

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 120
5361556

BETWEEN BRIDGET MCDONALD
Applicant
AND LAKES DISTRICT MUSEUM
INC
Respondent

Member of Authority: Helen Doyle
Representatives: Applicant in person
Maurice Maxwell, Counsel for Respondent
Investigation Meeting: 3 May 2012 in Queenstown
Submissions Received: On day from both parties
Date of Determination: 20 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bridget McDonald was employed by the Lakes District Museum Inc. (the Museum) in the position of Retail and Administration Manager from 21 July 1997. Her employment with the Museum was terminated for reason of redundancy on 29 July 2011.

[2] On 31 October 2011 Ms McDonald lodged a statement of problem with the Authority. Ms McDonald said she did not believe the restructuring preceding her advice of redundancy was for genuine reasons but an excuse to get rid of staff the Director had a personal issue with. Ms McDonald set out some concerns with the process in the implementation of the redundancy.

[3] On 14 November 2011 the Museum lodged a statement in reply with the Authority and said that the parties, by agreement dated 19 September 2011, had settled all issues between them arising from the applicant's employment. The Museum said Ms McDonald was therefore estopped by reason of that settlement and accord and satisfaction from proceeding with her personal grievance.

[4] It was decided that the Authority would deal with whether Ms McDonald was prevented from pursuing her personal grievance as a preliminary issue. The Authority therefore will not refer to matters that are alleged in the statement of problem in any depth.

Issues

[5] The Authority is required to determine whether Ms McDonald and the Museum reached a full and final settlement of all employment relationship problems between them by way of a letter signed on 19 September 2011 in accordance with which payment was made to Ms McDonald.

[6] The principles of the Court in satisfaction is set out in the Employment Court judgment in *Graham v Crestline Pty Limited* [2006] ERNZ 848 at para [49]:

There must first be a genuine dispute between the parties. Secondly, whether accord and satisfaction has been made is a question of fact requiring a meeting of the parties' minds or that one of them must act in such a way to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.

[7] The Museum says that the signed letter and payment in terms of that letter was in full and final settlement of all issues in the employment relationship. Ms McDonald says that the only issue/dispute settled between the parties by her signing the letter was long service pay and not a personal grievance. The Authority will therefore need to consider whether there was a meeting of the minds as to what the terms of the letter and the payment made to Ms McDonald was to satisfy.

What events led up to the signing of the letter dated 12 September 2011?

[8] Ms McDonald's last physical day at the Museum was 29 July 2011. She was advised in a letter from the Chairman of the Lakes District Museum Board, John Wilson, handed to her that same day that the Board had decided to exercise its option to pay her four weeks wages in lieu of notice. There was some discussion

about final pay. Ms McDonald asked a question about long service leave and she understood from the response that she would hear back from the Museum about that the following week.

[9] On 2 August 2011 Ms McDonald received a letter from the Museum Director, David Clarke with a cheque in relation to her final pay, holiday pay and redundancy pay. Mr Clarke advised in his letter that no decision had been made regarding Ms McDonald's long service pay and that that would be discussed at the next Board meeting.

[10] On 5 August 2011 Ms McDonald left for an overseas trip and did not return until 5 September 2011.

[11] On 5 September 2011 Ms McDonald sent an email to Mr Clarke and advised that she had not received her long service leave pay. In her letter Ms McDonald asked that payment be made by the end of the week. She also asked for some employee wage records and a file note written by Mr Clarke which she said would clarify any ambiguity in the contract wording. In her email Ms McDonald said that if there was deletion of any leave from her employment record, she would need to pass the relevant information to the Department of Labour to deal with and the Labour Inspector would be in touch.

[12] On 5 September 2011 Mr Clarke responded to Ms McDonald and advised that her email had been sent to the Finance Committee to discuss and they would make a decision by the end of the week.

[13] On 8 September 2011 Mr Clarke sent a further email to Ms McDonald in which he advised that he had been working on the issue and had been awaiting legal advice. He did not accept there had been any deletion of information and said that he had received legal advice that the Museum was not obliged to pay her long service leave. He said that the legal advice had been sent to the Finance Committee members by email and they would make *the call*.

[14] Ms McDonald responded to Mr Clarke and advised that if she did not receive full termination pay by Friday she would proceed to the Employment Relations Authority. On 12 September 2011 Mr Clarke advised Ms McDonald by email that a letter had been sent to her PO Box regarding the long service pay issue and he asked

that she read it and respond. Ms McDonald then received in her Post Office box the following letter:

12/9/11

Without Prejudice Save as To Costs

Dear Bridget,

Thank you for your recent query as to your entitlement to long service leave, if any, following your redundancy. The Board has taken legal advice. This advice states that the terms of your employment agreement are clear and do not provide for long service leave until you have completed 15 years service. Accordingly, our legal advice received is that there is no legal obligation on the Museum to pay you any long service leave at all, your not having completed 15 years service.

However, the Board has determined that in light of your 14 years valued service, the Museum is prepared to pay you one lump sum payment (which equates to 14 years service) in full and final settlement of all issues between the parties. In other words, the Museum will make a one off ex gratia payment to you which equates to 14/15ths of 20 working days salary. If accepted, payment will be made on the basis that the terms of settlement and in, particular, the fact of payment remain strictly confidential between the parties.

Payment will be made within 3 working days of acceptance of this offer, which is to be indicated by counter-signing this letter and delivering it to the Museum marked for Mr David Clarke's attention.

We await your response..

*Yours sincerely
John Wilson*

[15] Ms McDonald signed the letter and dated it 19 September 2011. In doing so she agreed to the conditions outlined in the letter. Ms McDonald took the letter to the Museum and left it with the receptionist. On 20 September 2011 Mr Clarke emailed Ms McDonald and advised that her long service pay should go into her account on that day and he set out the calculations of that pay.

Determination

[16] There were no face to face discussions between Ms McDonald and Mr Clarke after 29 July 2011. All communication was way of email and the summary of those is set out above.

[17] Mr Maxwell in final submissions submits that the letter dated 19 September 2011 speaks for itself and is evidence of a global settlement of a dispute.

Ms McDonald said that she did not consider that by signing the letter she was also resolving any potential personal grievance and she said that if that was the case then it should have been stated in the correspondence from the Museum. Ms McDonald in written evidence says had she known that she would not have signed the letter because she would have wanted other terms for settlement to be included.

[18] There was nothing specifically in the letter or in the earlier emails referring to anything other than the long service pay. Mr Wilson and Mr Clarke both said in their evidence that they believed the personal grievance claim was something contemplated by Ms McDonald. There is reference, for example, to a letter dated 8 June 2011 from Ms McDonald in which she makes the following statement:

I have no wish to raise any grievance at the moment but the present situation is taking its toll on employees... David has left me in no doubt that he wants me to leave the museum and I would much prefer this to be done in an open and legal manner in order to prevent future problems.

[19] Mr Clarke also referred to Ms McDonald attaching to her statement of problem a confidential note that he said he prepared concerning a number of issues the Museum was working through with an employee. He referred to this as Ms McDonald *arming herself for a personal grievance*.

[20] Mr Wilson gave evidence of Ms McDonald at a consultation meeting claiming to have faced a constructive dismissal in relation to what she said was a lack of consultation regarding the restructuring.

[21] I accept having heard from Mr Wilson and Mr Clarke that they did consider Ms McDonald had issues with the restructuring and that there was a potential for a personal grievance. I accept that they wanted payment in terms of the disputed long service pay to be in full and final settlement of all matters. Mr Clarke gave evidence about a previous situation he had been involved in that cost the Museum a lot of money. It was his desire to prevent this by providing the letter and including the words in full and final settlement.

[22] The issue for the Authority though is whether there was a meeting of minds on that matter. In other words did Ms McDonald understand from the letter that she was

signing away her rights to take a personal grievance that she may have against the Museum or simply resolving an issue as to her long service pay.

[23] The 29th of July was Ms McDonald's last day of employment. Between that date and the signing of the letter on the 19th of September the only reference to any dispute between the parties was in relation to the long service leave. Ms McDonald had not after the termination of her employment raised a personal grievance or indeed any issue other than her long service pay. There was a clear dispute about that, the Museum denying any liability whatsoever to make a payment to Ms McDonald and Ms McDonald being firm that she was entitled to payment.

[24] Mr Maxwell submits that it cannot be fair and right for an employee to threaten litigation in order to obtain a settlement and then opt out of it. There was nothing from the Museum in its post 29 July 2011 communication about the long service leave to induce Ms McDonald to think that the settlement payment was for something other than her long service leave save the inclusion of the words in the letter – *in full and final settlement of all issues between the parties*. The email of 12 September from Mr Clarke alerting Ms McDonald to the posting of the 12 September 2011 settlement letter refers to [the letter] *re the long service pay issue*. I have had objective regard to the settlement agreement and the relevant background leading up to that agreement. I am not satisfied as I must be that there was a meeting of the minds between Ms McDonald and the Museum that the signing and subsequent payment under the settlement agreement was in satisfaction of any personal grievance or claim other than long service leave Ms McDonald had against the Museum.

[25] I am not satisfied therefore that there was accord and satisfaction reached that would prevent Ms McDonald from pursuing her personal grievance. She is not estopped from proceeding with her personal grievance.

Next Step

[26] The parties have not attended mediation. I direct the parties now attend mediation. If the matter remains unresolved, Ms McDonald is to contact the Authority and a further telephone conference will be held.

Costs

[27] Ms McDonald was not represented and it may be that there are no issues of costs. I will however reserve the issue of costs and if necessary these will be dealt with after the substantive matter.

Helen Doyle
Member of the Employment Relations Authority