

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 241/10
5134019**

BETWEEN NGAMU PARATA
Applicant

AND MONTAGE GENERAL INSURANCE
LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Anthony Drake and Rosemary Childs, Counsel for
Applicant
Dean Organ, Advocate for Respondent

Investigation Meeting: 14, 15 May 2009

Submissions Received: 5 June 2009
8 July 2009

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Ngamu Parata ("Mr Parata") seeks a compliance order in respect of a settlement agreement document with the respondent Montage General Insurance Limited ("Montage"). In the alternative, he says Montage has failed to comply with the terms of an oral agreement between them. Montage says it is not bound by any agreement and on that basis disputes the alleged failure to comply. Montage raises a counter-problem against Mr Parata claiming he is indebted to it in respect of various items. The parties were unable to resolve the problems between them by mediation.

The facts

[2] Montage is a limited liability company incorporated on 11 December 1998. It trades in the provision of domestic and commercial insurance services. It is a subsidiary of a holding limited liability company *Montage Financial Services Limited*.

[3] Mr Parata commenced employment with Montage in November 2007 as *Manager Montage General Insurance*. The terms of the employment were recorded in a written individual employment agreement dated 23 November 2007 ("the IEA"). Unfortunately, the IEA defines the employer as another limited liability company *Montage Financial Planning Limited* but is executed by a common director Mr O'Brien for Montage. Montage says it is the employer. These proceedings cite Montage as the respondent liable in remedies to Mr Parata.

[4] On 23 June 2008 Mr Parata was called to a meeting with Montage director and managing director of Montage Financial Services Limited Mr William (Bill) Paul O'Brien ("Mr O'Brien") and Montage Financial Services Limited's practice manager Mr Alistair Preece ("Mr Preece"). The meeting was to discuss concerns about Mr Parata's performance. Mr Parata was advised he was "stood down" from his duties. Mr Parata says that he was asked to resign.

[5] Mr O'Brien wrote to Mr Parata by letter dated 23 June 2008 materially as follows:-

As you know we met today to talk about my increasing concerns about the situation that we find ourselves in with your performance at work. In particular I am very concerned about the following matters - (we have been investigating some of these with your assistance during the last week).

It has now got to the point where we need to meet formally to discuss the following:

...

Such are my concerns about these matters that my trust and confidence in you and your ability to do the job that you signed on for hangs in the balance.

As you know, I did state to you at our last meeting that things have come to concern me to the extent that if I looked forward 3 months we could be potentially talking about termination of your contract. That is how far you are behind in my expectations of a reasonable employee.

Having said this you should not take this as indicating that I have made up my mind on these matters, rather, we now need to meet to consider these issues once more and to see where we go next. I am still open minded enough to consider all possibilities.

I advised you that you need to find a legal support person and that that person needs to contact our person for further dialogue and then potentially to set up a meeting between all of the parties in the next few days. As you know we discussed your stand down on full pay ahead of this meeting and you gave your consent for this as well as voluntarily returning your cell phone and credit card. You accepted this stand down.

I also stressed that I did not want you to have any contact with the office staff or customers during this time and to treat this whole matter with professionalism

and confidentiality, as will I. You agreed to this. For this reason we also do not expect that you will come in to the office whilst this matter is being resolved. Please now obtain support (if that is your desire) and provide me with that person's name and details as a matter of urgency.

Yours sincerely

Bill O'Brien

Managing Director

Montage Financial Services Ltd

[6] The parties then continued discussions with the assistance of their lawyers.

[7] By letter dated 30 June 2008 Mr Parata's lawyers raised personal grievances on his behalf for unjustified suspension and unjustified action tantamount to constructive dismissal.

[8] By letter dated 4 July 2008 Montage's representative wrote to Mr Parata's representative particularly advising:-

3. In the interim, work done on this case (and a review of Mr Parata's emails) subsequently reveals the following:

a. Montage can now prove that the CV offered to them as part of the recruitment process did not give an entirely accurate representation of Mr Parata's skills, circumstances or experience.

[9] By email letter dated 8 July 2008, Montage's representative confirmed Mr Parata's dismissal on 7 July 2008. The advice further particularly referred to Mr Parata's resume as follows:-

4.7 Mr Parata also gave false statements on his resume.

4.7.1 He has over claimed his responsibilities.

4.7.2 The account that Mr Parata also stated to explain his "leaving" Tower was patently false and reference checks recently taken from Tower indicate that Mr Parata would definitely not have been employed if this information had been available at the time.

