IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 43
5583128

	BETWEEN	KAREN ALICE CLEVERLEY Applicant
	A N D	SELWYN HOUSE SCHOOL TRUST BOARD Respondent

Member of Authority:	Peter van Keulen
Representatives:	Simon Meikle, Counsel for Applicant Hamish Evans, Counsel for Respondent
Investigation Meeting:	24 March 2016 at Christchurch
Submissions Received:	Orally and in writing by both counsel on 24 March 2016
Date of Determination:	12 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In her statement of problem lodged in the Authority on 21 September 2015, the applicant, Ms Cleverley, seeks arrears of wages in the sum of $60,487.02. The wage arrears arise out of an alleged failure to pay minimum wage for sleepovers that Ms Cleverley carried out in the course of her employment as the Director of Boarding between 2 December 2008 and 19 August 2011.

[2] The respondent (Selwyn House) says in response that any claim for wage arrears predating 21 September 2009 is statute barred. Selwyn House also says that it can defend any claim for wage arrears completely on the basis that the parties entered into a record of settlement. It says the full final and binding nature of that settlement prevents the applicant from bringing a claim arising out of her employment

relationship, its termination or otherwise, including any statutory entitlement she might claim to have.

[3] Selwyn House requested that these two issues be determined by way of a preliminary hearing prior to the substantive matter either proceeding to mediation or the Authority making a determination.

[4] At the commencement of the investigation meeting, Ms Cleverley's counsel advised me that she had conceded the issue raised regarding the time limitation of any claim for wage arrears. That is Ms Cleverley concedes that her claim for wage arrears can only be limited to those amounts that were not paid from 21 September 2009 until the date of termination of her employment, 19 August 2011.

[5] What remains for me to determine is essentially an application to strike out the claim as being frivolous because it is futile. The claim will be futile if there is a full, final and binding settlement agreement that settled it.

The issue

[6] The question for me to decide is whether the record of settlement entered into between the parties prevents Ms Cleverley from bringing her claim for wage arrears.

Facts giving rise to the employment relationship problem

[7] Selwyn House employed Ms Cleverley as a Director of Boarding from 16 July 2007 until 19 August 2011.

[8] In her role as Director of Boarding, Ms Cleverley was required to undertake sleepovers at Selwyn House.

[9] Ms Cleverley says that Selwyn House should have paid her for those sleepover shifts. This is based upon the Court of Appeal decision in *Idea Services Ltd v. Dickson*[1] and the Employment Court decision in *Law v. Board of Trustees of Woodford House*[2].

[10] Selwyn House queries the extent of the work undertaken in the course of carrying out the sleepover shifts and the other work that Ms Cleverley undertook as an

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1 [2011] NZCA 14
2 [2014] NZEmpC 25

employee; essentially Selwyn House asserts that it paid Ms Cleverley for the work she undertook and there is no basis for a wage arrears claim.

[11] I will determine this issue at a later date should this matter proceed. It is not necessary for me to determine the scope of the sleepover obligations nor is it necessary for me to determine the scope of Ms Cleverley's other employment obligations in this determination. For the purposes of this determination, I record that Ms Cleverley undertook sleepover shifts but that is not a reference to any decision I have made about the extent of work undertaken, if any, during those shifts or any right to be paid for those shifts.

[12] At the start of August 2011 there was an incident at Selwyn House in which Ms Cleverley shouted at some students in the playground. The circumstances giving rise to that and the extent of the behaviour is of no consequence to this matter. What followed from that incident was a disciplinary process that commenced with Ms Cleverley meeting with the Selwyn House Principal, Stephanie Lapthorn, to discuss the matter.

[13] At the conclusion of that discussion, Ms Cleverley requested that she have some time to consider her position and get back to Ms Lapthorn regarding what had happened so there could be a discussion about the next steps. It was apparent to Ms Cleverley at that time that Selwyn House was taking this matter quite seriously, so she took some time to obtain legal advice.

[14] On 8 August 2011 Ms Cleverley met again with Ms Lapthorn and advised her that she had taken legal advice in respect of the matter. It appears that that ended any discussion between Ms Cleverley and Ms Lapthorn; Ms Lapthorn advising that she would take legal advice and consider what steps should follow.

[15] Ms Cleverley then received a letter shortly after that inviting her to attend a disciplinary meeting on 10 August 2011. There is disputed evidence as to whether Ms Cleverley received this letter. In any event, a disciplinary meeting occurred on the morning of 10 August 2011.

[16] Ms Cleverley attended that meeting with her adviser at the time, Neville Higgison. Ms Lapthorn was present on behalf of Selwyn House together with its legal adviser, Amy Shakespeare. Selwyn House says that the Human Resources Manager, Anne Zwart, also attended. Ms Cleverley said in evidence that she did not recall

Ms Zwart being at the meeting. However, in contrast, Ms Zwart gave evidence that clearly stated she did attend and I accept that evidence.

[17] The meeting commenced with a discussion about the events that had occurred. The Selwyn House representatives left the meeting to consider what they had been told and what might happen. The evidence as to what occurred next was not entirely clear, but I find that one of the Selwyn House representatives told Mr Higgison, that Selwyn House was considering terminating Ms Cleverley's employment because of the incident. What followed was a discussion around an agreed exit for Ms Cleverley.

[18] In her evidence, Ms Cleverley expressed the events leading up to and including the meeting on 10 August 2011 as culminating in the termination of her employment by Selwyn House. That is not correct. The evidence from Selwyn House, which the record of settlement corroborates, is that the parties agreed an exit in which Ms Cleverley resigned. In cross-examination, Ms Cleverley accepted that in fact, what did occur, was an agreed exit.

[19] The meeting on 10 August 2011 concluded with the parties agreeing the terms of that agreed exit.

[20] At least two days later Selwyn House presented Ms Cleverley with a record of settlement setting out the terms of agreement over the agreed exit. Ms Cleverley says she read the agreement, did not speak to her lawyer about it, and, as she accepted the terms, she signed the agreement.

[21] Selwyn House also signed the record of settlement.

[22] That record of settlement was sent to a mediator. That mediator signed the record of settlement on 18 August 2011 pursuant to ss 149(1) and (3) of the Employment Relations Act 2000 (the Act) (the Record of Settlement)

[23] That Record of Settlement included the terms:

a. Ms Cleverley would resign her employment at Selwyn House on 9 August 2011 with her last day of work being on 19 August 2011;

b. Selwyn House would provide Ms Cleverley with a reference; and

c. Selwyn House would pay Ms Cleverley a sum of compensation pursuant to s 123(1)(c)(i) of the Act.

[24] The Record of Settlement also included the following terms:

> 5. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements as (moneys payable under the Minimum Wage Act 1983, or the Holidays Act 2003), as defined by the Employment Relations Act 2000.
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> 6. This agreement is in full and final settlement of all matters between [Ms Cleverley] and Selwyn House arising out of their employment relationship and its termination or otherwise including, but not limited to, all or any statutory entitlements.

[25] That might otherwise have been the end of all matters between the parties except that in 2014 whilst working at Waitaki Girls' College, Ms Cleverley found out about the possibility of a minimum wage claim arising out of sleepover shifts undertaken. Ms Cleverley says she was not aware of any possibility of such a claim prior to this time not having heard about *Idea Services* in 2011. The union brought the decision in *Woodford House* to Ms Cleverley's attention in 2014.

[26] Selwyn House in contrast, says that because of *Idea Services* it was aware of the possibility of minimum wage claims arising out of the sleepover circumstances in 2011. Selwyn House says that around the time Ms Cleverley left it was concerned about possible claims and it sought advice as to its obligations and the possible consequences, including financial implications, for Selwyn House because of *Idea Services*.

What is the effect of the Record of Settlement?

[27] The issue for me to resolve with respect to this preliminary matter is what is the effect of the Record of Settlement?

[28] A mediator signed the Record of Settlement pursuant to s 149 of the Act.

[29] Section 149 of the Act provides:

> (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
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> (a) who is employed or engaged by the chief executive to provide the services; and

> (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—
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> may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.
>
> (2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,
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> (a) explain to the parties the effect of subsection (3); and
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> (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request
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> (3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—
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> (a) those terms are final and binding on, and enforceable by, the parties; and
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> (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and
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> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.
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> (3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.
>
> (4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[30] Counsel for Selwyn House says that a record of settlement signed pursuant to s 149 of the Act is a complete bar to any claim. Counsel relies on the Employment Relations Authority determination of *KVB Kunlun New Zealand Ltd v. Andre De Wet*[3]. In that case, the Authority determined that a record of settlement signed pursuant to s 149 was a complete bar to any subsequent proceedings. In *De Wet* the respondent could rely on the record of settlement as a shield to any subsequent proceeding being brought against him in respect of his employment. What that meant was that the proceedings were frivolous, as they were futile, and the Authority struck out the proceedings.

[31] In *De Wet* Member Crichton stated:

> [14] I am satisfied that the record of settlement in this case is a complete bar to subsequent proceedings and accordingly Mr De Wet

[3] [2014] NZERA Auckland 513

> can rely on settlement as a shield to any subsequent proceeding brought against him in respect of his employment at KVB Kunlun.
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> [15] In reaching the conclusion I do, I rely particularly on the statutory basis under which the record of settlement was completed rather than the common law on accord and satisfaction. I now draw out the distinctions between these two principles.
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> [16] Dealing with the statutory matter first, I am satisfied that the effect of s.149(3) of the Act "presents an insurmountable hurdle" to a claim to reopen an employment relationship problem previously brought to an end by a mediated settlement in terms of that subsection, not only because the mediated settlement was expressed to be "a full, final and binding settlement of all claims either party may have arising out of the employment relationship or the termination thereof", but also because the agreement was "signed off" by a Department of Labour Mediator in terms of s.149.
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> [17] That section requires the Mediator to explain the effects of the agreement to the parties including that its terms are final and binding, cannot be cancelled, and cannot be brought before the Authority or the Court except for enforcement purposes.
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> [18] Indeed, as Judge Inglis said in *Young v. Board of Trustees of Aorere College* [2013] NZEmpC 111:
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> > "The combined effect of these provisions (in s.149(3)) is that a settlement agreement which has passed through the s.149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds."
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> [19] There is no suggestion in the present case, similar to *Young*, of duress and accordingly it seems to me that KBV Kunlun's claim must fail. In effect, as I understand *Young*, where a settlement agreement has passed through the additional filter of s.149, the effect of that additional filter is to create, save with duress issues, a complete bar to any reopening.
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> [20] Of course, not all settlement agreements do pass the s.149 process, and where they do not, the common law applies.

[32] Counsel for Ms Cleverley says that this analysis is not correct. Counsel accepts that s 149(3) of the Act provides that the terms of the Record of Settlement:

a. are final and binding and enforceable on the parties;

b. cannot be cancelled under s 7 of the Contractual Remedies Act 1979; and

c. cannot be brought before the Authority except for enforcement purposes.

[33] However, counsel points out that s 149(3)(a) of the Act states that is only *the terms* that are final and binding. It is therefore incumbent upon the Authority to be satisfied that *the terms* include the wage arrears claim before it says the wage arrears claim cannot be brought before it. If the terms of the Record of Settlement do not cover the wage arrears claim then *the terms* are not being brought before the Authority.

[34] Counsel for Ms Cleverley says s 149 of the Act does not mean that the Authority should not consider the extent of *the terms* of settlement and decide whether the claim currently before the Authority falls outside of *the terms*. This is in line with the approach in *Marlow v. Yorkshire New Zealand Limited* [4].

[35] Whilst I can see the force of that argument there are two problems with it.

[36] First, *Marlow* concerned a settlement agreement that was concluded before the Act came into force i.e. it was not an agreement that had passed through the s 149 process. Member Crichton, in *De Wet*, specifically references such agreements and acknowledges that in those circumstances the common law approach applies but his determination is that the Act supplants the common law approach for settlement agreements that have passed the s 149 process.

[37] Second, s 149(3)(b) of the Act states that it is *the terms* of the record of settlement that cannot be brought before the Authority. If I apply that narrowly then that means I must be satisfied that what is being brought before me is covered by *the terms.*

[38] However, in order to be satisfied that the claim is covered by the terms then surely, the terms are being brought before me. If s 149(3)(b) of the Act is to be applied widely then *bring those terms before the Authority* means that an applicant cannot bring a claim that requires any analysis of *the terms*. And, what Ms Cleverley's claim for wage arrears requires is for me to analyse *the terms* of the record of settlement to see if the wage arrears claim has been settled. Therefore, the claim brings *the terms* before me.

[4] [2000] 1ERNZ 206

[39] I favour the wider application and believe that this is what *De Wet* determined: s 149 of the Act prevents any complying record of settlement being re-litigated and there being scrutiny of the terms of settlement except for enforcement purposes.

[40] However, I do not accept that there is an absolute bar simply because a record of settlement has passed through the process provided for by s 149 of the Act (the s 149 Process). There are two possible exceptions.

[41] First, what if the terms of settlement specifically provided only for the settlement of an unjustified dismissal personal grievance and did not mention that settlement was full and final in respect of all claims arising out of the employment relationship?

[42] The determination in *De Wet* was based upon a term of settlement that was expressed as being *a full, final and binding settlement of all claims either party may have arising out of the employment relationship or the termination thereof*. The Authority objected to the applicant bringing that term before it and asking that it applied in a way to allow a claim that arose out of the employment relationship from proceeding.

[43] As a starting point, there must be at least a full and final settlement clause or at least a settlement clause that covers the claim being advanced. But that requirement does not necessitate an analysis contemplated by the common law as expressed in *Marlow*.

[44] In this case, clause 6 of the Record of Settlement provides for the settlement of all matters arising out of the employment relationship including any statutory entitlement. That clause clearly covers the settlement of any potential wage arrears claim.

[45] Second, will a record of settlement be binding if it settles a claim relating to minimum entitlements?

[46] Section 148A of the Act provides that a mediator must not sign a record of settlement under s 149(1) of the Act *in which a party agrees to forego all, or part, of the party's minimum entitlements*[5].

[5] S. 148A(2) of the Act

[47] The object of s 148A of the Act is to prevent parties compromising the lawful amount of any minimum entitlement.

[48] Section 148A of the Act does not prevent the parties from considering minimum entitlements in mediation and agreeing the amount payable based upon their interpretation of the statutory entitlement and the applicable facts. However it does prevent the parties settling an agreed or non-disputed lawful amount of minimum entitlement by payment of a lesser amount or a different kind of payment such as a compensatory payment under s 123(1)(c)(i) of the Act[6].

[49] So, a record of settlement will be binding if it settles a claim relating to minimum entitlements so long as a party is not foregoing an agreed or lawful amount of his/her minimum entitlement. A record of settlement that allows parties to forego minimum entitlements in this way should not pass through the s 149 Process.

[50] It follows that if a mediator signs a record of settlement in breach of s 148A of the Act the record of settlement has not validly passed through the s 149 Process and s 149 does not become operative.

[51] I have the following scenario in this case:

a. if I was to determine that Ms Cleverley has a valid claim for wage arrears arising out of payment of minimum wage for the sleepover shifts she works - which is arguable on the information before me, subject to an Investigation Meeting proceeding on the substantive merits of her claim;

b. but I determine now that she cannot bring that claim because she is prevented from doing so by a full and final settlement clause in the Record of Settlement - applying *De Wet*;

c. then, unless the terms of the Record of Settlement indicate that Ms Cleverley had settled that claim by agreeing an amount, which could be zero, the effect of Ms Cleverley agreeing the terms of the Record of Settlement is that she is, in fact, foregoing a minimum entitlement;

[6] See the Employment Relations Bill (no 2) 2010 (196-1) (explanatory note)

d. and this means the mediator has signed the Record of Settlement in breach of s 148A of the Act and the Record of Settlement has not passed though the s 149 Process.

