Penney by Fonterra (without an acknowledgment of liability) has not been made, but that is through no fault of Fonterra. The evidence is clear that Fonterra has been ready, willing and able to make that payment, but that Ms Penney has consistently refused to provide Fonterra with details of her bank account for the depositing of those funds. Ms Penney also says, and I accept, that she protested to her counsel about the payment of his fees by

Fonterra pursuant to the settlement agreement, and asked him to repay those funds to Fonterra.

[6] On 12 February 2010, Ms Penney filed an application in the Authority to reopen the Authority's investigation and on 2 March 2010 a statement in reply was filed by Fonterra.

Issues

[7] The fundamental question the Authority must determine in the present case is whether it is just and equitable for Ms Penney to be allowed to reopen a matter which, her execution of the settlement agreement and her formal notification to the Authority, would suggest was closed in August of last year. In order to answer this central question, it will be useful if the Authority considers the following matters:

- (a) Was the application to reopen timely?
- (b) Would there be a miscarriage of justice if the application to reopen is not granted?
- (c) Do public policy considerations militate against reopening?
- (d) Is there any material evidence available now which was not available then?
- (e) Is the settlement agreement complete?

Was the application to reopen timely?

[8] It is axiomatic that the application to reopen the present case was not made in a timely fashion. A settlement agreement was entered into between the parties in August 2009. No statement of problem seeking to reopen the investigation was filed until 12 February 2010, in effect six months after the settlement agreement was executed.

[9] I accept as good law the statement by the Authority (Member Campbell) in the case of *Eastern Bay Independent Industrial Workers' Union v. Carter Holt Harvey Ltd* (17 March 2009, AA76/09):

It is reasonable to expect such applications (that is applications to reopen) to be timely and if not, some explanation should be provided.

[10] In the present case, the filing was not timely and there is no explanation for why six months elapsed between the signing of the settlement agreement and the filing of the application to reopen.

Is there evidence of a miscarriage of justice occurring if the application is not granted?

[11] In the decision of the Full Court in *New Zealand Waterfront Workers' Union v. Ports of Auckland Ltd* [1994] 1 ERNZ at 604, the Court held that:

The primary consideration (in a rehearing application) was whether there had been a miscarriage of justice such that a rehearing was necessary to correct it.

[12] On appeal to the Court of Appeal, that statement of the law was approved.

[13] I am not satisfied that there has been any miscarriage of justice in the present case. This was a situation where an application had been made to the Authority and was then withdrawn after settlement of the matter was reached. Having had second thoughts about the settlement, Ms Penney then sought to revisit the matter, but as I have just remarked, after a significant lapse of time. The settlement which Ms Penney entered into and then sought to resile from was, in my opinion, a fair and even generous one having regard to all the circumstances. In her appearance before the Authority, Ms Penney seemed concerned about the prospect that she would not be able to find alternative gainful employment on a continuing basis because of the stain left on her record by the dismissal. Accordingly, she sought to have the Authority set aside the agreement previously reached and to reinstate the Authority's investigation so as to allow the possibility that she might be granted permanent reinstatement to her position at Fonterra.

[14] I have already made clear in this determination the Authority's view that Ms Penney did not have a strong case and that her claim for permanent reinstatement was particularly weak. It follows that, on the basis of the affidavit evidence considered by the Authority in the interim determination, it would seem there was little prospect of Ms Penney achieving her aim of being permanently reinstated.

[15] That conclusion is supported by the passage of time. Given the fact that the application to reopen was not made in a timely manner, the prospect that Ms Penney

would be able to fit back into the workplace (even assuming she satisfied the Authority of the desirability of that course of action) is all the more unlikely.

[16] Furthermore, as part of the process of considering the application to reopen, the Authority has of necessity had to turn its mind to the question of whether the settlement agreement reached between the parties in August of 2009 was a fair and reasonable one. The Authority concludes that it was, and indeed considers that the agreement might even be seen as a generous one to Ms Penney in all the circumstances. The effect of the agreement was to give Ms Penney a compensatory sum of \$10,000, make a significant contribution of up to \$4,920 (inclusive of GST) to Ms Penney's legal costs and forego any pursuit of costs against her by Fonterra. Given Ms Penney had been unsuccessful in her application for interim reinstatement and on the Authority's own view (as expressed in that determination) had a weak case going forward, it is difficult not to regard the settlement reached between the parties as a generous one to Ms Penney in all the circumstances.

[17] When the effect of that settlement is compared with the prospect that Ms Penney faces if she were to satisfy the Authority she should be allowed to reopen matters, it can be seen that there is no miscarriage of justice in a failure to reopen proceedings and indeed there is a strong argument for the view that denying Ms Penney the opportunity of completing the terms of settlement and having the benefit of those terms in the future, is itself a miscarriage of justice.

Do public policy considerations militate against reopening the investigation?

[18] I am satisfied that public policy considerations do militate against granting the application to reopen. In *Reid v. New Zealand Fire Service Commission (No 2)*, [1998] 3 ERNZ 1237, Chief Judge Goddard considered the doctrine of *res judicata*, the effect of which is to hold that it is contrary to public policy for a person to be repeatedly pursued in judicial proceedings where a matter has already been disposed of.

[19] In the present case, of course, the issue is not so much concerned with the decision of a Court as with a decision made by the parties to resolve matters on their own terms. However, public policy considerations still apply. In the Authority's view, it is not in the interests of public policy to encourage settlements reached between the parties to be overturned, except in the rarest of cases. Settlements

between parties in legal disputes are regularly concluded by agreements negotiated on the parties' own terms and any challenge to the ability to rely on such settlements undermines a fundamental building block in our dispute resolution system. Unless parties can have confidence that their agreements will be honoured, except in the most exceptional circumstances, it will become more rather than less difficult for parties to resolve matters on their own terms and that in itself will have an effect on the whole dispute resolution system.

Is there any evidence available now which was not available earlier?

[20] Ms Penney claims that she was under particular stress at the time she entered into the settlement agreement with Fonterra. She draws the Authority's attention to medical and counselling evidence to that effect and in particular to the fact that she was the subject of a series of criminal prosecutions at the very time that she was settling the issue with Fonterra. It is plain to the Authority that Fonterra had no idea at the time (that is, August 2009), that Ms Penney had other significant issues to deal with. Even if Fonterra had known at the time what other issues Ms Penney was facing, it says it would still not have been satisfied that her execution of the settlement agreement and her withdrawal of the proceedings was anything other than freely given.

[21] From the Authority's perspective, the factual evidence simply does not support Ms Penney's contention that she was affected by duress to such an extent as to overpower her ability to make rational decisions for herself. Ms Penney tried to argue that her counsel had bullied her into settling the matter. I do not accept that submission. I am satisfied that her counsel behaved professionally throughout and that the steps that he took were steps which he considered to be in Ms Penney's best interests. I do not think it can be a criticism of Ms Penney's counsel that she failed to take his perfectly sound advice. Again, Ms Penney should be looking at herself rather than her counsel in this regard.

[22] I am particularly drawn to the conclusion that Ms Penney has no reason to complain about her former counsel precisely because she was embroiled in the criminal matter at the same time and plainly was in a position to give her then counsel, Mr Meyer, proper sensible instructions about how to deal with the alleged criminal offending. Furthermore, I accept the submission made by Fonterra that during the course of the negotiations which led to the settlement agreement, Fonterra

was dealing not just with Mr Meyer, Ms Penney's counsel, but also with Ms Penney herself. While no doubt that was somewhat confusing from Fonterra's perspective, it does show that Ms Penney was actively involved in the negotiating process and was ready, willing and able to engage with the other side in the settlement of the issue between them. It follows that I am not satisfied that there is evidence available to the Authority which, had it been available in August 2009, would have led a reasonable observer to conclude that Ms Penney's ability to make rational decisions about the settlement was overborne by extraneous and inappropriate outside influences.

Is the settlement agreement complete?

[23] Ms Penney contends that because the settlement agreement was never signed by a mediator pursuant to s.149 of the Employment Relations Act 2000, the agreement is not complete. She calls in aid clause 11.4.4 of the relevant Fonterra collective employment agreement which says that any agreement signed by a mediator will be final and binding. That of course is correct as far as it goes, but the law is clear that where the parties themselves have executed an agreement and especially where that agreement has been partially performed, that too is a binding and enforceable agreement.

[24] In *Scott v. Wise* [1986] 2 NZLR at 484, the Court of Appeal stated the law on capacity in the following terms:

A person entering into a transaction should be able to understand the nature of the transaction when it is explained to him. Therefore it follows that the capacity required is related to the transaction.

[25] I draw from that principle the conclusion that Ms Penney needed to understand the nature of the transaction she was entering into when she signed the settlement agreement. There simply is no evidence that she did not understand what she was signing and the effect of it. Similarly, in the Authority case of *House v. Independent Power NZ Ltd*, my colleague Member Dumbleton declined to find duress in an application before him to enforce the terms of a mediated settlement where the employer claimed it had been forced to agree to compensation. Similarly, in *Joynt v. The Board of Trustees of Manukau View School*, another Authority decision AA89/01, 22 August 2001, my colleague Member Oldfield allowed the defence of accord and satisfaction where there was a concluded agreement (actually two agreements) between the parties which effectively covered the termination of the employment

relationship and dealt completely with all the matters as between the parties. As a consequence of the Authority's decision, the applicant in that case was unable to take matters further.

[26] In *Cable Talk Astute Network Services Ltd v. Cunningham* [2004] 1 ERNZ at 506, Judge Shaw gave the decision of the Employment Court about the meaning of expressions such as *full settlement* and *full and final settlement of my employment with ...*. The Court held that those expressions meant what they said and covered *all issues* arising out of the employment. Furthermore, on the different issue of whether there was evidence of duress in relation to the completing of the agreement, Her Honour found no such evidence on the particular facts of the case.

[27] I am satisfied that the law entitles me to conclude that a settlement agreement executed by the parties but not countersigned by a mediator pursuant to s.149 is a binding agreement between the parties unless there is evidence of duress compelling one party to commit to the agreement when he or she would not otherwise agree. Where that position is reached, as I am satisfied is the case in the present matter, it is available to the respondent party to plead accord and satisfaction. In the present case, that pleading is strengthened by the fact that the agreement expressed in the terms of settlement is partially performed and the respondent is ready, willing and able to complete the terms of settlement but has been precluded from so doing by the refusal of the applicant party to provide bank details.

Determination

[28] Taking all of the factors just reviewed into account, I am satisfied that the Authority ought not to grant a reopening of the investigation into Ms Penney's personal grievance claim against Fonterra. I think Ms Penney's best interests are served by her accepting this decision at face value, advising Fonterra of the details of her bank account or other instruction for payment of the compensatory sum, receiving that payment from Fonterra and thus completing the settlement process which commenced in August of last year. It is my considered view that no good purpose will be served by any further argument and disputation between these parties. I am absolutely satisfied that the proper course of action is to treat the dispute between Ms Penney and Fonterra as at an end on the basis of the terms agreed between those two parties in August of 2009.

Costs

[29] In the normal course of events, I would reserve costs without more, but in the present case would commend to Fonterra the proposition that it might agree to costs lying where they fall in consideration of Ms Penney's acceptance of this decision of the Authority.

[30] Should that not be the position, then costs are reserved.

James Crichton
Member of the Employment Relations Authority