4.7.3 Mr Parata's failing to give a complete account is contrary to the declaration that he signed in his employment agreement which indicated that he had provided a statement of truth and understood that employment could be terminated in the event that false declarations were provided (see especially Declaration 3, 5 and 10).

[10] At 1.00pm on 8 July 2008, Mr Parata, his lawyers whom I prefer to refer to hereafter as Mr K and Ms D, met with Mr O'Brien and Montage's representative Mr H. These parties know the identity of each person and that is all that is necessary.

Montage proposed an offer of settlement which was to be held open for acceptance until 10.00am the following day.

[11] On the morning of 9 July 2008 the discussions between the parties continued by email correspondence between Mr K, Mr H and Mr O'Brien. At 9.56am Mr Parata's lawyers proposed a counter-offer to Montage and advised they were preparing a draft settlement agreement document. That document was emailed to Mr H at 10.14am. Mr H replied that Montage was considering the document and would make amendments to it.

[12] Mr H advised that Montage would settle for payment of \$15,000 with holiday pay included. At midday Mr Parata's lawyers made a further counter-offer. At about 1.20pm Mr H made a further counter-offer on Montage's behalf.

[13] Mr O'Brien emailed Ms D and copied to Mr K and Mr H at 3.42pm as follows:-

We originally terminated Ngamu on Mon evening (7th July 2008) and said that we would prepare a letter re this to follow on Tues am. A draft of this letter was sent by [Mr H] which led to negotiations recommencing via [Mr K] - we were appreciative of this move. We have seen an email from [Mr H] to you at 1.22pm today (attached) and are not aware of any response from Ngamu at the time of writing. Notwithstanding this, we still expect to receive the vehicle, keys etc outside our building at 4pm today as per your email. We originally proposed this transfer to be at 4pm yesterday and at our meeting with you and [Mr K], I agreed to extend this to 12 noon today in good faith assuming that both sides could agree a settlement. During negotiations today this was further requested to be extended to 4pm today - hence our request. We have located a personal letter and a jar of coffee as the sole personal effects of Ngamu (is he aware of any others that we should include to pass to him at 4pm). This transfer will be done by our practice manager.

Regards

Bill

PS I have written this email as Ross was unable due to going into another client's apmt and you may wish to contact me in the interim whilst Ross is unavailable

[14] On the morning of 10 July 2008 Mr O'Brien telephoned Ms D. He followed up that conversation in an email at 8.29am. He asked the lawyer how to return the signed copy and what the process was thereafter. He quite rightly expressed dissatisfaction at the suggestion that the settlement agreement be executed by *Montage Financial Services Limited*, because he maintained that company was not Mr Parata's employer. His email was copied to the company solicitor because Mr O'Brien believed it prudent that that solicitor be aware of what it was proposed Mr O'Brien sign.

[15] At 2.36pm Mr O'Brien sent an email to Ms D seeking to vary the arrangements made on the basis that Mr Parata had failed to return two keys and two alarm remotes, had damaged his company motor vehicle and had failed an exam paper paid for by Montage.

[16] Sometime between 4.00pm and 4.40pm Mr O'Brien's son Mr William Frederick O'Brien ("Mr O'Brien jnr") who was employed at Montage as a trainee broker discovered a printed web transcript of Mr Parata's University of Auckland academic record. He handed the document to his father Mr O'Brien. On the basis of the document, Mr O'Brien formed the view that Mr Parata had been dishonest with Montage about his qualifications.

[17] Mr O'Brien telephoned Mr K and they discussed what Mr O'Brien had discovered in the academic record.

[18] The parties signed a document prepared by Mr Parata's solicitors entitled "Settlement Agreement" dated 10 July 2008 and which contained these material terms:-

Background

B An employment relationship problem has arisen between the parties.

C The parties do not wish to become embroiled in personal grievance or other litigation and have mutually agreed to the termination of Mr Parata's employment and to settle all differences between them.

D The parties, after obtaining independent legal advice wish to record the terms and conditions of the agreement made between them.

Agreement

1 The parties have agreed that Mr Parata's last day of employment with Montage will be Monday, 7 July 2008 at 5.00pm ('termination date'). Mr Parata is not required to give or work out any notice.

2 Montage will arrange to pay into Mr Parata's bank account all wages and holiday pay due as at 7 July 2008 upon the Agreement being signed.

3 Within seven days of the parties signing this Agreement, Montage will pay into [] Trust Account (for Mr Parata) the sum of \$15,000. Thereafter a further \$3,000 (less any speeding fines personally incurred by Mr Parata in the Montage vehicle and any uninsured damage to the Montage vehicle above normal wear and tear and any other reasonable charges or cost which can be noted) will be paid within 6 weeks. All sums will be pursuant to section 123(1)(c)(i), Employment Relations Act.

4 Montage will provide Mr Parata with a certificate of Service within 7 days of the parties signing this Agreement.

5 Mr Parata will forthwith return all Montage property in his possession (including vehicle, phone and accessories, car and building keys) by 4.00pm 9th July and exchange these items for his personal belongings at a meeting outside Montage office in the car park.

6 Neither party shall make any disparaging comments about the other to any third party.

7 The terms of this settlement and all discussions leading up to and surrounding it are, and shall remain, confidential to the parties and their advisors, except as required by law.

8 This settlement is in full and final settlement of all claims either party has or may have against each other relating to Mr Parata's employment and termination.

9 The parties request that this Agreement be signed by a Mediator of the Department of Labour.

10 This Agreement may be executed in any number of counterparts including facsimile and e-mail copies, and provided both parties have executed one of such counterparts, each counterpart shall be deemed to have been executed by both the parties.

(“the settlement agreement”)

[19] On 11 July 2008 the settlement agreement was sent to the Labour Department for signing by a mediator.

[20] On 14 July 2008, Mr Parata’s solicitors were advised by Montage’s representative that Montage did not intend to meet the terms of the settlement agreement.

[21] On or about 16 July 2008 Montage’s representative instructed the mediator not to sign the settlement agreement.

The merits

[22] Mr Parata seeks compliance with the settlement agreement or alternatively with the oral terms of an agreement reached between the parties on 10 July 2008.

[23] I am of the view that the written terms of the settlement agreement were enforceable pursuant to section 149 where a mediator signed the document. In this case, the mediator did not sign. Without that signature or affirmation, the settlement agreement was not enforceable under section 149 of the Employment Relations Act 2000.

[24] But I am satisfied that there was an oral agreement between these parties the terms of which were merely recorded in the written settlement agreement. That document constituted a record of settlement.

[25] The terms of the oral agreement are those which are set out in the settlement agreement. These terms I find proved because the parties gave evidence of them in the investigation meeting.

[26] A settlement agreement under section 149 is enforceable on its face. No evidence is required to prove to the terms of what was agreed. By section 148 of the Act, no evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information given in a mediation. But here there was no mediation.

[27] At no stage have these parties sought to rely on the confidentiality of the negotiations between them. They have presented full evidence of the discussions and negotiations leading up to the settlement agreement. Because of that fact, there is no impediment to the Authority making findings as to what was agreed.

[28] It is my finding that there was an agreement reached which led Mr O'Brien to sign the settlement agreement. It was signed by Mr Parata. The agreement was complete and there was an accord. A binding agreement came about because of the exchange of mutual promises.

[29] But I further find that Montage sought to resile from the agreement reached because it was not pleased when it found Mr Parata's academic record. Mr O'Brien formed a view that Mr Parata was not degree qualified. He became angry. He did not want to pay one red cent to Mr Parata.

[30] This I find is the actual reason Montage sought to resile from the settlement agreement. But I find it was too late. The agreement had already been made. Montage could not rely on any alleged misrepresentation because it already knew of such matters previously. It entered into the settlement agreement knowing what it later purported to rely on as the basis to back out of the agreement.

[31] I do not accept the arguments that Montage was induced to enter into the settlement agreement upon a misrepresentation or that there was duress. Montage had access to legal advice, but elected to proceed without taking advice. It also copied its advice to the company solicitor.

[32] These particular facts are very different from the factual situations in cited authorities. I distinguish this case from the others. I resolve this problem by proceeding on the basis that agreements are made to be kept. Montage made an agreement that it must honour. However undeserving Montage might subsequently decide Mr Parata was, it had already entered into a compromise having confronted such matters but nonetheless proceeding to strike a deal which permitted the parties to resolve the issues between them and get on. In such circumstances it would be quite wrong as a matter of equity and good conscience to permit Montage to be released from what it promised to do.

The determination

[33] For the reasons outlined above, I grant a compliance order in terms of paragraph 3(b) of the First Amended Statement of Claim.

[34] I am not persuaded to exercise my discretion to order a penalty against Montage in the particular circumstances of this case.

[35] I order Montage to pay interest at the rate of 4% from the date of the settlement agreement until the date of payment.

[36] I refuse to grant orders on the counter-problem because the settlement agreement constituted the full and final agreement on all matters between the parties.

The costs

[37] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Drake is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Organ is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority