

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 141  
5535494

BETWEEN                      DAVID SAUAKI LUMSDEN  
   Applicant  
  
A N D                              SKYCITY MANAGEMENT  
   LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:            Applicant in person  
   Kylie Dunn, Counsel for the Respondent  
  
Submissions Received:    1 May from the Applicant  
   8 May from Counsel for the Respondent  
  
Investigation Meeting:    On the papers  
  
Date of Determination:    15 May 2015

---

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

---

- A. Pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000, paras.1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem are dismissed.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] The respondent, SkyCity Management Limited (SkyCity), has made an application to the Authority seeking orders that:

- (a) Certain matters in the proceeding brought by the applicant, Mr David Lumsden, be dismissed as frivolous or vexatious pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act);  
and

- (b) Paragraph 4.7 of the amended statement of problem be excluded from the Authority's file on the basis that it records a without prejudice communication.

[2] Mr Lumsden opposes SkyCity's application.

[3] Both parties have agreed that this matter be dealt with by the Authority on the papers and have filed helpful submissions.

[4] Following receipt of the application, another Member of the Authority, Member Campbell, considered the amended statement of problem and removed para.4.7 on the basis that it referred to discussions held at mediation.

[5] The current application before the Authority relates to paras.1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem.

### **Background facts**

[6] SkyCity operates an entertainment complex in the Auckland central business district including food and beverage services.

[7] Mr Lumsden was employed by SkyCity as a bar tender at The Grill Bar and Restaurant from 20 February 2013 until 25 November 2014.

[8] In October and November 2014, Mr Lumsden raised various complaints concerning his employment with SkyCity's human resources department.

### **Settlement Agreement dated 25 November 2014**

[9] On 25 November 2014, the parties attended mediation, a service provided by the Ministry of Business, Innovation and Employment (MBIE) to resolve Mr Lumsden's complaints. The mediation resulted in a settlement agreement which was signed by both parties and certified by the mediator pursuant to s149 of the Act.

[10] The certification included the following:

(c) *I have been requested by the parties to sign the attached agreed terms of settlement; and*

...

(f) *I am satisfied that the parties understood the effect of ss.148A, 149(1) and (3), and have affirmed their request that I should sign the agreed terms of settlement.*

[11] Clause 2 of the settlement agreement stated:

*The terms of this settlement and its contents, have been reached on a no admission of liability basis and are in full and final settlement of all and any claims whatsoever that David Lumsden and SkyCity Food & Beverage have or may have against the other arising from or related to this employment relationship including the termination thereof.*

[12] Paragraph 11 of the settlement agreement stated:

*This is the full and final settlement of all matters between David Lumsden and SkyCity Food & Beverage arising out of their employment relationship including the termination thereof.*

### **Mr Lumsden's Statement of Problem -19 December 2014**

[13] On 19 December 2014, Mr Lumsden filed a statement of problem in the Authority claiming that SkyCity was in breach of the settlement agreement. On 19 January 2015, SkyCity filed a statement in reply denying any breach of the settlement agreement. On 27 March 2015, Mr Lumsden filed an amended statement of problem which included in para 4.7 reference to discussions at mediation. This paragraph was removed by Member Campbell.

### **Sky City's Application to dismiss – 16 April 2015**

[14] On 16 April 2015, SkyCity filed an application pursuant to clause 12A of schedule 2 to the Act to dismiss parts of Mr Lumsden's proceeding on the grounds it is frivolous or vexatious. Particularly, SkyCity seeks dismissal of paragraphs 1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem.

[15] Mr Lumsden has raised matters in the above paras of the amended statement of problem which were the subject of the mediation and resulting settlement agreement signed by the mediator on 25 November 2014. For example in paragraph 3 of the amended statement of problem, Mr Lumsden alleges his resignation amounted to a constructive dismissal. In paragraph 4, Mr Lumsden refers to complaints made by him to SkyCity's human resources department in October 2014 and to the facts that led to the mediation on 25 November 2014.

[16] Clause 11 of the settlement agreement is clear, that it is in full and final settlement "*of all matters between Mr Lumsden and SkyCity arising out of the*

*employment relationship, including the termination thereof*". This must include Mr Lumsden's complaints prior to the mediation and his claim of constructive dismissal. Paragraphs 4.14 and 4.15 of the settlement agreement relate to allegations that SkyCity breached its obligations to another of its former employees. That is not a matter for Mr Lumsden to pursue.

[17] Mr Lumsden agreed to the terms of the settlement agreement and a mediator certified that the settlement agreement was signed pursuant to s.149 of the Act.

[18] Ms Dunn for SkyCity refers in her submissions to a decision of the Employment Court in *STAMS v MM Metals Ltd*<sup>1</sup> in which the Employment Court held that a matter was "frivolous" where the issue was subject to a full and final settlement agreement.

[19] Ms Dunn also refers to *Philpott v ANZ National Bank Ltd*<sup>2</sup>, a determination of the Authority which followed *STAMS*. Mr Philpott claimed the existence of an unresolved employment dispute despite there being a settlement agreement. The Authority dismissed Mr Philpott's claim pursuant to clause 12A of Schedule 2 of the Act on the grounds it was frivolous and vexatious.

[20] In his submissions in opposition to the application to dismiss, Mr Lumsden argues that s.238 of the Act applies. Section 238 states:

***No contracting out***

*The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.*

[21] Mr Lumsden's argument appears to be that ss.149 and 238 of the Act are in conflict and that the plain reading of the Act means that SkyCity is unable to rely on s.149 as it would amount to a contracting out of the Act which is prohibited by s.238 of the Act.

[22] I do not accept Mr Lumsden's argument. Section 149 is a statutory mechanism for parties to reach a full and final settlement of an employment relationship problem. By signing a settlement agreement under s.149 and having it certified by a mediator, Mr Lumsden accepted that:

---

<sup>1</sup> [1993] 1 ERNZ 115

<sup>2</sup> [2011] NZERA Auckland 538

*s.149(3))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.*

[23] Mr Lumsden is attempting, in my view, to bring the terms of the settlement agreement before the Authority in breach of s.149(3)(b) of the Act. Further, as Ms Dunn has submitted, on Mr Lumsden's analysis of the Act, all settlement agreements would be unenforceable, including those signed off by a mediator pursuant to s.149 of the Act. I agree with Ms Dunn that this would be an absurd result and is not what is intended by the Act.

### **Determination**

[24] I accept Ms Dunn's submission that paras.1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem have no prospect of success. They relate to allegations that have been dealt with, and settled, by the parties and recorded in the settlement agreement.

[25] I make an order pursuant to clause 12A of Schedule 2 of the Act dismissing the matters set out in paras.1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem.

### **Costs**

[26] Costs are reserved.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**