

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Warren Gregory Tobin (Applicant)

AND Stayinfront Inc. (First Respondent)
AND Great Elk Company Inc. (Second Respondent)
AND Stayinfront (Asia Pacific) Limited formerly The Great Elk
Company Limited (Third Respondent)
AND Splashnet Inc. (Fourth Respondent)

REPRESENTATIVES Matt Young, Advocate for Applicant
Rob Towner, Counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

SUBMISSIONS RECEIVED 22 and 29 July 2005

DATE OF DETERMINATION 18 August 2005

DETERMINATION OF THE AUTHORITY OF PRELIMINARY MATTER

[1] Mr Tobin says he was employed by all four of the abovenamed respondents, and believes he has been unjustifiably dismissed by them. He has asked the Employment Relations Authority to determine that employment relationship problem. For present purposes I will refer to the employer party to the problem as 'Stayinfront' except where otherwise indicated.

[2] Stayinfront says all matters concerning Mr Tobin's association with the four companies, including the termination of his employment, were resolved by agreement between the parties. Therefore Mr Tobin cannot proceed with his grievance.

[3] For that reason Stayinfront's immediate response to Mr Tobin's statement of problem was to apply to have the matter struck out. I took the view that it was preferable to hear and determine as a preliminary matter whether there was a binding agreement between the parties, the effect of which was that the grievance could not proceed. I discussed that view with the parties at a conference call in November 2004. The nature and scope of the investigation into the preliminary matter were subsequently recorded in a Minute dated 17 December 2004. Various timetabling arrangements were made and preparations for the investigation meeting proceeded on that basis.

[4] Mr Young made submissions on the law relating to strike out applications, but since this matter is no longer being treated as an application for an order striking out it is not necessary to address them. However he should reconsider his view that the difference between an application for an order striking out proceedings, and an investigation and determination of a preliminary matter such as the present, is no more than one of semantics.

[5] Although a date was set for an investigation meeting, by agreement the preliminary matter was determined on the papers.

The agreements terminating the parties' association

[6] Mr Tobin held the position of Executive Vice President of Sales in Stayinfront's New Zealand office. Tony Bullen, Stayinfront's New Zealand Managing Director, also worked in that office, as did Joanne Skinner, a sales manager. In 2002 it came to the attention of Thomas Buckley, President of Stayinfront Inc and Stayinfront (Asia Pacific) Ltd among other roles, that Ms Skinner was having an affair with Mr Tobin, and had been having an affair with Mr Bullen. There were associated problems arising in the workplace. This information prompted discussions about how the repercussions could be resolved.

[7] By email message dated 3 June 2002, Mr Tobin advised Mr Buckley that he had:

“... spent some time thinking about my situation and my preference is to leave, providing we can put together an agreement around the terms we discussed last week.”

[8] A series of email messages between Messrs Buckley and Tobin during June and July 2002 set out some of the offers and counter-offers made during the negotiation process. In a faxed message dated 16 July 2002, Mr Tobin's then-solicitors provided detailed comments on draft settlement documents apparently being discussed at the time.

[9] One aspect of the overall settlement concerned the Tobin Family Trust's holding of equitable interests in Stayinfront Inc and Splashnet Inc, neither of which are New Zealand-registered companies. The negotiations about the way in which Mr Tobin's association with the respondent companies would end culminated in part in a stock purchase agreement dated 30 June 2002 (“the Stock Purchase Agreement”) under which the Trust's interests would be purchased by another organisation of which Mr Buckley is the managing member.

[10] In addition a letter from Mr Buckley to Mr Tobin, dated 25 July 2002, set out “all of the terms and conditions relating to the separation of your employment from Stayinfront Inc”. Clause 3 on page 2 of the letter read:

“By executing this Agreement, you ... in consideration of the terms set out herein and in consideration of the exchange of releases as set forth in the Stock Purchase Agreement ... hereby release and forever discharge the company ... from any and all manner of claim, known or unknown, civil or criminal, vested or contingent, that you ... ever had, have or may now have to the effective date of this Agreement against them or any of them of any nature or description ascertainable in any forum, arising out of or in connection with your employment with the Company or the termination thereof, including but not limited to ...”

[11] Clause 6 on page 3 of the letter read:

“You further warrant and represent that as of your date of execution of this agreement, there are no complaints, charges or other matters filed or pending before any ... court or agency in the United States or New Zealand regarding your employment relationship with the Company or the termination thereof and that in future you will not file or cause to be filed any such charges, complaints ...”

