

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 177
3117995 & 3118052

BETWEEN	JOANNE MITCHELL Applicant in 3117995
AND	STEVE MARTIS Applicant in 3118052
AND	BLAIR-BELLAMY FARMS Respondent

Member of Authority:	Robin Arthur
Representatives:	David Flaws, advocate for the Applicants None for the Respondent
Investigation:	On the papers
Submissions received:	11 March 2021 from the Applicants
Determination:	30 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joanne Mitchell and Steve Martis lodged applications seeking orders for payment of arrears of holiday pay they said was still owed to them for working on the Respondent's farm in 2018 and 2019.

[2] A preliminary jurisdictional issue arose in considering those applications because Ms Mitchell and Mr Martis had each earlier entered a settlement agreement with the Respondent. Each agreement had a term saying they were made in "full and final settlement of all matters between the parties arising out of their employment relationship".

[3] This issue has been resolved on the papers. The Respondent has not been involved with this application so far, either by lodging a statement in reply or by using

an opportunity provided to comment or make submissions on whether the Authority was able to proceed to consider the applications. Ms Mitchell and Mr Martis, through their advocate, did make use of an opportunity to make submissions on the jurisdictional issue. Those submissions have been considered along with copies of the settlement agreements and their applications.

Background

[4] Ms Mitchell and Mr Martis notified their formal employer of personal grievance and arrears claims in December 2019. The parties attended mediation on 22 May 2020. On 25 May 2020 Ms Mitchell and Mr Martis signed their settlement agreements. The employer signed the agreements two days later. The mediator certified those agreements on 2 June 2020.

[5] The parties agreed their terms of agreement would be confidential. These included two terms beneficial to Ms Mitchell and Mr Martis, about which no further detail need be given. The other relevant terms were as follows:

2. Both parties agree the employment relationship has ended by way of resignation. Parties will share information regarding holiday pay.

...

6. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, the Holidays Act 2003, or the Home and Community Support (Payment for Travel between Clients) Settlement Act 2016) as specified in s 148(3) of the Employment Relations Act 2000.
7. This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[6] The mediator's certificate states he had explained to the parties the effect of provisions of the Employment Relations Act 2000 (the Act) about the certification process. Certification makes the agreed terms final, binding and enforceable; not open to cancellation under certain sections of the Contract and Commercial Law Act 2017; and only able to be brought to the Authority for enforcement purposes, not for appeal or review.¹

¹ Employment Relations Act 2000, s 149(3).

[7] The settlement agreement form used by the mediator includes a section, also signed by the parties, confirming they fully understand those effects of the mediator certifying their agreed terms.

The parties' submissions

[8] Ms Mitchell and Mr Martis submitted that they had understood from discussions during mediation that, in addition to what was provided in their settlement agreements, they would be paid holiday pay "if arrears of wages were owing". As noted above, one term of the agreement said the parties would "share information" about holiday pay. They said the Respondent later told their representative that holiday pay had already been paid and documents supporting that conclusion would be provided. None were subsequently provided.

[9] They also said the mediator had not told them or their representative that the settlement agreements they signed following mediation would not allow them to pursue further claims for holiday pay. They said that if the mediator had done so, they would not have signed the agreements. On that basis they submitted an exception had been triggered to the prohibition on challenging or call into question terms of a certified agreement. Section 152(2) of the Act allows such questioning if the provisions of s 149(2) and (3) of the Act were not complied with. Those latter two sub-sections concern the requirement on the mediator to explain the effects of certifying the agreement, as making it final and not open to review or appeal.

Certification is a bar to further action in this case

[10] For the following reasons Ms Mitchell and Mr Martis' argument does not establish the Authority has jurisdiction to put aside the finality of their certified settlement agreements and to allow them to pursue their holiday pay claims.

[11] Firstly, there is a difficulty in considering evidence about what was said in mediation. Section 148 of the Act requires the parties and the mediator to keep confidential any statement made for the purposes of mediation and any information disclosed orally in the course of mediation. There is an exception where the parties consent to give up that confidentiality. There is nothing to indicate the necessary consent has been sought or given in this case.

[12] Further exceptions may exist in relation to disclosures of serious criminal activity or where there were established issues of mental capacity or illness that genuinely affected the ability of parties to participate in the mediation process. Nothing like that applies in this case.

[13] On that basis, what Ms Mitchell and Mr Martis said about what was said in mediation had to be set aside. However, even if considering and accepting their account was permitted, this did not disclose any clear agreement that holiday pay was owed or could be pursued in further action. Rather the account given in the submission prepared by their representative said that “if” there was holiday pay owing, it would be paid and the Respondent had subsequently said no holiday pay was owing. Nothing was reserved in their settlement agreements to pursue that issue in the event of disagreement on that point. Clause 2 of their agreed terms said only that further information about holiday pay would be shared.

[14] Secondly, certifications by the independent employment mediators, appointed to their roles by the chief executive of the Ministry of Business are not lightly to be set aside. It is a solemn and binding process. Clear steps are set out. The standard form used by mediators for agreements certified under s 149 of the Act includes a separate section to be signed by the parties confirming they have fully understood the effect of the mediator signing their agreed terms of settlement.

[15] A simple assertion that the mediator did not explain the effect is not sufficient to displace the content of a statutory certificate. If it were, the role of the s 149 certification process in giving certainty and finality to thousands of employment relationship problems resolved in that way each year would be significantly undermined.

[16] However Ms Mitchell and Mr Martis have not asserted, in their submissions, that the mediator failed to inform them of the elements that s 149(2) of the Act says must be explained – that is the provisions of s 149(3) regarding finality, limits on cancellation and limits on further action or appeal. Rather their complaint is that the mediator did not specifically refer to holiday pay as something they would be barred from pursuing a claim over. It is a level of detail not required by the statute.

[17] Thirdly, there is a plain and clear term saying each agreement was a full and final settlement of “all” matters between the parties. If there were any agreement to

reserve some issue or matter for further negotiation and resolution, that exception could be expected to be expressly referred to in that term. The advocate for Ms Mitchell and Mr Martis was involved in the mediation process and there was no information suggesting they were at any disability in reading or understanding the written terms of the agreement they each signed in two places – once at the end of the list of the agreed terms (just below the term referring to a full and final settlement) and once under the section confirming they understood the settlement was final and binding.

[18] Fourthly, the reference in the agreement to not foregoing minimum entitlements, such as holiday pay, describes what the parties state as something they are confirming to the mediator. It is not an automatic reservation of any question of minimum entitlements, known to be at issue at the time settlement was reached, for ongoing negotiation. To conclude otherwise would sit uncomfortably with the certainty and finality of the certification process provided for by s 149 of the Act. It would be contrary to the other agreed term that the agreements were in full and final settlement of all matters between the parties arising out of their employment relationship.

Conclusion

[19] The Authority does not have jurisdiction to consider the claim by Ms Mitchell and Mr Martis for arrears because the terms and certification of their settlement agreements bar further action. Accordingly, their applications are dismissed.

Robin Arthur
Member of the Employment Relations Authority