New Zealand Employment Relations Authority Decisions

Wainohu v Midwifery Choices Ltd WA 78/06 (Wellington) [2006] NZERA 726 (12 May 2006)

Last Updated: 2 December 2021

Determination Number: WA 78/06 File Number: WEA 352/05
WEA 389/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE

THE PARTIES Addie Wainohu

AND Midwifery Choices Limited

REPRESENTATIVES Tim Anderson for Addie Wainohu

Gary Tayler for Midwifery Choices Limited

MEMBER OF AUTHORITY P R Stapp

ON THE PAPERS 7 , 20 and 21 April 2006

Telephone conferences

23 March 2006 and 2 & 10 May 2006

DATE OF DETERMINATION 12 May 2006

DETERMINATION OF THE AUTHORITY

1. The parties have provided an agreed statement of facts. This is as follows and I quote it in full as provided by the parties' representatives:
    1. *Addie Wainohu commenced employment with the Kahungunu Health Services Trust as a midwife in June 2003.*
    2. *Jean Te Huia was a trustee of Kahungunu and the manager of its midwifery operation.*
    3. *On 3 November 2004, Jean Te Huia incorporated Midwifery Choices Limited and transferred the midwifery operation from Kahungunu to her new company.*
    4. *In early November 2004 Ms Wainohu signed an employment agreement with Midwifery Choices Limited.*
    5. *Midwifery Choices Limited provides midwifery services to expectant mothers in the Hawkes Bay District Health Board region.*
    6. *On 4 July 2005 Ms Wainohu's employment with Midwifery Choices Limited ended in circumstances that have given rise to two statements of problem in the Employment Relations Authority.*

7. *On 19 September 2005 Ms Wainohu filed a statement of problem against Midwifery Choices Limited with the Employment Relations Authority with proceeding number WEA352/05.*
    8. *On 20 October 2005 Midwifery Choices Limited filed a statement of problem against Ms Wainohu in the ERA with proceeding number WEA389/05.*
    9. *On 27 November 2005 Ms Wainohu instructed new representation, namely Tim Anderson from Gibson Sheat Lawyers Wellington, who was her duly authorised representative.*
    10. *Initially Miles Law (Jeff Miles) represented Midwifery Choices Limited but later Gary Taylor of Stretton Tayler Limited in Napier was instructed as their representative. At all material times during the negotiations under examination here*

Stretton Tayler Limited were the authorised representative of Midwifery Choices Limited.

11. *In December 2005 settlement negotiations were conducted by email between the parties' representatives.*
12. *On 22 December 2005 Mr Tayler on behalf of Midwifery Choices Limited proposed a settlement offer, such settlement offer contained in an email sent to Ms Wainohu's representative.*
13. *On 22 December 2005 Ms Wainohu's representative requested that the settlement offer remain open for Ms Wainohu to consider.*
14. *On 22 December 2005 Midwifery Choices Limited agreed to keep its offer open for consideration.*
15. *On 28 February 2006 Ms Wainohu's representative, by email, purported to accept the offer made by Midwifery Choices Limited dated 22 December 2005.*

2. There is more to the matter, including emails that were exchanged on 13 December 2005, which included an offer from Midwifery Choices Limited (MCL) and was rejected by Addie Wainohu. The parties are in dispute about whether or not an offer and acceptance was made in regard to emails between Ms Wainohu's representative and MCL's representative between 13 December 2005 and 28 February 2006? Ms Wainohu's representative has focussed on an offer made on 21 December, which he says was accepted on 28 February by MCL. Mr Tayler says that because a new matter was raised about statutory holiday entitlements and annual leave under the employment agreement that were not part of the claims before the Authority, any agreement had to be considered in the wider context of all the emails, especially his email of 13 December 2005.
3. Both parties' representatives have provided submissions on this matter. It is agreed that the parties gave their "authority" to the representatives to settle the matter on their behalf.
4. Each of the emails of 21-22 December 2005 was qualified ***"Without Prejudice"***.

5. On Tuesday 13 December Gary Tayler made an offer to settle that included a term: *"Your client withdraws her claim in the Authority and agrees to make no further claim against choices (sic) whatsoever"*. Tim Anderson "entirely rejected" Mr Tayler's offer and made another counter offer: ***our client proposes a settlement on the following basis*** (Anderson *21 December 2005 2:12 pm*). Mr Tayler on behalf of MCL then made another offer *"The offer you made to settle is rejected.* ***The only offer we have is for your client to withdraw her proceedings and ours will do the same. Costs will lie where they fall****."* (Emphasis added) (Tayler *22 December 2005 9:41 am*).
6. Next, Tim Anderson, after an agreed delay, responded: "***Our client accepts your clients offer to settle both claims between the parties for damages / compensation from 4 July 2005 on the basis that both claims are dropped and each party bears their own costs.****"* (Emphasis added). Mr Anderson also raised a matter regarding statutory entitlements and the annual leave entitlements under the employment agreement in the same email that he wanted to keep separate, and he told Mr Tayler that "*We will draft an appropriate agreement reflecting these terms of settlement for your clients' signature prior to the next call-over of this matter in the ERA."* The latter never happened. Mr Tayler took issue with Mr Anderson by pointing out that the offer of settlement he made on 13 December said *"Your client withdraws her claim in the Authority and agrees to make no further claim against choices (sic) whatsoever"*.
7. Mr Tayler has provided a submission that there never has been a settlement between the parties in regard to the exchange of emails. He asserts that if there was, then all that would have been required was for a notice of withdrawal administratively to bring the proceedings in the Authority to a close. He says that the assertion of the matter being withdrawn in the Authority is at odds with the words in Ms Wainohu's counsel's email dated 28 February which advises that *"We will draft an appropriate* agreement for your client's signature *prior to the next call-over of this matter in the ERA"*. Mr Tayler argues that counsel for Ms Wainohu knew that a signed agreement would be needed before matters were finalised. There has never been a document provided. He says that it was therefore not known what was intended to be put into such a document.
8. Mr Tayler says that MCL has no objection to Ms Wainohu's claim being dismissed as requested but does not and has never agreed to have its own proceedings dismissed. Mr Tayler says that as no settlement document was ever provided to satisfy settlement being reached, Ms Wainohu cannot be said to have concluded such a settlement and that the email exchange marked *"without prejudice"* should be protected and has accordingly requested the

Authority to dismiss Ms Wainohu's proceedings, and that MCL's proceedings remain active and set down for an investigation meeting.

9. Mr Anderson, on behalf of Ms Wainohu, has submitted that settlement was reached between the parties to dispose of both statements of problem (WEA352/05 and WEA389/05) that are currently before the Authority. He asserts that the settlement was reached upon an offer and acceptance.
10. Mr Anderson submitted that this was a simple matter of offer and acceptance that can be decided on contractual principles where no formal steps are required under the ERA 2000 before an agreement can come into effect.
11. It is my conclusion that there was no offer and acceptance to give rise to an agreement arising from the emails because the emails amount to offers and counter offers between the parties although they got very close to settling. I am supported in reaching this conclusion by the context in which the statutory and annual leave entitlement under the employment agreement claims were raised in Mr Anderson's email on 28 February, and after Mr Tayler's offer. It

remained open to Mr Tayler to consider the matter outside the claims in the Authority as different terms for a settlement considering his earlier offer to Mr Anderson was made on the basis that *"Your client withdraws her claim in the Authority and agrees to make no further claim against choices (sic) whatsoever"*. The claims of a statutory nature, and more particularly the claims relating to the annual leave entitlement under the employment agreement made on 28 February from Mr Anderson would thus not settle all claims between the parties, despite Mr Anderson's attempt to keep them separate, as he was entitled to do, but equally Mr Tayler was entitled to treat them as a new offer in the context of the email negotiations. This is especially so as they were conveyed in the middle of the text of the email that concluded with: "*We will draft an appropriate agreement reflecting these terms of settlement for your clients' signature prior to the next call-over of this matter in the ERA."* There is nothing to preclude the new matters from being included in a settlement. More prudently the terms should have been reduced to writing and included in an appropriate agreement for signature as proposed and the matters properly kept separate if that was needed. Upon the offer of 28 February Mr Tayler reasonably could expect a document to be prepared to consider but he was also entitled to reject the offer since it contained an additional matter.

12. I conclude that there was no agreement reached between the parties.

13. Costs are reserved.

P R Stapp

Member of Employment Relations Authority
