

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2017] NZEmpC 47
EMPC 162/2016**

IN THE MATTER OF challenge to a determination of the
 Employment Relations Authority

BETWEEN VICTORIA SINGH
 Plaintiff

AND TRUSTEES OF THE WELLINGTON
 RUDOLF STEINER KINDERGARTEN
 TRUST
 Defendant

Hearing: 30 November 2016

Appearances: G Bennett and B van den Berg , advocates for plaintiff
 H Kynaston and E McLean, counsel for defendant

Judgment: 8 May 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Victoria Singh, was employed by the defendant, the Trustees of the Wellington Rudolf Steiner Kindergarten Trust (the Trust). She held the position of kindergarten teacher from October 2013 until 25 February 2015. Her employment came to an end as a result of a voluntary resignation, the circumstances of which give rise to the employment relationship problem which was the subject of proceedings in the Employment Relations Authority (the Authority) and now a challenge to this Court.¹

[2] Ms Singh lodged an application with the Authority in May 2015. She claimed to have personal grievances for unjustifiable disadvantage, unjustifiable

¹ *Singh v Wellington Rudolf Steiner Kindergarten Trust* [2016] NZERA Wellington 64.

suspension, breach of good faith and duress in relation to her membership of a union. According to a determination of the Authority dated 3 June 2016, Ms Singh sought various remedies, including compensation for hurt and humiliation and lost wages. She also sought a penalty against the Trust.

[3] By way of a defence to Ms Singh's claims, the Trust denied the allegations being made against it but also raised the point that there is already a settlement agreement. This settlement agreement had been signed by the parties on 3 March 2015, and to the extent of payments required to be made to Ms Singh, became executed the following day on 4 March 2015. In addition to raising the defence of accord and satisfaction, the Trust also raised a defence of estoppel.

[4] The parties agreed that the Authority would determine a preliminary issue on the papers as to whether there was a settlement between the parties precluding Ms Singh's claim, or, in the alternative, whether she was estopped from proceeding by virtue of execution of the settlement. In the determination dated 3 June 2016, the Authority upheld the defences raised by the Trust and concluded that Ms Singh was therefore precluded from pursuing her claims in the Authority. She has filed a challenge to that determination, seeking a hearing de novo.

Pleadings

[5] The original statement of claim filed on behalf of Ms Singh contained considerable detail as to the factual background to the dispute. If the Court were to uphold the challenge against the decision of the Authority on the preliminary point, then the Court would need to continue with the matter by hearing Ms Singh's grievance claims.² An amended statement of claim has been filed, paring down considerably the factual allegations. Neither the amended statement of claim nor the earlier statement of claim set out any remedies sought by Ms Singh.

[6] It is clear that at this stage the parties are simply seeking a decision from the Court in respect of the determination dealing with the preliminary point. If the challenge is successful, then amended pleadings will be necessary.

² *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] ERNZ 271 (EmpC) at [59]-[60].

Factual outline

[7] During the course of her employment with the Trust, differences arose between Ms Singh and another employee in December 2014. Ms Singh made a complaint about the actions of the other employee, which the Trust investigated. While the investigation took place, Ms Singh took leave on pay. There is some dispute as to the circumstances surrounding Ms Singh leaving the workplace and her status from that point, but there is no dispute that while she was away, she received full pay and in fact did not return to employment. The investigation resulted in some, but not all, of Ms Singh's allegations against the other employee being upheld.

[8] There is no doubt that Ms Singh was unhappy with the result of the investigation. She and the Trust then entered into discussions, which culminated in an agreement being reached that Ms Singh would voluntarily resign her employment. While the terms of the settlement and matters discussed in the negotiations are to remain confidential to the parties as a term of their agreement, it is necessary for the purposes of this judgment to refer to parts of the agreement in general terms.

[9] In addition to the agreement that Ms Singh would voluntarily resign from employment, she was to receive a lump sum to cover payment in lieu of notice, reimbursement for annual leave owing and compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The agreement was signed on 3 March 2015, and payment was to be made no later than the following day, 4 March 2015. Payment was in fact made to Ms Singh and accepted by her on that date.

[10] In addition to the conditions previously specified, the Trust agreed to waive a debt owing by Ms Singh in respect of fees for her attending a professional development course. The Trust was also required to provide a positive reference to Ms Singh, which was to also confirm her period of employment with the Trust. That reference was provided to Ms Singh.

[11] Clause 11 of the written agreement stated:

This is the full and final settlement of all matters between Victoria and the Trust arising out of their employment relationship, including the termination of it.

[12] While it was not stated to be a condition of settlement, the agreement was to be referred to a mediator employed by the Ministry of Business, Innovation and Employment for signing pursuant to s 149(1) and (3) of the Act. An addendum to the agreement confirming the effect of that reference in reality incorporated the provisions of s 149(3)(a)(ab) and (4) of the Act by providing as follows:

We confirm that we fully understand that once the mediator signs the agreed terms of settlement:

- 1 The settlement is final and binding and enforceable by us;
- 2 Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal and application for review or otherwise;
- 3 The terms of the settlement cannot be cancelled under s 7 of the Contractual Remedies Act 1979;
- 4 That s 149(4) provides that a person who breaches an agreed term of settlement to which (3) applies is liable to a penalty imposed by the Authority.

[13] The form of the settlement agreement, which is entitled “Record of Settlement” and includes in the heading a reference to s 149 of the Act, was to be signed by the parties in two places. The first was following the setting out and dating of the agreed terms of settlement, and the second was following the addendum confirming that the matter was to be referred to a mediator for signing. The agreement became an executed contract by the Trust paying Ms Singh the lump sum payment within the time specified and providing the positive reference. Indeed, there is undisputed evidence that before the agreement could even be referred to a mediator, Ms Singh placed pressure on the Trust to meet the terms of settlement in time. In particular, she was anxious to obtain the reference for the purpose of alternative employment she had procured. It appears that in the interim, a certificate of employment was also provided to her by the Trust.

[14] Following the payment by the Trust to Ms Singh and the provision of the reference, the record of settlement was referred to a mediator for signing. It was at

that point that Ms Singh indicated that she did not wish to proceed with the settlement, and the mediator accordingly refused to sign it off. Having taken that stand, however, Ms Singh returned neither the funds nor the reference she had received. There is no suggestion that she sought to have the waiver of her debt reversed. Further significant factors are that throughout the negotiations, Ms Singh was being advised and supported in the negotiations by an officer of her union and that following the payment and the provision of the reference, Ms Singh's resignation from employment was announced at the regular parents' evening meeting at the kindergarten.

Discussion of legal issues arising

[15] Section 149 of the Act enables parties to an employment relationship problem which is resolved through the provision of the mediation service or otherwise to have a mediator sign the agreed terms of settlement. The effect of this has already been discussed. Under s 149, the parties must request the involvement of the mediator. If the agreement has been signed off by a mediator pursuant to this section, then in the event of a disagreement, the contract and its terms may not be brought before the Authority or the Court except for the purposes of enforcement.

[16] If s 149 is not used, and the agreement has not been signed off by a mediator, the parties are free to reach an agreement, or accord and satisfaction, which will then fall under contract law. Assuming there is a consensus ad idem and all other elements constituting a valid contract are satisfied, the parties will be bound and the terms will be final and enforceable. The parties may also, in that event, avail themselves of provisions of the Contractual Remedies Act 1979. Enforcement would then be through the ordinary courts having civil jurisdiction.

[17] In the present case, and as discussed by the parties' representatives in their submissions, two Employment Court decisions address the effect of the settlement not being signed off by the mediator although that was in contemplation. While these two decisions resulted in different outcomes based on their particular facts, they nevertheless applied the same principles.

[18] In the first of these decisions, *Abernethy v Dynea New Zealand Ltd (No 2)*,³ the parties agreed to a process which would apply to their settlement agreement. First, an oral agreement would be reduced to written form and sent to the parties for approval. Secondly, it would be passed onto the mediation service, and the mediator would then, pursuant to s 149 of the Act, confirm their understanding of the terms of the agreement before signing it off. Only at this point there would be a binding contract.

[19] The Court held that since the parties had agreed to this formal process and that no binding accord could exist until the process was complete, the fact that the mediator failed to sign off the agreement meant that it was unenforceable. However, as submitted by Mr Kynaston, counsel for the defendant, a substantial difference exists between the *Abernethy* case and the present case. In *Abernethy*, the parties agreed that the oral terms they had discussed would be captured in a record of settlement to be approved by the parties and then sent to a mediator for sign off. Further, in *Abernethy*, the record of settlement was never approved or signed off by the employee, let alone signed by the mediator. That is in stark contrast to the present case.

[20] The second decision referred to by counsel was *Penney v Fonterra Co-Operative Group Ltd*.⁴ This decision is substantially similar to the present case in many respects. In *Penney*, Ms Penney, the plaintiff, signed two documents. The first was a settlement agreement and the second was a separate request for a mediator to sign the agreement. At least two weeks after signing the agreement and it not having been signed by the Mediator, Ms Penney submitted that the agreement was incomplete and therefore invalid. Judge Couch did not accept her argument and commented as follows:

[44] This argument cannot succeed either. The agreement itself was complete upon signing by the parties. The only significance of the request to the mediator was that, if the mediator signed it in accordance with s 149 of the Employment Relations Act 2000 the agreement would be subject to the provisions of s 149(3). It was not a term of the settlement agreement that it be effective only if signed by a mediator. On the contrary, its terms provided

³ *Abernethy v Dynea New Zealand Ltd (No 2)* [2007] ERNZ 462 (EmpC).

⁴ *Penney v Fonterra Co-Operative Group Ltd* [2011] NZEmpC 151.

explicitly that it should be effective immediately upon being signed by both parties. ...

[21] Three points can be made about the *Penney* decision to differentiate it from *Abernerthy*. First, a contract was formed independently of the involvement of the mediator. Secondly, the mediator's signature would only bring s 149(3) to bear on the parties. Thirdly, the settlement agreement did not contain a term stating that it be effective only if signed by a mediator. The wording of the agreement explicitly stated otherwise in that the agreement was to be effective immediately upon signing.

[22] In the present case, the parties structured the record of settlement in such a way that the terms of the settlement were to be signed initially and separately by the parties. The reference to a mediator was set out as an addendum to the record of settlement to be signed separately. It must have been the intention of both Ms Singh and the Trust that the settlement was not conditional upon signing off by the mediator because as applied in *Penney*, the terms of the settlement were to be effective immediately upon being signed by both parties. The record of settlement in the present case contains a provision that the settlement was to become executed the following day by payment of the agreed sums. In addition, the waiver of the debt had immediate effect, and Ms Singh put pressure on the trust to provide the reference again before the matter would be considered by a mediator. These are further matters which distinguish the present case from the situation which applied in *Abernethy*.

[23] Even if the settlement agreement was not legally binding until signed by the mediator, an equitable estoppel arises in the present case.

[24] When the issue of estoppel was raised with Mr Bennett, advocate for Ms Singh, during the course of the hearing, he was unable to offer any submissions. In his submissions, Mr Kynaston, representing the defendant, referred to *Checkmate Precision Cutting Tools Ltd v Tomo*.⁵ At [20] of that decision it was stated:⁶

[20] The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it

⁵ *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 54.

⁶ Footnotes omitted.

would be unconscionable to do so. There must be clear words or conduct by one party which creates a belief or expectation in the other, and the party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word. ...

[25] The principles upon which this Court has previously relied in finding that an estoppel arises have been well established in numerous decisions of the courts exercising civil jurisdiction.⁷ It would need to be shown that:⁸

- (a) Ms Singh created or encouraged a belief by the Trust by her words or conduct;
- (b) The Trust reasonably relied on that belief to its detriment;
- (c) It would be unconscionable for Ms Singh to depart from that belief or expectation.

[26] In the present case, Ms Singh clearly created a belief or expectation on the part of the Trust that the matter was settled. She set about pressuring the Trust to execute the agreement by making payment and providing the reference. Both were of substantial benefit to her. In this case, the Trust did rely on the representations and promises contained in the settlement; particularly, that it was in full and final settlement of all matters arising out of the employment relationship, including the termination of it. In addition, the Trust acted upon the settlement by accepting Ms Singh's resignation from employment and waiving the debt that she owed. The latter was to its detriment. There is a certain lack of integrity in the stand which Ms Singh then subsequently took in endeavouring to rely upon the reference to the mediator as a means of setting aside the substantive settlement. The Trust therefore altered its position such that it would be inequitable to allow Ms Singh to go back on her word.

⁷ For instance *Wilson Parking NZ Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

⁸ At [44].

Conclusion and disposition

[27] The parties in this case have accepted that the Court's findings on these preliminary points raised will determine one way or another whether Ms Singh is able to proceed with her de novo challenge to the determination of the Authority. The Authority held that Ms Singh was precluded from pursuing her claims by the record of settlement. That finding is upheld. In addition, Ms Singh would otherwise be precluded in any event on the basis of a clear estoppel. The challenge is therefore dismissed.

[28] Insofar as costs are concerned, it is noted that at the directions conference on 10 October 2016, it was agreed that Category 2 under this Court's Practice Direction Guideline Scale would apply. Costs should follow the event. Mr Kynaston's participation as counsel on behalf of the Trust was appropriate, and accordingly, the category applying under the Guideline will be 2B. Mr Kynaston and Mr Bennett should be able to reach an agreement on the calculation of costs. If there is any disagreement or lack of cooperation in that regard, then the matter may be referred back to the Court for a decision.

M E Perkins
Judge

Judgment signed at 4 pm on 8 May 2017