

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Shelley Rosenberg
<b>AND</b>	Air New Zealand Limited
<b>REPRESENTATIVES</b>	Susan Hornsby-Geluk, counsel for Shelley Rosenberg Kevin Thompson, counsel for Air New Zealand Limited
<b>MEMBER OF AUTHORITY</b>	R A Monaghan
<b>INVESTIGATION MEETING</b>	15 November 2006
<b>SUBMISSIONS RECEIVED</b>	6 and 16 October, 8, 22 and 29 November 2006
<b>DATE OF DETERMINATION</b>	5 December 2006

**DETERMINATION OF THE AUTHORITY ON PRELIMINARY  
MATTER**

[1] Shelley Rosenberg has raised an employment relationship problem with her former employer, Air New Zealand Limited. She filed her problem in the Authority in 2005, and it was allocated file number AEA 785/05. It was scheduled for an investigation meeting on 12-14 July 2006 and a timetable for the filing and exchange of witness statements was agreed.

[2] The matter was withdrawn by letter to the Authority dated 23 June 2006, as is permitted by clause 14, Schedule 2 of the Employment Relations Act 2000. Ms Rosenberg has since filed a new statement of problem, which has been allocated the present file number 5050065, together with an application to reinstate the proceedings in AEA 785/05. Air New Zealand says Ms Rosenberg should not be permitted to reinstate the earlier proceedings, and nor should the present application continue, because the associated claims have already been resolved.

[3] This determination addresses whether either matter should be permitted to proceed. The answer to that turns primarily on whether there was an accord and satisfaction associated with the withdrawal in June 2006.

**Back ground to the withdrawal of the problem**

[4] The existence of an accord and satisfaction depends on the construction of exchanges between the parties' lawyers.

[5] In a lengthy letter to counsel for Air New Zealand dated 7 June 2006 Aaron Lloyd, who was then acting for Ms Rosenberg, indicated that his client wished to make a further attempt to resolve the dispute between the parties. Among other things the letter said:

"The decision that the Rosenbergs now have to make is whether to proceed to the Authority, and incur further significant legal costs, or to find another way of dealing with this matter. Mr Rosenberg advises us that he has identified alternative options to the Authority hearing."

[6] There was a reply to that letter, but it covered a matter not directly relevant here and was not produced. By further letter to Mr Lloyd dated 21 June 2006, Mr Thompson requested the supply of witness statements and relevant documents which were to have been filed and served on 16 June 2006.

[7] Also on 21 June Mr Lloyd sought instructions from Mr Rosenberg, on behalf of Ms Rosenberg. The instructions were that Mr Lloyd make clear to Mr Thompson and to the Authority that the matter was being withdrawn because Ms Rosenberg did not feel it was a cost effective way of obtaining a resolution. There was a particular concern about the possible added expense if the Authority's determination were challenged in the Employment Court.

[8] Mr Lloyd telephoned Mr Thompson immediately. Both prepared file notes, copies of which were annexed to affidavits sworn for the purposes of this application.

[9] The conversation began with Mr Lloyd referring to his receipt of instructions from his client. Mr Lloyd deposed that he told Mr Thompson he had instructions to withdraw the matter because his client was concerned the investigation in the Authority would not be the end of the matter, and Ms Rosenberg may not be able to afford any continuation of it.

[10] Mr Thompson did not believe there was any mention of an instruction to withdraw so early in the conversation, but otherwise he, too, noted the expression of concern that there would be no finality in the Authority and that ongoing costs would be a problem for Ms Rosenberg. According to Mr Thompson's file note:

"... R's want finality in Auth, if they proceed. I said wouldn't say – too early (...) both ways. R's may want to appeal. Costs for R's in the Auth if don't succeed. Coy would follow up. R's want finality in Auth – can't be guaranteed then want to withdraw. I said no guarantee.

[11] In his affidavit Mr Thompson referred to that part of the conversation, saying:

"22. I said that if the claim did proceed in the Authority and the Rosenbergs were unsuccessful then the Company would inevitably ask for costs. However if a claim was dropped before a hearing and before substantial expense had been incurred, then the Company would not seek costs. In other words there was something of a 'point of no return' on costs which insofar as the Company was concerned had not been reached here.

23. The explanation I gave was something of a standard 'patter' ...

24. At this point Aaron had not said categorically that the Rosenbergs would be discontinuing and I offered this information to encourage the claims to be dropped ...

25. Aaron then said that the Rosenbergs did want finality in the Authority and if that could not be guaranteed, then they would withdraw the claim. I said again that the Company could give no guarantees if the claim proceeded.

[12] In comparison Mr Lloyd's file note noted the information about the instruction to withdraw, then read:

"I expressed to Kevin that [the withdrawal] was on the basis that the Rosenbergs were concerned that the Authority may not be the end of the matter, and that, if they were successful, that it is likely that Air New Zealand would continue and make the matter unaffordable for Shelley to continue with. Whilst he did not commit to a position, he indicated that there was a chance that would happen."

[13] Of the passages in Mr Thompson's affidavit from which I have quoted, Mr Lloyd said in his affidavit:

"15. ... I do not recall [Mr Thompson] raising the issue of costs before the Authority at all. Indeed, I do not believe that the topic of costs before the Authority was discussed, only the matter of costs more broadly, and specifically the Applicant's concern that if the matter continued in the Authority then the costs of doing so ... would increase to a point where it became uneconomic. If he did mention costs before the Authority, then it is highly likely that it was in the manner he describes, that it as part of a 'standard patter' and I probably dismissed it as such."

[14] It was common ground that there was further discussion about settlement negotiations, and the prospect of any return to them. Both participants identified that there was no such prospect.

[15] Mr Lloyd noted that then:

"[Mr Thompson] asked if I would confirm in writing the withdrawal of the application, suggesting perhaps that I copy him in on the letter to the Authority ..."

[16] Mr Thompson noted:

"I told AL to tell Auth that prob resolved and I'm not required. Auth still expected statements. AL to advise asap."

[17] When he was questioned at the investigation meeting, Mr Thompson stood by his use of the word 'resolved'. Mr Lloyd could not be sure the phrase 'problem resolved' was not said, but said that in his mind the matter had not been resolved.

[18] The conversation ended.

[19] By letter to the Authority dated 23 June 2006, Mr Lloyd advised:

"The applicant in this matter has advised us that she no longer wishes to pursue the application currently before the Authority.

Accordingly we are instructed to advise the Authority that the application AEA 785/05 is being withdrawn and discontinued. Our client has asked us to advise the Authority that the matter is being withdrawn out of financial concerns. ..."

## Determination

[20] Both parties cited a recent decision of the Employment Court in **Graham v Crestline Pty Limited** 15 September 2006, AC 53/06. I agree with Mr Thompson that the following statements of legal principle are applicable:

"[47] An agreement between parties to settle litigation is called an accord and satisfaction. It is, to use the words of Scrutton LJ in 1933:

... 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] Most recently and in this Court, the constituents of accord and satisfaction have been reaffirmed. There must first be a genuine dispute between the parties. Second, whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim."

[21] I also gain some assistance from this passage in the following, earlier judgment of the Employment Court in **Fredricsen v Northland Districts Aero Club Inc** 23 April 2001, AC 30/01:

"[29] The Tribunal focussed upon whether there had been an 'accord and satisfaction'. The statute, however, speaks of the 'settlement' of personal grievances. An accord and satisfaction is a contract in settlement of litigation or potential litigation. A 'resolution' of a grievance may be a better analogy. In determining whether there has been a settlement the focus should be on whether there was agreement between the parties that the personal grievance claim would go no further."

[22] With reference to the above passage in **Fredricsen**, I do not believe the facts show there was agreement that the personal grievance claim would go no further at all. The grievance itself remained 'unresolved' – and of course the notion of 'resolving' employment relationship problems expressly underpins the Employment Relations Act 2000. What remained at large, as detailed in Mr Lloyd's letter of 7 June, was the institution or the forum in which resolution would be sought. There was a concern that proceeding through the employment institutions would be too costly. I do not construe Mr Lloyd's side of the conversation with Mr Thompson as amounting to a departure from that general position.

[23] Turning to a standard analysis of whether there was an accord and satisfaction, the exchange of promises typical in circumstances like the present involves one party offering to withdraw a grievance and proceed no further with it, in return for the other party's agreement not to seek costs.

[24] I have not been able to resolve the differences in the accounts of Messrs Thompson and Lloyd of their discussion on the seeking of costs should the matter be withdrawn before an investigation meeting, or the point in the conversation at which Mr Lloyd referred to the instruction to withdraw.

[25] With reference to where the burden of proof lies, I am not persuaded there was an exchange of promises of the kind set out above. I believe, too, that with the evidence as unclear as it is it would not be fair to deprive Ms Rosenberg of an opportunity to have her grievance heard - which would be the result of a finding that there was an accord and satisfaction. Finally, I am at least persuaded that Mr Lloyd had no instructions to withdraw the grievance on the ground that it would not be proceeded with, provided costs were not sought.

[26] Mr Thompson relied further on the comments in **Graham**, at [49] of the decision, concerning one party acting in such a way as to induce the other to think some consideration is taken in satisfaction of a claim. However if I accept that Mr Thompson did refer to the possibility of the company not seeking costs if the claim was 'dropped before a hearing', I would also accept that Mr Lloyd did not pick the reference up as a possible resolution of Ms Rosenberg's grievance. In other words, I would accept he dismissed the reference as 'patter' rather than a concrete possibility calling for a response.

