

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 574
3191419

BETWEEN

DAVE JAQUES
Applicant

AND

AURORA LAW LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Rebecca White, counsel for the Respondent

Submissions received: 10 and 31 July 2023

Determination on the
papers: 2 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A problem arising from an employment relationship between Dave Jaques and Aurora Law Ltd, appeared to be resolved with the signing of a Record of Settlement (ROS) by a mediator.

[2] The terms of settlement signed under s 149 of the Employment Relations Act 2000 (the ER Act), had been agreed to by Mr Jaques and Aurora Law in mediation on 10 November 2017. The ROS was signed the same day.

[3] Mr Jaques claims that he entered into the settlement under the influence of a mistake about a particular undertaking Aurora Law agreed it would carry out as a term of settlement.

[4] The Authority is asked by the parties to determine whether in the circumstances it has jurisdiction under the ER Act to order cancellation of the ROS, as sought by Mr Jaques.

[5] Aurora Law contends the Authority lacks jurisdiction to cancel a ROS for mistake. If that submission is not upheld, Aurora Law contends that cancellation is not available in the circumstances because, if there was a mistake,

- Mr Jaques was aware of the situation he says he was mistaken about
- Aurora Law was not aware of the existence of a mistake
- The mistake was not material to Mr Jaques, and performance of the parties' bargain did not result in any substantial disadvantage to Mr Jaques
- By his action or inaction, Mr Jaques affirmed the ROS and is estopped from seeking cancellation of it.

The undertaking of Aurora Law – deed of assignment

[6] As a term of their settlement the parties agreed;

3. The Employer will enter into a deed of assignment to Dave Jaques of debt in respect of all invoices issued to [client's name], in aggregate no less than \$43,292.20. The Employer shall have no claim to any funds paid by [client's name] in respect of such invoices.

[7] The debtor was a client of Aurora Law and had been provided legal professional services by the law firm. As an employee of Aurora Law, Mr Jaques performed work in providing those services.

[8] Aurora Law considered the client became indebted to it for an amount of fees and raised invoices for the services provided. In her witness statement¹ Mandy Rusk, a director of Aurora Law, said that the debtor had later disputed that it received any invoices from her firm.

[9] What is important in considering the ROS is that before the terms of settlement were agreed, Aurora Law had regarded the client as indebted to it and, until shortly before the settlement, the firm's accounts reflected that belief.

Invoiced amounts written off

[10] About three weeks before mediation and signing of the ROS, Aurora Law zero rated the invoices it held for the services it had provided to the client. Ms Rusk agreed to do this to facilitate the client's files being uplifted. In her witness statement she said², 'credit notes recorded that they had been issued due to the uplift.' The firm's records were adjusted to show the amounts of the invoices as written off.

[11] Mr Jaques believes that this action of the law firm cancelled the invoices or made them unpayable, and they therefore became unenforceable by him against the debtor. Although Aurora Law subsequently gave an undertaking to assign its interest in the debts to him, Mr Jaques believes they were worthless when that occurred, although he says at the time he did not know that.

[12] Since the ROS was signed in November 2017, he has managed to recover about \$30,500 of the invoices assigned to him, but he believes that a mistake of his prevents him from recovering the balance of about \$12,800.

[13] Mr Jaques was aware that Aurora intended to zero rate the invoices, for on 10 October 2017 after he learned that was going to happen, he emailed Ms Rusk and expressed his dissatisfaction with that action.

[14] Several weeks later on 3 November 2017, in settlement of the employment relationship problem, Ms Jaques, Aurora Law and the mediator signed the ROS which included the undertaking to assign the invoices in the name of the debtor client.

¹ At para 22.

² At para 23.

[15] This was followed by the execution of a deed of assignment, which was signed by Aurora on 14 November and by Mr Jaques on or about 23 November.

[16] Mr Jaques could then begin taking steps to recover the invoiced amounts from the debtor.

Cancellation of a ROS

[17] The Authority is asked to determine, as a preliminary question, whether it has jurisdiction to cancel terms of settlement in a ROS, where the decision to enter into them by one or both parties was influenced by mistake.

[18] If the Authority determines it has jurisdiction, any orders will be made only after the parties have had an opportunity to be heard further if they wish.

[19] For the purposes of this investigation Mr Jaques and Aurora Law agreed to waive confidentiality that normally will apply to mediation.

Meaning of the undertaking

[20] A useful starting point is the ROS and the meaning of the undertaking of Aurora Law reproduced above.

[21] The parties have not suggested there is any lack of clarity with the clause. The Authority agrees.

[22] What was to be assigned to Mr Jaques was 'debt' in respect of invoices issued to the client for up to the stipulated \$43,292.20. It was not an agreement to assign empty vessels. Mr Jaques was to be assigned instruments, in the form of invoices, having a realisable value, or which were redeemable for money or money's worth.

[23] The undertaking cannot reasonably be read as the assignment of non-existent or fictional debts. Aurora Law disclaimed its entitlement to any 'funds paid' by the debtor, which gives some indication that Mr Jaques and Aurora Law had an expectation that debt or debts of the client, did exist when the ROS was signed.

[24] The assumption underlying the undertaking is that the debtor was contractually obliged to pay the amount invoiced to it.

Credit note

[25] The credit note issued by Aurora Law to the debtor before the ROS undertaking was given, is a standard form headed **TAX CREDIT NOTE**. With reference to an amount of fees, under the name of the debtor the form states, 'Amount written off as agreed due to uplift'.

[26] The reason for writing off the fees is a separate matter from the action of writing the fees off. Although there may have been an arrangement or understanding between Ms Rusk and the debtor that is not recorded in the tax credit note, on the face of the document it is clear the debt was cancelled. The action of Aurora Law removed the obligation to pay.

[27] It would be no surprise if the debtor, relying on the evidence of the credit note, were to deny the existence of a debt. It seems that has happened.

[28] For Aurora Law submissions have been made that in case law a distinction has been drawn between accounting entries made in the creditor's records, and the transactions which create debts.

[29] The Authority accepts that distinction, but in this case the issue is whether Aurora Law held itself out to the debtor as cancelling the debt arising from the transaction which created it.

[30] Ms Rusk in a letter of 29 October 2019 to the Law Society, said that she had personally provided the director of the debtor with the tax credit notes made out against the debtor's name. The notes stated, 'amount written off'. This takes the action of Aurora Law beyond internal accounting or recording.

[31] On the information it has been provided with, the Authority rejects the submission that the action of Aurora Law had no effect on the ability of Mr Jaques, as assignee, to collect on the assigned invoices. The written off invoices appear to be without value and the parties bargain therefore resulted in a substantial disadvantage to Mr Jaques

[32] Aurora Law contends that it assigned its *interest* in the invoices, which was its interest in being paid for services provided. It contends that an invoice can be written off internally in the firm's system, without absolving the debtor from payment of the invoiced amount to an assignee.

[33] Mr Jaques makes a good point in saying that Aurora Law had cancelled its interest in the invoices before they were assigned. The option to zero rate the invoices, or write them off, should have been assigned to become his interest to exercise.

A mistake?

[34] It seems quite unlikely that Mr Jaques, for some perverse or bizarre reason, knowingly undertook in the ROS to receive nothing of realisable value against some or all the amount of \$43,292.20 quantified in the undertaking.

[35] Ms Rusk in her statement noted that Mr Jaques could have asked to check with the firm whether the invoices in question had actual or potential value. That must be so, but he was also entitled to rely on representations, if any were made by Aurora Law in mediation, whether by words or conduct, about the present or future existence of debt legally recoverable from the client.

[36] Mistake may be a rational explanation for the circumstances that arose. It may seem that Mr Jaques was acting under a mistaken belief of some sort, perhaps that Aurora Law would reverse the credit notes he was aware were going to be issued to the debtor. To what extent Ms Rusk may have encouraged him to hold such belief is unclear from the untested statements made so far to the Authority.

[37] To get a better picture, the Authority will require evidence from Mr Jaques and Ms Rusk about their exchanges in mediation before the undertaking was agreed to by them. Confidentiality has been waived.

Section 149 Settlements

[38] The ROS was entered into under s 149 of the ER Act. The extent to which terms of settlement may be disturbed once a ROS has been signed, is expressly limited by s 149(3):

- terms of settlement are to be final and binding on the parties – (a)
- they may not be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017 (CCLA) – (ab)
- they are not to be brought before the Authority except for enforcement purposes – (c)

[39] The exclusion of ss 36 to 40 of the CCLA, removes the remedy of cancellation of terms of settlement where there has been failure to perform the settlement or where it has been induced by misrepresentation.

[40] Under s 151 of the ER Act, the remedy for repudiation of a settlement is compliance. A penalty for breach of an agreed term of settlement may also be imposed under s 149(4) of the ER Act.

Compliance order and penalty

[41] If the Authority is correct in its view that the parties intended to assign invoices of value issued to the debtor against a legal obligation to make payment, then in principle Aurora Law could now be ordered to assign such invoices to Mr Jaques for the unrecovered balance of the funds quantified in the undertaking.

[42] As a matter of discretion, a compliance order is unlikely to be made if it is shown that the debtor has no present or future obligation to meet an invoice of Aurora Law. It seems that Aurora Law had no desire to retain the debtor as a client after October 2017, so no fees are likely to be payable.

[43] A penalty must be claimed within 12 months of an alleged breach of a settlement. As the assignment of the invoices occurred in 2017, any penalty claim brought now would be well out of time.

Cancellation for mistake

[44] Section 24 of the CCLA provides that relief may be granted for mistake made by a party in entering into a contract. Mr Jaques claims he made a mistake that qualifies for relief under the CCLA.

[45] The nature of that relief includes cancellation under s 28 of the CCLA, which is a discretionary remedy. A court may make any order that it thinks just, including cancellation and payment of compensation.

[46] The immediate issue the parties have raised for the Authority is whether ss 24 to 30 of the CCLA dealing with relief for mistake, have any application to terms of settlement in a ROS made under s 149 of the ER Act.

[47] Whereas ss 36 to 40 of the CCLA are expressly excluded from being applied to terms of settlement, no reference in that regard has been made to ss 24 to 30.

[48] It is a natural and reasonable inference that if CCLA relief for mistake was intended to be excluded, the ER Act would have expressly said so. The restriction of the exclusion to a number of identified CCLA sections only, implies that other sections are not excluded, unless that can be plainly seen as necessary to meet the objects and purposes of the ER Act and the apparent policy on which s 149 is based.

[49] The Court of Appeal considered s 149 of the ER Act in *TUV v Chief of New Zealand Defence Force*³. The Court held that s 149(3) does not operate as a statutory bar to the setting aside of certified s 149 agreements⁴.

[50] The Court drew an inference from s 149(3)(ab) in relation to cancellation under ss 36 to 40 of the CCLA, observing;

This provision would not be necessary if s 149(3)(a) and (b) precluded a challenge to agreed terms of settlement on any basis whatsoever. The express exclusion of the ability to cancel a settlement under specified provisions of the Contract and Commercial law Act also strongly suggests that the ability to challenge agreed terms of settlement under other provisions of that Act – for example, s 24 in relation to relief for mistake, or s 73 in relation to illegal contracts - is not affected by the general language in s 149(3)(a) and (b)⁵.

³ [2020] NZCA 12

⁴ At [84]

⁵ At [41]

[51] *TUV* was not a case about mistake but was concerned with an employee's capacity to enter into a contract certified by a mediator under s 149.

[52] Nevertheless, the Authority regards the judgment of the Court of Appeal and its above observations as strongly persuasive.

[53] The Court considered its conclusions were unsurprising, given the purpose of s 149 to prevent the reopening of a valid settlement agreement. It also considered Parliament had not intended to override important protections for individuals reflected in the law relating to validity of contracts, and in the grounds for finding that a contract is void or voidable at inception⁶.

[54] The Court drew a distinction between cases of repudiation or failure to perform by one party, and cases where the contract is invalid from the start because of illegality, mistake, incapacity, duress, or other vitiating circumstance. In the former case there is a valid contract, whereas in the latter there may be no contract and consequently no agreed terms of settlement⁷.

Conclusion

[55] Following the Court of Appeal judgment in *TUV*, the Authority concludes that it may examine the terms of settlement signed by Mr Jaques and Aurora Law, and the circumstances in which those terms were agreed to. The Authority may also determine whether there is any basis for cancelling the ROS under s 28 of the CCLA and s 162 of the ER Act, and it may make any orders it considers just in the circumstances.

[56] Given the untested nature of the evidence or information provided by Mr Jaques and Ms Rusk, the Authority makes no findings as to whether there was a qualifying mistake under s 24 of the CCLA, or Mr Jaques knowledge of such mistake, or whether by action or inaction he affirmed the terms of settlement, or whether the benefit he received from the settlement was substantially less than the benefit Aurora Law received.

[57] It is unhelpful to the parties that nearly five years have now gone by since they signed the ROS. It is quite apparent from the information provided to the Authority,

⁶ At [42] and [45]

⁷ At [39] and [46]

that there is continuing acrimony between Mr Jaques and Ms Rusk. Before coming to the Authority, the parties had appearances, no doubt costly, before the District Court and the Law Society. There is usually plenty of scope in similar disputes for increasing cost and time to be spent. Mr Jaques and Ms Rusk will be conscious they are officers of the court and have obligations not to promote or prolong proceedings, even if they are parties.

[58] For these reasons, and in the interest of the parties' health and wealth, the Authority urges them to take hold of this matter and finally resolve it between them, whether through further mediation or other process.

[59] If they cannot settle their differences the Authority will require Mr Jaques and Ms Rusk to attend an investigation meeting, so that they can be examined as to their conduct and knowledge in connection with the undertaking given and recorded as a central term of settlement of an employment relationship problem.

[60] That evidence will assist the Authority to determine whether the ROS is able to be cancelled for any reason and, if so, whether as a matter of discretion in all the circumstances it should justly be set aside.

Mr Jaques to notify the Authority

[61] If it becomes clear there is no prospect of resolution, Mr Jaques is to advise the Authority by memorandum and further directions will then be given in consultation with him and counsel for Aurora Law.

[62] Costs are reserved.

Alastair Dumbleton

Member of the Employment Relations Authority