[12] Mr Tobin signed his agreement at page 6 of the letter, following written acknowledgements that he had read and understood the agreement, had time to consider its terms, had entered into it voluntarily, had not relied on any representations not contained in the agreement, and had the agreement reviewed by his attorney. The agreement is referred to as the “Severance Agreement”.

[13] A further document headed “Mutual Release” was also signed on 25 July 2002.

[14] The agreements provided that New Jersey law would apply. However this problem has been addressed with reference to New Zealand law.

Litigation based on the stock purchase agreement

[15] In 2004 a dispute arose over a narrowly defined aspect of the Stock Purchase Agreement. Mr Tobin and the trustee of the Tobin Family Trust filed a complaint in the Superior Court of New Jersey Law Division – Bergen County, in respect of it. The complaint proceeded as far as the taking of depositions, and part of the transcript was produced in evidence. The litigation was settled, so in early August 2004 the parties signed a “Settlement Agreement and Mutual Release”.

[16] In submissions Mr Young seemed to be relying on the following release provision in clause 6 of that agreement:

Plaintiffs and Defendants hereby release and forever discharge each other ...from any and all liability ... solely with respect to [the subject matter of the litigation]; provided, however, **that nothing contained herein shall be construed to affect, waive or release any rights or claims that any party hereto has under the law of any jurisdiction, including rights or claims which by law in New Zealand are not able to be contracted out of,** (emphasis Mr Young’s).

[17] To the extent the highlighted proviso has any meaning, I do not accept that it is capable of amounting to an amendment of the agreements of 2002. That is the effect of Mr Young’s reliance on it. The reality as I understand it is that the 2004 agreement is no more than a settlement of the litigation concerning a specific aspect of the stock purchase agreement. Clause 6 is not relevant to whether the agreements entered into in 2002 preclude the continuation of Mr Tobin’s personal grievance.

[18] Secondly, reliance on the proviso assumes the correctness of the argument to which I am about to turn. For the reasons I will set out, I do not accept the argument is correct.

The effect of s 238 of the Employment Relations Act

[19] The principal argument in support of Mr Tobin’s position that his grievance should be permitted to proceed is based on s 238 of the Employment Relations Act 2000, read together with the personal grievance provisions in Part 9 of the Act.

[20] As presented, the argument was based on assertions that the various settlement agreements amounted to a contracting out of the personal grievance provisions in the Employment Relations Act - that is, Part 9 - which is not permissible under s 238 of the Act. Section 238 provides simply:

‘The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.’

[21] While he acknowledges seeking legal advice when he entered into the mutual release and severance agreements in 2002, Mr Tobin says he was not advised of the fact that ‘under New Zealand Employment Law you cannot contract out of your obligations under the Employment Relations Act 2000.’ He feels he was poorly advised on employment matters, and says he did not become aware of the applicable provision of the Employment Relations Act until his new advisor drew it to his attention in August 2004. He says that, until he received that advice, he feared that his initiation of personal grievance proceedings would have attracted the sanctions set out in the settlement agreement.

[22] However there is a difference between an agreement involving a promise by the parties not to pursue a cause of action that might otherwise be available (or is being pursued), and a general agreement that the cause of action is not available as between the parties whether or not any attempt at pursuit is in contemplation. The latter is not permissible under s 238, but the former is permissible. I put this proposition to Mr Young during the conference call in November 2004, but he did not agree with it.

[23] The following examples illustrate the point:

(a) a settlement agreement ('A') provides in part:

"This agreement is in full and final settlement of all matters arising out of the applicant's employment by the respondent, and the termination thereof, including but not limited to any personal grievance the applicant may have in respect of the employment relationship and its termination."

(b) an employment agreement ('B') provides in part:

"The personal grievance provisions in Part 9 of the Employment Relations Act 2000 shall not form part of the parties' employment agreement and shall not otherwise be available to the parties."

[24] Provisions like the one in example A are so common that suggesting they are rendered ineffective by s 238 files in the face of long-established New Zealand employment law and practice. As my colleague pointed out, when discussing the same submission about the effect of s 238 in **Skinner v Stayinfront (Asia Pacific) Limited** (AA 161/05, 4 May 2005):

"[10] If Mr Young's argument was accepted there would be no certainty around any settlement of any employment relationship problem. Such a situation would undermine one of the express objectives of the Act which is to enable parties to resolve their employment relationship problems themselves."

[25] I would say further that, if Mr Young's argument was accepted, the implications are that there would be little point in even attempting to settle a personal grievance or potential personal grievance. Yet s 143 of the Act says this:

"The object of [Part 10] is to establish procedures and institutions that –

- (a) ...
- (b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; and
- (c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available ...; and
- (d) recognise that the procedures for problem-solving need to be flexible; ..."

[26] The Department of Labour's mediation service is one of the institutions established under Part 10. The mediation service has a broad mandate to 'assist persons to resolve, promptly and effectively, their employment relationship problems' (s 144(2)(e)). Assisting in discussions which lead to the settlement of grievances (or potential grievances) forms a significant part of the dispute resolution work of the service. Not only does the Act recognise that resolution of an employment relationship problem may take the form of a settlement agreement, but it makes special provision for the final, binding and enforceable nature of those agreements (s 149 and 151).

[27] None of this means that grievances or potential grievances can be settled only by referring them to the mediation service. In practice parties attempt to, and do, reach such settlements without the assistance of the mediation service.

[28] Not only that, the decided cases make it quite clear that the defence of accord and satisfaction is available when an applicant seeks to proceed with a personal grievance in the face of what looks like a settlement. Mr Towner cited several in submissions. Those decided under the Employment Relations Act included a decision of the Employment Court in **Cabletalk Astute Network Services Limited v Cunningham** (AC 26/04, 14 May 2004), and several determinations of the Employment Relations Authority.

[29] The Employment Contracts Act 1991, the predecessor to the Employment Relations Act, contained in s 147 a provision substantially similar to s 238. There are many decisions of the

Employment Court and Employment Tribunal in which the defence of accord and satisfaction was upheld, or more generally that a grievance fell within the terms of a settlement, so that the grievance in question could not proceed. In decisions where the defence of accord and satisfaction did not succeed, that was because its components were not made out rather than because of any argument based on s 147. Among other decisions Mr Towner cited **Marlow v Yorkshire New Zealand Limited** [2000] 1 ERNZ 206, where a settlement was relied upon and the issue concerned the extent of the actions in the parties' contemplation at the time of settlement.

[30] Mr Young also seemed to be submitting that the settlement agreements here purported to oust the jurisdiction of the Employment Relations Authority and Employment Court, again offending against s 238 and other provisions of the Employment Relations Act. I do not agree that is the effect of the agreements. In this very problem there has been no challenge to the Authority's jurisdiction to embark on the course it has. Again the question is simply one of whether the agreements are effective between the parties to preclude the continuation of Mr Tobin's grievance. If I found they were not - for reasons of the kind set out in some of the cases cited - a grievance could proceed (aside from the further hurdle created by s 114 of the Act). That process involves the exercise of a jurisdiction, not an ouster of it.

Other reasons why the agreements should not prevent the grievance from proceeding

[31] Mr Tobin has not relied on an argument that there was no accord and satisfaction. Nor was there any real issue, beyond a bare assertion based on **Marlow** (supra), about whether the wording of the settlement agreements is broad enough to encompass the matters Mr Tobin now seeks to litigate.

[32] The remaining aspect of the preliminary matter is Mr Tobin's view that the circumstances leading to the termination of his employment, as well as the negotiation and completion of the settlement agreements, were unfair.

[33] The alleged unfairness of the termination itself bears directly on the substantive merits of Mr Tobin's grievance. Mr Young urged me to address the merits in the course of this investigation, but the content of the documents filed led me to prefer to separate considerations of the merits from those concerning the effectiveness of the settlement agreements. I do not accept the submission that it is necessary to address the merits in order to gain the 'full flavour' of this problem. Even if I accepted the truth of the assertions Mr Tobin has made regarding those merits, the question would still be one of the binding nature of the settlement agreements. Separate legal tests apply to that question.

[34] The agreements met the basic requirements that there be offers which were accepted, supported by a mutual exchange of promises amounting to consideration. Regarding the concern about their negotiation and completion, long-established legal principle requires a legal basis beyond mere unfairness for saying they should, in effect, be ignored. The grounds for arguing that an agreement should be ignored or set aside are limited, but one of them is that an applicant made the agreement in question under duress. Neither that nor any of the other recognised grounds was raised in the statement of problem or in response to my subsequent request for more precision regarding the basis on which Mr Tobin says his grievance should proceed. I may have been astute to identify duress as a possible ground from the material filed, although, as happened here, the Authority frequently receives broadly-stated applications whose legal basis is difficult to identify.

