

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Vivienne Ellen O'Connell (Applicant)
AND Redpaths NZ Ltd (Respondent)
REPRESENTATIVES Sheila McCabe for Applicant
Cathy Bormans for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 27 April 2007
DATE OF DETERMINATION 01 May 2007

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Ms O'Connell's employment relationship problem concerns an alleged personal grievance of unjustified dismissal. It was lodged with the Authority on 19 December 2007. Upon receipt of the statement of problem the respondent's solicitor, Ms Bormans, advised that her client did not consider it appropriate to lodge a reply to the substantive issues as it wished to raise a defence of accord and satisfaction. A copy of a document was provided in support of the respondent's position and Ms Bormans suggested a teleconference to discuss the issue. Later however she advised that she did not intend to join the conference as she had further instructions as follows:

- i. "Our client believes that this case has previously been settled in full.*
- ii. In any event, the respondent company has no assets and will be placed into liquidation.*
- iii. For those reasons, our client does not intend to take any steps in relation to this matter."*

[2] I decided that in the circumstances a direction to mediation would not assist the parties and instead, proceeded to set down an investigation meeting into the preliminary matter of accord and satisfaction. This has now taken place and consistent with Ms Bormans's earlier advice there was no appearance for the respondent. Ms O'Connell, her solicitor and her husband did attend. This determination deals only with the preliminary matter of the accord and satisfaction and is based on documentary materials provided by both parties as well as evidence from Vivienne and David O'Connell.

Determination

[3] Vivienne and David O'Connell once had a proprietary interest in the respondent through shares in the name of their family trust. In addition to her employment relationship problem they have a dispute with two other shareholders over matters relating to that commercial interest. Sometime in March 2006, after their family trust had sold its shares, they entered

into a written agreement headed up *"This is an Understanding Going Forward. It is not a legal contract."* It is signed by Ms O'Connell, her husband and the other two shareholders.

[4] That document sets out a list of steps to be taken as a means of resolving the commercial issues between the parties. It makes no reference of any sort, direct or indirect, to Ms O'Connell's employment dispute. However Ms O'Connell and her husband both say that they gave an undertaking that if the terms of this "understanding" were honoured she would not proceed with a personal grievance. To that extent, they accept that there was an agreement between the parties. They told me that the sums involved in the commercial dispute were very significant and if the understanding had been honoured they would have been happy to let the employment matter go. Mr O'Connell confirmed this in a letter to their own solicitors dated 30 March which read:

"...I advise that the parties have come to a satisfactory arrangement in respect of to the resolution of the above disputes and we will not be continuing with legal proceedings."

[5] "The above disputes" included Ms O'Connell's personal grievance.

[6] However David and Vivienne O'Connell say that the steps set out in the *"understanding"* were not completed, despite a number of phone calls on their part requesting this. They have come to the conclusion that the respondent is unable or unwilling to comply with the *"understanding."* Ms O'Connell sees herself as free to proceed with her personal grievance.

[7] The two documents I have referred to here, and what David and Vivienne O'Connell have told me, constitute all the evidence of the existence and terms of the agreement between the parties. This evidence is not sufficient to establish that either the *"understanding"* document or the oral undertakings Ms O'Connell gave shareholders of the respondent amounted to an accord with the respondent. There is even less basis for any assertion that the terms of the agreement have been complied with.

[8] I conclude that there is not enough evidence to establish an accord and satisfaction and that there is no bar to Ms O'Connell proceeding with a personal grievance.

Y S Oldfield
Member of Employment Relations Authority