

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 369
5393809**

BETWEEN

SUNIL BALI
Applicant

AND

SRG HOLDINGS LTD t/a
SUPERVALUE
First Respondent

NZ LIQUOR MERCHANTS
LTD t/a SUPER LIQUOR
Second Respondent

Member of Authority: Eleanor Robinson
Representatives: Sione Fonua, Counsel for Applicant
Mike Kyne, Advocate for Respondent
Investigation Meeting 11 October 2012 at Auckland
Determination: 16 October 2012

DETERMINATION OF THE AUTHORITY

Application for compliance order

[1] On 23 May 2012 a Record of Settlement (the Settlement) was signed under s149 of the Employment Relations Act 2000 (“the Act”). The parties to the Settlement were the Applicant, Mr Sunil Bali, and the Respondent, SRG Holdings Ltd (SRG). The Settlement was signed by Mr Bali and Mr Vipin Garg, Director, on behalf of SRG. The Record was also signed by a Mediator employed by the Department of Labour.

[2] The issue now brought before the Authority by Mr Bali is that SRG has not complied with clauses 2 and 3 of the terms of the Settlement. The relevant terms as set out in clause 2 of the Settlement relate to the terms of an offer of employment to be made to Mr Bali by NZ Liquor Merchants Ltd, (NZLM), a company of which Mr Garg was also a director, and in clause 3 relate to a condition of the offer. The clauses state:

2. *NZ Liquor Merchants Ltd t/a Super Liquor Manukau shall provide Sunil Kumar Bali within one day of the date hereof, with an offer of employment. The terms of this offer shall include that Sunil Bali shall be employed as a Sales*

Supervisor; he shall be employed for 30 hours per week at an hourly rate of \$14.50 per hour; he shall work according to a roster with the hours to be between 10 a.m. and 11 p.m. [Monday to Sunday] and his other terms of employment to be substantially the same as contained in his individual employment agreement with SRG Holdings Ltd.

3. *If Sunil Bali is not able to commence work on or before June 8, 2012 then the above offer shall lapse and shall not be extended.*

[3] Clauses 4 and 5 of the Settlement are also relevant and state that:

4. *SRG Holdings Ltd shall provide Sunil Kumar Bali within seven days of the date hereof, with a reference relating to his employment with the company.*
5. *SRG Holdings Ltd shall provide Sunil Kumar Bali within one day of the date hereof, with a letter of explanation for immigration purposes. The company shall state that while it is no longer able to provide employment with the company its sister company is prepared to make an offer of employment as detailed above.*

[4] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled under section 7 of the Contractual Remedies Act 1987; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Background Facts

[5] Mr Garg said that on 24 May 2012 Mr Bali attended at SRG's offices, and he had given him the three documents relating to the Settlement, these being the offer of employment and employment agreement with NZLM referred to in clause 2 of the Settlement, and the two documents from SRG referred to in clauses 4 and 5 of the Settlement.

[6] Mr Garg said that the handover of the documents was witnessed by Mr Gurmeet Singh and a handwritten note dated 24 May 2012 signed by Mr Garg, and witnessed by Mr Singh confirming the handover, was produced by Mr Garg in evidence.

[7] The letter which was provided in accordance with clause 4 of the Settlement was addressed “To Whom It May Concern’ and headed “Record of Employment – Sunil Kumar Bali”. The content was a record of Mr Sunil’s employment with SRG and a reference.

[8] The letter provided in accordance with clause 5 of the Settlement was addressed to Immigration NZ, and stated:

Should Mr Bali be granted a further work visa, I am not in a position to offer him further employment at SRG Holdings Ltd due to staff constraints. I have however offered him a position as a Sales Supervisor with another Company, NZ Liquor Merchants Ltd trading as Super Liquor Manukau.

[9] Mr Garg said Mr Bali had been asked to sign a receipt for the letters; however he had refused to sign and said he would return the following day. Mr Garg said he had subsequently sent the offer of employment letter together with a written employment agreement to Mr Bali by email. The offer of employment letter was headed ‘OFFER OF EMPLOYMENT – PART-TIME’ and offered Mr Bali a position as a Sales Supervisor with NZLM.

[10] Mr Bali claimed that the terms of the offer of employment as set out in the written employment agreement had not complied with clause 2 of the Settlement. In determination [2012] NZERA Auckland 195 dated 7 June 2012 the Authority determined that SRG had complied with clause 2 of the terms of the Settlement.

[11] On 8 June 2012 Mr Bali had decided to accept the offer of employment with NZLM which had been made to him and contacted Mr Garg, who had advised him to contact Mr Mike Kyne, his representative, as he himself was not in Auckland.

[12] Mr Bali said he had contacted Mr Kyne who had advised him that as the offer which had been made to him was conditional upon his obtaining a work visa by 8 June 2012, he would have to sight the work permit before counter-signing the job offer.

[13] Mr Bali subsequently appealed this decision to the Employment Court. In a Minute dated 15 August 2012, Judge Travis advised:

If Mr Bali is still seeking compliance with the terms of the settlement, as at present determined by the Authority, subject to the challenge to the Court, then it would appear that he has to commence compliance proceedings in the Authority again, dealing with the events of 7 June onwards. This time consideration would have to be given to joining NZ Liquor Merchant Ltd as a party against whom enforcement may be sought.

[14] Mr Bali subsequently submitted a statement of problem to the Authority seeking a compliance order to direct NZLM to execute an employment agreement in accordance with the Settlement.

Determination

Respondents

[15] Mr Garg is the sole director and joint shareholder with his wife of both SRG and the Second Respondent, NZLM. In this capacity he agreed that NZLM would provide the offer of employment to Mr Bali.

[16] The Settlement identified the parties to it as being Mr Bali and SRG, and was signed by Mr Bali, and by Mr Garg on behalf of SRG. NZLM had no employment relationship with Mr Bali at the date of the mediation on 23 May 2012, and was not identified as a party to the Settlement; however I accept that as the sole director of NZLM Mr Garg had the authority to represent that NZLM would provide the offer of employment to Mr Bali and to agree to clause 2 of the Settlement.

[17] I am not persuaded that the parties had turned their minds to the issue of whether NZLM was a co-respondent during the mediation process, nor am I persuaded that it has been properly joined. However given that the issue for determination is whether there has been compliance with the Settlement by SRG and NZLM I shall proceed to address that specific issue in this determination and allow NZLM to be a respondent party in this compliance issue.

Compliance

[18] Mr Fonua for Mr Bali submitted that the Settlement contained no provision making the offer of employment conditional upon Mr Bali obtaining a work visa. and that by making the offer of employment conditional upon Mr Bali obtaining a work visa, SRG and NZLM were withdrawing the offer of employment contrary to the terms of the Settlement.

[19] I find that I cannot agree with this submission. I observe that clauses 2 and 3 of the Settlement are brought together in the offer of employment letter, and clause 5 of the offer of

employment letter and clause 3 of the Settlement relate to the commencement date of employment which, in accordance with the Immigration Act 2009 provisions, must be accompanied with a valid work permit because Mr Bali is a foreign national.

[20] Mr Fonua submits that the first part of clause 3 which reads: *“If Sunil Bali is not able to commence work on or before June 8, 2012 ...”* must be read to mean if Mr Bali *‘is not able to accept work’*. As a result, as Mr Bali was prepared to accept the offer on 8 June 2012, the offer became an agreement binding on the parties upon his acceptance.

[21] The Settlement is in writing. In the *Law of Contract in New Zealand*¹ it is stated that

If the contract is in writing, its interpretation is exclusively within the jurisdiction of the Judge. In exercising this function, the Judge has traditionally been bound by what is known as the parol evidence rule. This rule provides for the exclusion of extrinsic evidence to “add to, vary or contradict” a written document.

[22] Although exceptions to the parol evidence rule have been recognised, for example to address the situation in which a prior oral agreement between the parties has not been correctly recorded in the written document, this particular written document is a Record of Settlement pursuant to s 149 of the Act.

[23] As such the negotiations which took place before the Settlement was signed by the parties and by the mediator are confidential in accordance with s 148 of the Act. Accordingly it is only the written terms of the Settlement which are pursuant to s 149(3)(a): *“final and binding on, and enforceable on the parties”*, that are to be determined by the Authority.

[24] In determination [2012] NZERA Auckland 195 I found that SRG had complied with clause 2 of the Settlement. Although NZLM had not been joined as a respondent at the time of that determination, for the sake of completeness I now also find that NZLM had complied with clause 2.

[25] Further, in supplying the two letters dated 24 May 2012 being the employment reference and an explanation to the NZ Immigration Department, I also now find that SRG had complied with Clauses 4 and 5 of the Settlement.

[26] The wording of clause 3 is: *“If Mr Bali is not able to commence work on or before June 8, 2012 ...”* I find that this wording is clear and unambiguous.

¹ Burrows, Finn & Todd, Third Edition

[27] In accordance with the Immigration Act 2009, in order to commence work in New Zealand a foreign national prospective employee must have a valid work permit or the right to work in New Zealand, otherwise the employer in providing work to a person without a work permit or the right to work would be breaking the law. Mr Bali agreed that on 8 June 2012 he did not have a work visa and therefore he could not commence work on that date.

[28] Accordingly I find that Mr Bali could not comply with clause 3 of the Settlement and as a result the offer which had been provided to him in accordance with clause 2 of the Settlement lapsed and was not extended: *“If Sunil Bali is not able to commence work on or before June 8, 2012 then the above offer shall lapse and shall not be extended.”*.

[29] I determine that SRG and NZLM had complied with clauses 2 and 3 of the Settlement.

Costs

[30] Mr Kyne has applied for costs on behalf of the Respondent.

[31] I see no reason in the current case for departing from the normal level of awards made by the Authority in similar circumstances. The normal rule is that costs follow the event and SRG and NZLM are entitled to a contribution towards their costs.

[32] For a case of this kind \$3,500.00 is accepted as the notional daily rate. The Investigation Meeting took less than a half day. Accordingly, Mr Bali is ordered to pay SRG and NZLM the sum of \$500.00 towards their costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority