

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 166/08
5134106

BETWEEN FRED CARROLL
 Applicant

AND SILVER FERN FARMS
 (PPCS) LIMITED
 RESPONDENT

Member of Authority: P R Stapp

Representatives: Megan Williams for Applicant
 Gary Williams for Respondent

Investigation Meeting: Napier 28 October 2008

Further information and
submissions: By 3 December 2008

Determination: 12 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Carroll says that the company has not honoured a mediated settlement entered into by the parties on 10 September 2007, and not provided hearing aids as promised. The settlement was put in writing and signed off and a mediator recorded it on 10 September 2008 under s 149 of the Employment Relations Act 2000.

[2] The company denied that the settlement included a promise to arrange and pay for hearing aids. It accepted that it was a party to the settlement for enforcement, despite the settlement not containing the correct legal title of the employer's name. It says it has done what was required under the terms of the settlement.

The issue

[3] The signed off record of mediation settlement included the following relevant term:

“4. Megan Williams will provide the letter to PPCS which acknowledges Fred’s claim for a hearing disability whilst in the employment of the company. The company will action the claim.

[4] Does the above term mean that the company was required to arrange and buy Mr Carroll hearing aids?

The Authority’s investigation meeting held in Napier

[5] The company was represented throughout the Authority’s investigation by its employment relations manager, Mr Gary Williams. Mr Williams also gave evidence of his knowledge of the background involved in Mr Carroll’s claim. He has also relied on the knowledge of other people and documents given to him.

[6] Mr Carroll claimed, during the Authority’s investigation, that he was told by an occupational nurse that he would be entitled to hearing aids and she wrote something down at the same time. I have not had the benefit of any direct evidence from the occupational nurse and the company’s documents produced do not record any useful information of any entitlement. I have alluded to this because Mr Carroll genuinely believes he was informed by a nurse that he had an entitlement to the company buying him a hearing aid, but he has accepted that the wording of the mediated settlement did not say the company would buy him a hearing aid.

[7] At the time of my investigation meeting I would have liked to have heard directly from the occupational nurse, but this seemed to me to be unnecessary because my determination rests on the plain meaning of the words in the settlement. I can only rely on the accuracy of the records that were produced and the assertion made through Mr Williams that there are no other records and no promise was made to buy a hearing aid for Mr Carroll’s use. After the Authority’s investigation meeting Gary Williams produced a further document that he was able to obtain regarding a second assessment application from Mr Carroll.

[8] Also, after the Authority's investigation meeting a further part document was handed in by Mr Carroll that purports to establish the nurse confirmed further action would be taken on providing a hearing aid. Subsequently the full document dated 27 November 2007 was sent in by Ms Williams.

The background events and the letter referred to in the terms of settlement

[9] A letter dated 12 September 2003 says Mr Carroll had cover for a hearing loss and that he was entitled to receive treatment and rehabilitation, but he was not at that time entitled to hearing aids. Mr Carroll made no further application after receiving that decision.

[10] Mr Carroll's cover for his hearing loss was confirmed in February 2006 and he was informed that a further application would be required if his hearing deteriorated.

[11] Mr Carroll says that there was a second hearing assessment carried out by the company's occupational nurse and this involved her promising him hearing aids and she filled out a form, but there was no audiology assessment. He could not remember the nurse's name and did not have a copy of the form he says she filled out.

[12] During this time there were employment problems between the parties. Mr Carroll's representative wrote to the company on 15 May and 4 September 2007 saying that Mr Carroll "*would like to be fitted for hearing aids*" and asking for an arrangement "*for an appointment for him at the suitable practitioner*". I have noted that these letters were written by Ms Williams on the basis of information given to her by Mr Carroll and that information required to be corroborated. The parties then arranged for mediation over the employment problems, where the settlement, now in dispute, was reached, and signed off on 10 September 2008.

[13] After the mediation Ms Williams gave to Mr Williams the letter dated 12 September 2003 and an audiology assessment (from the first assessment), which he passed on to the company's ACC team. He says that an approval was given for an "out of time" review of the issue under the Injury Prevention Rehabilitation and Compensation Act, that the review confirmed that there was no entitlement to hearing aids, and that no hearing aids were promised. In fact the review hearing determined

there was no jurisdiction to consider an out of time review on an entitlement for hearing aids.

The company's position on the claim

[14] Mr Williams says that he did not know anything about Mr Carroll's claim about his hearing loss until Mr Carroll's mediation. In order to understand what Mr Carroll was saying about his claim at mediation Mr Williams agreed for the 12 September 2003 letter, which Mr Carroll and Megan Williams were referring to, be provided to confirm what Mr Carroll was saying he was entitled to.

[15] Mr Williams says there was no mention made for the company to pay for hearing aids. Also, he says he had no knowledge of a second assessment for any entitlement involving the company's occupational nurse. Furthermore, Mr Williams says that the nurse could have been one of two people and that he has been told that there are no details available of a record made by the nurse to establish an entitlement for Mr Carroll.

[16] During the Authority's investigation he gave a commitment to try and locate any other documents since Mr Carroll had raised the issue about what the occupational nurse had apparently said and the reference he made to her filling out a form. The document he produced did not go so far as to confirm any arrangement for the purchase of a hearing aid, but did confirm the company pursued Mr Carroll's issue, albeit an out of time application for review.

[17] The company's submission has been to refer to what the settlement on its plain meaning of the words means: that he took the action he understood was meant by the term of the settlement on following up the 12 September 2003 letter.

Was there any agreement for the company to arrange and pay for hearing aids?

[18] The answer to the above question is no because Mr Carroll has not been able to prove the company agreed to buy him a hearing aid, and Mr Carroll has accepted that the wording of the mediated settlement did not say the company would buy him a hearing aid. The record of settlement does not make any express provision for the

company to arrange and buy Mr Carroll a hearing aid. The record of settlement provided for the company to action Mr Carroll's claim and it did do that upon receiving the documents that Mr Carroll and his representative referred to.

[19] I am supported in my conclusion because:

- The words of the record of settlement are clear and unambiguous.
- Ms Williams was only acting on what she had been told by Mr Carroll and I am satisfied that what she was told needed verification that could not be found at the time.
- Mr Williams referred the matter to the ACC team.
- PPCS is an accredited employer under the Injury Prevention Rehabilitation and Compensation Act. It manages claims and uses Aon, a medical insurance provider, for assessments. The matter was taken up again by the ACC team that involved the out of time review.
- The letter dated 12 September 2003 (the first assessment) declined an entitlement to hearing aids, and this was the letter given to Mr Williams to action further.
- Mr Williams's evidence that there was never any agreement for PPCS to buy hearing aids. This is supported by Mr Carroll's evidence that he "believed" he was entitled to hearing aids and that he accepted the terms of settlement did not expressly state that he had such an entitlement. Ms Williams acted on that information with her letters of 15 May and 4 September 2007, but that information needed to be verified and that never properly happened.
- The follow up after the mediation was dependant upon Mr Carroll producing the evidence of the entitlement that Ms Williams was acting on in regard to what now emerges was a second assessment. Mr Williams had no knowledge of any second assessment by the company's occupational nurse and the record supports there being no promise.
- Mr Carroll says all he had was an understanding of what the terms meant to him, whilst accepting the term did not actually convey that the company would pay for a hearing aid. It is clear what ever he understood was meant did not get converted to writing in the mediated settlement that he signed.

- The reviewer declined jurisdiction on the out of time review application, which is proof action was taken by PPCS.
- Documents produced do not commit to any purchase of hearing aids.
- Mr Carroll's position has now changed in the submissions made to me that the company was committed to take action on subsequent documents now being relied upon for further action. I am not satisfied that the position now being submitted was clearly understood by Mr Williams, who I am satisfied did take action as he reasonably believed he was required to, under the terms of the record of settlement. Of course it is still open to PPCS to pursue that further if it was of a mind to do so. However, because Mr Carroll's employment has now ended there is potentially no jurisdiction for me to interfere any further.

[20] The document produced by Mr Carroll after my investigation meeting does not assist him because:

- It was handed in without me being able to fully test its reliability and the context in which it was prepared.
- Only part of the document was sent in to me.
- It was not referred to in any detail earlier.
- The document first sent in was undated. The complete document is dated 27 November 2007 and signed off by Mr Carroll. It is a document requesting the payment for the cost of hearing aids and says that Mr Carroll was retested by the same nurse and she recommended he apply for hearing aids and apparently said he would have cover.
- Mr Williams's response to the document is that he noted initially it was an incomplete document. He was unaware of the events described in the document at the time of the mediation. The document was not amongst the documents he was sent at the time of the mediation. He says he still has no information other than the hearing test result and cannot confirm or deny or comment on the second hearing test and what was said to Mr Carroll.

[21] The above evidence and information is consistent with the company's position on the matter. It took some action as required under the terms of settlement, albeit Mr Carroll undoubtedly will remain dissatisfied with this outcome, and that the action he

understood would be taken has involved a different course of action reasonably taken by the company.

[22] This is not a matter for a compliance order. The applicant's claim must be dismissed.

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority