IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 209
5598020

	BETWEEN	PCA Applicant
	A N D	DAVID ORSBOURN MEDICAL SERVICES LIMITED t/a ENHANCESKIN Respondent

Member of Authority:	David Appleton
Representatives:	Anjela Sharma, Counsel for Applicant Luke Acland, Counsel for Respondent
Investigation Meeting:	Determined on the papers by consent
Submissions Received:	Submissions waived by consent
Date of Determination:	23 November 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] The issue before the Authority is to determine whether the parties have reached a binding agreement between them, settling the present proceedings. Ms Sharma maintains that such an agreement has been reached, whilst Mr Acland maintains that it was not.

Background

[2] Proceedings in the Authority have been on foot between the parties and an investigation meeting set down before another Member to take place on 14 December 2016. On 11 November 2016 the parties' counsel copied the Authority into email correspondence between them which revealed the disagreement between them

regarding settlement. Ms Sharma was then on leave for a period, but upon her return, a case management telephone conference call was held to discuss how to resolve the impasse that has arisen. It was agreed that, as the settlement negotiations had proceeded entirely by email between Ms Sharma and Mr Acland, I would examine this correspondence and decide whether an in-principle agreement had been reached or not, by applying normal contractual principles.

[3] Accordingly, I have examined the correspondence, and have been able to reach a view. I summarise the material correspondence[1], without disclosing its contents, as follows:

a. On 31 October 2016 an offer to settle was made by Mr Acland to Ms Sharma.

b. Ms Sharma replied on 3 November 2016 by letter, which contained a counter-offer.

c. On 8 November 2016 Mr Acland rejected the counter-offer, and repeated the original offer.

d. On 9 November 2016, Ms Sharma made a counter-offer and repeated conditions stipulated in her first counter-offer of 3 November.

e. On 10 November 2016, Mr Acland rejected the counter-offer and repeated that the offer made by the respondent on 8 November stood (which had stated that the original offer of 31 October stood). Hence, Mr Acland was repeating the original offer.

f. Around 90 minutes later, Ms Sharma stated that her client accepted the sum offered by the respondent, but required that other conditions stated in her earlier counter-offers must stand. Therefore, this communication was another counter-offer.

g. Around 60 minutes later, not having heard from Mr Acland, Ms Sharma wrote "my client will settle on the basis of your clients offer as presented". She said she would draft a record of settlement.

[1] I omit reference to exchanges which do not contribute to the substantial enquiry that I am undertaking.

h. Around 90 minutes later, Ms Sharma sent to Mr Acland a draft record of settlement.

i. Around two hours later, Mr Acland replied saying that the draft needed to have another term inserted, (which he had not raised up to that point).

j. Ms Sharma replied and asked for an explanation of the term, which Mr Acland furnished later that afternoon.

k. Finally, Ms Sharma replied in the evening of 10 November saying that her client was not agreeable to the addition, and taking issue with Mr Acland's approach. At this point, negotiations effectively broke down, and disagreement arose as to whether there had been a binding agreement or not.

Discussion

[4] This exchange of offer and counter-offer needs to be examined against the framework of contract law. There are two basic principles that are material here:

a. Acceptance of an offer must be complete and unconditional; and

b. A counter-offer terminates the original offer.

[5] When Ms Sharma sent her email to Mr Acland, referred to in 3(f) above, by saying that her client wanted "all other terms of settlement [to] apply as outlined in our earlier correspondence", and by stipulating the way in which payment was to be made (which Mr Acland had previously expressly taken issue with) Ms Sharma was making a counter-offer. As is stated in *Law of Contract in New Zealand*[2], "An acceptance will only be effective where the offeree agrees to be bound by the exact terms proposed in the offer".

[6] The next step is to examine the effect of Ms Sharma making that counter-offer. In *Burrows, Finn and Todd*[3] the learned authors refer to *Hyde v Wrench*[4] in which the defendant offered, on 6 June, to sell an estate to the plaintiff for £1,000. On

[2] 5th edition, Burrows, Finn and Todd, pub.Lexis Nexis, at 3.3.6
[3] Ibid., at 3.3.8
[4] (1840) 3 Beav 334

8 June, in reply, the plaintiff made an offer of £950, which was refused by the defendant on 27 June. Finally, on 29 June, the plaintiff wrote that he was now prepared to pay £1,000. It was held that no contract existed, as the plaintiff had rejected the original offer and was no longer able to revive it by changing his mind and tendering a subsequent acceptance.

[7] The same situation exists here. When Ms Sharma made her counter-offer, she rejected the original offer, thereby terminating it, and Mr Acland had not put it back on the table prior to Ms Sharma purporting to accept it. When Mr Acland later said that he wished to insert another clause in the draft record of settlement, no binding agreement was in place and the parties were still in negotiation. Indeed, Ms Sharma sending the draft record of settlement was, in fact, a new offer, which Mr Acland was entitled to either accept or reject, as his client wished.

Determination

[8] The parties have not reached a binding settlement of the proceedings, and they remain on foot.

Next steps

[9] As the proceedings are still on foot, the Member originally allocated to deal with the matter will convene a case management telephone conference call to discuss whether the investigation meeting set down for 14 December should continue. The without prejudice materials that I have seen in reaching my determination shall be removed from the file so that the Member does not see them. As I have not referred to the substance of the negotiations in this determination, there is no reason for the Member not to see this determination.

Costs

[10] I reserve costs. They may be addressed after determination of the substantive matter.

David Appleton
Member of the Employment Relations Authority