

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 100
5609347**

BETWEEN KATE RAMSEY
 Applicant

AND PHILIP & LILA BERGE t/a
 GLAMBRICK FAMILY TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Ken Usmar, Advocate for Applicant
 Lila Berge, Representative for Respondents

Investigation Meeting: On the papers

Submissions received: 18 March 2016 from Applicant
 21 March 2016 from Respondent

Determination: 01 April 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Kate Ramsey, claims that the Respondents, Philip and Lila Berge trading as Glambrick Family Trust, failed to pay outstanding accrued holiday pay which was due to her prior to them reaching a mediated settlement.

[2] Mr and Mrs Berge claim that Ms Ramsey was paid all due entitlements and that their understanding is that the mediated settlement agreement was in full and final settlement of all claims made by Ms Ramsey.

Issues

[3] The issue for determination is whether or not Ms Ramsey is now entitled to make a claim for statutory holiday pay entitlement from Mr and Mrs Berge.

Note

[4] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and on submissions from the parties.

Brief Background Facts

[5] With the assistance of a lawyer engaged by them, Mr and Mrs Berge reached an agreement with Ms Ramsey on terms in relation to resolving a personal grievance raised by her.

[6] Mr and Mrs Berge and Ms Ramsey subsequently set out the terms of the agreement in a memorandum of Settlement (the Record of Settlement) dated 30 November 2015 and made pursuant to s 149 of the Employment Relations Act 2000 (the Act)..

[7] The terms of settlement included the following clauses:

Clause 7 *IN REACHING this Agreement, the parties confirm that neither has agreed to forego minimum entitlements ((monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined in the Employment Relations Act 2000)*

Clause 12. THIS AGREEMNT is a full and final settlement of all employment related claims and matters between the employee and the employer arising out of their employment relationship and its termination, including all claims (whether existing or within reasonable contemplation arising from matters up to the date of this agreement which either has or may have against the other in respect of the employee's employment or its cessation.

[8] The Record of Settlement was signed by Ms Ramsey on 1 December 2015, and by Mr and Mrs Berge on 7 December 2015.

[9] The Record of Settlement was also signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 11 December 2015.

[10] It was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised of and accepted that they understood the effect of sections 148A, 149 (1) & (3) of the Act.

[11] The Record of Settlement further stated that the Mediator confirmed:

(e)... that the parties have advised me that no minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined in the Employment Relations Act 2000) have been foregone in the reaching of this settlement; and

(f) I am satisfied that the parties understood the effect of sections 149(1) & (3) and have affirmed their request that I should sign the agreed terms of settlement.

Determination

[12] There are two situations in which parties can conclude a Record of Settlement. The first is where the parties may reach a settlement pursuant to s 149 of the Act for the resolution of an employment relationship problem through the provision of mediation services; the second is where the parties reach a resolution settlement which they require a mediator to certify under s 149 of the Act. The Record of Settlement between Ms Ramsey and Mr and Mrs Berge fell into the second situation.

[13] In either situation, the Mediator is required to explain to the parties the effect of sections 148A, 149(1) & (3) of the Act and receive confirmation from them before signing the Record of Settlement that no minimum entitlements have been foregone in reaching the settlement.

[14] Section 149 (1) of the Act sets out the conditions upon which a mediator may sign the terms of settlement and s 149(2) of the Act sets out that the mediator has explained the effect of subsection 149(3) and is satisfied that the parties affirmed their request: "... *knowing the effect of that subsection,*".

[15] Sections 148A, 149(1) & (3) of the Act state:

148A Minimum Entitlements

(1) Minimum entitlements may be the subject of-

(a) mediation under this Part; and

(b) agreed terms of settlement under section 149(1).

(2) Despite subsection (1), a person who is employed or engaged by the chief executive to provide mediation services and who holds a general authority to sign agreed terms of settlement under section 149 (1) must not sign the agreed terms of settlement in which a party agrees to forego all, or part, of the party's minimum entitlements.

149 Settlements

(3) Where, following the affirmation referred to subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,-

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under section 7 of the Contracts Remedies Act 1979; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[16] The Record of Settlement sets out at clause 7 the confirmation of the parties that minimum entitlements under the Holidays Act 2003 have not been foregone by either party. Clause 12 sets out the parties' agreement that the Record of Settlement is to be in full and final settlement of all claims arising or within the reasonable contemplation of the parties at the date of signing.

[17] The Mediator has signed the Record of Settlement after confirming that she had explained the effect of sections 148A, and s 149(1) & (3) of the Act. In particular the Mediator affirms prior to her signature that she has confirmed the advice of the parties that no minimum entitlements have been foregone in reaching the settlement as she is required to do pursuant to s 148(2) of the Act..

[18] I find that Clauses 7 and 12 confirm the understanding of the parties of the implications regarding minimum entitlements and the finality of the settlement prior to their signing it, and that the Mediator fulfilled the statutory requirements prior to signing the Record of Settlement.

[19] I find that the Record of Settlement is binding on the parties and cannot come before the Authority for cancellation, review or otherwise pursuant to s 149 (3)(ab) and (b) of the Act.

[20] I determine that Ms Ramsey is not, by virtue of the Record of Settlement, entitled to claim statutory holiday pay from Mr and Mrs Berge.

Costs

[21] While costs are reserved, I note here that, subject to their submissions, the Respondents were not legally represented and, unless they incurred legal costs, it is therefore unlikely that they have grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority