

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 39  
3070855

BETWEEN FDS  
Applicant

AND YEALANDS ESTATE WINES  
LIMITED  
Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person  
Miriam Radich and Sarah Wadworth, counsel for  
the Respondent

Investigation Meeting: On the papers with input up to and including  
11 November 2019

Date of Determination: 30 January 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant, FDS, asks the Authority set aside a s 149 settlement concluded by the parties on 10 November 2015 and reopen a claim Yealands unjustifiably dismissed him. FDS also asks there be a prohibition on publishing anything which might identify him.

[2] Yealands opposes the substantive application on the grounds it is precluded by s 149(3) of the Employment Relations Act 2000. Yealands concedes the non-publication but on condition the same applies to it. Its non-publication request is opposed by FDS.

[3] The parties agreed the initial issue, whether or not the s 149 agreement can be set aside, be determined on the papers.

**Background**

[4] FDS was employed by Yealands in January 2012.

[5] On 5 August 2015 Yealands wrote to FDS advising that as he would be aware the business was reviewing its roles and structures and inviting him to a meeting. The resulting process saw FDS being advised he was to be made redundant on 24 August 2015.

[6] FDS challenged the dismissal and that saw the parties conclude a s 149 agreement at a mediation which occurred on 10 November 2015. The agreement was signed by the mediator. It was in the normal form which meant the parties acknowledged its terms would be final and binding and except for the purposes of enforcement neither party could action, appeal, review or otherwise bring the terms before the Authority.

[7] The parties also acknowledged they understood the agreements terms could not be cancelled under s 7 of the Contractual Remedies Act 1979.

[8] It is Yealands view there was no further interaction on the issue till FDS filed his current application on 14 August 2019.

[9] FDS says he now considers the agreement invalid on the grounds company representatives lied at the mediation thereby wrongly inducing him to enter into the agreement. He says he had concerns Yealands was engaged in illegal activity which he raised with the Ministry of Primary Industry (MPI). He says he initially formed the view his dismissal was really attributable to his complaint which was why he challenged it. FDS says company representatives at the mediation vehemently denied MPI's enquiries influenced its decision and asserted the dismissal was genuinely attributable to the fact his position was no longer required.

[10] FDS says his concerns of improper activity were subsequently found to be valid which led to Yealands and some of its managers being fined a total of \$500,000.<sup>1</sup>

[11] It is clear FDS retained doubts about why he had been dismissed as after the criminal issues were resolved he forwarded a Privacy Act request to MPI. The letter, dated 12 December 2018, seeks copies of personal information MPI might hold and says:

I have been advised I probably do have a personal grievance against Yealands Estate Wines Ltd (YEWL), so emails which I can access which show I was going to be dismissed would be of particular value to me.

---

<sup>1</sup> Sentencing notes, *Ministry of Primary Industries v Yealands Estate Wines and Ors* [2018] NZDC 25519

[12] FDS is of the view the documents subsequently released by MPI confirm his suspicion Yealands representatives at the mediation lied. He goes on to say:

I understand honesty is a key part of good faith, which is a the most important component of the mediation process. I believe this makes the original findings invalid, and I would like the opportunity to re-litigate the matter. In order to do this I need the settlement of mediation to be overturned or set aside.<sup>2</sup>

## Discussion

[13] As already said this determination addresses the preliminary question of whether or not the s 149 agreement the parties concluded on 10 November 2015 should be set aside.

[14] Yealands say no on the grounds ... *s 149(3) of the Act provides the complete answer and the relief the applicant seeks is unable to be granted.*<sup>3</sup>

[15] Section 149(3) provides:

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,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and

(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.

[16] Sections 36 to 40 of the Contract and Commercial Law Act 2017 were previously subsections of s 7 of the Contractual Remedies Act 1979.

[17] Section 37 of the Contract and Commercial Law Act 2017 is that which allows cancellation if a party is induced to agree by a misrepresentation. That is essentially what FDS is claiming and if follows that which he seeks is expressly prohibited.

[18] FDS's initial argument is a technical one. He says the identity of the respondent as recorded in the settlement is Yealands Estate Winery Limited and not Yealands Estate Wines Limited as the company is properly known. He says that as there is no such entity as Yealands Estate Winery Limited the settlement is null and void.

---

<sup>2</sup> Statement of Problem dated 13 August 2019

<sup>3</sup> Yealands submission dated 30 October 2019 at [2]

[19] This is not an argument I can accept. The citation is a misnomer and clearly a mistake given the original statement of problem correctly identified the respondent party which in turn means it is clear FDS knew who he was dealing with.<sup>4</sup>

[20] FDS's other line of argument is that illustrated in the quote in [12] above and that which Yealands arguments attempt to rebut. The argument is *Fraud vitiates all*.<sup>5</sup> FDS says the fraud was Yealands deliberate misrepresentation as to the reason for his dismissal which induced him to settle. He argues this is an act of bad faith in breach of s 4 of the Act and s 4 enunciates an overriding objective of the Act.

[21] What this argument misses is the principle that a specific provision, which s 149(3) is, is to be applied in preference to a one more general one such as s 4.

[22] Section 149(3) appears to be an absolute prohibition though in reality it is not as reflected by the recent comments of the Chief Judge in *TUV v WXY*.<sup>6</sup> There Judge Inglis said:

[45] Section s 149(3) is directed at limiting the circumstances in which parties can revisit their agreements by seeking to bring the terms of settlement before the Court (including, for example, in instances of settlor remorse). It is not directed at deeming validity of the agreement itself.

[46] If that is correct, and if the plaintiff can establish that she did not have the requisite mental capacity to enter into the settlement agreement in this case, then s 149(3) would not be engaged. That is because the fundamentals of contractual formation would not have been made out and there would be no agreement for s 149(3) to leverage off. Such cases are likely to be rare because of the hurdles that must be overcome in establishing, for example, lack of mental capacity, knowledge and unconscionability.

[23] That said the case law suggests the grounds for setting aside a s 149 agreement are limited to issues of mental incapacity or duress. Neither applies here. What is being alleged is FDS was misled by a misrepresentation to which he applies the stronger term *fraud*. Section 37 of the Contract and Commercial Law Act 2017 provides a misrepresentation, whether it be innocent or **fraudulent** (emphasis is mine), is a permitted ground of cancellation.<sup>7</sup> Unfortunately for FDS using s 37 of the Contract and Commercial Law Act 2017 as a ground of cancellation is expressly precluded by s 149(3) of the Employment Relations Act 2000.

[24] Even if that were not the case FDS's submission would fail to convince me the alleged misrepresentation even occurred. At no place in either his initial or reply submissions does he cite

---

<sup>4</sup> Refer, for example, *Registered Securities Ltd (In Liquidation) v Jensen Davies & Co* [1999] 2 NZLR 688 (CA)

<sup>5</sup> FDS's submission in reply dated 11 November 2019 at [14](2)

<sup>6</sup> *TUV v WXY* [2018] NZEmpC 154

<sup>7</sup> Previously s 7(3) of the Contractual Remedies Act 1979

specific illustrations of the alleged fraud. What he does is attach 4 pages of e-mails selected from the complete release of information from MPI to his reply submission and say they show an intent to deceive.

[25] I disagree. They comment on ensuring a robust redundancy process given Yealands considered a challenge was guaranteed. They also talk about a need to settle given FDS's *intention of going through the process*, potential risk and commercial justification. While there are comments which suggest an ulterior motive it is not the complaint to MPI but general dissatisfaction with FDS's performance. I also note the first e-mail that suggests Yealands was aware FDS had raised the issues which ultimately led to the prosecution does not arise till after the redundancy and even then there is no mention of MPI but instead what appears to be an industry group. The same e-mail, dated 16 September 2015, also suggests Yealands then thought the issue remained internal. The same points apply to the complete volume of Privacy Act releases attached to both the Statement of Problem and FDS's initial submission of 15 October 2019.

[26] In summary I have to conclude that notwithstanding s 149(3) FDS would fail to make his case in any event.

[27] There is then another potential impediment. The issue FDS wishes to challenge is his dismissal, irrespective of what may have motivated it. He was clearly aware of the fact of dismissal at the time it occurred and raised a challenge. The challenge was then resolved.

[28] Section 114(6) of the Employment Relations Act provides:

No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[29] That sections effect was visited in *Blue Water Hotel Limited v VBS*.<sup>8</sup> The conclusion was succinctly summarised in the subsequent cost decision where the Court recorded:

[1] In its judgment of 7 November 2018, the Court dealt with the important question of whether the three-year time limit referred to in s 114(6) of the Employment Relations Act 2000 (the Act) is absolute; and whether that period is capable of being extended under ss 219(1) or 221, which contain broad powers for extending time.

[2] The Court determined that the powers of the latter sections could not be used to extend the three-year time limitation provision under s 114(6) of the Act.<sup>9</sup>

---

<sup>8</sup> *Blue Water Hotel Limited v VBS* [2018] NZEmpC 128

<sup>9</sup> *Blue Water Hotel Limited v VBS* [2019] NZEmpC 24 at [1] and [2]

[30] While FDS characterises this as the reopening of an extant filing I have to conclude from its rationale that the message from *Blue Water Hotel* appears clear – you cannot progress a personal grievance which has lain dormant for over three years.

### **Non-publication**

[31] Both parties ask there be an order prohibiting the publication of their identity.

[32] In his initial submission FDS says publication would ...*cause victimisation to me and my family*. He goes on to say *my name and details are not in the public domain, I would like to keep it that way*.

[33] The starting point is the principle of open justice and the argument in [32] above is far from adequate. That said there is a far more persuasive argument and that is his approach to MPI was a protected disclosure. In its submission Yealands accepts that and s 19 of the Protected Disclosure Act 2000 therefore precludes the publication of anything which might identify FDS. It follows there shall be a prohibition on the publication of anything which might identify him.<sup>10</sup>

[34] Turning to Yealands request. It is argued non-publication is warranted for three reasons. The first relates to reputational damage with it being said *The effects from the Employer's offending on reputational damage are not yet conclusive but ... There is a very real concern that reputational damage and commercial harm will eventuate following publicity (and the re-surfacing) of these issues*.

[35] This does not convince. The issues have been the subject of widespread publicity and those with a genuine interest such as participants in the wine export market to which the submission refers will already be well aware of them and not need reminding.

[36] The second point was that the terms of settlement were, by agreement, confidential. They are not discussed here and remain confidential.

[37] The third is there would be an unfairness as if I were to reject FDS's application, as I have, Yealands will be deprived of an opportunity to respond to his claims thus creating a natural justice issue. Again I disagree. The submission does not say which issue it is that Yealands feels it should be allowed to respond to – the original claim of unjustified dismissal or the allegation it misled and lied. It would appear to be the later as the former has now been rendered well and truly irrelevant by both the passage of time and the original settlement. There is, I conclude, no

---

<sup>10</sup> Clause 10 of schedule 2 of the Employment Relations Act 2000

detrimental effect from Yealands not replying to FDS's allegation its representatives misled if only because one of my findings was the documents upon which FDS relies do not support that contention. It is effectively disposed of.

[38] For these reasons Yealands application for non-publication is declined.

### **Conclusion**

[39] For the above reasons FDS is unsuccessful with his application the Authority set aside the s 149 settlement concluded by the parties on 10 November 2015 and allow him to continue to pursue his claim of unjustifiable dismissal.

[40] Yealands application there be a prohibition on the publication of its identity also fails but there is an order prohibiting the publication of anything which might identify FDS.

[41] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority