Employment Court of New Zealand

Penney v Fonterra Co-operative Group Limited [2011] NZEmpC 151 (23 November 2011)

Last Updated: 2 December 2011

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2011] NZEmpC 151

CRC 32/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN NICOLA JANE PENNEY Plaintiff

AND FONTERRA CO-OPERATIVE GROUP LIMITED

Defendant

Hearing: 2 November 2010 (Heard at Christchurch)

Appearances: plaintiff in person

Shan Wilson, counsel for defendant

Judgment: 23 November 2011

JUDGMENT OF JUDGE A A COUCH

[1] This case raises the unusual issue of whether an investigation by the

Employment Relations Authority which had been concluded ought to be reopened.

[2] Ms Penney was employed as a tanker driver by Fonterra until she was dismissed on 19 March 2009. She pursued a personal grievance alleging that her dismissal was unjustifiable. She sought both interim and final reinstatement. The Authority declined her application for interim relief[1] and promptly scheduled an investigation meeting for her substantive claims. Before that meeting could be held, a letter signed by Ms Penney was sent to the Authority in which she said that the

matter had been settled and that she wished to withdraw the proceeding then before

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the Authority. After receiving that letter on 13 August 2009, the Authority concluded its investigation.

[3] On 12 February 2010 Ms Penney lodged an application that the Authority reopen its investigation and determine her claims on their merits. In particular, she sought to pursue her claim for reinstatement. The Authority conducted a hearing of that application and declined it.[2] Ms Penney now challenges that determination.

[4] There were difficulties with this proceeding from the outset. All Ms Penney could challenge was the Authority‟s determination not to reopen its investigation. In her statement of claim, however, she made no reference to that and instead pleaded the merits of her claim of unjustifiable dismissal. This led to a complete mismatch between the statements of claim

and defence.

[5] I dealt with those issues in a conference on 26 August 2010 with Ms Penney and Ms Burson as counsel for Fonterra. As the effect of the Authority‟s determination was that Ms Penney‟s claim was brought to an end, her challenge seeking a hearing de novo had the effect of putting the whole employment relationship problem before the Court – see the decision of the full Court in *Abernethy v Dynea New Zealand Limited*.[3] As a matter of practicality, however, I directed that the question of whether Ms Penney‟s claims had been effectively settled ought to be decided first. That direction was given with the agreement of both

parties. The de novo hearing which took place on 2 November 2010 was of that issue only.

[6] If Ms Penney‟s claim was effectively settled, she no longer has any cause of action which can be pursued in a reopened investigation. The legal phrase often used to describe settlement of a claim is accord and satisfaction. In practical terms, that means a binding agreement to discontinue the claim on terms which have been

performed or which the party obliged to do so is ready and willing to perform.

[7] In this case, Ms Penney acknowledges that she signed an agreement which, on its terms, effectively settled her claim. She says that this agreement ought not to be given effect for three reasons:

(a) She signed it when she was under stress and that her apparent agreement to its terms was not her real intention.

(b) She signed the agreement in reliance on an offer of employment by another employer and that she believes Fonterra was responsible for that job offer subsequently being withdrawn.

(c) The agreement provided for it to be signed by a mediator under s 149 of the Employment Relations Act 2000 and that, because that did not occur, the agreement was incomplete.

Events

[8] On the pleadings, the parties were at issue on the facts. Similarly, the briefs of evidence filed by the parties had significant differences. At the hearing, however, Ms Penney abandoned the brief which had been filed on her behalf and, in the course of cross examination, effectively accepted the nature and sequence of events as described by Fonterra‟s witnesses. I was also provided with numerous contemporary documents confirming those events. As a result, I am not required to resolve conflicts of evidence or to assess the reliability of witnesses. Rather, my task is to consider the effect of the events which occurred.

