IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 17/10
5278135

	BETWEEN	PENNY McARTHUR Applicant
	AND	LOGAN PARK HIGH SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority:	Philip Cheyne
Representatives:	Quentin Stratford, Counsel for the Applicant Barry Dorking & Fiona McMillan, Counsel for the Respondent
Investigation Meeting:	26 January 2010 at Dunedin
Determination:	29 January 2010

DETERMINATION OF THE AUTHORITY

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[1] Penny McArthur and a representative for Logan Park School both signed a document headed *RECORD OF SETTLEMENT* in August 2007. Separate clauses state that *These terms of settlement have been agreed on a full and final basis* … and *[Mrs McArthur] …shall make no further claims or accusations against the [School] …on any matters relating to her employment.* By this application, Mrs McArthur seeks to challenge this record of settlement so that she can make a claim against her former employer. There is a fulsome objection from the School and at late notice but without objection from Mrs McArthur, a counterclaim for alleged breach of the settlement by reason of these proceedings.

[2] To resolve this problem, I will outline the settlement arrangements and explain more fully the basis of Mrs McArthur's challenge to the settlement before determining the merits of that challenge.

[3] I should note that these proceedings were initiated in the name *Logan Park School*, the name given to the respondent in the record of settlement. The respondent in these proceedings should be Mrs McArthur's former employer, properly identified in the statements in reply as Logan Park High School Board of Trustees (BOT) so I make that order.

The settlement arrangements

[4] An issue arose in her work and Mrs McArthur sought assistance from her union (PPTA). The official that started advising Mrs McArthur become unavailable and she then consulted PPTA's Wellington based solicitor Nicole Carter. On Ms Carter's recommendation, Mrs McArthur authorised her to agree to terms of settlement including her resignation. Ms Carter communicated with the BOT's representative (Phil Roberts) and agreement was reached about a settlement. The terms were drafted up, Mrs McArthur confirmed to Ms Carter her acceptance of those terms and an arrangement was made for Mrs McArthur to go to Mr Roberts' office to sign the record of settlement.

[5] Mrs McArthur, her husband and Mr Roberts met on 16 August 2007. In her evidence Mrs McArthur acknowledged that she could not now recall the specifics of her discussion with Mr Roberts that day. However, she is very clear that she was left with the impression that she would be contacted by a mediator from the Department of Labour and that the terms of settlement would not become binding on her until signed by the mediator after discussion with her.

[6] Mr Roberts gave evidence. I accept his evidence that Mrs McArthur confirmed to him that she had spoken to Ms Carter and understood that the settlement was full and final. Mrs McArthur then signed the terms of settlement. Mr Roberts told Mrs McArthur that a mediator would contact her to satisfy themselves that Mrs McArthur understood that it was a full and final settlement. I accept Mr Roberts' evidence that he did not tell her that the settlement would not be binding until she had been contacted by the mediator. Sometime after this meeting Mr Roberts took the signed terms of settlement to the offices of the mediator in Dunedin.

[7] On Saturday 18 August 2007 Mrs McArthur received in the post a copy of the signed terms of settlement that included the mediator's signature underneath the following:

I, Phillip de Wattignar of Dunedin, Mediator, certify that:

(a) I am employed by the Chief Executive of the Department of Labour to provide mediation services under the Employment Relations Act 2000; and

(b) I hold a current general authority from the Chief Executive to sign, for the purposes of s.149 of the Act, agreed terms of settlement; and

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

(d) Before I signed the agreed terms of settlement I explained to them the effect of s.149(3); and

(e) I am satisfied that the parties understood the effect of that subsection and have affirmed their request that I should sign the agreed terms of settlement

I now sign the agreed terms of settlement pursuant to s.149(1) & (3).

Dated at Dunedin this 17th day of August 2007

[Signed]

Mediator

[8] Mrs McArthur's evidence is that she was not contacted by the mediator. There is no evidence to counter that assertion so I accept that it is true for present purposes.

[9] Both parties had to do various things under the terms of settlement and it is not suggested that there was any default by either party at the time. Indeed Mrs McArthur had already signed a letter of resignation dated 16 August 2007 which Mr Roberts was able to fax to his client the same day.

[10] Nothing further of relevance happened until Mrs McArthur complained to the Department of Labour that the mediator had never contacted her. There is a letter dated 30 June 2009 acknowledging that Mrs McArthur's complaint was justified *in that although the investigation cannot conclusively determine whether the mediator contacted you, it would seem there has been an apparent breach of policy* since there was no written record of such contact, apart from the record of settlement. The letter indicates that the Authority has power to determine problems such as this.

[11] The next thing to happen was that Mrs McArthur consulted a solicitor and these proceedings were initiated in August 2009. I took the view that mediation would not assist with resolving Mrs McArthur's challenge to the signed terms of settlement and an investigation meeting was arranged.

Challenging the record of settlement

[12] Ordinarily where there is a record of settlement under s.149, no party may seek to bring those terms before the Authority in any proceedings except for enforcement purposes: see s.149(3) of the Employment Relations Act 2000. Reinforcing that, under s.152(1) mediation services may not be challenged or called in question in any proceedings on the ground that the nature, content or manner of the services were inappropriate. Mrs McArthur's challenge is about the content of the mediation services. She must rely on the exception contained in s.152(2)(a) which says that *Nothing in subsection (1) or in section[s] 149 …prevents any agreed terms of settlement signed under section 149 …from being challenged or called in question on the ground that …the provisions of subsections (2) and (3) of that section …were not complied with.* To reinforce the proposition that the Authority may investigate and make a determination about compliance with s.149(2), s.148 concerning confidentiality and the competence of a mediator to give evidence does not apply to the functions performed under s.149(2). No other purpose could be served by such an exception. If material non-compliance with s.149(2) is established, the privative effect of s.149(3) must be ousted as there could be no other purpose in allowing the point to come before the Authority.

[13] I have already referred to Mrs McArthur's evidence that she was never contacted by the mediator. It follows that the mediator could not have complied with s.149(2) and s.149(3) does not apply.

[14] The argument for Mrs McArthur is that non-compliance with s.149 means that she is not bound by the terms in the record of settlement. I reject that argument. Rather, I adopt the approach taken by the Authority in *Wheeler v 24 Hour Electrical Ltd* 920020 6 NZELC 96,855 that having terms of settlement signed off by a mediator is a voluntary step and that a binding settlement can be reached short of that step. That leads to the question whether a settlement in this matter was concluded irrespective of the mediator's involvement.

[15] Mrs McArthur's statement of problem says that Mr Roberts told her that the settlement would not be binding until signed by a mediator, that person having first contacted her to discuss and explain the record of settlement. However I have preferred Mr Robert's evidence about the exchange with Mrs McArthur. Mr Roberts told her no such thing; he simply described the usual process followed by mediators.

Possibly Mrs McArthur assumed from its wording that the record of settlement would not be binding without the mediator contacting her, just as she may have assumed that it would be an opportunity for her to get a second opinion on Ms Carter's advice before she was irrevocably tied to the settlement. However, it is more likely, and established to a level of probability, that at the time Mrs McArthur knew she was committing herself to the record of settlement regardless of the mediator's involvement. There is no other reason to explain the provision to Mr Roberts of Mrs McArthur's signed letter of resignation, that being one of the terms in the record of settlement. The same reasoning applies to Mrs McArthur benefitting without protest from other terms of the record of settlement.

[16] To some extent Mrs McArthur in her statement of problem is critical of the BOT (or Mr Roberts) for requiring her to attend meetings about her original employment issue then having her attend Mr Roberts' office to sign the record of settlement when her original advisor was unavailable. There is no merit in this complaint. Mr Roberts dealt with the PPTA solicitor who appears to have initiated the settlement discussions having received Mrs McArthur's instructions to do so. Obviously Mrs McArthur now regrets proceeding to the point of signing the record of settlement, but none of that can be visited against the BOT or its advisor. From their perspective everything was perfectly regular and they were entitled to assume that Mrs McArthur was being adequately advised.

[17] I conclude that the record of settlement amounted to a full and final settlement regardless of the mediator's involvement. As part of that settlement Mrs McArthur promised not to make any further claims against the BOT on any matters relating to her employment. That promise prevents further proceedings such as those that Mrs McArthur wants to take.

[18] There are several other aspects of the BOT's defence that I will mention. The BOT says that Mrs McArthur is estopped from further proceedings. That is probably correct but it is not necessary to determine the point. If necessary I would also conclude that Mrs McArthur had affirmed the record of settlement by continuing to accept its benefits and endure its burden for nearly two years after knowing of the mediator's non-compliance with s.149.

[19] I am left to deal with the BOT's counterclaim.

Counterclaim

[20] On a finding about non-compliance with s.149, the BOT protests jurisdiction on the basis that the record of settlement is an ordinary contract rather than an employment agreement so is beyond the Authority's jurisdiction. I am referred to *Counties Manakau Health Ltd v Pack* [2000] 1 ERNZ 518. That case discussed without deciding jurisdictional issues under the Employment Contracts Act 1991 related to the enforceability of mediated settlements. As I read the cases mentioned in *Pack* neither the Court of Appeal nor the Employment Court unequivocally held that a non-mediated agreement to settle a dispute about rights and obligations arising from employment falls outside the jurisdiction of the employment institutions. In any event, the Employment Contract Act cases provide little guidance now. I find that the present employment relationship problem concerning Mrs McArthur's challenge to the record of settlement between her and the BOT and the BOT's counter-claim fall comfortably within the opening words of s.161(1) and especially subclause (r) of the Employment Relations Act 2000.

[21] To pursue its counterclaim the BOT must say that the record of settlement is not caught by s.149(3)(b) since a claim for damages is not one of the methods of enforcement permitted under s.151: see *South Tranz Ltd v Strait Freight* [2007] ERNZ 704. As with Mrs McArthur's challenge, the BOT is not prevented by s.149(3)(b) from bringing the record of settlement before the Authority because of the finding that s.149(2) was not complied with.

[22] By its counter-claim the BOT says that these proceedings by Mrs McArthur constitute a breach of the record of settlement where she promised to *make no further claims or accusations against the respondent or any of its employees on any matters relating to her employment*.

[23] I do not accept that Mrs McArthur has breached this provision in the record of settlement. These proceedings by her are an attempt to remove the statutory and contractual hurdles created by the record of settlement to her making a claim against the BOT on matters relating to her employment. She has cleared the statutory hurdle but not the contractual one.

[24] In any event, the harm apparently suffered by the BOT as a result is confined to its legal costs and that is something properly addressed by an application for costs.

Summary

[25] The parties' record of settlement remains valid and binding despite non-compliance with s.149(2) of the Act.

[26] Mrs McArthur has not breached any term in the record of settlement.

[27] Costs are reserved. If costs cannot be agreed, any claim must be made within 28 days by lodging and serving a memorandum and the other party may lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority