

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 124/10
5156635

BETWEEN ASSURED FINANCIAL
 PEACE LTD & PROSPER
 WITH US LTD
 Applicant

AND BRYCE PAIS Respondent

Member of Authority: James Wilson

Representatives: Ajay Bhatt and Stuart Gloyn for the applicant
 Brian Rooney for the respondent

Investigation Meeting: Determined on the papers

Submissions received: 15 October 2009 from the applicant
 28 August 2009 from the respondent

Determination: 17 March 2010

**DETERMINATION OF THE AUTHORITY
IN RESPECT TO COMPLIANCE**

The terms of settlement

[1] On 26 February 2009, the applicants, Assured Financial Peace Ltd and Prosper With Us Ltd (AFP), and the respondent, Mr Bryce Pais, signed a settlement agreement in terms of section 149 of the Employment Relations Act (the Act). The terms of settlement were properly certified by a Department of Labour mediator in terms of that section. The relevant parts of that settlement were:

The following was agreed to between the parties at mediation:

- a. Assured Financial Peace Ltd and Prosper With Us Ltd will pay Bryce Pais, on a without prejudice and denial of liability basis, the compensatory sum of \$17,000.00 in terms of the provisions of s. 123(1)(c)(i) of the Employment Relations Act 2000. This amount will*

be paid to the Applicant by way of direct credit and in accordance with the following;

- i. \$3000.00 will be paid within 7 days of the Respondents receiving written confirmation that the case has been withdrawn from the Employment Relations Authority, and that the complaint has been withdrawn from the Institute of Financial Advisors (and which the Applicant will not subsequently relodge at any time);*
 - ii. The balance of \$14,000.00 to be paid to the applicant within six months of the date hereof;*
- b. That any and all issues that could arise out of the \$30,000.00 "New Windsor Road transaction" will not be pursued by either party.*

What happened next?

[2] On 26 February 2009, i.e. three days after signing the settlement with AFP, Mr Pais wrote to the Institute of Financial Advisers saying:

Further to my initial complaint dated 27 November 2008, I have also pursued a separate employment matter with Ajay Bhatt. This matter was resolved by mediation at the offices of the Employment Relations Authority (sic) today.

One of the conditions of the settlement negotiated was that I withdraw my above complaint against Ajay Bhatt made to your Institute.

I therefore, while maintaining every allegation, now formally withdraw my complaint against Ajay Bhatt, and will not pursue the matter further.

Application for compliance

[3] AFP, by way of a statement of the problem filed with the Authority in March 2009, asked the Authority to order Mr Pais to comply with the agreed settlement. In particular AFP sought:

- 1. Please instruct the respondent to withdraw the complaint (to the Institute of Financial Advisers) in its entirety including all allegations as agreed during mediation and comply with the record of settlement.*

2. *Instruct him to refrain from providing any assistance to IFA as mentioned in his e-mail dated 21 March 2009, since the complaint is withdrawn and the mediated settlement is binding.*

3. *(Order that) Payment of agreed \$3000.00 be made within seven days of Applicants receiving confirmation of withdrawal of allegations by the respondent from IFA as required by the record of settlement*

[4] In his statement in reply Mr Pais says that he has complied with the terms of settlement and asks that the Authority order AFP to pay him the money owing in terms of the settlement.

[5] During a conference call with the parties on 15 July 2009 it was agreed that I would deal with two preliminary issues (the Authority's jurisdiction and the legality of the settlement) on the papers. It was also agreed that Mr Rooney, on behalf of Mr Pais would file submissions on these matters on or before 21 August 2009 and that the applicant's submissions in reply would be filed on or before 18 September 2009.

The submissions

From Mr Pais

[6] Mr Rooney, for Mr Pais, has argued that:

(1) ...the reference in the settlement agreement to the withdrawal of the complaint was merely a trigger for the payment of a small instalment of the agreed payment the applicant's were to make, and, on its plain and clear meaning, did not impose on the respondent any obligation at all to withdraw the complaint. However, if the settlement agreement had required the respondent to withdraw his complaint, then it would have been a contract interfering with the course of justice, which was an illegal contract at common law and which therefore is unenforceable.

(2)... the order sought by the applicants exceeds the jurisdiction of the Employment Relations Authority, which is created by statute alone, and the Authority lacks jurisdiction to make the orders sought.

[7] In his submissions Mr Rooney cites the High Court judgment in *Polymer Developments Group Ltd. v Tilialo* (High Court, Auckland; Glazebrook J; 30 April 2002; CP 521/IMOO) to support his contention that:

...contracts to stifle prosecutions, which include contracts to impede disciplinary proceedings against professional persons, are illegal and therefore unenforceable.

And:

It follows that if (AFP) are correct in saying that the settlement agreement obliged the respondent to withdraw his complaint, then the settlement agreement, in its entirety because of section 3 of the Illegal Contract Act 1970... is illegal and unenforceable.

In fact, however, (Mr Pais) says that the settlement agreement did not oblige him to withdraw the complaint, such that it was not an illegal contract and remains unenforceable (sic) the issue of the legality only arises from the applicant's misconceived view of the terms of the agreement.

[8] Mr Rooney also submits that the jurisdiction of the Employment Relations Authority is limited to ordering compliance with any terms of settlement which have been agreed. He argues that the orders sought by AFP go beyond the jurisdiction of the Authority. In particular Mr Rooney argues:

- a. *Ordering Mr Pais to withdraw his complaint in its entirety including all allegations* is beyond the terms of settlement as on its plain words the settlement agreement did not require Mr Pais to withdraw his complaint and there is no jurisdiction under section 161 of the Act for the Authority to add to alter the terms of any settlement agreement. Even if the settlement agreement did require Mr Pais to withdraw his complaint an order in the terms requested would exceed the terms of settlement. All that was agreed was that Mr Pais would withdraw his complaint, not his allegations.

- b. *An order instructing (Mr Pais) to refrain from providing any assistance to the Institute of Financial Advisers* similarly is outside of the settlement agreement and any such order would itself be interfering with the course of justice. In any event the jurisdiction of the Authority is limited to making determinations about employment relationship problems and Mr Pais's complaint to the Institute arose from a relationship which was not an employee/employer relationship and is entirely a separate issue.

From Assured Financial Peace

[9] The Managing Director of AFP, Mr Ajay Bhatt, in his submissions in reply picks up Mr Rooney's point regarding the Authority's jurisdiction and suggests that the parties had *made a fundamental error by agreeing to the mediated settlement*. Mr Bhatt says that Mr Pais was paid as an independent contractor and that this issue should have been addressed as a preliminary issue before the mediated settlement was entered into. He suggests that if Mr Pais was an employee then the question of tax liability needs also to be addressed. However after addressing the question of tax liability Mr Bhatt goes on to say:

It is important to note that (AFP) is happy to comply with the agreement but the payment then would be determined after the assessment by IRD.

And:

...(AFP) accepts the submission that the mediated agreement is not void and was always in acceptance of it. The issue is that Mr Pais has not complied with the agreement in its entirety and spirit.

[10] Also in his submission Mr Bhatt reveals that in fact the Institute of Financial Advisers, in a letter dated 11 August 2009 advised:

It appears from the material supplied to us that you make the appropriate disclosures, and while promoting such investments differs from the usual practice of investment advisor members of the Institute it cannot be said that your doing so is improper.

Although the Institute does not specifically say that it is going to take no further action in this matter, the implication from the letter is that the file is now closed.

[11] At the end of his submissions Mr Bhatt requests the following outcome:

(AFP) requests that the Authority recognize the relationship was not an employment relationship and declares the agreement void.

If the Authority feels it is unable to do this at this juncture then the Authority recalculates the amount due taking into account the Tax implications discussed above.

Since the agreed amount of \$17,000 has no tax liability to either party, (AFP) requests the Authority to allow (AFP) seven days after its decision to pay \$3000.00 and six months thereafter to pay the balance after recalculation.

Discussion

Was Mr Pais an employee?

[12] The parties entered into a settlement agreement in terms of section 149 of the Employment Relations Act. The settlement specifically said that the settlement was in respect to *employment relationship problems*. If there was an issue regarding whether or not Mr Pais was an employee this matter should have been addressed before the settlement was agreed. Neither party raised the issue and both agreed to the settlement in good faith. While Mr Pais may have been an independent contractor in to AFP, by their actions AFP accepted that Mr Pais was also an employee. The nature of the relationships between the parties is not a matter which has been raised previously with the Authority and, in any event, it would be inequitable to revisit Mr Pais's status at this late juncture. **For the avoidance of doubt: Mr Pais was employed by the respondents.**

Has Mr Pais complied with the settlement agreement?

[13] **Mr Pais has complied with the letter of the settlement agreement.** It cannot be said however that he has complied with the spirit of the agreement. He agreed to withdraw his complaint and did so. He then found a way to circumvent the agreement he had made to ensure that the matters about which he had complained continued to be investigated by the Institute. Under other circumstances the Authority would be reluctant to condone such behaviour.

[14] The circumstances in this case are far from usual. The fact that Mr Pais *continued to maintain every allegation* in the end had no effect. As I understand it Mr Pais was not required to give any further assistance to the Institute and subsequently the Institute found that Mr Bhatt had done nothing *improper*. Mr Pais's circumvention of the wording of the agreement therefore had no adverse effect on Mr Bhatt or his companies.

Is the settlement agreement an illegal contract and therefore unenforceable

[15] Mr Rooney has made a forceful argument to the effect that if withdrawal of his complaint by Mr Pais was a condition of the settlement, the settlement would require *an interference with the course of justice* which would render the agreement illegal in terms of the Illegal Contracts Act. Mr Rooney of course argues that the withdrawal of the complaint was not a requirement of the agreement but merely a trigger for the first payment in terms of the agreement. In any event Mr Rooney argues that Mr Pais did withdraw his complaint and therefore did comply with the settlement.

[16] I do not agree with Mr Rooney's argument that the withdrawal of the complaint to the Institute is simply a trigger. While there is no constraint placed on the \$14,000 balance to be paid to Mr Pais within six months there is clearly a requirement that he withdraw his complaint before he is paid the initial \$3000 payment. However I do not find that this renders the settlement illegal. While Mr Bhatt's intention may have been to stop the Institute from investigating his practice the agreement did not achieve this end. Although Mr Pais withdrew his formal complaint the Institute was able to continue its investigation without a formal complaint being in place. The withdrawal of the complaint did not interfere with the

course of justice. **I find that the settlement agreement between the parties was not an illegal contract and is enforceable.**

Should the agreed payments be recalculated to take account of taxation liability?

[17] **The settlement agreement sets out what, in gross figures, AFP agreed to pay Mr Pais. The full amount, without deduction of tax should be paid.** The settlement agreement does not specify what the *compensatory sum* is compensation for. The payment is said to be in terms of section 123(1)(c)(i) of the Employment Relations Act and such payments are usually accepted as being non taxable. However the question of what tax is payable is a matter between Mr Pais and the Inland Revenue Department.

Determination and orders

[18] For the reasons set out above I find that:

- a. Mr Pais has complied with the settlement agreement between the parties dated 26 February 2009.
- b. Mr Pais was an employee of the respondents' and the settlement agreement is legal and enforceable.
- c. The amounts set out in the settlement agreement are gross figures and should be paid to Mr Pais without deduction of tax.

[19] Mr Pais has been denied the use of these funds for many months beyond the dates specified in the original settlement. There is no reason why payment should be any further delayed. The payments set out in the settlement agreement were due for payment in February and August 2009. My understanding is that neither payment has been made. **By way of compliance with the settlement agreement Assured Financial Peace Ltd and Prosper With Us Ltd are ordered to pay Mr Bryce Pais the sum of \$17,000 gross, less any monies already paid, within 14 days of the date of this determination.**

Costs

[20] Costs are reserved. If the parties unable to settle this matter between themselves, Mr Rooney, on behalf of Mr Pais may file and serve a submission in respect to costs within 28 days of the date of this determination. AFP will then have 14 days in which to file a response.

James Wilson

Member of the Employment Relations Authority