IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 513
5517908

	BETWEEN	KVB KUNLUN NEW ZEALAND LIMITED Applicant
	A N D	ANDRE DE WET Respondent

Member of Authority:	James Crichton
Representatives:	Jo Douglas, Counsel for the Applicant Timothy Oldfield, Counsel for the Respondent
Investigation Meeting:	18 November 2014 at Auckland
Date of Determination:	15 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By Statement of Problem filed on 9 September 2014, the applicant (KVB Kunlun), alleged various breaches of the employment agreement of the respondent (Mr de Wet), sought damages, penalties and costs.

[2] In response, Mr de Wet claimed a settlement agreement between himself and KVB Kunlun constituted a complete defence to the applicant's claim and invite the Authority to strike out the proceedings in reliance on Clause 12A of the Second Schedule to the Employment Relations Act 2000 (the Act).

[3] A telephone conference was convened with counsel on 7 October 2014 at which it was agreed that the question whether there was accord and satisfaction between the parties preventing KVB Kunlun from proceeding needed to be dealt with as a preliminary issue and the matter proceeded exclusively on that basis.

[4] This determination then concerns only the question whether the record of settlement pursuant to s.149 of the Act is a complete defence to KVB Kunlun's claim.

[5] Mr de Wet was employed by KVB Kunlun as Senior Manager, Compliance and Operational Risk. The operative individual employment agreement is dated 29 July 2013.

[6] Part of Mr de Wet's responsibility was to report to KVB Kunlun on breaches of the various statutory and regulatory requirements within KVB Kunlun's operating matrix.

[7] As a matter of fact, there were breaches of the regulatory framework during Mr de Wet's employment and KVB Kunlun alleges that Mr de Wet failed in his disclosure obligations.

[8] In the meantime, in the context of a restructure, Mr de Wet's employment came to an end pursuant to a record of settlement under s.149 of the Act. The effective date for the termination of the employment was 17 April 2014.

[9] KVB Kunlun alleges that after that date, information came into its possession which was not known to it prior to the date of settlement with Mr de Wet and that, had it had that information when it settled with Mr de Wet, the settlement might well have been on different terms and/or not taken place at all.

[10] The essence of KVB Kunlun's case is that it seeks to proceed against Mr de Wet in respect of matters which were not known to it at the time it settled with Mr de Wet whereas Mr de Wet seeks to use the settlement agreement as a shield to prevent the reopening of any further proceeding between the parties.

Issues

[11] The fundamental question for the Authority to decide is whether the effect of the settlement agreement between the parties acts as a complete bar to any subsequent proceeding by either party.

[12] A second issue is the question of the knowledge held by KVB Kunlun about the disputed matters and whether there is any particular category of person within KVB Kunlun who was required to know about the disputed matters. That second

issue only comes into play if I decide that the settlement agreement is not a complete bar to further proceedings.

[13] Accordingly, I propose to address the following questions:

(a) Is the record of settlement a complete bar to subsequent proceedings; and

(b) Who at KVB Kunlun needs to know about the disputed matters?

Is the record of settlement a complete bar to subsequent proceedings?

[14] I am satisfied that the record of settlement in this case is a complete bar to subsequent proceedings and accordingly Mr de Wet can rely on the settlement as a shield to any subsequent proceeding brought against him in respect of his employment at KVB Kunlun.

[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 those two principles.

[16] Dealing with the statutory enactment 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 that agreement was *"signed off"* by a Department of Labour mediator in terms of s.149.

[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.

[18] Indeed, as Judge Inglis said in *Young v. Board of Trustees of Aorere College* [2013] NZEmpC 111:

> *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.*

[19] There is no suggestion in the present case, similar to *Young*, of duress and accordingly it seems to me that KVB 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 for duress issues, a complete bar to any reopening.

[20] Of course, not all settlement agreements do pass through the s.149 process and where they do not, the common law applies.

[21] The importance of this distinction is that two of the authorities which KVB Kunlun relies upon are cases involving settlements which fell short of the statutory provision in s.149. In *Marlow v. Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206, on an accord and satisfaction argument, the Court determined that the agreement between the parties only settled matters that both parties were aware of and in consequence the plaintiff could bring a health and safety claim because the settlement between her and the former employer concerned redundancy. Critically for our purposes, that case was decided before the enactment of the Employment Relations Act 2000 and there was no similar provision (to s.149) at play in the decision.

[22] Similarly, *Rickards v. Ruapehu District Council* [2003] 1 ERNZ 400 also concluded, applying *Marlow*, that the settlement between the parties was limited to claims both parties knew about at the time of the settlement. Again, *Rickards* did not involve a s.149 situation. In fact, like *Marlow*, the significant events in *Rickards* took place during the currency of the Employment Contracts Act 1991 although by the time the matter came before the Employment Court, the current statute was in place. Notwithstanding that, the legal basis on which *Rickards* fell to be considered was the same as in the case of *Marlow*, namely the former Employment Contracts Act 1991 regime where there was simply no equivalent provision to the present s.149 process.

[23] I am satisfied that if, in the present case, the parties had not used the s.149 process in its entirety, there might have been a basis on which KVB Kunlun could argue its claims could proceed.

[24] Certainly on the basis of *Marlow* and *Rickards*, it is possible that a proper construction of the words used by the parties in the settlement agreement could have

been construed so as to allow claims about which the parties were not aware at the time they entered into the agreement. To quote the words of Chief Judge Goddard in *Marlow*:

> *The settlement cannot possibly be taken to extend to preclude the plaintiff from making claims coming to light later out of unrelated events during the employment.*

[25] After all, what KVB Kunlun says in its claim against Mr de Wet is that until well after the settlement with him, it was unaware of circumstances which it claims Mr de Wet ought to have alerted it to and which caused it loss.

[26] Because of the nature of the decision I have taken, I need to express no view about the weight I would attribute to that claim.

[27] If the settlement in the present case had not passed through the s.149 process, it cannot be assumed that KVB Kunlun would have succeeded; all that can be said is that its claim would not have been precluded as I am satisfied is the case because of the effect of s.149 of the Act. This is because, as Tipping J said in *Tag Pacific Ltd v. The Habitat Group Ltd* (1999) 19 NZTC (CA90/98):

> *Although each case will turn on the words used in their factual setting, … an intention to release an unknown claim is not likely to be inferred, even when apparently very general words have been used.*

Who at KVB Kunlun needs to know about the disputed matters?

[28] By virtue of the decision that I have already made which precludes KVB Kunlun from proceeding further with its claim, this question is effectively otiose and I need take it no further.

Determination

[29] I am satisfied as a consequence of the statutory provision of s.149 of the Act, through which process the settlement agreement in the present case passed, that KVB Kunlun cannot raise any matters pertaining to the employment relationship between the parties because the record of settlement executed by the parties and passed through the s.149 process acts as a complete shield to such proceedings.

[30] I am satisfied that the proper course of action is to strike-out KVB Kunlun's proceedings and in doing that, I rely on the power granted to the Authority under

clause 12A of the Second Schedule to the Act which allows the Authority to strike-out proceedings which are either frivolous or vexatious.

[31] I do not say that the proceedings are vexatious; and in determining that they are frivolous I adopt the definition of Judge Finnigan in *STAMS v. MM Metals Ltd* [1993] 1 ERNZ 115 where the learned Judge defined *"frivolous"* as futile.

[32] These proceedings are futile because they are in effect statute-barred.

Costs

[33] Costs are reserved but the parties are urged to try and resolve costs on their own terms. If that should not prove possible, Mr de Wet is to file and serve his submissions seeking the fixing of costs in the Authority and KVB Kunlun has 14 days thereafter to file its response.

[34] I will then deal with the fixing of costs on the papers.

James Crichton
Member of the Employment Relations Authority