

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 6
5432729

BETWEEN GLYNIS HARRIS
 Applicant

AND FLETCHER DISTRIBUTION
 LIMITED trading as
 PLACEMAKERS
 CHRISTCHURCH
 SOUTH
 Respondent

Member of Authority: M B Loftus

Representatives: Paul Froggatt, Advocate for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 19 December 2013 at Christchurch

Submissions received: At the investigaiton meeting

Determination: 14 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Glynis Harris, seeks various remedies as a result of what she describes as the unjustified decision of the respondent, Fletcher Distribution Limited (Placemakers), to suspend her without pay as of 13 September 2013.

[2] Placemakers' accepts it ceased paying Ms Harris but claims it did so given her resignation during the course of a disciplinary process. Placemakers' says Ms Harris completed a settlement agreement which estoppes any further claims.

[3] Further, and if Ms Harris is claiming she was unjustifiably dismissed, she failed to raise a grievance in the required manner and if she had, her claim would be

precluded by virtue of a prohibition clause invoking the provisions of ss.67A and 67B of the Employment Relations Act 2000 (The Act).

[4] During a telephone conference held on 25 November it was decided the question of whether or not Ms Harris is able to proceed be determined as a separate preliminary issue.

Conduct of the investigation

[5] Ms Swarbrick urged me to comment on the behaviour Ms Harris and her representative, Mr Froggatt. In particular, she asks I comment on what she submits was a failure to address Ms Harris' application in good faith.

[6] The request is hard to deny.

[7] Ms Harris and Mr Froggatt were present for approximately twenty five minutes before they walked out. During that time it became apparent they had no desire to participate meaningfully in the process. The bulk of the time they were present was spent canvassing reasons why the meeting should not proceed. These reasons had little or no merit.

[8] Matters were not assisted by Mr Froggatt's insistence he give Ms Harris' evidence (despite the fact he was not present when pertinent events occurred) and shield her from questioning.

[9] That said, she said enough to elicit some key responses. Those, along with the behaviour which preceded the walkout, led me to conclude it appropriate I continue the investigation and provide a determination in respect of the preliminary issue.

Background

[10] Ms Harris was offered a job as a member of Placemakers' sales team on 9 July 2013. She commenced on 29 July having previously signed an employment agreement which contains a provision which appears to be a valid prohibition against taking a dismissal grievance within 90 of commencement pursuant to ss.67A and 67B of the Act.

[11] Within weeks Ms Harris had been promoted to a supervisor's position. That saw changes to her title, hourly rate and duties. Other terms and conditions remained the same.

[12] Not long thereafter Placemakers became concerned about Ms Harris' conduct. On 30 August 2013 she received a letter from Mr Stephen Brown, the branch operator, asking she attend a disciplinary meeting to discuss an allegation of serious misconduct. It was proposed the meeting occur on 3 September.

[13] Ms Harris sought assistance and engaged the services of IR Thompson Associates Limited (Thompson's). Thompson's is an established firm of employment advocates operating in Canterbury.

[14] On 2 September Ms Carren McDonald, an advocate with Thompson's, sent an email to Mr Brown requesting further information and advising a meeting would not be possible the following day. Her queries were answered on 3 September.

[15] On 6 September Ms McDonald and Ms Harris came to Placemakers premises to view relevant surveillance footage.

[16] On 9 September Ms McDonald wrote to Mr Brown asserting Ms Harris could give a clear and concise explanation of her conduct and there was no evidence to support a finding of misconduct. The letter goes on to say:

Our client is of the opinion that even if she clears her name, it is now impossible for her to return to the employment relationship due to the damage caused by the nature of the allegations and suspension.

Our client is willing to enter into without prejudice discussions if you are mindful to do so. Alternatively, the writer is available to attend a meeting on ...

[17] A without prejudice proposal followed on 10 September. Ms McDonald says it reflected terms discussed with, and agreed by, Ms Harris when the two had met at Placemakers on 6 September. Placemakers replied with a counter offer on 11 September.

[18] Ms McDonald then had an assistant, Ms Sian Thompson, forward Placemakers offer to Ms Harris by e-mail. A copy of the covering e-mail was provided. She says

she also left a message on Ms Harris' phone detailing the counter offer and explaining the terms thereof.

[19] It was proposed there be a full and final settlement of all matters arising out of the employment and the termination thereof. Ms Harris would resign with effect 13 September 2013 and be paid outstanding wages and statutory entitlements within seven days of a Ministry of Business Innovation and Employment (MBIE) mediator signing the agreement. Ms Harris would return any company property within seven days of her signing and Placemakers was to make a contribution towards her legal costs upon receipt of an invoice from Thompson's.

