

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 15
3191419

BETWEEN

DAVE JAQUES
Applicant

AND

AURORA LAW LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Dave Jaques, in person
Rebecca White, counsel for the respondent

Investigation Meeting: 12 September 2024

Submissions and information received: At the investigation meeting and 15 October 2024

Determination: 16 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dave Jaques was employed as solicitor by Aurora Law Limited (Aurora), between November 2016 and September 2017. Aurora is a law firm based in Auckland. Mr Jaques gave notice of his resignation in September 2017 and later raised a personal grievance alleging constructive dismissal.

[2] The parties attended mediation in November 2017 and entered into a record of settlement (ROS), which was signed by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act). One of the terms of settlement required Aurora to enter into a deed of assignment of debt with Mr Jaques in respect of all invoices generated for a particular client in aggregate of no less than \$43,292.20. Aurora had written off the relevant invoices a few weeks prior to mediation, of which Mr Jaques was aware.

[3] Mr Jaques over time recovered a total of \$38,395.48 pursuant to a deed of assignment (the deed).

[4] In September 2022 Mr Jaques lodged a statement of problem alleging Aurora had breached the ROS. He alleged at the time of signing the ROS Aurora misled him into believing the invoices were still “valid”, and there was a shortfall in recovery relating to the invoices of \$12,814.58. It said he suffered a separate loss which was claimed. In the alternative he sought relief under s 28(2)(c) Contract and Commercial Law Act 2017 (CCLA) to vary the wording of the ROS such that he could recover the remaining \$12,814.58.

[5] In an amended statement of problem Mr Jaques now seeks cancellation of the ROS altogether, pursuant to the CCLA, which provides for the granting of relief from mistake including cancellation by order of a court or tribunal.

[6] Aurora contended the Authority lacked jurisdiction to cancel a ROS for mistake. As that submission has not been upheld by the Authority, Aurora contends that cancellation is not available in the circumstances because there was no qualifying mistake as Mr Jaques was aware of the situation he says he was mistaken about, Aurora 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 him. It says if there was a mistake, which it denies, relief should not be granted to Mr Jaques in the circumstances.

The Authority’s process

[7] This matter was previously allocated to another Authority Member who conducted an “on the papers” investigation to determine as a preliminary issue whether the Authority had jurisdiction to cancel a ROS. The Authority issued its preliminary determination on 2 October 2024.¹

[8] Aurora lodged an application to reopen the Authority’s investigation based on an objection to parts of the Authority’s determination constituting findings of fact and law, made when Aurora had understood such findings would not be given by the Authority. The Authority was satisfied there were grounds for reopening arising from its presentation of matters that were not agreed by Aurora. It accordingly issued a

¹ *Jaques v Aurora Law Limited* [2023] NZERA 574.

determination on 7 December 2023 confirming the terms of the reopening order being that the Authority's determination of 2 October 2023, in so far as it made or appeared to make findings of fact and law on matters other than the central jurisdictional question, was modified to remove the parts objected to by Aurora.² While the contentious findings were included in the 2 October 2023 determination to give context, they were said to not be findings necessary to support the Authority's conclusion about jurisdiction.

[9] In its 7 December 2023 determination the Authority concluded that it may examine the terms of settlement signed by Mr Jaques and Aurora, and the circumstances in which those terms were agreed to.³ It found it may also determine whether there is any basis for cancelling the ROS under s 28 of the CCLA and s 162 of the Act, and it may make any orders it considers just in the circumstances. Given the untested nature of the evidence or information provided by Mr Jaques and Aurora, the Authority made no findings as to whether there was a qualifying mistake under s 24 of the CCLA, 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 received.

[10] This matter was later allocated to me to investigate. An investigation meeting was set down. The Authority had received a witness statement from Mr Jaques as part of the Authority's preliminary investigation, which formed the basis of his evidence at the investigation meeting. Aurora's director Mandy Rusk also provided a witness statement and sworn/affirmed affidavit during the preliminary investigation, which formed the basis of her evidence.

[11] Aurora also lodged a witness statement for Laurence Flitten, sole director of a debt recovery and credit management business, which was the client whose debt was assigned by Aurora to Mr Jaques under the ROS. It is referred to as IBSC in this determination. Mr Flitten attended by audio visual link, having been granted leave to do so by the Authority.

[12] Each of the witnesses answered questions under oath or affirmation at the investigation meeting, having confirmed the contents of their witness statements.

² *Jaques Applicant in 3191419 v Aurora Limited in 3262679* [2023] NZERA 733.

³ *Jaques v Aurora Law Limited* [2023] NZERA 733.

[13] For the purposes of this investigation Mr Jaques and Aurora agreed to waive confidentiality that normally will apply to mediation, pursuant to s 148(1) of the Act. I have however limited the material referred to in this determination to the extent feasible.

[14] As permitted by s 174E of the Act this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. Not all evidence or submissions are referred to but have been considered.

The issues

[15] The issues requiring investigation and determination are:

- (a) Was the ROS signed by the parties entered into under a mistake?
- (b) Is there is a basis for cancelling the ROS under s 28 of the CCLA and s 162 of the Act?

Background

[16] Mr Jaques worked for Aurora from November 2016. Remuneration was agreed including a salary plus a bonus amount. Mr Jaques gave evidence that as part of his arrangement with Aurora he provided business advisory services to Aurora through a company of his, Digital Signs Limited, which invoiced Aurora for its services.

Aurora invoicing

[17] Ms Rusk says it is Aurora's usual practice to render invoices to clients at regular intervals, usually monthly, or where there is a natural "pause" in a matter, such as when a transaction settles. She says during Mr Jaques' employment, Aurora's system showed that Mr Jaques was rendering invoices on this basis.

[18] Ms Rusk gave evidence that once an invoice is rendered, Aurora becomes liable for income tax and GST associated with that invoice. For that reason, it was (and is) important that invoices be sent to the client for payment as soon as possible after having been rendered.

[19] In relation to the bonus component of Mr Jaques' remuneration, Ms Rusk says they had an arrangement whereby he would be paid a bonus based on the amount of fees he billed to clients in excess of a certain amount. From her point of view, that

bonus was to be paid when the relevant fees were recovered. This was said to be a further reason that it was important for invoices to be sent to clients quickly for payment. Ms Rusk says it was not Aurora's policy for invoices to be issued and not be sent to clients for payment.

[20] Ms Rusk gave evidence that Mr Jaques liaised directly with Aurora's support staff when it came to billing, and she had no reason to think that the invoices Aurora was issuing for work on his matters were not being sent to clients on Aurora's usual terms.

IBSC

[21] Ms Rusk says in around early October 2017, she became aware that Mr Jaques had entered into a different arrangement with IBSC. IBSC was a debt recovery business and had engaged Aurora to assist with recovery of debts for its clients. It is common ground the arrangement that Mr Jaques agreed to with the IBSC's director Mr Flitten was that IBSC would be Aurora's client (rather than IBSC's clients). The arrangement was:

- (a) Aurora would charge a fixed fee, matched to scale costs;
- (b) if the debt was accepted by the debtor after court documents had been prepared and served but not filed, Aurora would accept a 50% reduction in its fee;
- (c) IBSC's clients would only pay filing fees, and Aurora's fees would only be due upon the court's judgment;
- (d) if the claim was unsuccessful, Aurora's fee would still be payable.

[22] This arrangement was recorded in a letter from Mr Jaques to IBSC dated 8 March 2017. Mr Jaques gave evidence that Ms Rusk was made aware of IBSC coming on board as a client and of the arrangement regarding payment, but had forgotten about it. Ms Rusk gave evidence that she was not aware of the details of this arrangement while Mr Jaques was employed, and that she only become aware of documentation recording the arrangement when she was reviewing Aurora's files in 2019 and 2021.

[23] Mr Jaques gave evidence that he did not recall interim or monthly billing, but that he was "happy to be proven wrong" about that. The Authority has been provided with a spreadsheet which Mr Jaques had completed and returned to Aurora's practice

manager on 1 September 2017 which shows work-in-progress (WIP) for IBSC. His annotations for four of IBSC's matters was to "invoice but don't send".

[24] Ms Rusk says she was not aware IBSC were being invoiced but no invoices were being sent. Ms Rusk says having agreed that IBSC's clients would not be liable for any fees until their matters were resolved, Mr Jaques caused Aurora to issue a number of invoices on IBSC files but directed that those invoices not be sent to IBSC. Aurora believes given the agreement reached with IBSC, the most likely reason for issuing these invoices was so Mr Jaques could achieve a higher bonus payment from Aurora.

End of employment

[25] In a resignation letter, Mr Jaques raised a personal grievance, claiming that he had been constructively dismissed. Aurora says Mr Jaques final day of employment at Aurora was 28 September 2017. Mr Jaques does not dispute that.

[26] I understand Mr Jaques lodged a statement of problem in the Authority on 7 October 2017, with Aurora lodging a statement in reply on 25 October 2017, denying his claims.

IBSC uplifts files

[27] Mr Flitten and Mr Jaques were in contact prior to the end of Mr Jaques employment. Mr Flitten gave evidence that as IBSC had a relationship with Mr Jaques, it decided it would keep its files with him, when he moved to another law firm. He said Mr Jaques was the only person he dealt with at Aurora up to that point.

[28] Mr Flitten wrote to Ms Rusk on 4 October 2017 asserting that there was "no money owing" on IBSC files. Upon receipt of that letter Ms Rusk asked Aurora's Financial Controller to refer Mr Flitten to the invoices that had been issued to IBSC and which would need to be paid before the uplift could occur. Mr Flitten took exception to this.

[29] On 9 October 2017, Ms Rusk received an email from Mr Flitten, which referred to several telephone conversations with her the prior week and the 4 October 2017 request to uplift IBSC's files.

[30] Mr Flitten visited Aurora's offices on 10 October 2017 to personally uplift the IBSC files. Ms Rusk says this was, at times, a heated conversation. Mr Flitten told Ms Rusk that he had never been sent the invoices that had been issued to IBSC, and insisted that Aurora issue credit notes for the invoices. Ms Rusk says she agreed to issue credit notes to IBSC, and did so the following day. The credit notes recorded that they had been issued due to the uplift. The credit note issued by Aurora to the debtor is a standard form headed TAX CREDIT NOTE.

[31] Mr Flitten recalls speaking with Mr Jaques about being invoiced by Aurora, and is sure he would have advised Mr Jaques that credit notes were issued for IBSC's debt.

[32] On the evening of 10 October 2017, Mr Jaques emailed Ms Rusk under the subject line "Bonus owing", saying:

I understand you may have written off something like \$45,000 invoices owed by IBSC today – even though he did not ask you to, and he was at all times willing to pay them when the cases were determined.

Similar to the [other client] matter you did not involve me in this decision at all (not that you needed to since it is your business), but I hope you don't now try and say my clients are not paying so you don't need to pay me.

[33] It is common ground that Aurora did not reply to that email, and that the parties had no dialogue about the status of the invoices after that email prior to mediation.

Mediation

[34] Mediation took place on 3 November 2017, several weeks later. Mr Jaques represented himself, while Ms Rusk was represented by an experienced employment lawyer.

[35] Ms Rusk gave evidence that during the mediation, Mr Jaques suggested that Aurora's interest in the IBSC invoices be assigned to him. Ms Rusk's evidence is that Mr Jaques provided the figure for the invoices to IBSC of \$43,292.20 - she did not provide this figure. She says she was initially reluctant to agree to this, because she did not think Mr Jaques would be able to pursue those fees personally as he was not entitled to practice on his own account as a barrister and solicitor. She says she specifically raised this concern while we were in joint session with Mr Jaques, and recalls that her representative confirmed that this was an issue Mr Jaques needed to consider and work

through. She says Mr Jaques said that he was happy to take on the risk of not being able to recover the fees directly, or words to that effect.

[36] At the investigation meeting Mr Jaques denied that it was him who raised the prospect of him being assigned interests in IBSC's invoices. He said he recalled a discussion in which Ms Rusk expressed that she did not think the fees were collectable. In his witness statement Mr Jaques says he assumed that Aurora would "reverse anything they had done" and that there was money still owing "on those invoices". He says Aurora knew the "debt" being assigned was zero and there was no discussion about not reversing that. At the investigation meeting he said the mistake he made was not knowing Aurora had no intention of providing him with invoices or WIP reports.

ROS

[37] In settlement of the employment relationship problem, Ms Jaques, Aurora and the mediator signed the ROS. The ROS records the "Employee and Company" as Mr Jaques and Digital Signs Limited and Aurora as the employer. It provided for a payment by Aurora to Mr Jaques pursuant to s 123(1)(c)(i) of the Act, as well as the following clause:

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

[38] The ROS states the terms of settlement are in full and final settlement of any claim or complaint Aurora may have in respect of Mr Jaques and his company and Digital Signs Limited. It also recorded the parties fully understood that once the mediator signs the agreement, the settlement is final, binding and enforceable.

[39] Mr Jaques notified the Authority that the matter had been settled, and on 6 November 2017 the Authority confirmed it would close its file.

[40] It is common ground that Aurora made payment of the specified amount under s 123(1)(c)(i) of the Act in accordance with the ROS.

Deed of assignment

[41] The deed was finalised after the mediation. Ms Rusk says she drafted the deed and sent it to Mr Jaques via Aurora's representative.

[42] The deed between the parties recorded Aurora as the assignor and Mr Jaques as the assignee. It included the following:

RECITAL

- B. During the course of his employ, the Assignee provided legal services to a client, namely [IBSC] for which fee invoices (the “Fee Invoices”) were issued on behalf of the Assignor by the Assignee in aggregate value of not less than \$43,292.20.
- C. The Assignor has agreed to assign and the Assignee has agreed to accept an assignment of the interest of the Assignor in the sums invoiced in aggregate to [client] on the terms and conditions contained in this Deed of Assignment.

OPERATIVE PART

1. The Assignor hereby assigns to the Assignee its interests in the Fees Invoices issued to IBSC in aggregate value of not less than \$43,292.20.
2. The assignment of the Fees Invoices is in consideration of the Assignee taking full and sole responsibility for the collection of the outstanding debt owed by IBSC for which the Assignor relinquishes all entitlement to on the basis that the Assignee accounts for all tax liability attributable to those Invoices. For the sake of clarity, that is because the Assignor has not recovered any payment whatsoever with respect to those Fees Invoices.
3. The result of the assignment set out in clause 2. above is that the Assignee has no further call on the Assignor for any reason whatsoever and any claim potential or otherwise, either in law or in equity that the Assignor may or may not have against the Assignee is now settled once and for all, fully and finally.

[43] The deed was signed by Ms Rusk on behalf of Aurora on 14 November 2017 and sent for countersigning to Mr Jaques.

[44] Before the deed was signed, Mr Jaques requested copies of the invoices to IBSC via email, and details of the WIP reports underpinning them. Ms Rusk says she considered it was not consistent with her professional obligations to provide such information without IBSC’s consent. Because IBSC was no longer Aurora’s client, she was not unable to contact Mr Flitten directly. She suggested that Mr Jaques liaise with Mr Flitten to obtain the information. Aurora did however provide a spreadsheet summarising the WIP and fees billed to IBSC.

[45] On 24 November 2017, Mr Jaques requested WIP reports. He noted that until he received these, he did not consider Aurora had effectively assigned the rights under the invoices.

[46] On 27 November 2017, Mr Jaques noted that he had still not countersigned the deed. He asserted that a proper assignment had not been provided by Aurora and advised he would “take action on this”.

[47] Ms Rusk says Mr Jaques did not return a signed copy of the deed to her, but it is he who has provided a copy that he has signed with the Authority. Mr Jaques acknowledges signing the deed. Aurora says he did so without requesting any further information or documentation from Aurora.

[48] At the investigation meeting Mr Jaques acknowledged signing the deed and that he was bound by it, but was unclear about the date he signed it.

[49] By October 2017 Mr Jaques had started employment as a solicitor with another law firm. IBSC changed its representation to that law firm. Mr Jaques took steps to recover the invoiced amounts from the debtor through that law firm by drafting and issuing invoices.

[50] In June and July 2018 Mr Jaques contacted Aurora requesting it provide invoices. Ms Rusk responded shortly, declining to provide them, saying it was a request for information already provided to Mr Jaques and IBSC.

Mr Jaques recovered \$38,395.48 from clients

[51] Aurora obtained a letter dated 18 August 2023 from a partner of the law firm Mr Jaques worked at subsequent to his employment with Aurora. The letter states Mr Jaques was in employment until October 2022, and that during his employment the firm rendered invoices to its clients that included “disbursements” for Aurora’s fees. It confirmed the money received from clients for those disbursements were paid to Mr Jaques from its trust account.

[52] The letter refers to four invoices having been issued by the firm, with a total of \$38,395.48 having been received and paid to Mr Jaques. Mr Jaques acknowledged drafting the four invoices himself. The four invoices are dated 25 August 2017, 23 April 2018, 26 April 2018 and 8 July 2019. Mr Jaques received two payments totalling \$25,490.90 on 28 June 2018, and two payments totalling \$12,904.58 on 10 June 2020 in relation to three invoices. A fourth invoice including a \$6,782.50 “disbursement” for Aurora’s fees was disputed by the client and settled for a lesser amount, and that

amount was not paid to Mr Jaques. At the investigation meeting Mr Jaques stated “we settled” because it was too hard to enforce their rights which left him with a shortfall.

[53] In his witness statement dated 10 July 2023, Mr Jaques claimed a total of around \$30,000 of the debt had been recovered. At the investigation meeting, he however acknowledged the amounts identified in the 18 August 2023 letter were in fact correct, and he had received \$38,395.48. There is therefore only a shortfall of \$4,896.72 between the aggregate value identified in the deed and the amount Mr Jaques recovered.

Statements of problem

[54] Nearly five years after the ROS was signed, in September 2022, Mr Jaques lodged a statement of problem asserting that when he signed the ROS he was “mistaken as to what he was signing, as Ms Rusk had “misled” him. He was seeking remedies including the balance of the sum assigned to him that he was unable to recover amounting \$12,814.58, and other losses for alleged breaches of the ROS. He also sought an amount of \$25,000 for hurt, suffering and distress due to Aurora’s alleged actions. In May 2023, Mr Jaques amended his claim to seek cancellation of the ROS alone.

Relevant law

[55] Section 162 of the Act provides the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under Part 2 of the CCLA. Within Part 2 of the CCLA are the following relevant provisions:

24 Relief may be granted if mistake by one party is known to another party or is common or mutual

- (1) A court may grant relief under section 28 to a party to a contract if,—
 - (a) in entering into the contract,—
 - (i) the party was influenced in the party’s decision to enter into the contract by a mistake that was material to that party, and the existence of the mistake was known to the other party or to 1 or more of the other parties to the contract; or
 - (ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
 - (iii) the party and at least 1 other party were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
 - (b) the mistake or mistakes resulted, at the time of the contract,—
 - (i) in a substantially unequal exchange of values; or
 - (ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an

obligation substantially disproportionate to the consideration for the benefit or obligation;

26 Decision to enter into contract not influenced by mistake if party aware of it

- (1) For the purposes of relief under section 28 in respect of a contract, the decision of a party to the contract to enter into it is not made under the influence of a mistake if, before the party enters into it and at a time when the party can elect not to enter into it, the party becomes aware of the mistake but elects to enter into the contract despite the mistake.
- (2) This section applies whether or not an application for relief is made.

27 Mistake caused by party seeking relief

The extent to which the party seeking relief (or the party through or under whom relief is sought) caused the mistake is one of the considerations that must be taken into account by the court in deciding whether to grant relief under section 28.

28 Nature of relief

- (1) If, under sections 24 to 26, the court has power to grant relief, the court may make any order that it thinks just.
- (2) In particular, but without limiting subsection (1), the court may do 1 or more of the following things:
 - ...
 - (b) cancel the contract:...

[56] The Court of Appeal has confirmed that s 149(3) does not operate as a statutory bar to setting aside certified s 149 agreements.⁴ Relying on the Court of Appeal's judgment in *TUV v Chief of New Zealand Defence Force*, as noted above the Authority has determined it has jurisdiction to examine the terms of the ROS and determine whether there is any basis for cancelling the ROS.⁵

Discussion

[57] The issues for the Authority to determine are firstly whether the ROS was entered into under a mistake and if so, secondly whether there is a basis for cancelling the ROS under s 28 of the CCLA and s 162 of the Act.

Parties' positions

[58] Mr Jaques asserts he was influenced to enter into the RoS by a mistaken belief that "there was still money lawfully owed on [the IBSC] invoices".

[59] This is not accepted by Aurora. Aurora says that the answer to the first of these issues is "no", because there was no mistake that qualifies for relief under the CCLA

⁴ *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] ERNZ 1 at [48] – [49].

⁵ *Jaques Applicant in 3191419 v Aurora Limited in 3262679* [2023] NZERA 733.

and Mr Jaques has received the full benefit of the agreement with Aurora. It says the second issue therefore does not need to be determined.

[60] In the alternative, and without detracting from its position on the first issue, Aurora says that the answer to the second question is also “no”, because:

- (a) Mr Jaques has affirmed the contract; and
- (b) to cancel the ROS, or provide any other relief to Mr Jaques in the circumstances would prejudice the security of contractual relationships generally, and be inconsistent with the purposes of the Act and the Authority’s equity and good conscience obligations.

Requirements for relief under s 28 CCLA

[61] In order for any relief to be available to Mr Jaques under the CCLA, s 24 requires that:

- (a) he was influenced in his decision to enter the ROS by a mistake;
- (b) the mistake was material to him;
- (c) the existence of the mistake was known to Aurora;
- (d) the mistake resulted, at the time of the ROS, in:
 - (i) a substantially unequal exchange of values; or
 - (ii) a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation.

Evidential findings

[62] Having heard from Mr Jaques and Ms Rusk at the investigation meeting, I am satisfied Ms Rusk’s evidence regarding Aurora’s billing practices, her lack of knowledge of the arrangement Mr Jaques entered with IBSC, and Mr Jaques’ generation of invoices without sending them to the IBSC is more reliable than Mr Jaques’ recollections. There were a number of occasions at the investigation meeting when Mr Jaques’ was questioned about documents, but later had to acknowledge his recollection was inconsistent with documents. He explained this was as a result of “drilling” down further into the details, and that he was happy to admit when he was shown to be wrong about evidence given.

[63] The Authority also finds Ms Rusk's evidence regarding discussions at mediation are also more reliable. Her evidence more detailed around the circumstances in which the issue of including IBSC's invoicing in resolution of the employment relationship problem was raised and agreed at mediation. Of note, I accept that it was at Mr Jaques' suggestion that IBSC's debt be assigned to him, and that he accepted the collectability of the fees would be an issue for him.

Analysis

[64] Aurora says there was no qualifying mistake. The Authority agrees.

[65] In relation to relevant considerations under s24 of the CCLA, I largely accept Aurora's submissions. There was no qualifying mistake because:

- (a) Mr Jaques was aware that Aurora had written off the invoices and issued credit notes for the invoices. Having been advised of those facts some three weeks prior to mediation, he did not request any further information or documentation from Aurora leading up to mediation or during it. He entered into the agreement anyway. He was arguably careless in not clarifying the position with Ms Rusk (as to whether the invoices had been reinstated) after becoming aware they had been written off.
- (b) If there was a mistake, it was not known to Ms Rusk. From Ms Rusk's perspective, Mr Jaques knew that the invoices had been written off and sought to have the underlying debt in those invoices assigned to him. If Mr Jaques was acting under a mistaken belief of some sort, there is no evidence Ms Rusk encouraged him to hold such belief or that she had actual knowledge of such a mistake.
- (c) Mr Jaques took on the risk that he would not be able to recover the fees due to not being permitted to practice on his own account. Ms Rusk's evidence was clear it was Mr Jaques who suggested that Aurora assign the IBSC invoices to him, evidence which I accept. She recalled being concerned that Mr Jaques would be unable to invoice the fees because he was not authorised to practice on his own account, and raised this in joint session. This was discussed at mediation, and Mr Jaques agreed that this was a matter for him to deal with.

- (d) Mr Jaques was assigned the interest in Aurora's invoices to IBSC. That is what he received. The status of the invoices in Aurora's accounting system has no bearing on the underlying debt, which was assigned to Mr Jaques pursuant to the ROS.
- (e) Any mistaken understanding by Mr Jaques (as to whether invoices were required to be provided by Aurora or otherwise) did not go to the essential nature of the contract – the essence of the contract was that the debt was assigned, and this is what occurred.

[66] If I am wrong on the issue of whether there was a mistake, any such mistake did not result in a substantially unequal exchange of values or benefit or obligation that was substantially disproportionate at the time the ROS was entered into, as the underlying debt had value and was assigned to Mr Jaques. Indeed, Mr Jaques relied on the ROS and the deed to recover payment from IBSC's clients. Further, rather than pursuing the matter of invoices with Aurora as a compliance matter in the Authority, he pursued the debts without them, and was largely successful in doing so. Mr Jaques ultimately received \$38,395.48 of the sums assigned to him under the deed. He recovered those amounts regardless of the fact Aurora declined to provide him with invoices in relation to them. In respect of the fourth invoice that was settled, the evidence shows Mr Jaques did not receive this money. The evidence shows he and the other law firm reached a settlement with the relevant client, whereby the client paid a lesser amount.

[67] Had the Authority been satisfied the elements of s 24 had been met, it would not have found the relief sought, being cancellation, was warranted in all the circumstances as a just outcome under s 28 of the CCLA. Such an outcome would further not align with the underlying purpose of s 149 which is to promote the full and final resolution of employment relationship problems at an early stage.⁹ Nor would it sit comfortably with the Authority's obligation to act as it thinks fit in equity and good conscience.⁶ No relief is granted.

Outcome

[68] The Authority is not satisfied there is a qualifying mistake for which relief should be granted under s 28 of the CCLA and s 162 of the Act.

⁶ Employment Relations Act 2000, section 157(3).

Costs

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[70] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Aurora may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Jaques will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[71] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁷

Sarah Blick
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1