[35] Mr Young's original submission was simply that, in fairness and equity, the grievance should be permitted to proceed. Accordingly, Mr Tobin asserted that he was steamrolled into reaching the agreements he did in 2002. He said that, at the time, he was under stress, could not sleep or eat, and

could not think clearly. His wife was pregnant, his marriage had disintegrated, he was under financial pressure, and he was being treated for anxiety and depression. At the same time, Mr Buckley was putting him under pressure to complete an agreement quickly.

[36] As far as the presence of duress is concerned, one problem with that position is Mr Tobin's affirmation of the stock purchase agreement by going so far as to issue proceedings based on it. It was negotiated at about the same time as the severance and mutual release agreements of 2002. Mr Tobin cannot effectively confirm his competence in respect of the stock purchase agreement, but deny it in respect of the severance and mutual release agreements.

[37] Another problem lies in Mr Tobin's general competence in negotiating often complex commercial agreements, and the fact that he was in the course of negotiating one such agreement when his employment-related difficulties arose. That commercial negotiation was the subject of the complaint filed in respect of the stock purchase agreement.

[38] Mr Tobin was questioned on his negotiating experience during the taking of depositions in that matter. The transcripts revealed answers to the effect that, over several years, Mr Tobin had negotiated numerous commercial agreements at a high level. He was accustomed to negotiating a wide range of agreements varying by structure, style, and choice of law (a reference to the fact that Mr Tobin negotiated different agreements in different countries). The agreements could be a few pages long, or up to 100 pages. Not only that, Mr Tobin told his questioner that counsel were rarely used until agreement had been reached in principle. There was nothing to suggest he varied or sought to vary this practice when negotiating his own agreements, or that he was incapable of or failed to press his own position in the process.

[39] Further to Mr Tobin's state of mind at the time of the negotiations about his own position, a one-page statement from Mr Tobin's clinical psychologist was filed. The psychologist said Mr Tobin was suffering from an anxiety disorder which when combined with his depression "would have affected Mr Tobin's day to day functioning in a range of areas." No more analysis than that was provided. While I might accept Mr Tobin had the mental and emotional problems he said he did in general terms, that kind of evidence is not enough to persuade me his state of mind was such that the agreements should be set aside.

[40] In submissions, Mr Young made assertions bearing on Mr Buckley's approach to the conduct of negotiations in general. He said a full hearing would allow 'similar fact' evidence to be called on that matter. If such evidence is intended to question the binding and enforceable nature of the severance and mutual release agreements, then assuming it is relevant and has probative rather than merely prejudicial value, it should have been made available to this investigation. As matters stand, nothing in the material I have suggests Mr Buckley overstepped any line in the course of the negotiations.

[41] Alternatively, if the evidence is intended to support Mr Tobin's allegation that he was constructively dismissed, then there will be an opportunity to call it if Mr Tobin overcomes the barriers to proceeding and a hearing into the merits of his grievance is convened.

[42] Mr Young also asserted in submissions that 'the disparity between the commercial value of the shares and the monies the Trust received for them shows the inequality of the bargain'. He said a full investigation would enable the introduction of evidence to that effect. I assume the assertion refers to the stock purchase agreement. Because of the New Jersey litigation it is probably not open to Mr Tobin to seek to challenge the binding nature of that agreement now. I doubt, in any event, the extent of the Authority's jurisdiction to look into the stock purchase agreement other than to

take into account that it was entered into as part of the overall arrangements for the termination of Mr Tobin's association with the respondent companies.

[43] Finally, Mr Tobin alleged that the sale of the shares and options pursuant to the stock purchase agreement resulted in a loss as at late 2004 of NZ\$17,000,000. I assume that is the basis for Mr Young's assertion in submissions. However in any forum any argument about the commercial value of the shares and options in the context of the validity of the settlement agreements, or the stock purchase agreement if that is the correct reference, would have to address the value as at the date of the settlement. Evidence about commercial value at a date over two years later is not relevant.

[44] Alternatively, if the value of the shares and options has increased since the date of the agreement, there may be an opportunity to call evidence regarding the resulting loss to Mr Tobin during any hearing of the merits of his grievance and for the purpose of quantifying his claim for remedies. Even then, such evidence would have to recognise the role of the Tobin Family Trust.

[45] For all of these reasons I find that Mr Tobin's raising of his grievance is caught by the terms of a final and binding settlement. The grievance cannot proceed.

Costs

[46] Costs are reserved. If the parties seek a determination of costs from the Authority they should file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority