

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 44/08
5095143

BETWEEN MALCOLM CHAMBERLAIN
Applicant

AND ASB BANK LIMITED
Respondent

Member of Authority: Marija Urlich
Representatives: Mark Ryan, for Applicant
Simon Dench, for Respondent
Investigation Meeting: On the papers
Submissions received: 4, 8 and 11 February 2008
Determination: 13 February 2008

**DETERMINATION OF THE AUTHORITY AS TO THE PROVISION OF
RELEVANT DOCUMENTS**

[1] Mr Chamberlain seeks resolution of the following employment relationship problem¹:

- 1.1 *The applicant had been employed by the respondent for 36 years.*
- 1.2 *On 16 March 2007 the applicant attended a meeting with the respondent where the respondent advised the applicant that they did not want to initiate disciplinary proceedings against him and they were offering him the opportunity to leave his employment with dignity. The respondent advised the applicant "if you want to leave now without going down the disciplinary route, the bank will be prepared to pay your gratuity and accept your resignation".*
- 1.3 *The applicant resigned from his position with the respondent.*
- 1.4 *The respondent has not paid him the gratuity that they offered him.*
- 1.5 *In addition the applicant alleges that his resignation was not genuine and that he was forced to resign from his position by the actions of the respondent.*

¹ Per statement of problem lodged 19 July 2007.

[2] The Bank says Mr Chamberlain is not entitled to rely on any offer to pay a gratuity. It says he rejected the offer by way of counter-offer in a letter dated 12 April 2007.

[3] Part of the 12 April 2007 letter is made on a without prejudice save as to costs basis. The admissibility of the letter is the subject of this determination.

Bank's submissions

[4] Mr Dench, for the Bank, submits that the 12 April 2007 letter is admissible on two grounds.

[5] First, despite being a without prejudice communication, the letter should be admitted because the exception to prevent the decision-maker being misled or deceived is made out². The Bank needs the letter to be admitted to run its defence that the offer was rejected by way of counter-offer contained in that letter.

[6] Second, Mr Chamberlain affixed the Bank's 23 April 2007 without prejudice reply to his statement of problem. Mr Dench submits that if the 12 April 2007 letter is not included in the correspondence chain before the Authority the 23 April 2007 letter may be capable of being misunderstood.

Mr Chamberlain's submissions

[7] Mr Ryan submits the 12 April 2007 letter is not a counter-offer. He submits the letter is clearly without prejudice and arose from a without prejudice meeting on 11 April 2007 where Mr Chamberlain was invited by the Bank to confirm the remedies he was seeking in writing.

Determination

[8] If it is Mr Chamberlain's intention to argue that his resignation of 4 May 2007 amounted to acceptance of the Bank's offer of 16 March 2007 to pay him a gratuity then the letter of 12 April 2007 must be admitted.

² *Cedenco Foods Limited v State Insurance Limited (1996) 10 PRNZ 142, 143 (Court of Appeal)*

[9] Whether or not the contents of the 12 April 2007 letter amount to a counter-offer is an issue to be determined following the investigation of the substantive issues between the parties. To omit that letter would deprive the Authority of the opportunity determination the issues before it having considered all the relevant evidence.

Marija Urlich

Member of the Employment Relations Authority