[9] Ms Penney was employed as a milk tanker driver by Fonterra until 19 March

2009 when she was dismissed for repeated lateness. She pursued a personal grievance alleging unjustifiable dismissal and appointed a solicitor, Baden Meyer, to represent her. In addition to substantive remedies, including reinstatement, Ms Penney also applied for interim reinstatement. That application was heard on 22

May 2009 and a determination issued on 25 May 2009. In that determination, the

Authority expressed the view that Ms Penney had a barely arguable case and that,

even if she could establish that her dismissal was unjustifiable, she had a weak case for reinstatement.

[10] On 27 May 2009, two days after that interim determination was given, Mr Meyer sent an email to Ms Burson suggesting settlement discussions. Initially Mr Meyer sought reinstatement as part of a settlement package but that was immediately rejected by Fonterra. Through Ms Burson, Fonterra made an initial settlement offer of $4,000 on 19 June 2009.

[11] Later in June 2009, Mr Meyer advised the Authority and Ms Burson that he no longer had instructions to represent Ms Penney in the substantive hearing, then scheduled for 14 and 15 July 2009. As a result, that hearing was postponed. Mr Meyer continued, however, to have a role in the settlement negotiations with Ms Burson. Much of the subsequent correspondence was conducted on Ms Penney‟s behalf by Mr Meyer but, at times, Ms Penney dealt directly with Ms Burson.

[12] On 22 July 2009, Ms Penney telephoned Ms Burson and asked whether Fonterra would reconsider its refusal to reinstate her. Ms Burson replied by email the following day that Fonterra was not prepared to consider reinstatement and that it was not possible to take that discussion further. This prompted an email from Ms Penney expressing her disappointment but saying that she would accept $20,000 from Fonterra as “full final settlement”.

[13] Before Ms Burson responded to that proposal, Mr Meyer wrote to her on 29

July 2009, with another proposal on behalf of Ms Penney for settlement by a payment of $15,000. This proposal was explicitly said to be made on Ms Penney‟s instructions.

[14] Ms Burson replied on 30 July 2009 with an offer by Fonterra to pay $10,000 as compensation. Mr Meyer replied on 3

August recording that Ms Penney would accept the offer of $10,000 provided Fonterra also paid her legal costs of $4,920 and agreed to a provision in the agreement that neither party would make disparaging remarks about the other.

[15] That proposal was essentially accepted by Fonterra. On 6 August 2009, Ms

Burson sent Mr Meyer a detailed settlement agreement for consideration.

[16] The following day, 7 August 2009, Ms Penney sent an email directly to Ms Burson saying that she would settle for $15,000 plus $4,920 towards her legal fees. This led to discussion between Mr Meyer and Ms Burson and a suggestion by Mr Meyer that the parties „split the difference" with Fonterra paying $12,500 plus her legal costs. That suggestion was rejected almost immediately.

[17] The next day, 8 August 2009, Ms Penney sent an email to Mr Meyer to the effect that she still wanted $15,000 plus legal costs. She also said that she wanted a written assurance from Fonterra that it would not interfere with her employment if she got a job with an associated company. Mr Meyer duly relayed that position to Ms Burson on 10 August 2009.

[18] On 11 August 2009, Ms Penney sent an email directly to Ms Burson enquiring whether Fonterra had considered her proposal for settlement at $15,000 plus costs. Later the same day, Mr Meyer sent an email to Ms Burson to say he had a message from Ms Penney that she would accept Fonterra"s current offer, that is

$10,000 plus costs. Following that, Ms Penney telephoned Ms Burson confirming that she was prepared to sign the settlement agreement but wanted an assurance from Fonterra that she would be able to enter their sites if she was working for another company. That assurance was given shortly afterwards by email and confirmed the following day by letter.

[19] On 12 August 2009, Ms Penney signed the settlement agreement and a letter to the Authority formally withdrawing her claim. The settlement agreement included a request to a mediator to sign the agreement. Ms Penney had signed that request separately.

[20] The settlement agreement provided for $10,000 compensation to be paid within 7 days into a bank account nominated by Ms Penney. It then provided for a contribution to Ms Penney"s legal costs of up to $4,920 including GST to be paid

within 7 days of receipt of a GST invoice from her lawyer. The agreement also included the following term:

11. THE Company will pay and the Employee will accept the payments and benefits referred to in this Agreement as a full and final settlement of all claims the Employee has or may have against the Company, it parent or associated companies or any of its officers or employees, arising out of her employment (including the cessation of that employment).

[21] The settlement agreement was signed on behalf of Fonterra on 14 August

2009. It was then sent to a Labour Department mediator who telephoned Ms Penney. It is unclear when this occurred but it appears to have been around 17 or 18 August

2009. The mediator explained the statutory effect of her signing the agreement and asked Ms Penney to confirm her request for it to be signed. Ms Penney declined to do that and apparently asked the mediator to call her back the following week.

[22] On 24 August 2009, Ms Penney sent an email to Fonterra asking for the total sum of $14,920 to be paid directly to her and saying that Mr Meyer was no longer acting for her. The following day, she repeated this request in an email to a partner in Ms Burson"s firm, John Rooney. In it, she said "I shall expect a cheque from you for the 14,920 I wont accept any thing less than this figure". Mr Rooney replied that Fonterra would comply with the terms of the settlement agreement which provided for $10,000 to be paid to Ms Penney and a further $4,920 to her lawyer. He asked Ms Penney for an address to which her cheque could be sent.

[23] On 28 August 2009, Ms Penney sent an email to Mr Rooney suggesting that

Fonterra had agreed to pay the whole of her legal fees. She then said:

Fonterra is short $1900

If we can come to an agreement

I"ll need to let you know that im toying with getting problem re: opened to have it re addressed.

So hopefully we can get things sorted

[24] The suggestion that Fonterra pay more was promptly rejected by Ms Burson who reiterated the request for an address or bank account details to enable Fonterra to make payment of the $10,000 to Ms Penney. In response, Ms Penney sent the following email to Ms Burson on 1 September 2009:

I signed up the agreement as i was told the seasonal job with Dynes Transport was mine, then they did a flip flop and i feel fonterra is at the bottom of this.

Bayden send through part of my legal account, i was on the understanding fonterra will pay the whole account in full.

as i signed under stress and ill informed, etc

Im not happy

I know fonterra are short in Clandeboye of drivers

Since fonterra had a hand in stuffing up this im asking they give me temp work as this is what i require and fonterra is making it difficult for me

I hope to hear in due course

[25] On 3 September 2009, Ms Burson replied making it clear that Fonterra was not prepared to renegotiate the agreement with Ms Penney and once again asking for details which would enable Fonterra to make payment to her.

[26] Ms Penney then sent letters or emails to the Chief Executive and other members of management of Fonterra, asking them to consider re-employing her. Those requests were firmly rejected and Ms Penney knew by the end of October

2009 that Fonterra would not agree to vary the terms of the settlement agreement.

[27] On 12 February 2010, Ms Penney lodged her application that the Authority reopen its investigation.

[28] While the negotiations between Ms Penney and Fonterra were taking place, there were two other important series of events occurring.

[29] Following her dismissal, Ms Penney actively sought alternative employment as a driver. One of the companies she approached was Dynes Transport, who had a vacancy for a milk tanker driver. The person she dealt with was A J Renga. Ms Penney‟s evidence was that, following an interview, Mr Renga said that the position was hers provided there would be no problems when she went on to Fonterra sites. He also said that he wanted to speak to Shane Fleming, Fonterra‟s regional depot manager.

[30] It is unclear when this offer was made to Ms Penney but it appears to have been in late July or very early August 2009. Ms Penney said in evidence that the reason she was prepared to forego her claim for reinstatement and negotiate a monetary settlement was that she had this alternative job offer. Ms Penney first

made such a proposal for settlement on 24 July 2009. It was also the reason Ms Penney sought an assurance from Fonterra that she could come on to Fonterra sites while employed by another company. That was first raised in her email to Mr Meyer of 8 August 2009. The assurance sought was given in an email from Ms Burson to Mr Meyer on 11 August 2009 and confirmed in a letter from Fonterra the following day.

[31] When she signed the settlement agreement, Ms Penney was confident that she would be able to take up the position with Dynes Transport she had discussed with Mr Renga. No firm agreement had been entered into but Ms Penney understood that the only remaining step was for Mr Renga to speak with Mr Fleming.

[32] Some two weeks or so after the settlement agreement was signed, Ms Penney learned that the position with Dynes Transport was no longer available to her. She received no explanation from Mr Renga and he was not called as a witness. Ms Penney assumed that Mr Renga had changed his mind after talking to Mr Fleming and that Mr Fleming had said something to cause that change of mind. Mr Fleming said in his evidence that he had no discussion with Mr Renga about Ms Penney. That evidence was unchallenged.

[33] The other events occurring during 2009 were the resolution of criminal charges against Ms Penney laid in 2008. There were four charges of assault with a blunt instrument and two charges of wilful damage. One wilful damage charge was withdrawn in late 2008. The assault charges were the subject of a jury trial which concluded on 22 June 2009 and at which Ms Penney was acquitted. The remaining wilful damage charge was heard on 12 August 2009 when it was dismissed.

[34] I turn now to consider each of the grounds relied on by Ms Penney to say that the settlement agreement ought not to be given effect.

Stress

[35] Ms Penney‟s evidence was that she was under stress on the morning of 12

August 2009 when she signed the settlement agreement. The principal reason she gave for that stress was that she was due to appear in the District Court that day on a criminal charge. She also said that she was stressed by several other events

including wilful damage of her property and threatening phone calls and texts from her ex partner. She produced letters from her general practitioner and a counsellor in support of this evidence.

[36] On the basis of this evidence, Ms Penney submitted that she had not genuinely consented to the settlement agreement and that it ought not to be given effect.

[37] Such a submission can only succeed where it is established on the evidence that the person seeking to avoid the agreement was deprived of reason to the point of mental incapacity. Such incapacity may be the result of mental illness, dementia or, in rare cases, the effect of alcohol or other drugs. It must also be established that the other party knew or ought to have known of the incapacity. Even then, incapacity will only render the agreement voidable. If the agreement is subsequently affirmed when the person concerned is no longer incapable, it will be valid. Even putting all of Ms Penney‟s evidence on this issue at its highest and taking it at face value, it falls a very long way short of establishing those factors. It is also clear that Ms Penney implicitly affirmed the settlement agreement in the days following 12 August 2009 when she demanded payment in reliance on the agreement.

[38] The evidence Ms Penney gave on this issue also fell away under cross examination. In answers to questions from Ms Wilson, it emerged that Ms Penney last saw the counsellor in May 2009 and she accepted that the counsellor had no knowledge of her state of mind in August 2009. The letter from her general practitioner was written in January 2010 and Ms Penney agreed that the doctor did not base his somewhat equivocal opinion on any contemporary examination.

[39] It was apparent from the documents Ms Penney produced that the incidents of wilful damage occurred in April 2008 and the malicious calls from her ex partner were in March 2009. By far the most serious charges Ms Penney had been facing were those of assault with a blunt instrument. She had been acquitted on those charges more than seven weeks prior to the settlement agreement being signed. None of these matters could have affected Ms Penney‟s reason as at 12 August 2009.

[40] The remaining factor Ms Penney relied on was the wilful damage charge which was the subject of a defended summary hearing later on 12 August 2009. While that may well have been uppermost in her mind that morning, I do not accept that it significantly affected her reason. It was a relatively minor charge which was dismissed that day. In any event, Ms Penney agreed that she had accepted Fonterra‟s offer the day before. A further factor is that it was not until nearly three weeks after signing the agreement that Ms Penney first suggested that she had been stressed when signing it. Up to that point, she sought to negotiate a better financial deal based on the agreement rather than suggest the agreement was invalid for any reason.

The Dynes job

[41] Ms Penney said that what she wanted most was an alternative job and it was only because she had the prospect of employment by Dynes Transport that she agreed to terms of settlement with Fonterra which did not include reinstatement. Based on her belief that Fonterra was responsible for Mr Renga‟s decision not to proceed with the job she had applied for at Dynes Transport, Ms Penney submitted that she ought not to be bound by the terms of the settlement agreement.

[42] Putting to one side the legal difficulties inherent in this submission, it cannot succeed on the facts. While the prospect of a job with Dynes Transport was important in Ms Penney‟s mind, the settlement agreement was not conditional on her getting that job. Further, I cannot find as a fact that Fonterra was responsible for Ms Penney not getting that job. Her belief that Mr Fleming had turned Mr Renga against her was based on supposition and inference from the timing of events. Mr Fleming gave clear and unchallenged evidence that Mr Renga did not do a “verbal reference check” with him on Ms Penney and that he never spoke to Mr Renga about

Ms Penney‟s case. There is no reason to question Mr Fleming‟s evidence and I

accept it.

Signing by the mediator

[43] Ms Penney‟s third submission was that, because the settlement agreement included a request that it be signed by a mediator and that had not happened, the agreement was incomplete and therefore invalid.

[44] This argument cannot succeed either. The agreement itself was complete upon signing by the parties. The only significance of the request to the mediator was that, if the mediator signed it in accordance with s 149 of the Employment Relations Act 2000 the agreement would be subject to the provisions of s 149(3). It was not a term of the settlement agreement that it be effective only if signed by a mediator. On the contrary, its terms provided explicitly that it should be effective immediately upon being signed by both parties. It therefore became effective on 14 August 2009 when it was signed on behalf of Fonterra.

Other issues

[45] In addition to the submissions she relied on in closing, Ms Penney raised two other specific issues in the course of the hearing. In fairness to her, I briefly deal with them.

[46] It was common ground that Fonterra had not paid Ms Penney the $10,000 compensation provided for in the settlement agreement. She suggested that this gave her grounds to cancel the agreement. That is not so. The settlement agreement specifically provided for payment by direct credit into a bank account nominated by Ms Penney. Despite repeated requests from Fonterra, she has not provided the details of any account or, in the alternative, an address to which a cheque might be sent. She cannot rely on her own default to avoid the agreement.

[47] The employment relationship between the parties was subject to the terms of a collective agreement between the Dairy Workers Union and Fonterra. Clause 11.4

provided for mediation of employment relationship problems. Clause 11.4.4 provided "Any agreed settlement of the problem signed by the mediator will be final and binding." Ms Penney suggested that the corollary of this clause was that any settlement agreement not signed by a mediator was not final and binding. There is an obvious flaw in this logic. The clause in the agreement simply reflects the effect of s 149(3)(a) of the Employment Relations Act 2000. For the reasons given above, the provisions of that section are additional to the common law not in substitution for it. It is also common ground that the settlement agreement was not reached in mediation. Clause 11.4 of the collective agreement therefore did not apply.

Conclusion

[48] I find that the settlement agreement between the parties was valid and enforceable. Ms Penney‟s personal grievance has been completely settled. It follows that there is nothing for the Authority to investigate if its investigation were to be reopened. To do so would therefore be pointless. The application to reopen the Authority‟s investigation is dismissed.

[49] By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in its place.

Comments

[50] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. The principal reason for that delay is the Christchurch earthquakes, which have impacted heavily on the Court‟s resources and my availability to devote the necessary time to completing judgments in other matters heard before this case.

Costs

[51] Fonterra has been put to significant cost in resisting Ms Penney‟s challenge. It has been entirely successful in doing so. Unless there are circumstances of which I am unaware, Fonterra is entitled to a contribution by Ms Penney to those costs. I

urge the parties to agree what that contribution should be but, if agreement is not possible, counsel for Fonterra should file and serve a memorandum within 20 working days after the date of this judgment. Ms Penney will then have a further 20

working days in which to file and serve a memorandum in response.

Signed at 4.20pm on 23 November 2011.

A A Couch
Judge

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[1] CA 68/09, 25 May 2009.
[2] CA 131/10, 23 June 2010.
[3] [2007] NZEmpC 83; [2007] ERNZ 271