[20] Ms McDonald says she received a text from Ms Harris at 8.03am the following morning. It reads:

Hi carren just got ur message was in imterview, yes am happy 2 accept exit package from placemakers thanks glynis.

[21] Ms McDonald responded by advising this meant Ms Harris would owe a residual amount to Thompson's and asks *Let me know if you are happy to accept on those terms. Thanks. Carren.*

[22] The response, which arrived at 10.02am, was *Yes that is okay.*

[23] Ms Harris denies being a party to these exchanges. She accepts the phone number from which the texts emanated is hers, but claims she did not send them.

[24] Ms McDonald then asked Ms Thompson to prepare a settlement agreement. This was done and it was forwarded to Placemakers. Mr Brown signed on 13 September and returned the document to Ms Thompson. She then forwarded it to Ms Harris by email with the accompanying message:

Please see the attached for you to sign and scan back to us. If you are unable to print and scan the signed copy back to us, please let me know and we will arrange an alternative for you to sign.

[25] That was followed by a reminder from Ms Thompson on 16 September as the document had not been returned.

[26] At 9.44am on 18 September Thompson's says it received a signed copy of the agreement in pdf form. The accompanying email read:

Hi Sian,

Attached is signed copy of document, can you please let me know when final payment will be made to my account.

Many thanks

glynis.

[27] Ms Harris denies she signed the settlement and sent the accompanying email and attachment. While not suggested at the time she subsequently said via a solicitor she later retained (letter to Mr Brown dated 4 November 2013) that:

Ms Harris alleges that Ms McDonald forged Ms Harris' signature on the Mediation Agreement. Ms Harris has absolutely no recollection of ever having signed that Mediation Agreement. Ms Harris does not, and never did, agree to the terms therein.

[28] This accusation also appears to be behind a complaint lodged with the Police on 16 December 2013. The accusation is an unidentified person had taken, obtained or used a document for pecuniary advantage. Who that person was is unspecified, though I suspect it is Ms McDonald given statements Mr Froggatt made when arguing Police involvement precluded a continuation of the investigation. That said, I cannot be sure as both Ms Harris and Mr Froggatt refused to answer pertinent questions.

[29] In the interim Thompson's forwarded the agreement to MBIE's Mediation Service. MBIE replied on 19 September querying the identity of the respondent. That took a while to resolve and in the interim there were a number of emails and texts from Ms Harris to Thompson's questioning where her final payment was.

[30] The identity issue was resolved on 24 September when a mediator contacted Placemakers, confirmed the company understood the terms of settlement and it agreed to an amendment of its identity.

[31] The mediator then approached Ms Harris. The outcome of the discussion was conveyed to Thompson's on 26 September. The pertinent part of the mediator's email reads:

I have this morning spoken to Glynis Harris who has indicated that given the delays in this matter she does not want me to sign off. I have referred her back to your office for further advice.

In the interim I will hold the Record of Settlement here pending further instructions from your office.

[32] The process was never completed as Ms Harris withdrew Thompson's authority to act. She then filed her Statement of Problem in the Authority on 10 October and sought alternate advice (Ms Boniface). In the interim Placemakers complied with the terms of the settlement and made the payments required of it.

Determination

[33] The first question to be determined is whether or not Ms Harris signed the settlement agreement. Having considered the evidence I conclude the answer is yes and her contrary assertion lacks credibility. I reach this conclusion for the following reasons.

[34] The contemporaneous documentary evidence is compelling and includes the e-mails exchanged between Ms Harris and Thompsons. Ms Harris accepts those attributed to her came from her e-mail address but provides no evidence, argument or suggestion as to how this occurred if she did not send them as she claims.

[35] There are then the texts and particularly those referred to in paragraphs 20 and 22 above. They remain accessible on Ms McDoanld's telephone and I viewed them. Again Ms Harris accepts the number from which they emanated is hers and the phone in question remains in her possession. Again she denies authorship but takes the issue no further.

[36] Further documentary support for Placemakers position comes in the form of an e-mail from the mediator. It makes no mention of Ms Harris' present contention – namely she was not a party to the agreement and did not agree to its terms. I note this for two reasons. Surely if the present claim were true Ms Harris would have said so at the time and it would be reflected by the mediator. Instead the mediator attributes her change of mind to delay. That is consistent with the content of contemporaneous e-mails and texts and is, I conclude, far more likely and credible.

[37] Add to this Ms MacDonald's evidence she explained the terms of settlement to Ms Harris. Ms Harris refused to take advantage of an opportunity to challenge Ms McDonald's evidence and it remained consistent and credible when I questioned her.

[38] Finally I note this is not the only instance where a denial of Ms Harris' faces overwhelming contrary evidence. One of her reasons for not progressing the investigation was a claim Placemakers had, via briefs prepared for the hearing, falsely claimed she had accused Ms McDonald of forgery. That claim is totally undermined by the letter of 4 November 2013 and I have no doubt, given my knowledge of the lawyer concerned, the accusation would not have been made without the stated instruction.

[39] Having considered the evidence, and the way it was presented, I conclude Ms Harris signed the settlement having agreed to its terms.

[40] That conclusion leads to the question of whether or not she is now estopped from pursuing her claim.

[41] The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so (see, for example *Checkmate Precision Cutting Tools v Tomo* [2013] NZEmpC 54 at [20]).

[42] However a complication arises as a result of the reference to s.149 in the proposed settlement and the fact it was forwarded to a mediator. There is conflicting opinion about the effect this has on the settlement.

[43] On one hand there is *Abernethy v Dynea New Zealand Ltd (No.2)* 2007 ERNZ 462 where the Court concluded where:

(1) *the parties intended from the outset to submit any oral agreement reached to the s 149 ERA procedure,...*

(2) *... there is no binding accord until that process has been completed ... (paragraphs 56-58).*

[44] On the other there are cases such as *Penney v Fonterra Co-Operative Group Ltd* [2011] NZEmpC 151 at [43] and [44] where the Court said:

The agreement itself was complete upon signing by the parties. The only significance of the request to the mediator was that, if the mediator signed it in accordance with s 149 of the Employment Relations Act 2000 the agreement would be subject to the provisions of s 149(3). It was not a term of the settlement agreement that it be effective only if signed by a mediator. On the contrary, its terms provided explicitly that it should be effective immediately upon being

signed by both parties. It therefore became effective on 14 August 2009 when it was signed on behalf of Fonterra.

[45] In this instance I consider the approach adopted in *Penney* to be that which should apply here. I do so for the following reasons.

- a. I conclude the factual situation in *Penney* is a better fit with the present situation. *Abernethy* concerned a situation where the parties expressly discussed and agreed the settlement be signed by a mediator in accordance with s.149 of the Act. That did not occur here. There is no evidence the issue was discussed and Ms Thompson said she simply included the s.149 provision as she always did so. Given the lack of discussion Mr Brown put no weight on when payment was to be made (ie: after signature by the mediator) and this is confirmed by the fact he acted on the terms of settlement despite the lack of a mediator's signature;
- b. Furthermore, and was the case in *Penney*, settlement is stated to have occurred after signature by the parties (refer clause 10);
- c. The Act's purposes include the promotion of mediation (and voluntary resolution) over judicial intervention which should be reduced. To invalidate an agreed settlement on the basis of a technicality would appear contrary to those purposes; and
- d. *Penney* is the more recent guidance from the Court.

[46] I conclude it would be unconscionable to allow Ms Harris to go back on her agreement when I add the above conclusion to the following:

- a. The terms of settlement are clear;
- b. The documentary evidence confirms Ms Harris both understood and, at least initially, accepted them; and
- c. Placemakers fulfilled its obligations and made the required payments.

[47] Even if the above conclusion is wrong and Ms Harris should not be estopped, she faces further hurdles which mean it is unlikely she could proceed. There is the

argument she never raised a grievance in the manner required by the Act and the ss.67A and 67B argument.

[48] The outcome of an argument over whether a grievance was raised is debatable given the way the Statement of Problem was pleaded and the facts. It is most likely that if there is a grievance and if it was properly raised, it is a claim of unjustified dismissal. I say that as while Ms Harris says she is claiming wages that should have been paid during a suspension, the reality is Placemakers ceased paying as a result of its understanding Ms Harris was no longer employed. Had it not been able to justify its actions by relying on the settlement this would amount to an overt act of termination. That is a dismissal and it does not appear to have been challenged.

[49] Ms Harris' employment agreement contains a clause which prevents her from taking a dismissal grievance within 90 days of commencement pursuant to ss.67A and 67B of the Act. On the face of it the clause looks valid and that which normally invalidates such clauses (agreeing the prohibition after employment has commenced) is not a factor here – it was signed two weeks prior to commencement.

Conclusion

[50] For the above reasons I conclude Ms Harris entered into an agreement to resign. The parties acted on the agreement and given the terms of the settlement agreement Ms Harris is estopped from proceeding further. Even if that were not the case, it is unlikely she could proceed for other reasons. Her claim therefore fails.

[51] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority