

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 64
5556288

BETWEEN VICTORIA SINGH
 Applicant

AND TRUSTEES OF THE
 WELLINGTON RUDOLF
 STEINER KINDERGARTEN
 TRUST
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Greg Bennett, Advocate for Applicant
 Hamish Kynaston, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 29 January 2016, from Applicant
 8 March 2016, from Respondent

Determination: 3 June 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Victoria Singh lodged an application in the Authority in May 2015 claiming unjustifiable disadvantage, unjustifiable suspension, breach of good faith and duress in relation to her membership of a union. This related to her employment as a part time teacher with the respondent's Rudolf Steiner kindergarten in Wellington. She seeks various remedies including compensation for hurt and humiliation and lost wages. Additionally she seeks a penalty against her former employer.

[2] In response, the trustees of the Wellington Rudolf Steiner Kindergarten Trust (the Trust), have asserted Ms Singh resigned from her employment at the kindergarten effective 25 February 2015. The Trust denies dismissing Ms Singh or acting

unjustifiably towards her, stating it acted lawfully and in good faith towards her throughout her employment.

[3] The Trust also says that any employment relationship problems which might have arisen between Ms Singh and it were settled under the terms of a record of settlement agreed and signed by both parties on 3 March 2015. The Trust has asked the Authority to determine as a preliminary matter the issue of whether there was a settlement between the parties which precludes Ms Singh's claim or, in the alternative, whether she is estopped from proceeding with it by virtue of that settlement.

The Authority's investigation

[4] In the course of an Authority telephone conference with the parties on 1 July 2015, it was agreed the preliminary issue would be determined on the papers. A timetable was set for the receipt of submissions and affidavits from each party. Unfortunately it was not adhered to due to the indisposition and/or unavailability of Ms Singh's advocate for several months. A further telephone conference on 22 December 2015 resulted in a rescheduled timetable for submissions and affidavits.

Affidavits of the parties

[5] Ms Singh provided a short affidavit providing a very brief background to the matter that led to negotiations commencing with her employer and a record of settlement being prepared. In the course of her affidavit, Ms Singh recorded her understanding that the record of settlement would not be binding until signed by a mediator who would certify it.

[6] Ms Singh deposed that, when she signed the record of settlement, she did not believe it to be a binding agreement. Her understanding, from two emails she had received from the trustee who had been negotiating the record of settlement with her, was that the document would not become binding until certified by a mediator. When a mediator contacted Ms Singh, she informed the mediator she did not agree to the record of settlement being certified. This was because she had changed her mind "*for various reasons*" which she did not specify. Ms Singh concluded her affidavit by stating her belief the matter should proceed to a hearing so her full allegations could be heard.

[7] The Trust provided two affidavits, one from Gwen Isaac, a trustee of the Wellington Rudolf Steiner Kindergarten Trust, and the other from Michael Leggat, a barrister and solicitor who advised the Trust in relation to its dealings with Ms Singh and who drafted the record of settlement in question. Ms Isaac provided a comprehensive affidavit with several documents attached including a number of emails between herself and Ms Singh, and between Mr Leggat and Ms Singh in the period between 20 February 2015 and 3 March 2015 when the record of settlement was signed.

[8] Ms Isaac deposed that Ms Singh had made a complaint to the Trust about another Trust employee. Her complaint was investigated and was partially upheld: one allegation was upheld but another more serious allegation was not. Ms Isaac and another trustee met with Ms Singh and her husband on Friday, 20 February 2015 to discuss the investigation report. She says Ms Singh was unhappy with the outcome and there were concerns regarding her relationship with the other employee. A discussion ensued about the possibility of resignation on agreed terms by Ms Singh. Ms Isaac said Ms Singh expressed interest in the Trust making her an offer.

[9] Later the same day, Ms Singh telephoned Ms Isaac wanting to know very soon what her employer was offering by way of a settlement package so she could consider her options over that weekend. Ms Singh followed up the telephone call with an email requesting details of the exit package. The following day, Ms Singh again emailed Ms Isaac referring to the possible components of an exit package that had been discussed the previous day, asking Ms Isaac to confirm those were the details of the package she had been offered and noting:

*I would like to negotiate some of these terms – please confirm that the trust is open to this.
Yours in good faith – Victoria*

[10] A number of emails passed between Ms Singh and Ms Isaac on Saturday, 21 February in which Ms Singh sought clarification of the Trust's offer and put forward a number of additional elements she wished to be included. She concluded one email by saying "*would really like a sold [sic] figure to agree to by Monday so we can sign off on this on Wednesday*".

[11] On Monday, 23 February, Ms Isaac emailed Ms Singh an amended offer in which the Trust accepted some of her requests and declined others. She attached a

record of settlement to that email. Ms Isaac noted in her email that the Trust was a charity with limited resources and was making the offer in good faith using best endeavours to resolve the situation fairly for both parties. Ms Isaac included the following paragraphs in her email:

We have had our lawyer draw up a record of settlement setting out the above terms. If you agree to them, please sign the agreement in the two places provided and return it to me. Our lawyer has explained that the record of settlement once signed will be referred to a mediator appointed by MBIE who will telephone each of us to discuss the agreement and then certify it.

I look forward to hearing back from you as soon as you have had time to consider this. I will leave it to you whether you wish to take legal advice. If it is able to be agreed by tomorrow, payment of the settlement sums should be able to be made by this Friday.

[12] The record of settlement attached to Ms Isaac's email was a standard MBIE¹ Mediation Service document. One of the clauses provided for the financial payments referred to in the settlement to be made not later than 27 February 2015. The final clause noted that the settlement was in full and final settlement of all matters between Ms Singh and the Trust arising out of their employment relationship including its termination.

[13] The record of settlement contained spaces for Ms Singh and a representative of the Trust to sign and date. Beneath that was the normal Mediation Service notation regarding the parties' confirmation of their full understanding that, once the mediator signed the agreed terms of settlement, the settlement was final and binding on and enforceable by the parties. There was then provision for further signatures by Ms Singh and a trust representative.

[14] The final section of the record of settlement was to be completed by the mediator after she/ he had received confirmation from the parties that the mediator had explained to them the effect of ss.148A, 149(1) and (3) of the Employment Relations Act 2000; that they understood the effect of those provisions; and that they had not foregone any minimum entitlements in reaching their settlement.

[15] Ms Isaac then recorded in her affidavit that she received an email on 24 February 2015 from Kate Drury, an NZEI adviser, who introduced herself as representing Ms Singh on the matter of the proposed record of settlement. Ms Drury

¹ Ministry of Business, Innovation and Employment

advised Ms Isaac the record of settlement was agreed with three exceptions, concerning the resignation date, annual leave entitlement and the settlement figure.

[16] Between 25 February and 3 March 2015, Mr Leggat and Ms Drury undertook email correspondence and telephone discussions regarding the record of settlement and its terms. Ms Isaac deposed that on 3 March 2015, she was sent copies of several emails between Ms Drury and Mr Leggat attaching different versions of the record of settlement. She says it was drawn to her attention in a phone call from Mr Leggat that the almost-final version of the record of settlement, which had yet to be signed, had a deadline for payment of 4 March 2015 at Ms Singh's initiative.

[17] Ms Isaac's affidavit states she received Ms Singh's signed record of settlement late in the afternoon of Tuesday, 3 March 2015. Ms Singh had signed the document in the two appointed places and initialled each page. Ms Isaac then signed the record of settlement in both places that day, initialled each page on behalf of the Trust, and emailed it to Mr Leggat.

[18] Mr Leggat deposes that he received the record of settlement Ms Singh had signed at 4.16 pm on 3 March 2015. An email attached to his affidavit confirms this. He was in Christchurch on business at the time. He checked the document then forwarded it to Ms Isaac with a request that she execute it on behalf of the Trust.

[19] Mr Leggat received the duly signed record of settlement back from Ms Isaac and, at 10.46 am on 4 March 2015, he sent it to Ms Drury attached to an email. In the email he asked Ms Drury if she would arrange the certification with the Mediation Service as he would be unable to do so until the following day. Ms Drury's email response confirmed she would.

[20] Ms Isaac notes in her affidavit that she spoke with the Trust's treasurer on 3 March 2015 because she was aware of the urgency to get the payment to Ms Singh in accordance with the record of settlement. On Wednesday, 4 March 2015, the Trust made the agreed settlement payments to Ms Singh, totalling in excess of \$10,000.

[21] One non-financial term of the settlement entailed a positive reference for Ms Singh. On Thursday, 5 March 2015, Ms Singh, through her NZEI representative, requested the reference be emailed to her. Ms Singh followed up on Sunday, 8 March 2015 by emailing Ms Isaac directly asking that the reference be provided the following day. If it was not complete by that time, she asked the Trust to send a

certificate of service as soon as possible, noting she required this immediately for relieving work. Ms Isaac deposed that she emailed Ms Singh a scanned copy of the certificate of service on Monday, 9 March 2015.

[22] That day, Ms Singh made several requests regarding the return of her belongings. Those requests were attended to by the Trust and on Monday, 9 March 2015 Ms Isaac emailed Ms Singh a positive reference in accordance with the agreement reached on 3 March.

[23] Ms Isaac's evidence is that the MBIE mediator contacted her on Thursday, 5 March or Friday, 6 March 2015 to ask if she understood what she had signed in relation to the terms of the record of settlement. Ms Isaac confirmed that she did. The following day, a message was left on her answer phone by the mediator asking Ms Isaac to return her call. Ms Isaac says she did not retrieve the message until 15 March 2015. It was 18 March 2015 before Ms Isaac and the mediator spoke and Ms Isaac learned the mediator could not certify the record of settlement as Ms Singh had reported to her that she did not understand or agree with what she was signing.

[24] Ms Isaac deposed that her initial reaction to this news was shock as, based on the email correspondence, the phone and the face-to-face discussions she had had with Ms Singh over the two weeks previously, she appeared to her to have an excellent grasp of what the record of settlement entitled her to and what it signified.

[25] Ms Isaac states in her affidavit that the Trust had paid Ms Singh the settlement sum at Ms Singh's request and as agreed on Wednesday, 4 March 2015. Ms Singh had not repaid the sum or returned the reference provided and nor had she offered to do so.

Submissions

[26] Mr Bennett, in submissions made on behalf of Ms Singh, said the Trust had been informed of the record of settlement process by its lawyer and was fully aware there could be no binding and enforceable agreement until the mediator had signed it. He submits it was on that basis Ms Singh agreed to signing the proposed settlement terms as she believed nothing was binding until the mediator had spoken to her and discussed the proposed terms and she had agreed for the mediator to certify the terms to make them binding and enforceable.

[27] Mr Bennett canvased some case law he considered relevant, including *Abernathy v. Dynea New Zealand Ltd (No 2)*² in which the Court determined that when the parties reach agreement and agree on a process to be followed, no binding accord is reached until the process is completed. He distinguished *Penney v. Fonterra Cooperative Group Ltd*³ in which Judge Couch found a settlement agreement was complete upon signing by the parties. In Mr Bennett's submission, the emails from Ms Isaac to Ms Singh, which required the parties to have the record of settlement certified by a mediator, was a different process from that before the Court in *Penney*. He referred to *JP Morgan Chase Bank NA v. Lewis*⁴ in which the Court of Appeal did not rule out the possibility that a settlement agreement could be considered to be a variation of an employment agreement. Mr Bennett submitted that decision does not affect or have relevance to the current matter.

