+Determination Number: AA 15/04
File Number: AEA 773/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Wayne Kevin Shepherd (Applicant)
AND	Glenview Electrical Services Limited (Respondent)
REPRESENTATIVES	Alex Hope, Counsel for Applicant Mark Hammond, Counsel for Respondent
MEMBER OF AUTHORITY	Janet Scott
CONSIDERATION OF PAPERS	Submissions from Applicant received 13 November 2003 Submissions from Respondent received 28 November 2003
DATE OF DETERMINATION	13 January 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant has filed in the Authority seeking to have a claim of unjustified dismissal heard and determined. To remedy his alleged grievance the applicant seeks lost remuneration under ss. 123 & 128 of the Act, compensation under s.123 (c)(i) in the sum of $7500, damages for breach of employment agreement and costs.

Background.

The applicant worked for the respondent as an electrical labourer. He commenced employment in Rotorua in June 2000. He transferred to Hamilton in September 2000 where he was eventually assigned to work as an electrical labourer on a contract the respondent had with Waikato Hospital.

It is the applicant's position that in February 2001 he was removed from the hospital job because the respondent wanted someone with better qualifications on the job. He was told he would be assigned to other work.

The applicant submits he was told on 21 February that no further work was available for him.

The applicant considered he had an employment relationship problem and this was raised and addressed in mediation with the assistance of a Mediator appointed under s.144 of the Act. On 6 March 2001 the applicant entered into a s.149 agreement "*in full and final settlement of all matters between the parties.*" The terms of the settlement were promptly attended to by the respondent.

On 4 August 2003 the applicant filed this claim with the Authority. He alleges he was persuaded to enter into the agreement at mediation after being advised by one of the company's directors that

Waikato District Health Board did not want the applicant working there. He submits that subsequent enquiries have revealed that the Hospital had not recommended, requested or required that the applicant be removed from the employment of Glenview Electrical Ltd or to cease to provide services on the Waikato Hospital campus.

Preliminary Question

The parties have agreed that the question as to whether s.149 (3) acts as a barrier to this application being heard and determined will be dealt with as a preliminary issue. It is to be dealt with on the basis of submissions. Those submissions are now before me.

Submissions

Submissions for the Applicant

Counsel for the applicant accepts the terms of a s149 settlement agreement are final and binding. It is submitted, however, that such an agreement may be cancelled by a party under the Contractual Remedies Act 1979. (*House v Samuel Miller Films Ltd*, CA 71/02*).*

The Authority has jurisdiction to make orders under the Contractual Remedies Act (Employment Relations Act s.162 (c)). It may invoke the provisions of the Contractual Remedies Act to cancel a contract/agreement where:

- A representation has been made to one party by the other party to a contract.
- That representation was false, whether innocently or fraudulently.
- The other party was induced to enter into the contract on the basis of the misrepresentation.

In the *House* case (cited above) the Authority relied on a decision made under the Employment Contracts Act 1991 (*Hunt v Forklift Specialists Ltd* [2000] 1 ERNZ 553. The Court found a settlement entered into under s.88(2) of that Act was capable of being cancelled.

Counsel for the applicant also addresses the question of confidentiality of the mediation process and suggests ways to resolve this issue.

It is also submitted that, if the Authority does find it has jurisdiction to deal with this matter, the appropriate course is to set a timetable for filing an application to have the s.149 agreement cancelled.

Submissions for the respondent

The respondent seeks to strike out the applicant's claim on the basis that the Authority has no jurisdiction to deal with the matter as the grievance was settled under s.149 of the Employment Relations Act 2000. The following grounds are argued in support of the application.

- The provisions of s.149 are emphatic and unequivocal…… *"no party may seek to bring these terms before the Authority or the Court, whether by action, appeal, application or review or otherwise."*
- For policy reasons it would defeat the purpose of s.149 to allow mediated settlements to be revisited.

- The respondent denies there was any misrepresentation, but in any event none could be proven. There is no record kept of mediations; the discussions were without prejudice; the mediator could not reasonably be expected to recall what occurred and the burden of proof would be impossible to surmount.

- Even if the alleged representations were made (which is denied) it was open to the applicant to check on the veracity of any aspect of the factual information presented before signing off final and binding terms.

Counsel for the respondent canvassed the case law in *House* and *Hunt* (cited above).

It was argued that *House* was distinguishable on its facts. The employer party had failed to meet an essential term of the settlement agreement. That breach substantially altered the benefit of the agreement to the applicant. It was clear the object for cancelling the agreement in that case was to find a way around res judicata, to obtain enforcement of a sum owed. It was not an attempt to re-litigate the substantive case.

In *Hunt* it was held a mediated settlement is not a pronouncement of a final decision but a variation of a contract of employment - the alternatives available on a breakdown in settlement being to apply for compliance with a provision of the employment contract or to treat the contract as at an end and to cancel it. This case as with *Hunt* and *Shaffer v Gisborne Boy's High School Board of Trustees* [1995] 1 ERNZ 94 all focused on compliance with the settlements in question not with what went on leading to the settlement.

The case of *Webb v Clydemore School Board of Trustees AA 178/01* was also raised in support of counsel's submissions that s.149 agreements are final and binding on the parties.

The s.149 Settlement Agreement between the parties.

The s.149 settlement in question follows the conventional form. It includes the following terms:

1. These terms and all matters discussed at Mediation shall remain confidential to the parties.

2. This is a full and final settlement of all matters between the parties.

3 -6. Other Terms

It concludes:

We request a Mediator from the Department of Labour to sign these terms because the employment problems between us have been resolved and we wish them to be final, and binding and enforceable on us

Dated at Hamilton on this 6th day of March 2001

Signatures: *applicant*
respondent

We also confirm that before the Mediator signed the agreed terms of settlement that-

The Mediator explained to us that:
(a) Those terms are final and binding on, and enforceable by us; and
(b) Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or the Court whether by action, appeal, application for review or otherwise; and

We confirmed to the Mediator that we understood that explanation and affirmed our request;

Signatures: *applicant*
respondent

I, (name of Mediator) of Hamilton, Mediator, certify that:

- *(a) I am employed by the Chief Executive of the Department of Labour to provide mediation services under the Employment Relations Act 2000: and*
- *(b) I hold a current general authority from the Chief Executive to sign, for the purposes of s.149 of the Act, agreed terms of settlement; and*
- *(c) I have been requested by the parties to sign the attached agreed terms of settlement; and*
- *(d) Before I signed the agreed terms of settlement I explained to them the effect of s.149(3); and*
- *(e) I am satisfied that the parties understood the effect of that subsection and have affirmed their request that I should sign the agreed terms of settlement.*

I now sign the agreed terms of settlement pursuant to s.149(1)&(3).

Dated at Hamilton this 6th day of March 2001.

Name of Mediator
Mediator

I would note two relevant points with respect to the agreement between the parties.

- There has been no challenge to the agreement pursuant to s.152 (2) (a) of the Act.
- The respondent promptly met its obligations under the settlement agreement.

I find this is settlement agreement was concluded and signed by the Mediator in accordance with the provisions of the Act.

Discussion

The answer to the question posed is, I find, to be found in the clear words of s.149 (3) (b) of the Act considered against the scheme of the Act.

Section 149 (3)(b) of the Act states:

> *"except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether, by action, appeal, application for review* ***or otherwise.****"*

The words of this subsection are clear that other than for enforcement the parties may not challenge the terms of a s.149 agreement. The words "***or otherwise"*** added to the words "*whether by action appeal application for review"* in my view create an absolute bar to any challenge to a properly concluded s.149 settlement agreement by any means, including cancellation of the agreement under the Contractual Remedies Act 1979. While the Authority clearly has the power under s.162 of the Act to make orders under the Contractual Remedies Act 1979 the exhaustiveness of the words ***or otherwise*** specific to s.149(3)(b) of the Act rule out the application of the Contractual Remedies Act to s.149 settlement agreements.

The scheme of the Act as it pertains to the settlement of employment relationship problems supports this interpretation, in particular-

- The prominence given to mediation as the primary problem-solving mechanism (s.3 Object of this Act). Associated provisions of the Act support this objective e.g. s 159.

- The stringent obligation on the mediator to explain the effect of s.149 (3) to the parties and to be assured by them that they understand the effect of that section and knowing that effect that they still wish the mediator to sign the terms of settlement.

- The provisions which ensure the enforceability of s.149 settlement agreements by compliance order under s. 137 or via the District Court procedures pursuant to s.141 of the Act. These enforcement provisions stand in contrast with the compliance procedures under the Employment Contracts Act 1991 which did not provide for s 88 (2) agreements between the parties to be enforced as an order or determination of the Tribunal and which led to case law designed to rectify the problems that created.

- The confidentiality provisions of the Act as they relate to the provision of mediation services.

All of these provisions I find are designed to underscore the importance of mediation in the resolution of employment relationship problems and the sanctity and finality of those agreements once properly concluded.

Determination

S.149 (3) provides an absolute bar to the Authority hearing and determining Mr Shepard's application (brought under AEA 773/03) and I decline to consider the matter further.

Final note:

If I am wrong in the above, the question also arises as to whether the applicant could be taken to have affirmed the agreement given the delay in bringing proceedings. The applicant has submitted documentary information in support of his claim of misrepresentation that is dated 12 July 2001.The application before me is dated 4 August 2003 – two years after information on which Mr Shephard relies in support of his application came to his attention. All this, plus the difficulties Mr Shephard would face in demonstrating misrepresentation, suggest to me that Mr Shephard is floating a poorly constructed kite.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject within one calendar month of this determination

Janet Scott
Member of Employment Relations Authority