

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 158
5273865

BETWEEN BRIAN GRANT
 Applicant

AND VICE CHANCELLOR
 UNIVERSITY OF OTAGO
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Janie Kilkelly, counsel for Applicant
 Barry Dorking, counsel for Respondent

Consideration of papers: 30 July 2012

Date of Determination: 31 July 2012

DETERMINATION OF AUTHORITY

- A. The Vice Chancellor’s application to have Mr Grant’s disadvantage grievance claim dismissed is declined.**
- B. Costs are reserved.**

Application to dismiss frivolous or vexatious proceedings

[1] The applicant Mr Brian Grant has raised disadvantage and dismissal personal grievance claims arising from the employment relationship he had with the respondent Vice Chancellor of the University of Otago from 2001 until 2009.

[2] The Vice Chancellor has applied to have the disadvantage grievance dismissed by the Authority under the power given to it at clause 12A of Schedule 2 of the

Employment Relations Act 2000. That power may be exercised at any time in any proceeding to dismiss a matter the Authority considers to be frivolous or vexatious.

[3] In determining this preliminary issue I have considered the Vice Chancellor's written application to strike out and Mr Grant's submissions in opposition.

[4] Dismissal of the disadvantage grievance is applied for on the grounds that a mediated settlement Mr Grant entered into under s 149 of the Employment Relations Act is a bar to having his claim investigated and determined by the Authority, as he has sought.

[5] A Record of Settlement under s 149 was signed by the parties or their agents and by a mediator, on 14 October 2008. Section 149 of the Act provides that the terms of such settlement are to be final and binding on the parties and that except for enforcement purposes those terms may not be brought before the Authority.

[6] The Vice Chancellor in his statement in reply to Mr Grant's claim appended a copy of the Record of Settlement. It has been brought before the Authority for enforcement purposes, as it is contended that the parties' final and binding settlement must be observed by them and that it prevents them from reopening an employment relationship problem that has been resolved by agreement.

[7] In all respects the form of the Record of Settlement complies with s 149 of the Employment Relations Act. The Record states that the employment relationship problem had arisen directly from an unsatisfactory relationship between Mr Grant and a named senior colleague on the University's academic staff. The settlement is expressed to be conditional on obtaining that person's concurrence to it, and the parties recorded their agreement that the employment relationship problem "should be resolved in mediation" between Mr Grant and the staff member with the assistance of both a University mediator and a Department of Labour mediator.

[8] It is clear I find from its wording that the settlement between the parties was not a resolution of the substance of an employment relationship problem but was a settlement of the procedure for achieving a future resolution of that problem. The parties agreed that the grievance should be resolved and they agreed on a process for doing that, but they have not yet agreed on a resolution.

[9] Under the settlement, “prior to mediation” taking place at some future time, Mr Grant and the staff member were to provide particulars of any complaints they had about each other, and following that;

(6) *The mediators will determine an appropriate process for achieving and recording a satisfactory outcome.*

[10] A further clause provides:

(7) *Subject to any agreements reached at mediation, the applicant’s performance review will be deferred until after the conclusion of mediation.*

[11] It appears from the evidence intended to be given to the Authority that the settlement had not been fully performed between the parties by the time Mr Grant was summarily dismissed for serious misconduct in August 2009. Just before then, in July 2009, he had been given notice of redundancy following a review and restructuring within his department. The dismissal for misconduct prior to the redundancy meant that he did not receive any redundancy compensation. As well as raising a disadvantage grievance Mr Grant challenged the justification for his dismissal and he now wants the Authority to investigate and determine both grievance claims.

[12] In the statement of problem lodged on his behalf the following reference is made to the Record of Settlement:

The Record of Settlement of the Employment Relationship Problem did not have as part of it that it was full and final settlement of the matters under review as part of its terms and therefore because of that those matters are properly and lawfully incorporated as part of the present actions. The mediation was simply an unrealised attempt at resolution of those issues.

[13] The Record of Settlement has the appearance of an ‘agreement to agree’ upon a resolution of the substantive grievance and as such may arguably be unenforceable by compliance order, which is a discretionary remedy. I consider that under the settlement the parties agreed they would try and resolve the substance of the employment relationship problem between Mr Grant and his colleague by mediation using two mediators who were to be supplied with further information about the problem. Although that much was resolved between the parties they did not proceed to a point where further mediation, as contemplated by the terms of settlement, took place to try and resolve finally the substantive problem itself.

[14] In October 2008 the parties had contemplated reaching a mediated settlement to assist them in their ongoing employment relationship. Although they may be capable of continuing with mediation if the terms of the settlement can still be fully performed by them, the parties now in 2012 may see no real purpose in doing that because the employment relationship between them ended in 2009.

[15] It is open to Mr Grant to seek compliance with the Record of Settlement, at least to require that mediation takes place as contemplated in the Record of Settlement, but I do not consider a compliance order could be issued to compel the parties to settle the substantive grievance. Alternatively, and perhaps more sensibly, the parties may acknowledge to the Authority that mediation as originally contemplated has not been successful, as there has been no settlement of the substantive problem and there is now unlikely to be. In that case, as with any unsettled grievance claim, Mr Grant may proceed if he wishes to an investigation and determination of the disadvantage grievance claim.

[16] For the above reasons the Authority declines to exercise its power to dismiss that claim under clause 12A of Schedule 2 of the Employment Relations Act.

[17] If the parties do proceed to further mediation as contemplated by the Record of Settlement, the investigation of the dismissal grievance will be adjourned until that process is completed. If the parties acknowledge that further mediation is unlikely to constructively assist resolution, or is impracticable in the circumstances, then the Authority will have a telephone conference with them and set down all the grievance claims for investigation and determination together.

Costs

[18] Costs are reserved.