New Zealand Employment Relations Authority Decisions

McKinley v McLanachan Partnership (Auckland) [2017] NZERA 68; [2017] NZERA Auckland 68 (14 March 2017)

Last Updated: 1 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 68
5529652

BETWEEN LESLEY MCKINLEY Applicant

AND KAREN ANNE AND KENNETH RAE MCLANACHAN PARTNERSHIP Respondent

Member of Authority: Robin Arthur

Representatives: Sarah McKinley, Advocate for the Applicant

Gary Tayler, Advocate for the Respondent

Investigation Meeting: On the papers

Determination: 14 March 2017

DETERMINATION OF THE AUTHORITY

A. The terms of a settlement agreement made between the parties and certified under s 149 of the Employment Relations Act 2000 operate to prevent the Authority investigating and determining further claims by Lesley McKinley arising from his former employment relationship with the Karen Anne and Kenneth Rae McLanachan Partnership.

Employment Relationship Problem

[1] This determination concerns the effect of a settlement agreement certified by a Ministry of Business mediator under s 149 of the Employment Relations Act 2000 (the Act) on the ability of a party to make further claims if one of the agreed terms was that the settlement was full and final in respect of all employment relationship matters between the parties.

[2] Lesley McKinley applied for an Authority investigation and determination of whether his former employers, the Karen Anne and Kenneth Rae McLanachan

Partnership (the partners), had paid all his minimum entitlements to wages, holiday pay and annual leave. The partners opposed his application on the grounds they had a “full and final” settlement agreement with Mr McKinley, certified under s 149 of the Act, which meant he could not pursue any claims related to his former employment relationship with them.

[3] The parties’ representatives agreed this disputed point could be determined “on the papers”, that is on the basis of submissions from them and by referring to the statement of problem, statement in reply and other documents lodged with the Authority.1

How the claim arose

[4] The partners’ farming businesses include Te Kumi Station, a farm on the East Coast. Mr McKinley had worked on the farm for around 14 years. He was the farm manager at the time he was severely injured in an accident on the farm on 27 October

2012. While riding a quad bike he hit a tree. The collision broke his neck and caused a serious brain injury. As a result of those injuries Mr McKinley, who is now aged in his mid-60s, has been left unable to return to employment of any kind.

[5] While Mr McKinley was not able to work from the date of his accident, his employment relationship with the partners did not formally come to an end until 22

July 2014. The end of the relationship was one term agreed in a settlement agreement he and the partners signed following mediation that day. A Ministry of Business mediator certified the agreement under s 149 of the Act. Further details of the terms of that agreement have been referred to later in this determination. They included provision for confidentiality of those terms and a compensation payment. One term also provided that their agreed terms were "full and final settlement of all matters ... arising out of their employment relationship".

[6] On 14 December 2015 the District Court sentenced the partners on a charge laid by Worksafe under the Health and Safety in Employment Act 1992.2 The

partners had entered a guilty plea.

1 Employment Relations Act 2000, s 174D.

2 *Worksafe New Zealand v Kenneth McLanachan and Karen McLanachan* [2015] NZDC 24763.

[7] In considering what sum to award as reparation for the emotional harm caused to Mr McKinley as a result of the accident, Judge Collins found an aggravating factor was the partners' failure to clearly identify hazards and eliminate or minimise those hazards on the farm. The partners failed to properly plan for health and safety and to give clear direction that no one on the farm was to use a quad bike without wearing a helmet.

[8] In assessing the level of reparation that could be ordered his Honour said a figure towards $70,000 would have been appropriate because of the "life-long, life- changing impact on this man, and the particular distress caused to him by how he now has difficulty interacting and relating to his family". However he reduced that reparation amount to $50,000 taking into account "the figure" reached in the mediation on employment matters.3

[9] The partners' counsel had sought Mr McKinley's consent to waive confidentiality in the details of the employment mediation settlement so that information could be referred to in the District Court proceeding. Documents Mr McKinley's representative provided the Authority included a "notice of waiver" said to have been given to the judge on 14 December 2015. It was signed on Mr McKinley's behalf by his daughter who held his enduring power of attorney. The

notice waived "confidentiality under s 148(1) of the Act".4

[10] The judge's sentencing notes refer to being told the figure agreed in the employment mediation. He ordered the figure not be published. He also said he did not "entirely agree" with a submission made on the partners' behalf that, in deciding on reparation for emotional harm, the court should recognise "a full and final settlement was reached" in the employment mediation. The judge noted that settlement was under different legislation and in a different context. However, as already noted, he reduced the reparations sum ultimately ordered to take some account of a compensation amount paid under the s 149 settlement agreement.

[11] Judge Collins ordered the two partners to each pay $25,000 as reparation for emotional harm and a fine of $10,000.

3 *Worksafe New Zealand* , above n 2, at [27].

4 *McKinley v Karen Anne & Kenneth Rae McLanachan Partnership* [2016] NZERA Auckland 401 (09

December 2016, Member Craig) at [9].

[12] On 30 September 2016 a statement of problem lodged in the Authority on Mr McKinley's behalf sought an investigation of "breaches and non-compliance in regard to his minimum entitlements while employed by [the partners]". It asked he "be compensated for monies not received".

[13] The statement of problem included references to what was said during mediation on 22 July 2014. When asked by the Authority to revise the statement of problem by removing those details, Mr McKinley's representative declined to do so on the grounds that confidentiality in the mediation was waived for the purposes of the District Court proceedings and so no longer applied. The partners, through their representative, opposed material about what was said or not said in mediation being included in the statement of problem.

[14] After receiving submissions from the representatives on this disputed point, the Authority issued a determination that found any waiver made for the purposes of the court proceedings was limited to the provision to the judge of the settlement agreement. The waiver did not apply to what was said in the course of mediation.5

As a result of that determination, two passages were removed from Mr McKinley's

statement of problem.

[15] The partners then lodged a statement in reply. They raised two issues that required determination. They said Mr McKinley's claim was "statue barred" from proceeding due to s 149 of the Act. They relied on the terms of settlement having contained a statement that no holiday pay or entitlement was outstanding and being agreed to be "full and final". They requested Mr McKinley's application be found "frivolous and vexatious" and struck out.

The Authority's investigation

[16] From the partners' reply, two questions arose for investigation about Mr

McKinley's application:

(i) Did the terms of the 22 July 2014 settlement agreement, certified under s149 of the Act, and the consequent application of the provisions of s

149(3) of the Act, bar the Authority from going ahead to investigate the

application?

5 *McKinley,* above n 4, at [24] and [25].

(ii) Should the Authority consider his application to be frivolous and vexatious and exercise its discretion under clause 12A of Schedule 2 of the Act to dismiss the application?

[17] No answer to question (ii) was needed if the answer to question (i) was yes.

[18] Before reaching the conclusions expressed in this determination I considered

written submissions made on the partners' behalf by Mr Tayler, dated 23 January and

16 February 2017, and on Mr McKinley's behalf by Mrs McKinley, dated 16

February 2017 and 17 February 2017. As permitted by 174E of the Act this determination has stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made but has not recorded all evidence and submissions received.

The terms of settlement, s 149 certification, and the effect of s 149(3) of the Act

[19] The first term of the settlement agreement stated its terms "and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties". However, for the purposes of this determination, it was necessary to disclose some or all of terms numbered 2, 7, 8 and 9 in that agreement:

2. ... No holiday pay or entitlement is outstanding and no other debits have been incurred by one party to the other.

...

7. [The partners] shall pay Les McKinley within 7 days of the date hereof, the compensatory sum of [redacted in this determination] in terms of section 123(1)(c)(i) of the Employment Relations Act 2000. ...

8. In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined by the Employment Relations Act 2000).

9. This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.

[20] The agreement then included the following section signed by Mr McKinley and both the partners:

We confirm that we fully understand that once the Mediator signs the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and

2. except for enforcement purposes, neither of us may seek to bring those terms before the Authority of Court whether by action, appeal, and application for review, or otherwise; and

3. the terms of settlement cannot be cancelled under section 7 of the

Contractual Remedies Act 1979; and

4. that section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[21] The remainder of the agreement comprised the certificate of the mediator, signed and dated at Gisborne on 22 July 2014. He certified the parties asked him to sign the agreed terms of settlement and the following three statements:

...

d) Before I signed the agreed terms I explained to them the effect of sections

148A, 149(1) & (3); and

e) I confirm that the parties have advised me that no minimum entitlements

(monies payable under the Minimum Wage Act 1983, or the Holidays Act

2003, as defined by the Employment Relations Act 2000) have been foregone in the reaching of this settlement; and

f) I am satisfied that the parties understood the effect of sections 148A,

149(1) & (3), and have affirmed their request that I should sign the agreed terms of settlement.

[22] Section 149(3) confirms the finality of certified agreements:

Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under section 7 of the Contractual

Remedies Act 1979; and

(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] The reference in s 149(3) to subsection (2) concerns the requirement for the mediator to explain the effect of subsection (3) and to be satisfied, knowing that effect, the parties then affirmed their request to have the mediator certify their agreement.

Mr McKinley's arguments

[24] Mr McKinley's arguments that his claim was not barred by the s 149

agreement, in summary, were:

(i) The agreement did not specifically note minimum entitlements were part of the full and final settlement; and

(ii) One term of the agreement specifically noted "neither [party] has agreed to forgo" minimum entitlements; and

(iii) Minimum entitlements were not addressed at the mediation on 22 July

2014.

[25] He also relied on an Authority determination made in another case that had permitted a worker to pursue a claim relating to minimum entitlements, despite the worker having earlier entered a s 149-certified agreement that contained a statement agreeing its terms were in full and final settlement of all matters.

[26] Each of those three arguments failed for the following reasons.

No specific mention of minimum entitlements?

[27] Term 2 of the agreement specifically referred to there being no outstanding "holiday pay or entitlements" and "no other debits" between the parties. Despite this, Mr McKinley has sought to pursue holiday pay because part of his claim said he had not got all the annual leave he was due while employed. A letter sent to the partners by a Gisborne-based human resources consultant acting on Mr McKinley's behalf, dated 7 September 2016, alleged 50 days annual leave was owed to him. The letter valued the leave said to be due at $9,504 for the five year period used for the calculation. Other claims were also made for public holidays and alternative leave over five years with an estimated value of a further $25,500. Making those claims could not be reconciled with what was agreed in Term 2 and the "full and final settlement of all matters" stated in Term 9.

No agreement to "forgo" or relinquish entitlements?

[28] Mr McKinley was said to have signed the settlement agreement with the understanding that he had not forgone, in the

sense of relinquishing, any entitlements. His submission emphasised the phrase “neither has agreed to forgo minimum entitlements” in Term 8 of the agreement. However interpretation of the whole term,

rather than a selected phrase, had to be on the basis of what would have been apparent to a reasonable observer, well-informed of the circumstances and background of the agreement at the time it was made, and in the context of the other terms. Read in that way Term 8 does not reserve minimum entitlements as a matter outside the agreement. Rather it is a declaration by both parties as to the state of affairs at the time, with each confirming neither had relinquished such entitlements in reaching their agreement. Interpreting Term 8 as meaning any such entitlements were reserved as a matter outside the scope of the agreement would render senseless what Term 9 said about the agreement being made in “full and final settlement of all matters ... arising out of their employment relationship.”

Not addressed at mediation?

[29] The Authority’s earlier determination addressed the issue of Mr McKinley attempting to provide evidence about what was said, or not said, at mediation on the subject of minimum entitlements. Despite the requirement to remove those references from his statement of problem, the submissions made on his behalf continued to seek to put in evidence the content of what was discussed in mediation.

[30] There were two reasons that information could not assist Mr McKinley’s

argument.

[31] Firstly, the law protects what was said in mediation from subsequent disclosure and examination by the Authority.6 There are some exceptions. Both parties can agree to waive confidentiality but, in Mr McKinley’s case, the Authority has already determined that the consent given to disclose the settlement figure to the District Court did not extend to a general waiver by both parties of confidentiality in what was said at mediation.7 The partners did not agree to waive that confidentiality for the purposes of the Authority’s determination on Mr McKinley’s application.

[32] Some other exceptions to the confidentiality rule may be made for public policy reasons. One such exception concerns disclosure where serious criminal conduct occurred during mediation.8 It was not a relevant concern here. Other

possible exceptions include where the agreement was made under duress or if a

6 *AFT v BCM* [2015] NZEmpC 234 at [58].

7 *McKinley*, above n 4, at [25].

8 *Jesudhass v Just Hotel Limited* [2007] NZCA 582 at [41].

party’s free will and ability to comprehend significant events may have been affected for medical reasons and that party was vulnerable due to being without advice or representation at the time that the agreement was made.9 Duress in this context refers to the specific criteria of a legal test, rather than a general sense of pressure to reach agreement.10 There was no suggestion of any improper threat or pressure that might have met that legal test in this case.

[33] And there was no information to suggest Mr McKinley was alone or lacked support and advice when he attended mediation on 22 July 2104. Given he had suffered a head injury, and its consequent effects on cognitive capacity, it would not have been appropriate for him to be so. However nothing in the statement of problem, submissions made or correspondence from Mrs McKinley to the Authority suggests he was alone or lacked support and advice. The 7 September 2016 letter written by a human resources consultant, referred to earlier, includes the phrase “when we attended mediation previously”, which suggests she may have been present. Correspondence from Mrs McKinley, referring to what was said or not said in mediation, implies she was there. Consequently, while Mr McKinley’s abilities continued to be impaired by his injuries, there was no evidence he lacked free will or appropriate support and advice at the time that the agreement was signed and certified with him.

[34] Secondly, even if the confidentiality of the mediation was lifted to allow evidence of what was said during it, Mr McKinley’s case was not advanced. The following passage from his submissions disclosed the purpose of seeking to lift the veil of confidentiality was to be able to say his claim for minimum entitlements was not discussed there:

The applicant was aware of the breach of his minimum entitlements prior to mediation, nonetheless these were not addressed at mediation. Neither were they specifically noted in the settlement agreement as forming part of the full and final settlement agreement.

[35] Because he accepted that he believed at the time of the mediation that he was not paid his minimum entitlements, his claim was captured by the agreement in Term

9 that all matters arising from his employment relationship with the partners were

fully and finally settled. This conclusion was supported by a close reading of an Authority determination that Mr McKinley's representative had submitted would support his argument for being able to proceed with his minimum entitlement claim despite the s 149 agreement: *Cleverley v Selwyn House School Trust Board.*11

[36] In that case Ms Cleverley had signed a s 149 agreement in 2011 with terms confirming no minimum entitlements were forgone and the agreement was full and final. The finality clause went a step further than the one in the agreement Mr McKinley and the partners made because Ms Cleverley's agreement said that included "all or any statutory entitlements". Despite those provisions the Authority allowed her to continue with a wage arrears claim made three years later, in 2014, for sleepover shifts she had worked while employed at the school.

[37] The Court of Appeal had decided in 2011 that the minimum wage legislation required workers to be paid for hours spent sleeping during such shifts. At the time she signed the s 149 agreement Ms Cleverley was not aware of the court's decision, but the school's representatives were. In 2014 a decision by the Employment Court in a different case had confirmed school staff should be paid for such hours spent on sleepover shifts.

[38] The Authority member determined Ms Cleverley could continue her claim because she was not aware until 2014 of the possibility of a minimum wage claim arising out of the sleepover shifts she carried out for Selwyn House. As the prospect of such a claim was not in her contemplation at the time of agreeing to a full and final settlement in 2011, the finality term did not prevent the Authority continuing with an investigation of her claim.12

[39] Unlike Ms Cleverley, Mr McKinley accepted he was aware before the mediation that he had the prospect of pursuing a claim that he had not been properly paid all his minimum entitlements while working on the farm. A letter dated 16 June

2014 sent to the partners by the human resource consultant acting for him at the time, alleged Mr McKinley's employment conditions had "been breached". The letter referred specifically to the Holidays Act 2003 and the Employment Relations Act

2000. An objective observer could not reasonably conclude those alleged breaches of minimum entitlements were not in the contemplation of Mr McKinley and his advisors at the time that the full and final settlement term was agreed in the s 149 agreement made and certified on 22 July 2014.

[40] Mr McKinley's assertion he was entitled to proceed despite that agreement failed for the same reasons that the Employment Court found a plaintiff with a similar claim could not succeed in *Maharaj v Wesley Wellington Mission Incorporated.*13

[41] Both he and the partners were aware, whether or not it was discussed at the mediation, that there was at least a potential claim for minimum entitlements. With that knowledge they settled, electing to use clear language to record that their agreement was in "full and final settlement of all matters ... arising out of their employment relationship".14

[42] While Mr McKinley claimed he was due minimum entitlements, what that might have comprised or amounted to was not established at the time. Instead he compromised his potential cause of action, being his ability to proceed with a claim to attempt to establish he did have outstanding minimum entitlements, avoided the risk of litigation, and settled in exchange for a compensatory payment.15

Other matters

[43] The Act does allow for the agreed terms of settlement signed under s 149 to be challenged or called into question where a mediator has not complied with the requirement to explain the effects of such a settlement before certifying it.16 There was no suggestion any such failure applied to the certification process carried out on

22 July 2014. As is intended by s 149 the Authority is entitled to rely on the mediator's certificate that the effect of the settlement was explained to Mr McKinley and the partners and, after do so, the mediator was satisfied both parties knew that effect and wanted him to certify their agreement. As a result, the term agreed

regarding finality was itself final, binding and enforceable on Mr McKinley. It

13 [2016] NZEmpC 129.

14 *Maharaj*, above n 13, at [40].

15 *Maharaj*, above n 13, at [42].

prevented him pursuing his application for an Authority investigation of his claim that he was still entitled to be paid certain minimum entitlements.

[44] It was apparent from Mrs McKinley's correspondence to the Authority that an important part of the context for Mr McKinley pursuing that claim was a strong belief by him and her that he was poorly served by how the District Court reached its decision on reparation for emotional harm. He felt it was unfair the partners, through their counsel, were able to tell the

Judge about the compensation amount agreed in the employment mediation and the Judge then reduced the reparation as a result. For reasons discussed in the mediation, but not disclosed to the Judge, Mr McKinley considered the compensation agreed there was for other matters between the parties, not related to the accident or the emotional distress caused. However the settlement agreement referred to the compensatory sum being paid under s 123(1)(c)(i) of the Act. That section of the Act describes such compensation as being for "humiliation, loss of dignity, and injury to the feelings of the employee". And if the Judge read the reference to that section, it would not have been apparent to him that the compensation agreed in mediation could have been paid for any reason other than such emotional distress.

[45] It is not within the Authority's jurisdiction to remedy any dissatisfaction Mr McKinley had with the District Court's decision. Neither could the Authority fail to observe the limits set by s 149(3) of the Act on the grounds of the sympathy that anyone would naturally have for the difficult circumstances Mr McKinley has faced as the result of the injuries he suffered in the accident.

[46] And, for reasons already given, even if the Authority were able to consider his different view of the basis for the compensation agreed in the employment mediation, it would not have enabled him to avoid the effect of the finality clause and pursue the minimum entitlement claim. Making such a claim was in the contemplation of Mr McKinley, and his advisors, before the mediation. Consequently the claim was extinguished by the full and final settlement made and certified that day.

Determination

[47] For the reasons given in this determination Mr McKinley's application for an investigation of his claim is dismissed. The terms of the settlement agreement and the effect of s 149 operate to prevent the Authority carrying out such an investigation.

[48] Because of the conclusion reached it was not necessary to determine the proposition the application should be dismissed as frivolous and vexatious.

Costs

[49] By email on 9 January 2017 the partners' representative asked for costs to be reserved so "an application for indemnity costs" could be lodged. By a Minute issued on 13 January, I have already noted an order for costs was unlikely to be made on that basis, given all the circumstances apparent from the statement of problem, the statement in reply and background documents. The Authority's broad discretion regarding costs, to be exercised on a principled basis, includes its obligation to act as

it thinks fit in equity and good conscience.17 The circumstances, as they appear from

information available at the time this determination was issued, favour an outcome where costs would lie where they fall. If the partners have a different view and wish to have the Authority consider and determine whether there should be a costs outcome different from the indication given, they may lodge and serve a memorandum on costs within 14 days of the date of issue of this determination. Mr McKinley's representative would then have 14 days to lodge any memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur

Member of the Employment Relations Authority

17 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]- [108].
