IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 50/07
5083123

	BETWEEN	STEPHEN ABERNETHY Applicant
	AND	DYNEA NEW ZEALAND Respondent

Member of Authority:	Paul Montgomery
Representatives:	Nicole Ironside, Counsel for Applicant Shan Wilson, Advocate for Respondent
Investigation Meeting:	19 April 2007 at Nelson
Submissions received:	27 April 2007 from Applicant 30 April2007 from Respondent
Determination:	10 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In his application for interim reinstatement, the applicant, Mr Abernethy, claims he was unjustifiably demoted from his position as Senior Technician and subsequently unjustifiably dismissed by the respondent. He seeks reinstatement to the position of Senior Technician and a range of remedies.

[2] The respondent lodged a statement in reply protesting as to jurisdiction, raising the defence of full accord and satisfaction having been made to Mr Abernethy.

[3] In the light of this proffered defence, the Authority convened an urgent investigation meeting to deal with the preliminary issue as to whether the applicant was barred from pursuing his personal grievance in the Authority.

The events

[4] The applicant had been employed by the respondent for nearly five years, being promoted to Senior Technician in April 2005. Mr Abernethy is a qualified electrician and to that skill he has added a number of NZQA and ENCHEM qualifications relevant to his work for the respondent.

[5] The respondent's business is the manufacture of synthetic resins for the production of fibre boards, and the company has a stringent regime of health and safety procedures relating to its operation.

[6] As a result of two incidents the company viewed as potentially serious, an investigation was undertaken. The applicant says he has concerns about how this process was undertaken. However, that need not detain us at this point. There was a series of meetings between the applicant and the company management. As a result of what I will refer to as the earlier meetings, the company advised Mr Abernethy that it proposed demoting him to the role of Process Technician. The respondent scheduled a meeting with the applicant on Tuesday, 30 January 2007 and Mr Abernethy attended that meeting with Mr Brent Climo, an employment consultant based in Nelson. The applicant has alleged procedural deficiencies in the company's conducting of this meeting.

[7] In the course of the meeting, Mr Climo requested that the respondent provide the opportunity for the applicant to write an essay about his commitment to both health and safety and the company in general. The respondent agreed to consider such a document in its deliberations.

[8] Later, on 30 January 2007, Mr Abernethy was advised by the company's management that he was required to attend a meeting the following day. Again, Mr Abernethy has concerns about the process adopted, and as he had not been advised of the nature of the meeting, said he decided to attend it without Mr Climo. That evening (30 January) he wrote the essay referred to above to hand to the company's representatives the following day.

[9] On 31 January 2007, Mr Abernethy attended the meeting. The outcome of the meeting was that the applicant was advised that the company would retain his services as a Process Technician, not as Senior Technician and would issue him a final written warning effective for a period of 18 months. These decisions were formalised in a letter to the applicant dated 31 January 2007.

[10] On 1 February 2007, while working on the night shift, the applicant slipped, fell into a urea hopper and suffered a head injury. After consulting a doctor, he was placed on ACC until 22 February 2007.

[11] While on leave, Mr Abernethy considered his position and decided to contest the demotion and the final warning. He wrote a letter to the respondent setting out the reasons why he believed the company's actions were unfair. The letter is dated 10 February 2007 and was delivered to the company by the applicant's wife on 14 February 2007.

[12] On or about 15 February 2007, Mr Reed, the company's New Zealand manager, telephoned Mr Climo and advised him of the letter. Mr Climo had not been aware that his client had written the letter and later sought a copy of the letter from his client. In the course of the telephone conversations between the two men, Mr Reed pointed out to Mr Climo that a review of the disciplinary material would open up the full range of responses available to the company, including the possibility of dismissal.

[13] Following receipt of a copy of the 10 February letter, Mr Climo arranged a meeting with his client so that options available to Mr Abernethy could be canvassed. Mr Climo says he met with the applicant and his wife on Friday, 16 February 2007 telling them that Mr Reed had responded unfavourably to the letter and considered that it amounted to an appeal.

[14] Mr Climo says he then put to Mr Abernethy and his wife a range of options with which they were faced. In his affidavit Mr Climo says:

> *We then discussed various options which were:*
>
> *(a) Accept a drop in salary and seniority and do nothing.*
>
> *(b) Accept a six month demotion and no salary cut.*
>
> *(c) Press for the employer's review of evidence and if dismissal results, pursue a personal grievance for unjustified dismissal.*
>
> *(d) Accept the demotion and warning and file a personal grievance for unjustified disadvantage while staying in employment.*
>
> *(e) Negotiate, with the company, an exit package of three months' gross wages.*
>
> *The purpose of discussing these options was to ensure that Stephen made the best decision for himself. … We were left with the prospect of having to negotiate how Stephen could stay in his job without loss of status and consequential loss of income.*
>
> *When Stephen and I discussed the option of an exit package, Stephen asked me about a possible settlement figure. I told Stephen I would normally ask for 20% of an employee's gross annual salary … We agreed that an exit package was the last option to pursue and if I went down that track then I would ask for $20,000.00.*

[15] On 19 or 20 February 2007, Mr Climo rang Mr Reed and left a voice message on his cell phone asking Mr Reed to contact him. Mr Reed received this message and since he had just completed a meeting involving Ms Adlam, the Nelson Plant Manager, had her listen to it as well. Both are clear that Mr Climo said he wanted to speak to Mr Reed about *a deal*. Mr Climo said he did not use the word *deal* but rather said he wanted to talk through the options for Stephen.

[16] Mr Reed returned the call and a meeting was arranged and took place at the Nelson plant offices at 4pm on 21 February 2007. Ms Adlam and Mr Climo were there in person, Mr Reed attended by way of conference call from New Plymouth. There is no doubt that Mr Climo stated that everything under discussion was on a *without prejudice* basis. There is no doubt the company agreed.

[17] This meeting essentially involved a negotiating of outcomes between the company and Mr Abernethy's representative. There is no need to wade through the proposal/counter-proposal details, but Mr Climo's affidavit states:

> *Finally, I ask Cleve and Sharon whether the company would consider, on a without prejudice basis, an exit package.*

[18] Various combinations of alternatives were discussed between the group, but having arrived at a position, Mr Reed said to Mr Climo, *if these terms are acceptable to Stephen, then Stephen would give his resignation to the company which would be effective from 23 February 2007.*

[19] In evidence, Mr Reed stated that he required of Mr Climo to ensure that both the applicant and his wife, Mellany, were involved in the discussion regarding the exit package. Mr Climo says he does not recall that being said, but he simply knew that any terms would need to have been discussed by the couple prior to agreement.

[20] Mr Climo told the Authority:

> *I said that the terms of any proposed exit package would need to be drawn up as a record of settlement. The record would need to be approved by both parties and signed off by a mediator. I said this would be of benefit to both parties. Cleve agreed and appeared to understand what this meant. Sharon did not appear to understand what was involved with this. I explained to her that a record of settlement was important protection for the company because it would include clauses like "full and final settlement" and "not bringing up a personal grievance subsequently". I said that a record of settlement would also have a liquidated penalty clause. This meant that if confidentiality was breached by Stephen, then the company could sue him for the money which it had paid him. I also said that a record was protection for Stephen because he did not want to have to pay tax on the money the company pays him.*

[21] Mr Climo then explained to Ms Adlam the process wherein he said he would post three copies of the record of settlement to her and if she was happy with the terms then she would sign those three and send them through to Stephen *for his approval*. He said that once the parties had signed the record then it would be sent to the Department of Labour mediator.

> *The mediator would get in touch with each party to confirm that each party understood the terms and were happy with them. I said that once the mediator had signed the record off then there was a binding contract. … I have never said that the record of settlement is simply confirmation of a deed that has already been struck.*

[22] Mr Climo goes on:

> *The meeting ended with me needing to go back to Stephen to present the company's terms of the exit package. I do not recall listing the terms of settlement during the meeting rather there was a discussion of the proposed terms of settlement.*

[23] On 22 February 2007 during the morning, the applicant and his wife visited Mr Climo at his office to see where things stood. Mr Abernethy advised Mr Climo that he had a doctor's appointment later that day to determine whether he had medical clearance to commence work on 23 February 2007. *I told Stephen that the company was not prepared to move on the demotion, salary cut and final warning. They were adamant that if the matter was reopened then Stephen could be dismissed*.

[24] Mr Climo says his clients were not happy with the amount the company was offering and that Mr Abernethy requested that a counter-offer be made. The applicant asked Mr Climo to attempt to raise the bar to $15,000 and Mr Climo agreed that he would attempt to do this.

[25] Mr Climo put the proposition to Mr Reed by phone, however, Mr Reed said he would not accept any counter-offer and repeated the original offer. Mr Climo then telephoned his client at his home later on that same day and told him the company would not agree to any increase in the amount. He says: *Stephen sounded deflated and low. His response was along the line: "is that it then, I guess I have no choice in the amount the company is offering"*.

[26] Mr Climo then says: *I told Stephen I would draw up a record of settlement and explained the process whereby copies would be sent first to the company and then to him and then to the mediator.* Mr Climo reiterated similar terms about the involvement of the mediator and the essential signature of that person to ensure a binding contract.

[27] Mr Climo, although somewhat unsure, clearly communicated with Mr Reed to tell him that a deal had been arranged. He said *I would have told him that I would be drawing up a record of settlement.* Mr Reed directed that from this point on Mr Climo was to deal with Ms Adlam in respect of all matters relating to the exit of Mr Abernethy.

[28] A little later on in his evidence, Mr Climo says: *I do not recall ever talking to Sharon Adlam again after my telephone conversation with Cleve.* The evidence from Ms Adlam contradicts this

comprehensively. Her evidence before the Authority was that on 22 February 2007 she received a call from Mr Climo setting out the agreed terms. Contrary to Mr Climo, Ms Adlam had taken notes in her diary detailing accurately what had been agreed.

[29] The following day, Mr Climo posted three copies of a document headed Record of Settlement. A covering letter was sent with the document and I set out the relevant section of that letter:

> *Brent Climo*
> *9 Mayroyd Tce*
> *Nelson*
> *22/2/07*
>
> *Dear Sharon,*
>
> *Enclosed three copies of settlement agreement – if happy sign six times (two per copy) and send to Steve with instructions to sign six times also then post to:*
>
> *Mediation Services*
> *P O Box 3705*
> *Wellington*
>
> *Regards,*
>
> *Brent Climo*

[30] The record of settlement employs the Mediation Service's template, however in order to retain the confidentiality of the agreement, I will refer only to those clauses which are relevant in the present preliminary matter. The document clearly establishes that the terms of settlement and all matters shall remain confidential to the parties and that those parties acknowledge that a liquidated penalty will be payable plus costs by the offending party if the confidentiality clause is breached. It confirms that the settlement is full and final and that the compensation pursuant to s.123(c)(1) of the Employment Relations Act 2000 will be paid within seven days from the date of the settlement. The document states that: *Stephen will tender his written resignation which will be effective from the 23rd February 2007.* It also provides that the company will furnish the applicant with a certificate of service within seven days of the signing of the document.

[31] Ms Adlam received this document and upon satisfying herself that the terms as set out were those agreed between the parties, signed the three copies and forwarded those to the applicant at his home address.

Discussion and analysis

[32] At the heart of this preliminary issue is this: If parties to a genuine dispute have verbally agreed, either in person or through appropriately appointed representatives to resolve that dispute, and that resolution involves the payment of a consideration to achieve resolution, is that verbal agreement and its terms of no force until a third party signs a record of such settlement?

[33] The brief answer is in the negative unless an express condition, such as final approval by a principal is in place. The document submitted to the respondent was a **record** of settlement (emphasis is mine) verbally agreed to by the applicant's legitimately appointed representative and the respondent's representative. Having checked that the terms set out in the document were those to which the respondent had agreed, Ms Adlam, on behalf of the respondent, signed the record and as directed by Mr Climo sent the three copies to the applicant. Her signature was simply an affirmation of the agreed settlement terms. Neither the document itself nor the covering letter imposed any proviso qualifying the finality of the agreement that had been reached.

[34] Appropriate guidance has been given in the judgment of Colgan CJ in *Graham v. Crestline Pty Ltd* AC53/06. Similar to the circumstances in that matter, the respondent in this case relied on the representations made to it by Mr Climo whom it legitimately understood was the applicant's appointed representative and an experienced advocate in employment matters. The record of settlement sent to the respondent is not marked as a draft nor does it state that the document is subject to the applicant's personal approval. Negotiation was not still in progress and thus once agreement had been reached, the without prejudice conditions which overarched the negotiation process ceased to apply.

[35] Mr Climo had every right to hold himself out as the applicant's representative. He had taken ongoing instructions from the applicant as matters developed, relayed those to the respondent and, after consultation with the applicant (who might well have preferred a more generous settlement), accepted the offer. In such circumstances, the respondent was entitled to rely on the representations made to it by Mr Climo on behalf of the applicant.

[36] It is clear from the events which followed that upon receipt of the record of settlement the applicant, having now had his period on ACC extended for a further month, took issue with the content of the agreement. In his evidence before the Authority, Mr Abernethy told me *the ACC issue was the catalyst for taking issue with the total package.* It was at that point that Mr Abernethy sought further legal assistance and approached Fletcher Vautier Moore to advise him. It is also significant that in his evidence to the Authority, Mr Climo clearly stated that he had got clear

approval from Mr Abernethy before ringing Mr Reed on 22 February 2007. That was the day on which Mr Climo drafted the record of settlement and posted it to Ms Adlam.

[37] What followed in the wake of Ms Ironside's initial correspondence to the company was a thoroughly understandable state of confusion. At the time of its arrival, Ms Adlam was on business in Singapore and in fact prior to being appraised by Mr Reed of the arrival of the correspondence, had already checked with the appropriate personnel in New Zealand that a certificate of service had been drafted and that Payroll was aware of the deadline for paying the compensation and Mr Abernethy's holiday pay entitlements. Such actions indicate clearly that the respondent was committed to meeting its obligations in a timely manner. The subsequent delays in relation to the pay out of the funds as set out in the record of settlement and membership of Southern Cross and superannuation scheme were, in my view, simply a result of personnel being unaware of the status of Mr Abernethy at that particular time. Contrary to the submission on behalf of the applicant, I do not accept that these clearly indicate that the company regarded Mr Abernethy's employment as ongoing at that time.

[38] Turning to the matter of the letter of 10 February 2007 which, it is now submitted, was the notification of a personal grievance, I am of the view that the letter did not raise a personal grievance. Even if the letter did raise a personal grievance rather than simply request a review of the company's decision, the applicant's representative initiated discussions on an exit package, having provided his client with a range of options available to him. One option was that Mr Abernethy return to work, then lodge a personal grievance challenging the company's decision. From the events that followed it, it is clear that the applicant rejected that option and requested, however reluctantly, Mr Climo to pursue the exit package approach.

[39] The outcome of those negotiations agreed by both parties to be on a *without prejudice* basis was an agreement to part company on agreed terms. Mr Abernethy now says he did not agree to all the terms and in particular the liquidated damages clause, relating to any breach of confidentiality on the part of either party. He says he was unaware of this provision until he received the copies of the record of settlement signed by Ms Adlam on behalf of the respondent. Further, he says that he expected that he would have received the record of settlement before the respondent had signed it.

[40] That may very well be so, although Mr Climo's evidence was that he had discussed this with his client thoroughly. These are matters between Mr Abernethy and Mr Climo.

Determination

[41] Returning to the issues to be determined as set out above:

- The 10 February 2007 letter falls short of alleging a personal grievance because it does not seek remedies. It simply seeks a review of the decision made.

- I am in no doubt that throughout the process Mr Climo legitimately, on authority from the applicant, held himself out as representative of Mr Abernethy (the principal).

- It follows that the respondent was entitled to rely on Mr Climo's representations to it on behalf of the applicant, particularly in the light of its insistence that the applicant's wife also needed to be appraised of the offer and to accept its terms.

- As discussed above, where a genuine dispute existed between the parties, settlement achieved verbally for a consideration does not require endorsement from a third party to make it binding on those parties. Section 149 of the Employment Relations Act 2000 simply provides one mechanism of enforcement. It is not the exclusive mechanism of enforcement of an agreement.

[42] I find, based on the respondent's compliance with the terms of the settlement, legitimately agreed by the applicant's representative, that accord and satisfaction between the parties was reached verbally on 22 February 2007.

[43] I find that settlement had been agreed and was not conditional on a mediator's advice and signature. The mediator's signature would have provided access to compliance action as a means of enforcement.

[44] I find that the delay in meeting its commitments to the applicant was occasioned by the confusion caused to the respondent by the letter from Ms Ironside on 23 March 2007. I note that letter was faxed to the respondent after office hours.

[45] I find the applicant is barred from pursuing his alleged grievance against the respondent. Under the verbally agreed terms, he has received accord and satisfaction.

Costs

[46] Costs are reserved. The parties are encouraged to attempt resolution of this issue between themselves. If that is not achieved, Ms Wilson is to lodge and serve her memorandum within 28 days of issue of this determination. Ms Ironside has a further 14 days in which to respond.

Paul Montgomery
Member of Employment Relations Authority