[28] Mr Kynaston submitted for the Trust that the record of settlement, agreed and signed by the parties, was a binding contract that precluded Ms Singh from pursuing her claim. Alternatively, he submitted Ms Singh was estopped from pursuing her claim, the Trust having acted in reliance, and in good faith, on Ms Singh's promises, to its considerable detriment. He submitted it would be inequitable in all the circumstances for Ms Singh to resile from her promises.

[29] Mr Kynaston cited the well-known principles of interpretation from *Vector Gas Ltd v. Bay or Plenty Energy Ltd*⁵ in which Tipping J stated:

The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The Court embodies that person. To be properly informed the Court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to be likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

² [2007] ERNZ 462

³ [2011] NZEmpC 151

⁴ [2015] NZCA 255

⁵ [2010] NZSC 5

[30] In Mr Kynaston's submission the question for the Authority to determine is whether, applying the *Vector* principles, the parties intended to be bound prior to the sign off of the record of settlement by a mediator. In his view, that was plainly the intention based on the words used, the structure of the record of settlement and the parties' conduct.

[31] I agree with that submission. It is clear, from the evidence of the emails between the parties, Ms Singh wished to receive payment and other benefits arising from the record of settlement, such as a reference, as soon as possible. It was Ms Isaac's evidence that the term of the record of settlement that provided for payment "*not later than 4 March 2015*" was at Ms Singh's instigation.

[32] Ms Singh had the opportunity to provide an affidavit in response to those of the Trust as well as submissions in reply to the Trust's submissions. She did not take that opportunity. Her advocate's office confirmed to an Authority officer on 30 March 2016 that he did not intend to provide a response. I accept Ms Isaac's undisputed evidence on that matter.

[33] I also accept the evidence of Ms Isaac that she received the record of settlement, and signed it, late in the afternoon of 3 March 2015. That evidence is supported by an email from Ms Drury to Mr Leggat at 4.16 pm on 3 March, with the subject line being "*Re: signed ROS – Singh*" and the message being "*Attached. Pse check. K*". The email correspondence between Ms Drury and Mr Leggat establishes that Ms Drury acknowledged receipt of the record of settlement signed by Ms Isaac at 11 am on 4 March 2015, confirming she would send it to the Mediation Service.

[34] I conclude, on the basis of the timeframes established above, that it could not have been in the contemplation of either of the parties that a mediator would contact them both and certify the record of settlement before 4 March, which was the date on which payments agreed in the settlement were to be made to Ms Singh. I accept the Trust's submission that, throughout the negotiations, and in the final version of the agreed settlement, the date for payment turned on the date on which the record of settlement was to be signed by the parties. At no point was the date for payment subject to a mediator's sign off.

[35] This has similarities to Ms Penney's situation where, in the case referred to in paragraph 27 above, the Employment Court rejected her challenge to the Authority's

declining of her application to reopen an investigation. While several of the grounds on which it did so are not relevant to Ms Singh's case, one ground is of particular significance. This was the Court's finding that the absence of a mediator's signature on the settlement agreement, when the agreement included a request that a mediator sign it, did not invalidate the agreement. The Court found the agreement itself was complete upon signing by the parties and said:

The only significance of the request to the mediator was that, if the mediator signed it in accordance with s.149 of the Employment Relations Act 2000 the agreement would be subject to the provisions of s 149(3). It was not a term of the settlement agreement that it be effective only if signed by a mediator.⁶

[36] For similar reasons I find Ms Singh is not able to rely on the absence of a mediator's signature on the record of settlement she signed on 3 March 2015 to pursue her claims in the Authority. The record of settlement became a binding contract at the time it was signed by Ms Isaac, for the Trust, on 3 March 2015. The payment on 4 March 2015 of monies agreed under that contract is evidence of accord and satisfaction.

Determination

[37] Ms Singh is precluded from pursuing her claims in the Authority by the record of settlement signed on 3 March 2015, which included the provision that it was in full and final settlement of all matters between her and the Trust arising out of their employment relationship.

Costs

[38] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁶ n3 at [44]