IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 628
3152361

	BETWEEN	AZMINA BHAMJI Applicant
	A N D	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Nicola Craig
Representatives:	Faizal Abba, advocate for the applicant John Rooney and Matthew Austin, counsel for the respondent
Investigation Meeting:	On the papers
Submissions (and other information) received:	18 and 26 August 2022 for the applicant 28 July and 25 August 2022 for the respondent
Date of Determination:	28 November 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. The applicant is not barred from bringing evidence of events occurring before the date of a settlement agreement between the parties.

B. Costs are reserved.

What is the employment relationship problem?

[1] For a dozen years Azmina Bhamji worked as a nurse at the Paremoremo Prison in Auckland. Ms Bhamji was employed by the Chief Executive of the Department of Corrections (Corrections).

[2] In 2018 Ms Bhamji lodged a claim in the Authority (the earlier proceeding) which included a statement that Corrections had a policy that four requests for days off could be made per roster and that that policy had been changed. A settlement was reached in May 2020 and Ms Bhamji withdrew her claim.

[3] In late 2021 Ms Bhamji lodged another claim in the Authority relating to what was described as an implied term allowing shift requests. The claim identified:

(a) a personal grievance that Ms Bhamji was disadvantaged by Corrections' unilateral change to her terms of employment in removing and/or reducing shift requests;

(b) a grievance that she was disadvantaged by Corrections' failure to provide her with an individual employment agreement that codified shift requests;

(c) a breach of sections 64 and 65 of the Employment Relations Act 2000 (the Act) by failure to provide an employment agreement which incorporates and codifies the implied term about shift requests; and

(d) A breach of good faith by Corrections.

[4] Corrections denied all those claims and identified that a claim about shift requests was barred by the settlement agreement.

How has the Authority investigated to this point?

[5] The Authority held case management conferences with the representatives and Ms Bhamji to clarify which claims Corrections saw as barred and why, along with what Ms Bhamji's position was about the impact, if any, of the settlement agreement.

[6] The arguments about what impact, if any, the settlement agreement had on the current claim evolved. An amended statement in reply was lodged.

[7] After some initial debate, the parties now agree that Ms Bhamji is not entirely prevented from bringing a claim about events post-settlement agreement.

[8] Reference was made for Corrections at one stage to the doctrine of res judicata. This was in the sense of the claim having been settled, rather than that the Authority had previously decided the issue. There was no determination of the Authority under the earlier proceeding about the shift requests issue.

[9] Given that the implied term claim appears to be based on custom and practice there is the prospect of evidence covering many years being offered.

[10] The parties agreed to the Authority deciding a preliminary issue on the papers. Submissions were provided by both parties.

What is the preliminary issue?

[11] The issue to be determined is whether the 2020 settlement agreement bars Ms Bhamji from using evidence of events before that agreement to establish an implied term in her employment agreement regarding shift requests.

What does the settlement agreement provide?

[12] The settlement agreement includes a provision requiring Ms Bhamji to undertake "*all necessary steps"* to withdraw her statement of problem. Also, clause 7 specifies:

> The terms and conditions of this Agreement are in full and final settlement of all claims either party (including the Department's officers and employees) may have against the other, now or in the future arising from the proceedings filed by Ms Bhamji in the Employment Relations Authority (being described as file number …).

What does Corrections argue?

[13] I will deal with Corrections' submissions first as it initially raised the impact of the settlement agreement on Ms Bhamji's claim.

[14] Corrections accepts that Ms Bhamji may bring a claim based on events and circumstances which occurred after the settlement agreement was reached. However, it submits that she cannot rely on events and circumstances which occurred before the

settlement agreement in order to establish that claim. She is limited to those occurring afterwards.

[15] Corrections emphasises the binding nature of agreements made under s 149 of the Act and that claims cannot be relitigated.[1] The settlement agreement here captures and thus bars the same claim being brought about events which pre-date the settlement agreement.

[16] The Authority's decision in *Bartlett v Hawkes Bay District Health Board* is relied on.[2]

[17] Evidence from before May 2020 is seen as not admissible if the Evidence Act 2006 is examined, as under s 7(2) of that Act such evidence should not be regarded as relevant.

[18] If Ms Bhamji is permitted to rely on earlier events that is said to undermine the settlement agreement, with Corrections receiving no statutory protection from having entered into a binding agreement under s 149 of the Act. A claim could have been lodged a week after the settlement agreement was entered into. The employee would be allowed to relitigate the same claim and rely on the same evidence, the only difference being that the entitlement crystallised at a later point in time.

What does Ms Bhamji argue?

[19] It is submitted that the onus is on Corrections to show that evidence prior to the signing of the settlement agreement is inadmissible to establish an implied term. Ms Bhamji accepts that the settlement agreement is final and binding and prevents her from bringing claims relating to her situation before May 2020. The new cause of action is said to commence in March 2021.

[20] For Ms Bhamji it is emphasised that there is an absence of any term in the settlement agreement either purporting to limit or bar the making of another claim or adducing evidence from prior to the signing of the settlement agreement.

[21] Ms Bhamji relies on s 7 of the Evidence Act which is entitled "*Fundamental principle that relevant evidence admissible*". Particular emphasis is placed on an

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[1] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [20] and *BRC Limited v Magele*, Employment Court, Wellington, WC 19/09, 26 August 2009 at [3].
[2] *Bartlett v Hawkes Bay District Health Board* Employment Relations Authority, Wellington, WA 41/09, 2 April 2009, Member Asher.

email from a Corrections manager from March 2020, although it seems likely that much wider evidence would be offered regarding events prior to May 2020.

[22] It is suggested that matters were settled in Mr Bhamji's favour and Corrections accepted that she had an entitlement.

What is the conclusion?

[23] There is no doubt that the settlement agreement prevents Ms Bhamji seeking compensation in the broad sense for events before May 2020.

[24] The question to be answered relates only to whether evidence may be given regarding events which occurred before the settlement agreement.

[25] The suggestion on Ms Bhamji's behalf that I should consider the claims in the earlier proceedings were somehow settled in her favour or that Corrections agreed she had an entitlement to shift requests are without foundation. The earlier proceedings were multi-faceted, a settlement may have occurred for any number of reasons and the settlement agreement contains no admission of liability by Corrections.

[26] The settlement agreement provides little specific assistance on the current question. Similarly the authorities referred to by the parties provide minimal guidance for the present situation, involving an alleged term of custom and practice where a claim regarding an earlier part of the period has been settled by the parties.

[27] Consideration of whether a term is implied through custom requires examination of whether the custom had achieved sufficient notoriety, is certain, reasonable, can be proved by clear and convincing evidence and is not inconsistent with an express term.[3]

[28] The starting position is that the Authority is able to take into account such evidence as it in equity and good conscience thinks fit.[4] It is not bound by the Evidence Act but will consider the principles of that Act.

[29] Without having heard the evidence about events before May 2020 it is difficult to conclude that it is entirely irrelevant on the basis of the claim covering that period having settled.

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[3] See for example, *Edminstin v Sandford Limited* [2017] NZEmpC 70.
[4] The Act, s 160(2).

[30] Recognising that this is not in the nature of a harassment or constructive dismissal grievance, I still draw some support from decisions indicating that evidence may be heard which provides background and context to a personal grievance claim even though outside the 90 day period.[5]

[31] I have considered whether allowing such evidence in would have the effect of meaning Corrections received no statutory protection from the settlement agreement. I do not accept that. Corrections does receive protection regarding events before May 2020 in the sense that it cannot be required to remedy Ms Bhamji for the impact of any disadvantageous events which occurred before then.

[32] I consider it equitable to allow evidence from before May 2020 to be heard. I conclude that Ms Bhamji is not barred from bringing evidence of events occurring before the date of the settlement agreement between the parties.

What is the next step?

[33] An Authority officer will contact the parties to arrange a case management conference to discuss progression of this matter.

Costs

[34] Costs are reserved and will be determined, if necessary, with costs regarding the determination of the remainder of the issues.

Nicola Craig
Member of the Employment Relations Authority

[5] See for example, *Premier Events Group Limited v Beattie (No 3)* [2012] NZEmpC 79.