**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2018] NZERA Christchurch 132
3033011

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| | BETWEEN | IMPULSE FISHING CO LTD AND/OR ROBSON FISHING PARTNERSHIP<br>Applicant |
| | A N D | VINCENT SMITH<br>Respondent |

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| Member of Authority: | Peter van Keulen |
| Representatives: | Tim Cleary, Counsel for Applicant<br>Anjela Sharma, Counsel for Respondent |
| Investigation Meeting: | 10 September 2018 at Nelson |
| Submissions Received: | 6 September 2018 for Applicant<br>6 September 2018 for Respondent |
| Oral Determination issued: | 10 September 2018 |
| Written Determination issued: | 12 September 2018 |

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**ORAL DETERMINATION OF THE AUTHORITY**

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**This determination is a written record of an oral determination delivered on 10 September 2018.**

## Employment relationship problem

[1] This is a determination of an application to stay claim ERA 5534332, *Vincent Smith v Impulse Fishing Co Limited and/or Robson Fishing Partnership*. Member Hickey investigated ERA 5534332 and issued a determination on liability on 22 March 2017. That determination concluded that Impulse Fishing Co Limited and/or Robson Fishing Partnership (Impulse Fishing) had unjustifiably dismissed Mr Smith and that Impulse Fishing may be liable for a penalty for failing to keep wage and time records and there may be further liability for wage arrears in respect of wages and holiday pay paid to Mr Smith. Member Hickey is set to investigate the issue of remedies on these matters shortly.

[2] There was also a second claim between the parties, ERA 5554312, addressing claims by Impulse Fishing against Mr Smith. Member Hickey dismissed these claims in her determination of 22 March 2017.

[3] Impulse Fishing has also challenged Member Hickey's determination to the Employment Court, EmpC 83/17 and that challenge is stayed pending the outcome of the further investigation into remedies.

[4] This application, if successful, will dispose of both the pending Authority investigation and the currently stayed challenge in the Employment Court. This is because this application has the effect of more than simply a stay as it is premised on the basis that the parties have reached an agreement that once effected will mean all matters between the parties have been settled and the Authority and Court matters will be withdrawn.

[5] Mr Cleary on behalf of Impulse Fishing says an offer to settle was set out in correspondence of 7 May 2018 between the solicitor acting for Impulse Fishing and Ms Sharma counsel for Mr Smith. That letter offered to settle all matters by payment of a sum of money from Impulse Fishing to Mr Smith. The offer included other terms of settlement that had been set out in previous correspondence.

[6] Mr Cleary's point was that at the time the only aspect of settlement being negotiated by the parties was the quantum of any payment as the other terms were clearly set out in correspondence and had not been questioned. And, after the offer was sent on 7 May 2018, an agent apparently acting on behalf of Mr Smith accepted it, on 8 May 2018.

[7] Ms Sharma, on behalf of Mr Smith says there was no clear acceptance partly because the agent was not an agent and had no authority to act. Ms Sharma also says, in any event if there was an offer accepted, acceptance was conditional on a record of settlement being signed by a mediator and this never happened.

[8] So the issue I must resolve is, have the parties reached a binding agreement settling all matters between them, arising out of their employment relationship. And, if so, was that agreement conditional on a record of settlement being signed by a mediator.

[9] I have already made it clear to the parties and counsel that I have found it very difficult to resolve this issue – to say this matter is finely balanced is an understatement. But I must reach a conclusion and in order to do so, I turn my mind to the basic principles and remind myself that my role is to resolve employment relationship problems according to the substantial merits of the case, without regard to technicalities. I must also act in equity and good conscience.

[10] It is these very points that Mr Cleary refers me too when he references case law which he says sets out that there is a global or objective approach to contract formulation.[1] One that the Courts have expressed as being, whether a reasonable person viewing the dealings or correspondence, objectively and as a whole, would accept that correspondence or those dealings show that there is a concluded agreement.

[11] The additional element to this is the interpretation principles that apply, that the subjective intention of the parties is not relevant i.e. that a party believes there is a concluded agreement on particular terms is not relevant, but the parties knowledge and the circumstances are relevant to informing the reasonable person's assessment[2].

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[1] *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560; and *Meates v Attorney-General* [1983] NZLR 308
[2] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5

[12] It is therefore my role to objectively assess the correspondence as a whole and determine whether a reasonable person, with the knowledge of the circumstances the parties had at the time, would conclude:

(a) That there was a binding agreement between the parties (or not); and

(b) If there was a binding agreement, that it was conditional upon a record of settlement being signed by a mediator (or not)?

[13] To assist in this assessment I must keep in mind, as I have stated, that I should consider the substantial merits of the case and not have regard to technicalities and I must act in equity and good conscience.

[14] Turning to the relevant correspondence:

(a) On 7 May 2018, the solicitor acting for Impulse Fishing sent an email to Ms Sharma with an offer to settle by payment of a specified sum (the "First Amount"). This offer was based on the other terms and conditions set out in an offer made on 27 April 2018, which in turn referenced terms and conditions in another offer made on 24 October 2017. The effect of this was clear; the offer to settle was the payment of the specified sum of money plus the previously outlined terms of settlement.

(b) On 8 May 2018, at 10:46 am, Ms Sharma responded to that offer by email stating that Mr Smith would agree to settle the matter for payment of a different specified sum, being an increase on the 7 May amount (the "Second Amount"). There was no reference to any of the additional terms of settlement. That email also identified some availability issues for Ms Sharma as she had to attend a non-work matter in Christchurch.

(c) On 8 May 2018, at 1:36 pm another person who appeared to be acting on behalf of Mr Smith – for the purposes of my determination I will refer to him as the Agent but do so without making any finding on whether this person was in fact an agent. The Agent's email stated that Mr Smith had instructed Ms Sharma to accept the latest settlement offer of the First Amount, "subject to the appropriate paper work being completed."

(d) On 8 May 2018, at 4:46 pm the solicitor for Impulse Fishing sent an email to the Agent and Ms Sharma and acknowledged the acceptance of the offer of the First Amount and stated "I will arrange for the documentation and sign off."

(e) On 11 May 2018 the solicitor for Impulse Fishing sent an email to the Agent and Ms Sharma enclosing a record of settlement, stating "(p)lease confirm it is acceptable and we will have our client sign, and we will forward to you to sign and then off to mediation services to action."

(f) On 24 May 2018 Ms Sharma sent an email to the solicitor for Impulse Fishing which raised two issues with the terms set out in the record of settlement – one related to timing of payment and the other related to the Employment Court challenge.

(g) On 25 May 2018, the solicitor for Impulse Fishing sent an email to Ms Sharma, which set out that Impulse Fishing would accept the proposed change for timing of the payment but not the other proposal. Attached was an amended record of settlement and the solicitor stated, in the email, "(p)lease therefore have your client agree the attached Record of Settlement."

(h) On 8 June 2018, Ms Sharma sent a letter to the lawyer for Impulse Fishing, which indicated, amongst other things that Mr Smith did not consider the First Amount to be sufficient in light of the effect of the one particular term of settlement set out in the record of settlement. She then set out two proposals for settlement being the First Amount with the removal of the particular term of settlement or the Second Amount if that term of settlement remained.

[15] The first key aspect of this exchange is that Ms Sharma rejects the offer of 7 May 2018 when she advances a counter-offer on behalf of Mr Smith on 8 May 2018. So when the Agent subsequently advises that Mr Smith wants to accept an offer based on the First Amount there is no offer capable of being accepted[3].

[3] *Hyde v Wrench* (1840) 3 Beav 334; and for the application in an Authority matter see *PCA v David Osbourn Medical Services t/a Enhanceskin* [2016] NZERA Christchurch 209.

[16] What this means is, the Agent's email of 8 May 2018 becomes a new offer. However that offer does not refer to any other terms of settlement[4] but rather states that the offer is "subject to the appropriate paper work being completed" i.e. it is conditional upon the paper work.

[17] What follows in terms of the subsequent emails from the lawyer for Impulse Fishing, particularly the email of 11 May 2018, is an invitation to review the terms set out in the record of settlement and for Mr Smith to confirm it is acceptable.

[18] Mr Cleary submitted that the language used in the email of 11 May 2018 was not a referral to the terms set out in the record of settlement being subject to further negotiation but rather that it was simply a polite way of requesting Mr Smith to confirm that the agreed terms were recorded correctly.

[19] I do not accept this. If all of the terms of settlement were known, agreed and accepted by Impulse Fishing, it seems more likely that the 11 May 2018 email would have set out that the record of settlement contained the agreed terms and it would have invited Mr Smith to sign and return it.

[20] My conclusion is, on reviewing all of the relevant correspondence objectively and as a whole, a reasonable person with the knowledge of the circumstances of the parties at the time would conclude that the parties had agreed an amount to be paid but the other terms were still to be settled.

[21] The exchange of correspondence after 8 May 2018 confirms this, particularly as there are counter-offers made on those specific terms as set out in the record of settlement. And there is no evidence that the issues raised or offers made by Ms Sharma on behalf of Mr Smith in her correspondence of 24 May 2018 and 8 June 2018 were ever agreed.

[22] As my conclusion is there are no agreed terms of settlement I do not need to consider if any agreement was subject to a record of settlement being completed.

[23] The application for a stay of ERA 5534332 is dismissed.

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[4] It is probable that the Agent was not aware of the previous proposed terms of settlement as the key piece of correspondence setting out those terms was not attached to the 7 May 2018 email and the Agent was not copied into the original correspondence.

[24] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority