IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 137
5375699

BETWEEN	NICOLA CATHERINE WEBB Applicant
A N D	ENVIRONMENTAL ACCOUNTING SERVICES LIMITED First Respondent
A N D	MICHAEL GORDON GREEN Second Respondent
A N D	CARLY GREEN Third Respondent

Member of Authority:	M B Loftus
Representatives:	Dale Lloyd, Counsel for Applicant Rachel Brazil, Counsel for Respondents
Investigation Meeting:	On the papers (by agreement of the parties)
Submissions Received:	30 May and 15 June 2012 from the Applicant 8 June 2012 from the Respondent
Date of Determination:	9 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination deals with the preliminary issue of whether or not the parties have already resolved the substantive dispute.

[2] The parties agreed to deal with this as a preliminary matter. It was further agreed Ms Webb would provide some affidavit evidence. If the respondents disagreed with the content, there would be an investigation meeting. If not, and as occurred, the parties would offer submissions and the issue would be determined on the papers.

Background

[3] Ms Webb's substantive claim is that she was unjustifiably disadvantaged and unjustifiably dismissed, albeit constructively, from her employment with the first respondent, Environmental Accounting Services Limited (EAS).

[4] Her statement of problem opens with a paragraph reading:

> *There is a concluded settlement agreement recorded in correspondence dated 27 February 2012 (Otago Southland Employers' Association ("OSEA") to Macalister Todd Phillips ("Mactodd")), 28 February 2012 (Mactodd to OSEA) and 28 February 2012 (OSEA to Mactodd). The First, Second and Third Respondents are refusing to comply with the terms of the concluded settlement agreement.*

[5] That statement identified that the preliminary issue needed determination as the answer will impact significantly on how the claim progresses. If there was a settlement it becomes a matter of enforcement or depending on the effect of *Wade v. Hume Pack–N–Cool Ltd* [2012] NZEmpC 64, compliance. If there was no settlement, there is a substantive grievance that remains to be investigated.

Background

[6] The substantive employment relationship problem arose in January 2012 and has its origins in a disagreement over Ms Webb's employment agreement. That was mediated and while unsuccessful discussion continued between the parties and the mediator. By mid February Ms Webb concluded the relationship was irreparably damaged and instructed Ms Lloyd to investigate the possibility of an exit arrangement.

[7] An initial proposal was tabled on 16 February in an e-mail from Ms Webb, through the offices of Ms Lloyd, to the respondents (collectively identified as EAS) via Ms Brazil. It was declined and a counter proposal tabled the following day. Discussion continued but no further proposals were tabled till 27 February.

[8] On 27 February Ms Brazil tendered another offer, described as her client's *top dollar*, their *final offer*. Key to the arrangement was a provision Ms Webb resign with effect 29 February and the offer would be withdrawn if not accepted by that date.

[9] Ms Webb's response came by letter dated 28 February 2012. Contained therein is advise that:

> *Subject to the following being incorporated into a final record of settlement, our client would accept the offer set out in your email of 27 February 2012. Accordingly, settlement would be as follows:…*

[10] This proposal also raises two new claims and repackages two amounts offered by EAS (compensation and a contribution toward costs) as compensation.

[11] The third document identified in the opening paragraph of the Statement of Problem as having been sent on 28 February was actually dated 29 February. It is again in the form of a letter but was e-mailed at 4.37pm. It reads:

> *Thank you for your letter dated 2012.*
>
> *Our client acknowledges your paragraph one that sets out your client's willingness to accept the offer set out in the writer's email of 27 February 2012.*
>
> *This settlement would remain as offered with the addition of* [the two items raised by Ms Webb the previous day].
>
> *Accordingly a draft Record of Settlement is enclosed for your consideration and below is the proposed wording for Ms Webb's reference. …*

[12] The attached Record of Settlement was in the form used by Department of Labour mediators when completing a section 149 settlement and there was space for the mediator's signature.

[13] Ms Webb is of the view the letter of 28 February constituted an offer and that of 29 February acceptance. She says:

> *That letter* [29 February] *acknowledged that settlement would remain as offered with the addition of* [the two items]. *A record of settlement was enclosed …*
>
> *I was then advised by my solicitor that Rachel Brazil had sent a further email advising that the record of settlement offer had expired.*
>
> *I was extremely surprised and upset as I had understood the email of 29 February 2012 to be an acceptance of the offer previously made. I had been liaising with my solicitors to arrange signing of the record of settlement in their Wanaka office.*

[14] At 8.52am on Friday 2 March Ms Brazil forwarded to Ms Lloyd a chain of e-mails which relate to one of the two items added through the correspondence of 28 and 29 February. The e-mail then goes on to advise:

> *Also Michael has instructed me to notify you that the Record of Settlement offer has expired.*

[15] The evidence talks about the fact Ms Lloyd was absent from her office from just before the letter of 29 February was received through to 5 March. That said, there is no suggestion Ms Webb was unaware of it – indeed she says she had been liaising with Ms Lloyd's office about signing when she was advised of the alleged withdrawal. The copy of the Record of Settlement offered as evidence is signed by Ms Webb but not EAS. Ms Webb does not say when she signed but the evidence cited above would lead to a conclusion it was after the withdrawal of 2 March. No-one suggests EAS was advised Ms Webb had accepted or otherwise considered an agreement had been concluded.

[16] On 5 March, Ms Lloyd e-mailed Ms Brazil to confirm the terms of settlement were accepted with that fact having *been assumed by this office when it read yours and my letters*.

[17] Ms Brazil replied quickly and advised EAS considered the deadline missed and that it had already spent some of the money on other outgoings. The email then continued with a revised but reduced offer.

[18] That was followed by a further email from Ms Lloyd to Ms Brazil at 5.59 that evening. It asserts an agreement had been concluded before closing with advice that:

> *... Nicola will not be returning to an environment where she has no confidence that the employer has any understanding of its legal obligations.*

Determination

[19] It is trite to say for there to be an agreement there must have been a meeting of minds – there must, to use an archaic term, be offer and acceptance. There must be certainty as to the terms of the agreement and acceptance must be unconditional and communicated. A counter offer is not unconditional acceptance – it is effectively rejection. Furthermore an offer can be revoked provided revocation occurs prior to acceptance and is communicated (refer Burrows, Finn and Todd, Law of Contract in New Zealand 4th edition (Wellington 2012) at chapter 3 for a more detailed analysis).

[20] As already said, Ms Webb's position is underpinned by her view the letter of 28 February formed an offer which was accepted in EAS's reply of 29 February. As a fallback, and in the event I conclude that not to be the case, it is suggested that the difference between the terms outlined in those two letters is *de minimus* – they are so minor as to be irrelevant and therefore a binding agreement remains notwithstanding any differences.

[21] In her letter of 28 February Ms Webb responds to EAS with the words *subject to the following being incorporated*… This is clearly a counter offer and the inclusion of new terms confirms that. It is, as claimed, an offer.

[22] The question is whether or not EAS's response constitutes acceptance. I conclude the answer is no. Confusion may arise from the fact that on one hand it says EAS recognises Ms Webb's willingness to accept the offer conveyed on 27 February, while on the other it says the settlement would remain as offered with the addition of the two new items raised by Ms Webb the previous day.

[23] The problem with the first paragraph (which may have induced Ms Webb to believe she had an agreement) is that its factual foundation is flawed. There are no words in the letter of 28 February which indicate Ms Webb was accepting the offer and the fact is she didn't – she counter-offered by adding two claims and seeking to repackage another part of the arrangement.

[24] A second issue is that EAS did not accept – they expressly rejected the repackaging and said their original position would stand. I place little importance on the inclusion of a proposed Record of Settlement. EAS were asked to do this by Ms Lloyd in the letter of 28 February and the terms proffered reflect their negotiating position. They do not reflect acceptance of the terms suggested by Ms Webb. I also note the settlement was a draft, which falls short of implying a finalised agreement.

[25] That conclusion raises the proposition that the remaining differences are *de minimis.* Again the answer is no. While not expressly discussed there must have been a GST component to the costs and Ms Lloyd's letter of 16 February would indicate it was included in the sum then being discussed and apparently conceded by EAS. Whilst this does not affect the benefit Ms Webb receives, it does alter the cost incurred by EAS. EAS can claim the GST portion and that would have provided an incentive for them to reject the repackaging. Furthermore one proposed term present

throughout the negotiation is the provision of a reference acceptable to Ms Webb. The letter of 29 February contains the first mention of its content and therefore requires, in my view, an indication of acceptance or otherwise. It is a significant part of the arrangement which had not, at that point, been concluded. These points indicate residual matters which are more than *de minimus*.

[26] Finally, and irrespective of whether or not Ms Webb intended accepting what was, in my view, yet another counter offer, she failed to convey that message to EAS prior to withdrawal of the offer. The first confirmation of acceptance comes in Ms Lloyd's e-mails of 5 March and even they fall short of absolute confirmation. The first only says that settlement was *assumed* and while the second talks of an ability to conclude the arrangement, it is conditional upon that being done by weeks end. The alternate will be pursuit of Ms Webb's claim in the Authority. Once again, conditional acceptance falls short of confirming an agreement.

[27] In the alternate it is argued that by signing the document and resigning Ms Webb acted on her belief that she had settlement and EAS is now estopped from denying the existence of an agreement. The argument relies on *Mechenex Pacific Services Ltd v TCA Air Conditioning (New Zealand) Ltd* [1991] 2 NZLR 393 and *Reporoa Stores Ltd v Treloar* [1958] NZLR 177 and a contention that the circumstances were such a reasonable person would infer an agreement given the offering of a Record of Settlement.

[28] Estoppel refers to a situation where someone acts in reliance on a promise - either express or implied. It has long been available as a defence, but in recent times has been found capable of constituting a cause of action. For instance, in a recent Australian case, a party was held liable for inducing a belief that a contract would be entered into and allowing the other to act in reliance on that belief (*Broughtons Stores (Interstate) Ltd v. Maher* (1988) 76 ALR 513).

[29] I can not conclude this is such a situation and EAS is estopped. Ms Webb does not say when she signed the agreement though the indications are it was after she was advised the offer had been withdrawn (15 above) and confirmation she would not return to EAS's employ does not appear until Ms Lloyd's second e-mail of 5 March. There is no evidence she formally acted on a belief she had settlement prior to receiving advice the offer had lapsed on 2 March.

Conclusion

[30] For these reasons I conclude that there was no settlement and EAS is not estopped from denying the existence of one. The substantive matter should therefore proceed, albeit with another member of the Authority investigating. I am precluded from doing so by virtue of having had access to without prejudice material in order to decide this matter. The other matter arising is the pleadings should be reviewed and, where appropriate as a result of this determination, be amended.

[31] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority