

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 113  
3016277

BETWEEN	BEN RIDLER Applicant
AND	RESULTS.COM LIMITED First Respondent
AND	FALCON CLOUSTON Second Respondent
AND	ANDREW LAMONT Third Respondent
AND	STUART LOWE Fourth Respondent

Member of Authority:	Nicola Craig
Representatives:	Andrew Schirnack for Applicant Graeme Tanner and Kirsty McDonald for Respondents
Investigation Meeting:	On the papers
Submissions received:	21 March 2018 from all parties
Determination:	6 April 2018

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. Ben Ridler’s claim against Results.com Limited, Falcon Clouston, Andrew Lamont and Stuart Lowe, and the counterclaims against Mr Ridler are currently barred by agreements reached between some of the parties.**
- B. Mr Ridler is not currently bound to withdraw his claim.**
- C. Costs are reserved.**

### **Employment relationship problem**

[1] Ben Ridler was employed by Results.com Limited (Results.com or the company) as its chief executive officer from 1 April 2013. Mr Ridler also had an interest, via a company, in Results.com shares. Results.com provides business management software. The second, third and fourth respondents are or were directors of Results.com.

[2] Mr Ridler claims that he was unjustifiably disadvantaged, in the form of bullying by Results.com, was unjustifiably dismissed in July 2017, and that the company breached its obligations to him regarding payment of salary up to the end of his employment and regarding holiday pay. He also seeks leave to recover any unpaid salary and holiday pay from the second, third and fourth respondents under s 142Y of the Employment Relations Act 2000 (the Act).

[3] Results.com denies Mr Ridler's claims. It also counterclaims that Mr Ridler breached various duties which he owed to it, including his duty of good faith, and express and implied contractual duties. It also claims that Mr Ridler received an overpayment of holiday pay during his employment with Results.com.

[4] Subsequently Results.com claimed that the Authority had no jurisdiction to deal with all, or alternatively some, of Mr Ridler's claims and its counterclaims, on the basis of a settlement agreement reached between the parties. The alternative argument is that there is a partial bar, based on the fact that salary and holiday pay issues are specifically referred to in the settlement agreement. Mr Ridler's position was that his claims are not barred.

[5] The parties agreed that I would consider this issue on the papers. I received affidavits from Mr Ridler and the third respondent Andrew Lamont, a short clarifying statement from Mr Lamont and submissions on behalf of all parties.

[6] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Mediation**

[7] On 10 October 2017 Mr Ridler, his counsel and counsel for Results.com attended mediation and agreement was reached.

[8] There was no evidence regarding whether the mediator was someone employed or engaged by the chief executive of the Ministry of Business, Innovation and Employment under the Act, or was what might be called a private mediator. In any event the parties agree that the mediator did not sign off the settlement agreement, only the parties did.

## **Settlement agreement and share deed**

[9] The settlement agreement is dated 10 October 2017 and is between Mr Ridler and Results.com. It is signed by Mr Ridler and Mr Lamont for Results.com.

[10] The background clauses of the settlement agreement include reference to Mr Ridler raising a personal grievance claim about his dismissal and:

3. After discussion between the parties and having given due consideration to all of the issues arising, the Employer and the Employee have agreed to settle their employment relationship on the following terms and conditions.

[11] The settlement agreement includes the following clauses:

2. ... the Employee will receive the unpaid salary up to the termination date of \$....

3. There is a dispute between the parties about the amount of holiday pay due to the Employee. In consideration of the terms of the agreement the Employee confirms that there is no holiday pay due and owing as at the termination date.

4. The Employer agrees to waive the restraint of trade...

5. The Employer agrees to forgive and write off a loan of \$... owing to the Employer by the Employee...

6. The Employer agrees to facilitate the sale of the Employee's shares in the Employer to Global Vision Consulting Group Limited on the terms set out in Appendix 1 (the "Share Deed").

7. This agreement is conditional on the Share Deed being signed by all parties on or about the date of this agreement. This agreement and the Share Deed are collateral and inter-dependent. All steps to occur under each of them on or before 31 October 2017 are to occur contemporaneously and a default under one of them is a default under the other of them. If the Share Deed is terminated, this agreement will terminate. ...

10. The Employee agrees to withdraw the proceedings lodged with the Employment Relations Authority on the date he received payment for the shares under the Share Deed. ...

12. In reaching this agreement, the parties confirm that neither has agreed to forgo minimum entitlements...

13. This settlement is in full and final settlement of all or any matter or claim of any nature that either the Employer or the Employee may have against the other.

[12] The share deed<sup>1</sup> is an agreement between the company which held the Results.com shares (of which Mr Ridler was the sole director)<sup>2</sup>, a company purchasing the shares, Mr Ridler and another person. The share deed is Appendix 1 of the settlement agreement. Clause 2 of the share deed makes it conditional on the signing of the settlement agreement. Further, the two documents are again said to be “collateral and inter-dependent, so that all steps to occur under each...are to occur contemporaneously and a default under one of them is a default under the other.”<sup>3</sup>

[13] Under the share deed a purchase price is set for the shares which is payable “in full on the Settlement Date...”<sup>4</sup> The settlement date is defined as 31 October 2017.<sup>5</sup> The share deed provides for default interest in the event of failure to pay.<sup>6</sup>

[14] Mr Ridler is bound under the share deed to a restraint. The share deed settles “all or any claims that ... [Mr] Ridler may have against the Purchaser, and all or any claims that the Purchaser may have against ...[M]r Ridler.”<sup>7</sup>

### **Evidence regarding negotiations and mediation**

[15] Neither party objected to the other filing evidence regarding settlement discussions which had occurred before and at mediation.

[16] As early as 12 September 2017 Results.com proposed a settlement agreement. Mr Ridler forwarded to his lawyers a copy of that proposal, with the statement:

It is conditional on the settlement of the shares happening, if it does not we continue with the employment case and other action.

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<sup>1</sup> Entitled Deed for Sale and Purchase of Shares

<sup>2</sup> The vendor

<sup>3</sup> Clause 1 of the share deed

<sup>4</sup> Clause 2 of the share deed

<sup>5</sup> Clause 1 of the share deed

<sup>6</sup> Clause 4 of the share deed

<sup>7</sup> Clause 15 of the share deed

[17] Mr Ridler saw the issues (the sales of shares and the employment issues) as intertwined and connected. He says that he went to mediation to resolve both issues at the same time.

[18] Mr Lamont was not at the mediation but was kept updated throughout by Results.com's counsel. He accepts that the mediation was in relation to Mr Ridler's claims in the statement of problem (including unpaid salary and holiday pay) and the company's counterclaims.

[19] Mr Lamont says that it was agreed between counsel that all matters between the parties to these proceedings would be resolved on the basis that Mr Ridler would be paid any outstanding salary entitlement owing at the termination of his employment, which was calculated and agreed to be the figure set out in the settlement agreement.

[20] Both Mr Ridler and Mr Lamont gave evidence regarding their views about what was intended by the settlement agreement and what that agreement meant. However, this evidence was largely either their subjective evidence about their own positions during negotiations or mediation, which under *Vector Gas*<sup>8</sup> are of little assistance, or their opinion as to how the settlement agreement and share deed should be interpreted.

### **Payments made**

[21] Since the settlement agreement and share deed were signed, Mr Ridler has been paid the sum specified in the settlement agreement as being unpaid salary.

[22] In November 2017 and January 2018 Mr Ridler received two payments, making up slightly more than a third of the amount which he was to be paid under the share deed.

### **Jurisdiction regarding the settlement agreement**

[23] As the settlement agreement is not signed by a mediator employed or engaged to provide services under the Act, it is not covered by s 149 of the Act.

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<sup>8</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5

[24] Under *JP Morgan Chase Bank NA v Lewis*<sup>9</sup> the Authority does not have jurisdiction to award damages for a breach a settlement agreement or otherwise enforce it, where a settlement agreement is not signed off under s 149(1) of the Act. The parties are in agreement on that point.

[25] Similarly it was agreed that I do not have jurisdiction regarding enforcement of the share deed.

[26] However, the question is whether, having filed claims and counterclaims which, on the face of them, are within the Authority's jurisdiction, the parties are barred from pursuing them, or at least the salary and holiday pay claims, by the settlement agreement. In order to decide that point I must interpret the settlement agreement and look at events since its signature.

### **Submissions**

[27] On Mr Ridler's behalf it is argued that the purchaser is in default under the share deed. Further, under clause 1 of the share deed, a default under the share deed is a default under the settlement. Mr Ridler's view is that until he is paid under the share deed, the proceedings in the Authority remain on foot.

[28] For Results.com it is argued that it has complied with all of its obligations under the settlement agreement and thus Mr Ridler is prevented from pursuing his claims against Results.com as all issues were resolved.

### **Are the parties' whole claims barred?**

[29] Both parties agree that the settlement agreement and the share deed were meant to resolve all the issues between them, and subject to issues regarding payment, would ultimately bar Mr Ridler's claims and Results.com's counterclaims. However, the question is whether they do this currently.

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<sup>9</sup> *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [104] to [109]

[30] I must ascertain the proper meaning of the settlement agreement and share deed. What would a reasonable person, having all the background knowledge reasonably available to the parties, consider that the agreement and deed meant?<sup>10</sup>

[31] Compromises were examined by Venning J in *Intelact Ltd v Fonterra TM Ltd*.<sup>11</sup> Three categories of compromise were referred to; accord executory (where no contract is created), accord and satisfaction (immediate and enforceable agreement reached) and accord and conditional satisfaction. The third category is somewhere between the first two and involves the parties reaching an existing and enforceable agreement for specified performance but does not operate to discharge existing causes of action unless and until there has been performance.<sup>12</sup>

[32] Looking at the documents, the settlement agreement is more focused on employment issues, whereas the share deed is obviously focuses on the sale of the shares which Mr Ridler's company owned.

[33] The two documents are strongly linked. The share deed is an appendix to the settlement agreement. Both documents refer to the two as being "collateral and inter-dependent", a default under one being a default under the other. In the event the share deed is terminated, the settlement agreement will terminate. There is nothing before me to suggest that that has occurred. Mr Ridler is only required to withdraw his Authority proceeding on the date he received payment for the shares.

[34] I am satisfied that the settlement agreement and share deed amount to an accord and conditional satisfaction. There is an agreement to settle but discharge of claims is conditional on payment.

[35] Had the settlement agreement and share deed been cancelled as a result of the delay in full payment, they would no longer amount to a bar on this proceeding. That is consistent with the Court of Appeal's finding in *Humphries v Carr*.<sup>13</sup>

[36] However, the settlement agreement and share deed are still on foot. Although there is provision made for Mr Ridler and his vendor company to terminate, clause 4

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<sup>10</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5

<sup>11</sup> *Intelact Ltd v Fonterra TM Ltd* [2017] NZHC 1086 at [42] to [44]

<sup>12</sup> From Phillips JA in *Osborn v McDermott*, cited with approval in *Humphries v Carr* [2011] NZCA 314

<sup>13</sup> *Humphries v Carr* [2011] NZCA 314

of the share deed provides that they may terminate. Automatic termination is not provided for. Termination has not yet occurred. The share deed envisages the prospect of late payment by providing for interest in the event that it occurs.

[37] The condition which would make the discharge of claims or liability absolute<sup>14</sup>, namely full payment<sup>15</sup>, could still be fulfilled. In those circumstances I regard the settlement agreement and share deed as currently a bar on further investigation of both Mr Ridler's claims and the Respondents' counterclaims. In the event that the settlement and share deed are terminated or cancelled the matter may need to be reconsidered.

[38] Having found that at present all parties' claims are barred, I do not need to consider Results.com's alternative argument that part of the claims only may be barred.

[39] My interpretation of the requirement on Mr Ridler to withdraw his Authority claim under clause 10 of the settlement agreement is that it applies only once full payment has been received. Mr Lamont appears to accept that in his affidavit. Full payment has not occurred yet. Mr Ridler is not currently bound to withdraw his claim.

### **Costs**

[40] Costs are reserved. The Authority's practice is to deal with costs for interlocutory or preliminary matters at the time of considering costs after the substantive determination.

**Nicola Craig**

**Member of the Employment Relations Authority**

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<sup>14</sup> *Auckland Bus Company Limited v New Lynn Borough* [1965] NZLR 542 at p 557 per North P

<sup>15</sup> Along with other obligations