IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 451
3163561

	BETWEEN	STEFAN SMITH Applicant
	AND	THE VICE-CHANCELLOR OF MASSEY UNIVERSITY Respondent

Member of Authority:	Michael Loftus
Representatives:	Greg Bennett, advocate for the Applicant Joss Opie and Georgia Callaghan, counsel for the Respondent
Investigation Meeting:	18 August and 7 September 2022 at Wellington
Submissions Received:	26 August 2022 from the Applicant 2 September 2022 from the Respondent with both spoken to on 7 September 2022
Date of Determination:	9 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Stefan Smith, claims the respondent, the Vice Chancellor of Massey University (Massey), has breached a record of settlement entered into pursuant to s 149 of the Employment Relations Act 2000 (the Act). He sought rectification his favour as opposed to compliance.

[2] In the alternate Dr Smith pleaded "non est factum" given a mistaken and erroneous belief as to what the settlement in fact meant given Massey's representatives "never stated or

mentioned" the possibility that what Dr Smith saw as an essential element of the settlement could be subsequently removed.

[3] Massey contends that it has acted in accordance with the settlement and argues that for a number of reasons Dr Smith has no chance of successfully pursuing his alternate claim.

Background

[4] Dr Smith is a qualified veterinary surgeon. He was, and remains, a shareholder in and employed by a company of which his wife is the sole director, Central Vets and Pets Limited (CVP) but was employed by Massey at its veterinary school as a lecturer until a dispute arose concerning what he contends was an unjustified warning. He lodged a personal grievance and as a result the parties attended mediation on 1 August 2019.

[5] The mediation ended with the parties having concluded a settlement agreement pursuant to s 149 of the Act. It saw Dr Smith exit his role at Massey and, crucial to this claim, contained a clause, 9, which reads:

> Massey agrees to provide an after-hours vet clinic service to clients of Central Vets and Pets, commencing on 1 February 2020 on its usual commercial terms on application from Central Vets and Pets. For the avoidance of doubt, Massey is not obliged to take Stefan's private practice clients (Central Vets and Pets clients) after hours before 1 February 2020. Stefan will ensure that Central Vets and Pets will provide an after-hours service up to 1 February 2020.

[6] Here, and as an aside, Massey has traditionally contracted with private veterinary practices in the Manawatu to provide this service. In 2015 CVP asked to be included but was told Massey was not, at that stage, accepting any more participants in the programme.

[7] After some interaction between Mrs Smith and the veterinary school, Massey forwarded the requisite documentation on 31 January 2020. Key amidst those is a document headed "*Memorandum of Agreement for the provision of out of hours veterinary emergency cover for Participating Practices ("MoA")*". The participating parties were identified as the University and CVP.

[8] Contained therein was a clause, 3, entitled "Term". It provided that:

> 1. The term of this MoA will commence on (to be agreed) and will end upon termination in accordance with this MoA. Either party must provide a minimum of three (3) months written notice terminating this MoA.

> 2. This MoA may be terminated by either party on thirty (30) days' notice in writing to the other party if such other party is in breach of any material term or condition of this MoA and does not remedy the breach within thirty (30) days from the day of service of the notice in writing specifying the breach and requiring its remedy.
>
> 3 [erroneous repeat of [2]].

[9] Also forwarded on 31 January was an email from Jon Huxley, the Dean and head of the Massey's veterinary school which, amidst other things, advised Mrs Smith that:

> Finally I would like to give you advance warning that our after hours vet clinic services are an area which we are actively reviewing at present. We will take you on under our current commercial terms but subject to the outcome of that review, the terms for all our clients may change in the future.

[10] In her brief of evidence Mrs Smith, who was consulted by her husband while he was agreeing his exit, says:

> I understand that the record of settlement stated Massey would provide after hours services on its "usual commercial terms" however I did not believe that the MOA is Massey's "usual commercial terms".

[11] She also says:

> I was astounded when I was provided with a memorandum of agreement (MOA), as I had not agreed to this document and only agreed to paying for the after hours service.

[12] Mrs Smith's disdain for the arrangement was conveyed to Massey in a letter of 4 February 2020. Pertinent to this dispute is the statement:

> Regarding the current memorandum of agreement (MOA) that I received on 31st January 2020, I have some comments and amendments that need to be made before it can be signed. All clauses, that provide Massey University with a means to cancel their out of hours veterinary cover obligation to CVP, need to be removed.

[13] While Mrs Smith takes issue with the MoA as a totality both her correspondence and the evidence of both her and Dr Smith makes it clear that the real issue was inclusion of the clause that allowed Massey to terminate the after-hours arrangement. It is that which is at the heart of this dispute.

[14] As events transpired, CVP have never signed the MoA but Massey has provided the service it would have been obliged to under the agreement and CVP has paid for that service. What subsequently brought things to a head is the fact that the review referred to in

Professor Huxley's email of 31 January 2020 has come to pass and Massey has gave notice it intends cancelling the then current MoA. A replacement was offered under which Massey would provide a reduced service having removed weekend and public holiday cover. That would continue to be available through a second arrangement with a private provider in the region. Essentially CVP is seeking to avoid that outcome and have the originally envisaged service provided in perpetuity.

Analysis

[15] In essence, Dr Smith's position can be summarised by a series of comments proffered on his behalf by Mr Bennett. They are to the effect that Dr Smith did not consider Massey could terminate the commercial arrangement between itself and CVP given he was intentionally using his personal grievance claim to obtain after hours cover for as long as CVP operated its practice. This was to both ensure CVP met its professional obligations while also freeing him from the onerous task of providing that after hours service. In the words of Mr Bennett:

> He was seeking to take advantage of Massey's service via the personal grievance, given the earlier advice to CVP that Massey was taking no further client practices. It was a leverage.

[16] While that may be the case Dr Smith must either establish a breach or otherwise show there are grounds to set the s 149 settlement aside.

Possible breach

[17] The provision alleged to have been breached is cl 9 of the settlement, with the argument being that Massey has, or soon will, cease to provide the afterhours service it originally offered to CVP and which was sought and agreed at the time of the mediation.

[18] Massey's response is that the settlement went further and stated the afterhours service would be provided in accordance with its usual commercial terms and that is exactly what was offered.

[19] In support of his position Dr Smith is trying to convince me that the "usual commercial terms" cannot be promulgated through a memorandum of understanding. There is also an argument that the terms contained in the MoA are not in fact those normally offered by the veterinary school's Pet Emergency Centre to its clients. This assertion is based on the fact that

while CVP has historically had no direct arrangement with the school for the provision of afterhours services, some of its clients have been forced to approach that service in their own capacity. Dr Smith says that subsequent to that all CVP receives is a clinical report and there is no evidence of a contractual arrangement, especially one that contains a termination clause.

[20] The difficulty for Dr Smith is his evidence in this regard makes it clear his understanding is based on nothing more than supposition and he can offer no hard evidence about what commercial arrangements Massey University and its veterinary school may have with others. Indeed, his approach is undermined by his acceptance that there will be a multiplicity of arrangements and Massey's evidence confirms that is the case.

[21] Massey's evidence is that there are a multiplicity of arrangements offed by various parts of the University and this is also the case for the veterinary school. It has various arrangements depending on the type of customer: for example casual walk ins, registered private clients of the school or "partner veterinary practices" which is what CVP would have been. The evidence also makes it clear the contractual arrangement under which Massey provides afterhours care to the clients of partner veterinary practices is promulgated via the MoA. That forwarded to CVP in January 2020 was identical to that signed by all other participating practices and in a form that had been in use for at least a few years. Here I also note that irrespective of the label used on the document the content of the MoA is what you would expect in a contract between two commercial entities (if one could label Massey University that way).

[22] The evidence makes it obvious that once CVP asked Massey provide an after-hours vet clinic service to its clients, Massey offered to do so on the usually applicable commercial terms for such an arrangement. That, in turn, means Massey has complied with the provisions of cl 9 of the s 149 agreement and there is no breach.

Non est factum

[23] The conclusion there was no breach means the pleading of non est factum must be addressed.

[24] Non est factum is the Latin label for a common law doctrine that can allow the signer of a legal document to escape the usual consequences of their signature. In arguing this may be applicable, Dr Smith suggests he has been either misled or made a mistake. That said, he does not distinguish between the two concepts, though they are indeed different.

[25] The idea Dr Smith was misled by the conduct of Massey's representatives in the mediation must, given the evidence, fail. He claims he was misled by omission as Massey's representatives knew about the MoA, its content and in particular the fact it contained a termination clause yet failed to tell him. That approach does not survive the evidence which is unequivocal. Dr Smith acknowledges the issue was never discussed and he never queried what "usual commercial terms" might mean, operating instead on what he thought the veterinary school did. Indeed, he went so far as to admit he did not even turn his mind to the possibility there might be a termination clause in the commercial terms offered to CVP until the MoA was received on 31 January 2020. That is nearly six months after the settlement was entered into. In other words there is no factual basis for claiming Massey misled Dr Smith.

[26] The second problem with this approach is it appears to be precluded by statute. A misrepresentation is defined as "the action or offence of giving a false or misleading account of the nature of something". In other words, to mislead.

[27] A s 149 agreement cannot be cancelled under ss 36-40 of the Contract and Commercial Law Act 2017 (CCLA 2017).[1] Section 37 allows a party to cancel the contract if induced to enter into it by a misrepresentation. The issue Dr Smith now faces is notwithstanding recent comments of the Court of Appeal that a blanket prohibition on the cancellation of a s 149 settlement in, for example, a case of fraudulent misrepresentation is not good policy that appears to be the effect of s 149(3)(ab) of the Act.[2] While *TUV* was appealed this issue was not commented on by the Supreme Court.

[28] The other possibility is cancellation for mistake with the ability to do that governed by the provisions of s 24 of the CCLA 2017. Under that Act, relief is available if a party to the contract entered into it having:

(a) Been influenced to do so by a mistake that was material to that party and the existence of the mistake was known to the other party;

(b) Both parties were influenced to enter into the contract by the same mistake; or

(c) Both parties were influenced to enter into the contract by virtue of a different mistake.

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[1] Section 149(3)(ab) of the Employment Relations Act 2000
[2] *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12 at [47]

[29] Mr Bennett, correctly I consider, conceded in submission that neither of the latter two possibilities can be applicable as the evidence is clear that Massey's representatives were not operating under any mistake or misapprehension. That leaves the first possibility, namely that only Dr Smith was operating under a mistake and it influenced his decision to enter into the settlement. However, for that to possibly apply there must also be evidence that Dr Smith's mistake was known to Massey. As set out in the Law of Contract in New Zealand that means:

> There can only be a mistake where the relevant party or parties to the contract have given consideration to a particular matter and come to an erroneous conclusion as to that matter. Where the party has simply not turned his or her mind to the particular matter there is no mistake at all.[3]

[30] The evidence makes it clear there could not, at least in those terms, have been a mistake here. That is because the evidence is neither party turned their minds to this till approximately six months after entering into the s 149 agreement.

Other matters

[31] For the sake of completeness, I now refer to three other matters discussed during the investigation.

[32] As already said Dr Smith's underlying concern is Massey can terminate the commercial arrangement it has with CVP. That that is at the heart of this matter was reflected in the remedies he sought which were that I order cl 3 be removed from the MoA, that he receive damages and costs. That highlights two significant problems.

[33] The first is a jurisdictional one. The Authority simply has no jurisdiction to contemplate altering or otherwise interfering in a contractual relationship between two commercial entities and which do not involve an employment relationship as defined by s4(2) of the Act.

[34] The second is that even if I could order the removal of the termination clause from the MoA, that would likely be ineffective. That is because the Courts have long held that contracts as these are terminable on reasonable notice irrespective of whether or not they contained a written termination clause and here I quote the Court of Appeal when it said,

> The English Court of Appeal argued that there is or should be a general presumption or favour of the determinability of continuing contracts of those specified duration … whether it can be put as high as a presumption is doubtful,

[3] Stephen Todd and Mathew Barber, *Burrows, Finn and Todd on the Law of Contract In New Zealand* (7th Ed, LexisNexis, Wellington, 2022) at [10.3.3]

> but we think that most Judges and practitioners today would expect to find cogent reasons in the nature or terms of the particular contract before placing on it the interpretation that there is no right to determinate on reasonable notice.[4]

[35] The final issue is that notwithstanding the fact CVP never signed, the evidence is both parties have both applied the MoA for around two years with Massey providing the afterhours service and CVP paying the required fees. In other words there is a strong argument the MoA and its terms have been accepted by conduct.

Summary and orders

[36] By way of summary, I conclude:

(a) Massey has not breached the s 149 agreement; and

(b) The s 149 settlement Dr Smith concluded with Massey University on 1 August 2019 cannot be set aside by reason of Dr Smith having been either mislead or entering into it by mistake.

[37] That means Dr Smith's application must fail and accordingly, it is dismissed.

[38] Costs are reserved with the parties being encouraged to resolve the issue between themselves. In saying this I recommend the parties view the applicable practice note.[5] If costs remain an issue and an Authority determination is needed Massey may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Dr Smith will have 14 days to lodge any reply memorandum.

Michael Loftus
Member of the Employment Relations Authority

[4] *Minister of Education v De Lux Motor Services (1972) Ltd* [1990] 1 NZLR 27 at 31
[5] www.era.govt.nz/assets/Uploads/practice-note-2.pdf