[27] In turn I would characterise this as a misunderstanding. I do not elevate the exchange to circumstances of the kind suggested in **Graham**.

[28] I therefore conclude there has been no accord and satisfaction. Ms Rosenberg may proceed with her grievance. The most practical approach seems now to proceed on the basis of the new statement of problem under the present file number.

#### **Details of settlement negotiations**

[29] The material produced in respect of this application included certain details of the parties' settlement negotiations. For that reason I heard this matter,

rather than the Authority member who will be addressing the substantive problem. The information about the negotiations which was provided to me will not be provided to that Member.

## Costs

### 1. Costs on the present application

[30] Full solicitor and client costs in respect of this application were sought on behalf of Ms Rosenberg. Mr Thompson has sought a contribution of \$1,000 to Air New Zealand's costs.

[31] In support of the request for solicitor and client costs Ms Hornsby-Geluk said it was Ms Rosenberg's view that the company was seeking to take advantage of her financial constraints to stall or frustrate the resolution of her grievance or to escalate her costs so they become prohibitive. Such a view should be reconsidered. Two separate investigation meetings have been scheduled in respect of the substantive grievance – one was adjourned or abandoned and one was cancelled following the withdrawal. Neither act was at Air New Zealand's behest. Secondly, although I have not been persuaded there was an accord and satisfaction here, I do not believe the company acted inappropriately – let alone unreasonably - in taking the view that there was one and seeking to argue in support of that view. I certainly do not accept there has been an attempt to take advantage of any perceived financial vulnerability of Ms Rosenberg's.

[32] Accordingly I do not accept that any consideration of solicitor and client costs is warranted.

[33] In support of the request for a contribution to the company's costs, Mr Thompson pointed out that it was the applicant who was seeking an indulgence regardless of the outcome of the application. I accept that, having initiated litigation then vacillated about whether to proceed, Ms Rosenberg has created unnecessary costs for all concerned. Finally I record that there was an investigation meeting in respect of this application, and it lasted for less than half a day.

[34] For these reasons Ms Rosenberg is ordered to contribute to Air New Zealand's costs in the sum of \$1,000.

### 2. Costs on the withdrawn application

[35] Mr Thompson submitted on behalf of Air New Zealand that, if I found there was no accord and satisfaction, costs should at least be paid on the withdrawn application before the new application can proceed. He sought costs of \$750 in that respect.

[36] He relied in support on an analogy with the procedures regarding discontinued proceedings in the District Court. I note that, when addressing an attempt to recommence a withdrawn grievance under the Employment Contracts Act 1991 in **Ngapuhi Fisheries Limited v Taurua** [2002] 1 ERNZ 562, the Employment Court said:

[41] ... so long as they are within the limitation period for doing so, the law [in the District Court] is that a discontinuance is not a bar to subsequent proceedings on the same cause of action, provided any costs allowed on the discontinuance have been paid. .... The practice of the Employment Tribunal should not be more restrictive than that of the District Court .... It would follow that a personal grievance discontinued before adjudication is able to be refiled,

subject of course to the Tribunal's powers of control of matters before it including for abuse of process, an allegation neither made nor apparent in this case."

[37] The emphasis in that case was on whether a withdrawn grievance could be refiled, as well as the transitional provisions in the Employment Relations Act.

[38] It does not appear there was argument on whether costs on the discontinued matter should be paid before any refiling (or continuation), and nor do I read the quoted passage as saying such payment is necessary. Not only that, with the procedure clearly before it, nor did the court order that costs on the discontinued matter be paid before the matter proceeded any further. If payment was not a necessity in the Employment Tribunal – where the claim in question was found to belong – it probably cannot be said to be a necessity in the Employment Relations Authority.

[39] Another consideration is, had Mr Thompson sought costs on the withdrawn application, a number of factors would have been taken into account including the amount of work done prior to the withdrawal and the timeliness of the withdrawal. Both the file, and Mr Thompson's affidavit, indicate relatively little preparation for the meeting had begun. In particular no witness statements had been filed by either party. A very modest amount of costs, if any, would have been awarded. I make no award now.

#### **Summary of orders**

[40] Ms Rosenberg's grievance may proceed under the present file number, subject to any further orders of the Authority member dealing with the substantive grievance.

[41] Ms Rosenberg is ordered to contribute to the costs of the present application in the sum of \$1,000.

[42] There will be no order for costs on the discontinued application.

**R A Monaghan**  
**Member of Employment Relations Authority**