[52] In this case my analysis applies as follows:

a. *Does Ms Cleverley's claim relate to a minimum entitlement?* Yes.

b. *Is there an arguable case to Ms Cleverley's claim to a minimum entitlement?* Yes.

c. *Is there a full and final settlement clause in a record of settlement that covers Ms Cleverley's claim to a minimum entitlement?* Yes. Clause 6 of the Record of Settlement refers to the settlement of all matters arising out of the employment relationship including any statutory entitlement.

d. *Does the Record of Settlement reflect a valid settlement of the minimum entitlement?* No. I am satisfied that Ms Cleverly was not aware of the possibility of a minimum wage claim arising out of the sleepover shifts she carried out for Selwyn House until 2014. Applying the principles of interpretation from *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [7] I am satisfied that the Record of Settlement cannot be interpreted to cover a valid settlement of a claim for wage arrears arising out of the sleepover shifts.

e. *Does this mean that when Ms Cleverley agreed the terms of settlement in the Record of Settlement she was foregoing a minimum entitlement?* Yes.

f. *Notwithstanding this was the Record of Settlement signed off by a mediator pursuant to s 149 of the Act?* Yes[8].

g. *Has the Record of Settlement validly passed through the s 149 process?* No.

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[7] [2010] NZSC 5

[8] In reaching this conclusion, I make no criticism of the mediator for signing the Record of Settlement pursuant to s 149 of the Act. The mediator at the time could only act as instructed and presumably was satisfied that s 148A of the Act was complied with. It is only subsequently that that the breach of s 148A has become apparent.

[53] If the Record of Settlement has not passed through the s 149 Process then s 149 does not become operative. I must then apply the common law to the Record of Settlement to establish whether the terms of settlement still prevent Ms Cleverley from bringing her wage arrears claim.

[54] In *Marlow* the Employment Court held that a settlement agreement that is expressed as being in full and final settlement of all matters can only be held to be a settlement of those matters within the contemplation of the parties at the time of settlement.

[55] In order to determine what was in the contemplation of the parties I must determine what it is that the parties intended to settle i.e. interpret clause 6 of the Record of Settlement applying the principles in *Vector Gas*. This means I cannot have regard to the parties' subjective evidence of what they intended to settle but rather I must draw my conclusion based on the wording of the clause and the relevant extrinsic evidence.

[56] I apply these principles as follows:

a. The payment of compensation provided to Ms Cleverley in the Record of Settlement was relatively modest and significantly lower than the amount she now claims for wage arrears.

b. The payment of compensation is expressed as a being a payment made pursuant to s 123(1)(c)(1) of the Act so it cannot be payment of an agreed amount of any statutory entitlement.

c. There is a reference in clause 6 of the Record of Settlement to settlement of any statutory entitlements. However, there is no reference to any payment for statutory entitlements so if Ms Cleverley was settling any statutory entitlements it had to be on the basis that accepted she did not have any such claims.

d. The circumstances that gave rise to the Record of Settlement were those surrounding a possible dismissal for conduct reasons. Rather than complete the disciplinary process the parties agreed Ms Cleverley's departure from Selwyn House. The parties would have negotiated the terms of the Record of Settlement in the context of

settling any potential personal grievances for unjustified dismissal or unjustified action causing disadvantage and providing compensation to Ms Cleverley for her resignation.

e. Ms Cleverley was not aware of the possibility of a claim for payment of minimum wage arising out of the sleepover shifts she did at Selwyn House at the time she negotiated the Record of Settlement.

f. Given all of these factors, I conclude that the potential claim for payment of minimum wage was not in the contemplation of the parties.

[57] I interpret clause 6 of the Record of Settlement as not being a settlement of Ms Cleverley's claim for payment of minimum wage arising out of the sleepover shifts.

[58] Ms Cleverley has not settled her wage arrears claim and she can bring that claim before the Authority.

Determination

[59] Ms Cleverley's claim for wage arrears arising in the period from 21 September 2009 to 19 August 2011 is not frivolous and I do not strike it out.

Costs

[60] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority