IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 249
5328358

	BETWEEN	MICHAEL MAHER
	AND	APEX GENERAL LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	Richard Harrison for applicant Kathryn Beck for respondent
Investigation meeting	24 May 2011
Determination:	10 June 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Mr Maher's employment as one of the respondent's commercial insurance brokers ended in September 2010. At that time he accepted that he had been made redundant and left on agreed terms. He subsequently learnt that the respondent had almost immediately taken on a new broker. This caused him to question whether his redundancy was genuine and led him to seek legal advice. He now wishes to pursue a personal grievance for unjustified dismissal as well as claims relating to alleged breaches of the duty of good faith and of his employment agreement.

Issues

[2] The respondent, Apex General Limited (Apex), denies that there was an unjustified dismissal but says in any event that the Authority cannot determine that question because the matters Mr Maher raises were the subject of a full and final settlement entered into by the parties on or about 16 June 2010.

[3] This determination deals with the preliminary issue of whether there is an accord and satisfaction between the parties, and in the alternative, an argument that Mr Maher is estopped from pursuing his personal grievance.

Was there an Accord and Satisfaction?

[4] Over a period of approximately a week in June 2010 the General Manager of Apex, Andrew Hay, held a series of meetings with Mr Maher and his colleagues to discuss a proposal to make changes in the Commercial Broker team. On 16 June Mr Hay arranged a one on one meeting with Mr Maher and confirmed the outcome: the team was to be reduced in number from six to five and Mr Maher had been selected as the person to go. Mr Hay presented Mr Maher with a letter which outlined the decision, noted that there were no redeployment opportunities available and went on to set out what Apex was prepared to offer as an "*enhanced redundancy entitlement.*" As the letter explained, this offer was subject to certain conditions.

[5] Mr Maher told the Authority that when he received the letter of 16 June:

> *"I contemplated challenging the way Apex had handled making me redundant, but I also assumed that Mr Hay was being honest with me in saying that he was reducing the number of brokers…I was afraid if I challenged the redundancy, I would risk losing the 'enhanced redundancy offer" and so I felt that I had no choice but to accept the terms…"*

[6] Mr Maher explained in his evidence that he had not been told exactly why he was the one selected for redundancy. Without more information, he said, he could not judge whether his selection was fair and this left him feeling uncertain about whether he had been properly rated in the selection process. However, at the time, he felt uncomfortable about suggesting that someone else should have been picked and so felt it better not to "rock the boat."

[7] Overnight Mr Maher considered the letter and sought advice about its contents from a friend with some experience in the area. Mr Maher told the Authority that he saw his choices as being to accept the offer or raise a personal grievance and at the time he felt the better option was to accept the offer.

[8] The next day he met with Mr Hay again to discuss some issues he had with the offer. Both agree that these discussions covered the term of the restraint of trade, payment of outstanding commissions, and the need to change some incorrectly recorded details about the employment agreement. They also discussed the termination date and whether Mr Maher would receive the "enhanced entitlement" if he succeeded in finding a new job before that date. Agreement was reached and the letter was redrafted to incorporate the matters discussed.

[9] Mr Maher claims to have sought two further concessions: to have the redundancy payment recorded as compensation (in order to avoid tax) and a guarantee that he would be kept on if any of the other brokers left within the notice period. Mr Hay disputes that these matters were raised let alone agreed to and they are not mentioned in either version of the letter.

[10] Crucial references to the settlement being "full and final" remained unchanged in the final version, which both men proceeded to sign. The relevant parts of that letter are as follows:

> *"Whilst we believe we have followed due process in relation to this redundancy steps, we are happy to offer you an enhanced redundancy entitlement. This is primarily in recognition of your long service with Apex General Limited. However, this enhanced offer is made on the strict condition that, if accepted, it will be in full and final settlement of all matters between us.*
>
> *The enhanced offer is as follows:*
>
> *(1) Your redundancy will be effective at the 17th September 2010. (Termination date.) (Or before if an employment opportunity becomes available) with no less than four weeks notice up until the 31st July 2010 and after this date (31/07/2010) has expired a two week notice period will apply.*
>
> *(2) If you agree to the condition above regarding settlement, then at the agreed termination date we will provide you with:*
>
> *(i) 2 weeks pay in lieu of notice (as per contract)*

(ii) An ex gratia payment of 2 months gross income (Annual income/12), less PAYE

(iii) Payment of all holiday pay and all statutory entitlements due at termination dat.

In the meantime you will be required to carry out your normal duties on a day to day basis, to the normal standard.

Apex Directors will do what we can to assist with future employment opportunities and we are happy to provide you with reasonable time off to undertake interviews during working hours, if required.

During the period until termination date, we will required a hand over process to the existing clients you currently manage on our behalf.

At termination date the following will apply:

- *You must immediately return all property of Apex that you have in your possession or control, including any documents, software, file notes and other materials and copies of same (whether relating to the business of the company, its clients, and its employees or ex-employees.)*

- *Confidentiality obligations as set out in your employment agreement shall continue to apply in full after your resignation.*

- *You acknowledge the restraint of trade as set out in your employment agreement (items 22, 22.1, 22.2, 22.3) will remain in force for the period described in the agreement of 6 months from termination of employment with Apex or any related company (as that term is defined in the Companies Act 1993.)*

- *You acknowledge that, save as set out in your redundancy agreement, no other monies including in relation to notice, redundancy compensation, salary, holiday pay, costs or damages) are due and owing to you by Apex.*

- *The terms of this agreement and the discussions leading up to it are confidential to you and Apex.*

As we have said, if you wish to accept this enhanced offer, then please sign below. However, Apex shall pay you and you will accept the payments and benefits referred to above in full and final settlement of all claims, rights, or actions you have or may have against Apex, and any subsidiary or related company (as that term is defined in the Companies Act 1993) or any trustees, directors, agents, officers or employees of Apex and all such companies, in any way relating to arising out of your employment or resignation.

You can obtain independent advice before signing this if you wish to."

[11] Mr Maher's employment continued until 17 September as planned. I was told that the lengthy notice period was to enable a managed handover of Mr Maher's clients to other colleagues. 70% of those clients (the smaller accounts) were to be moved to a different team which would provide a different level of servicing

(managing the accounts solely by phone and email.) The remaining 30% would be distributed amongst colleagues in the Commercial Broker team.

[12] Upon his departure both he and the respondent complied with the agreed terms.

[13] Mr Hay's view is that Apex relied on the agreement, and kept its side of the bargain. He said that someone like Mr Maher, who had operated in the business world for some time, must be understood to have signed with full knowledge of the consequences of what he was doing, and should have known that if he entered into a settlement agreement he took the risk that circumstances might subsequently change. It is the respondent's position that Mr Maher should not be able to pursue a claim as well as benefitting from the agreement.

[14] Mr Maher says he accepted the agreement on the basis that the redundancy was genuine and also on the basis that Mr Hay had reassured him that in the event a position became available during his notice period he would be retained. The significance of the latter point is, in the applicant's submission, that in this way some employment obligations remained outside the terms of settlement, and:

> *"if opportunities did arise over the next three months, then these would at least be disclosed and discussed with him so that he would have the opportunity for on-going employment in whatever form that would be…"*

[15] As noted already, Mr Hay denies any such undertaking. Given that it is not mentioned in the letter (when other changes were recorded) I am not persuaded on balance that Mr Maher's recollection is correct.

[16] In any event, Mr Hay says that there were no vacancies during Mr Maher's notice period. During that time Mr Hay knew one of the team was suffering ill health but he did not know when or even whether that broker would leave his job. In the end the person in question did leave but not until January 2011.

[17] Mr Hay does acknowledge however that the risk that he could lose another staff member was an added incentive to take on a new broker soon after Mr Maher's departure. He explained the circumstances in which the new broker was hired by

saying that sometime in August he was contacted by a former employee who negotiated to rejoin the organisation (part-time) on the basis that she would bring certain new clients into the business. Her hours of work did not change in January when the other broker left, giving a net result of 4.6 full time equivalent staff in the Commercial Broker team where there had been 6 full time brokers during Mr Maher's employment.

[18] Mr Harrison put it to Mr Hay that it was open to him, during the notice period, to offer Mr Maher the part-time position that was made available to the new broker. Mr Hay agreed, but stressed that the part-time broker was engaged on the understanding that she would bring in business to cover the cost of the position. He said also that he did not think he was obliged to offer that or any job to Mr Maher any more than Mr Maher would have been obliged (had he done so) to take it and, in so doing, lose his right to leave with an "enhanced entitlement" under the agreement.

[19] Mr Maher asserted that during his notice period the respondent also contemplated employing an additional person in the team to which 70% of his clients (the smaller ones) were being transferred. Email correspondence was provided to support this assertion. Mr Hay told the Authority that he considered this but in the end, no redeployment opportunity arose because he decided against employing another person in that team.

Determination

[20] The first argument advanced for Mr Maher is that back in June 2010 he made no claims of the respondent and accepted the restructuring. He says that with no live dispute to be settled there could be no accord and satisfaction.

[21] In response Apex argued that there did not need to be a formal dispute on record.[1] It says Mr Maher was given the opportunity to consider the offer of settlement and seek advice. He raised a number of points that he wanted the respondent to address and a discussion followed before these matters were resolved. Therefore it says there was a dispute to be settled.

[1] *Cabletalk Astute Network Services Limited v Cunningham* [2004] 1 ERNZ 506

[22] Although the parties did not find themselves engaged in an acrimonious dispute or one that was pursued formally there were nonetheless issues in contention between them which were discussed and resolved. I am satisfied therefore that there was a live dispute and that it was settled in terms set out in the letter of June 2010.

[23] Next the applicant says that even if there were a settlement, it would have been limited to matters within the knowledge of both parties. Mr Maher submits that the issue of whether the redundancy was genuine could not have been settled because (as he alleges) he had been misled on that point and entered into the settlement agreement without full relevant information. He says that he accepted the settlement offer on the basis that the redundancy was genuine and would not necessarily have done so if he had suspected otherwise.

[24] The respondent countered by saying that at the time the matters in contemplation (as set out in the June letter) included everything to do with Mr Maher's termination for redundancy, including issues relating to whether it was genuine as well as all aspects of the redundancy process. There was a common understanding between the parties as to what was being settled, and it included a claim relating to the respondent's justification for the redundancy.

[25] The evidence confirmed that, at the time he was advised of his redundancy, Mr Maher had concerns about the selection process; concerns which therefore formed part of the background to the negotiations about the ending of his employment and his acceptance of compensation for the loss of his job.

[26] Issues like selection and consultation go directly to the genuineness of the redundancy. They cannot be divorced from substantive justification. It is also arguable that if there was no question about the genuineness of the redundancy then there would be no obligation from which the respondent might have needed to purchase a release. I am satisfied that the genuineness of the redundancy was within the scope of the issues settled in the letter of June 2010.

[27] Finally the applicant alleges that the respondent failed to act in good faith in the period after the agreement was signed (by failing to tell Mr Maher about the circumstances relating to his colleague's ill health and by failing to continue to

consider redeployment.) Mr Harrison argued that the parties could not have settled such matters in advance and could not contract out of the personal grievance provisions in relation to them (or to any other matters which had yet to arise.) To say otherwise, he asserted, was to argue that the respondent would be free from all obligations to Mr Maher after 17 June 2010. Mr Harrison argued that the respondent's ongoing obligations during the notice period obliged it to offer Mr Maher redeployment options even after the signing of the agreement.

[28] The respondent acknowledged that the June 2010 agreement could not be binding in respect of matters that were not in contemplation at the time or in respect of unrelated future events. It concedes that Mr Maher would have been entitled to raise any completely new employment problem that developed after June 2010. The respondent argued rather that redeployment issues like questions over the genuineness of the redundancy were not new problems but fell squarely within the agreement. It also argued that changed circumstances after the event (such as the illness of a colleague or an approach from someone who could bring work to the business) could have no bearing on the status of the original agreement.

[29] To accept the applicant's argument on this point would be to accept that Mr Maher could revoke the agreement but the respondent could not. I cannot accept this. I am satisfied that the question whether the agreement was binding must be determined in relation to the circumstances at the time it was entered into, not subsequently. I am satisfied that there was full and final settlement of all issues relating to the termination for redundancy, including its genuineness, and the availability of redeployment. There was also consideration in the form of an extended notice period and an ex gratia payment of two months' salary, for the release from obligations.

[30] The respondent has therefore proved accord and satisfaction.

Estoppel

[31] The findings in relation to accord and satisfaction dispose of the employment relationship problem. It is therefore unnecessary to determine the alternative argument of estoppel.

Costs

[32] Costs are reserved. In the event that this issue cannot be resolved between the parties any application for costs, with submissions in support, must be lodged within 28 days of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority