IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 409
3232759

	BETWEEN	RICHARD HARDING Applicant
	AND	ZIWI LIMITED First Respondent
	AND	AMAZONIA MIDCO 1 HOLDINGS LIMITED Second Respondent

Member of Authority:	Claire English
Representatives:	Stephen Corlett, counsel for the Applicant Blair Edwards, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	19 June and 7 July 2023 from Applicant 30 June 2023 from Respondent
Determination:	1 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Mr Richard Harding was employed by the first respondent (Ziwi). As an employee of Ziwi, he received share options in the second respondent (Amazonia).

[2] Mr Harding raised personal grievance claims with Ziwi, after Ziwi took steps that would impact Mr Harding's role. Mr Harding, through his counsel, entered into negotiations with Ziwi and Amazonia, through their counsel.

[3] As a result of these negotiations, Ziwi and Amazonia put a settlement agreement to Mr Harding. He was invited to sign and return that agreement if acceptable to him, in which case, the agreement would be signed by Ziwi and Amazonia, and then sent to Mediation Services for counter-signing in accordance with section 149 of the Employment Relations Act 2000 (the Act).

[4] Mr Harding signed the agreement, and returned it. Ziwi signed the agreement also. However, Amazonia then refused to sign.

[5] Mr Harding now seeks a declaration that the settlement agreement is binding on Amazonia, and orders that Amazonia perform the agreed terms. Amazonia resists this, and takes the position that its unsigned offer to Mr Harding was merely an offer to treat that could be revoked, or alternatively, there is not a binding agreement for various reasons including a lack of certainty, lack of consideration, or conditions that were not fulfilled.

The Authority's investigation

[6] For the Authority's investigation, it was agreed that the matter would be determined "on the papers" following an exchange of written submissions. During this process, Ziwi reached agreement with Mr Harding, and accordingly, there is no longer any dispute to be determined as between Mr Harding and Ziwi.

[7] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

(a) Is there a binding and enforceable agreement between Mr Harding and Amazonia?

(b) Should either party contribute to the costs of representation of the other party?

Facts

[9] Mr Harding was employed by Ziwi. Amazonia and Ziwi describe themselves as associated companies, and Companies Office records show that Amazonia is, albeit three steps removed, a 100% owner of Ziwi's shares. As a result of Mr Harding's employment with Ziwi, he was entitled to acquire and hold shares in Amazonia.

[10] On 12 April 2023, Mr Harding raised a personal grievance claim, relating to steps taken by Ziwi which would impact Mr Harding's role.

[11] All three parties were represented by counsel. Mr Harding was represented by Mr Corlett, and both Ziwi and Amazonia were represented by Mr Edwards. The parties began discussions to resolve matters between them. The parties exchanged multiple settlement proposals via counsel, by email.

[12] On Friday 12 May 2023, the respondents emailed a settlement offer to Mr Harding, in the following terms:

> Ziwi is willing to gift your client 308,000 shares (time based), and has instructed me to make the following offer, which is open for acceptance until midday on Monday, 15 May 2023:
>
> - A termination date of 31 May 2023.
> - Payment of the following within 3 working days of the termination date:
> - Final pay.
> - Three months' salary.
> - $50,000 compensation pursuant to s123(1)(c)(i) of the Employment Relations Act 2000.
> - $7,500 plus GST towards Mr Harding's legal costs.
> - Mr Harding will transfer the 400,000 shares currently in his name to the company. In return, Mr Harding will be paid $200,000 and the loan for $200,000 will be waived.
> - 308,000 shares will be gifted to Mr Harding (this is on the basis that he is a good leaver).
> - The restraint of trade will not be waived.
> - No positive written reference will be provided.

[13] Mr Harding did not accept that offer. Instead, on 15 May 2023, his lawyer emailed the respondents' lawyer attaching an alternative offer.

[14] In response, counsel replied "I will take instructions. Can you please send me a word doc. version of this agreement". A word version was supplied by email later that day.

[15] The next piece of correspondence between the parties was on 17 May 2023. Counsel for the respondents wrote:

> The record of settlement is attached with our amendments marked up.
>
> I am happy to discuss these changes with you. Otherwise, if Mr Harding approves of the agreement, please send us a signed version and we will get it signed and executed.

[16] The attached document (the agreement) set out terms which were essentially the same as the bullet points set out in the respondents' email of 15 May 2023. Later that day, Mr Harding signed the agreement. His counsel returned it to the respondents' counsel, saying:

> Please find attached settlement agreement signed by our client as requested.
>
> In due course, please let us know when the agreement has been signed by your clients and lodged with MBIE.

[17] Ziwi then signed the agreement. On 19 May, counsel for the respondents provided the version of the agreement signed by Ziwi, together with the following message:

> Our signatories are all overseas. We are waiting on one for Amazonia. We should get the signed version soon, probably over the weekend. I will send it through as soon as it is received.
>
> The attached version is signed by Ziwi Limited. On this basis, and the fact we have an agreement in principle, I am happy for you to vacate the mediation date. Otherwise, I will send the executed agreement to you asap.

[18] Despite all this, on 23 May, Amazonia refused to sign the agreement. Mr Harding then issued these proceedings to resolve the matter.

[19] Both parties rely on the correspondence quoted above to support their positions.

Legal Principles

[20] I will first consider if there is a binding and enforceable agreement between Mr Harding and Amazonia. In other words, do the parties have a contract?

[21] The requirements for the formation of a contract are well-known:

> There must be agreement between the parties on terms that are complete and certain; the parties must intend to create legal relations; and…each party must

> give good consideration. Where the requirements…are met then a contract has been formed[1].

[22] This is commonly expressed as requiring:

a. An offer;

b. Acceptance of that offer;

c. Communication of acceptance;

d. Sufficiently certain terms;

e. Consideration;

f. Whether there are any conditions that must be met;

g. Lack of accord and satisfaction, and need for variation to be in writing.

[23] It is convenient to consider these issues in turn.

Was there an Offer?

[24] This is a point of contention between the parties. Mr Harding says that by sending a draft settlement agreement on 17 May, and inviting him to sign if he "approved" of the terms, Amazonia made him an offer. Amazonia takes the position that this was only an invitation to treat, and this is indicated by the reference in the covering email that, once Mr Harding's signature had been obtained, "we will get it signed and executed".

[25] An offer (as opposed to an invitation to treat) must consist of a definite promise to be bound by certain terms[2]. In the present matter, Amazonia, acting through its counsel, emailed Mr Harding (through his counsel), and put before him a completed contract.

[26] This was an advance on the email of 15 May, which set out proposed terms in the form of a list in the body of an email. Mr Harding was specifically invited to sign

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[1] Burrows, Finn and Todd, *The Law of Contract in New Zealand,* 7th edition, 3.1 at pg 39.
[2] [2] Burrows, Finn and Todd, *The Law of Contract in New Zealand,* 7th edition, 3.2.1 at pg 42.

and return a contractual document prepared by Ziwi and Amazonia in a commonly recognised form (that of a record of settlement capable of being signed by a Mediator in accordance with s 149 of the Act). He was invited to do so if he found the terms set out in that document "acceptable to him".

[27] He was not invited to add new terms, nor was it suggested that Ziwi and Amazonia needed to consider any further matters. To the contrary, Amazonia had "marked up" some wording to the contract, which it drew Mr Harding's attention to as being the necessary changes Amazonia required to consider the deal acceptable to it.

[28] Amazonia put a completed contract (save for signing and dates) before Mr Harding, and this action coupled with stating Mr Harding should sign the agreement "if acceptable to him", indicated that these terms were already acceptable to them. This impression is strengthened by the form of the contract being one which was well-recognised and did not require further drafting to be put into action.

[29] On these facts, I find that the offer put to Mr Harding on 17 May 2023, was an offer, not a mere invitation to treat. Amazonia made a definite promise that it would be bound by the terms it put forward (which it had already reviewed and altered to its own satisfaction), if only Mr Harding accepted them.

Conduct of Counsel does not Bind Amazonia

[30] Amazonia further says that it never agreed to the agreement put to Mr Harding on 17 May, and that it has never signed it accordingly. It takes the position that its counsel's conduct (in putting the 17 May document to Mr Harding) does not amount to an agreement on its behalf to be bound.

[31] The general rule is that a client is bound by the acts of its counsel[3]. It has also been found that any limitations on the solicitor's authority to settle must be expressed to the other party before settlement is reached to be effective[4].

[32] I do not understand there to be any dispute that Amazonia was represented by counsel. No limitations on counsel's authority were conveyed to Mr Harding before he

[3] *McEwan (2003) Ltd v Sharp Tudhope* HC Tauranga 15 June 2009.
[4] Ibid, at [67].

signed the agreement. Indeed, I am not convinced that any such limitation was clearly conveyed subsequently, simply Amazonia's refusal to sign.

[33] Amazonia argues that there was a limitation on counsel's authority to settle, that because the second respondent is a company incorporated under the Companies Act 1993, the issuing of shares in the second respondent company must be performed by the board, and section 130 of the Companies Act 1993 provides that the issuing of shares cannot be delegated by the board. Amazonia states that this is a well known "restriction".

[34] This is not a relevant circumstance given the facts of this matter. Firstly, there is no indication that any limitation on counsel's ability to settle was expressed to Mr Harding or his counsel. Second, there is no indication (either from the correspondence between the parties, or from the underlying facts of the matter) that Amazonia was being asked to "issue" shares, such that this would require the involvement of the board or trigger any issues in relation to s 130 of the Companies Act 1993. This was never mentioned as an issue in correspondence, the word "issuing" was never used, and the agreement requires that Amazonia was to gift 308,000 shares to Mr Harding, while he was to transfer the 400,000 shares already in his name back to Amazonia. This is a net transfer of shares to Amazonia, and could not result in a need to issue more.

[35] I do not accept on the facts before me that there was any limitation on counsel's ability to settle communicated to Mr Harding. The usual proposition, that a client is bound by acts of counsel, applies.

[36] Amazonia mounts another variation of this argument, that its counsel's conduct never amounted to an intention to be bound by an unsigned document, or to put it another way, that the email of 17 May sent to Mr Harding did not constitute an unconditional offer. Rather, the offer was conditional on signing and/or execution by a Mediator. I will consider this argument below as part of the argument that there was a conditional offer and those conditions were not fulfilled.

Acceptance and Communication of that Acceptance

[37] I cover these two points together, as there is no factual dispute between the parties.

[38] Mr Harding accepted Amazonia's offer of 17 May 2023. He did so by accepting the "marked up" tracked changes sent to him in full and without alteration, and confirmed this by signing the agreement.

[39] Mr Harding then communicated his acceptance of the contract that had been put to him by having his counsel convey the signed contract to counsel acting for Ziwi and Amazonia, well before the end of the working day on 17 May.

Sufficiently Certain Terms

[40] Amazonia takes the position that, even if there was offer and acceptance, the agreement cannot be binding due to a lack of certainty. The elements Amazonia says lack certainty are as follows:

a. Amazonia has two classes of shares on issue, and the document does not specify which shares are to become the property of Mr Harding;
b. The document does not deal with the cancellation of Mr Harding's share options;

[41] Counsel for the respondent goes on to state that non-voting shares are the only type of shares which Mr Harding as an employee of Ziwi would be entitled to hold, and further states "it would be plainly absurd to suggest that the parties intended for the Applicant to receive Ordinary shares, but the Second Respondent would not agree to a contract that leaves an essential term uncertain[5]".

[42] After reading the documentation, I am not left in any doubt that all three parties were discussing a resolution involving the types of shares which Mr Harding was entitled to hold, did hold, and did hold options in/over. Leaving this aside, the facts remain that Amazonia did put forward the agreement to Mr Harding and invited Mr Harding to sign the same, without making any reference to different classes of shares. Stating now, after the fact, that Amazonia would not do what it has in fact done, is of no assistance.

[43] I have considered the submission that the agreement does not deal with the cancellation of Mr Harding's options to acquire future shares in Amazonia.

[5] Paragraph 3.4(a) of the Submissions of Counsel for the Second Respondent dated 30 June 2023.

[44] The Background to the agreement specifically references the Share Option Agreement between Mr Harding and Amazonia, which is described as being "as a direct result of his employment with Ziwi". The agreement provides for the exchanging of shares, cancelling of debt, and gifting of other shares, to Mr Harding, and then provides that this is in "full and final settlement of all claims, grievances, and disputes between them arising from and/or relating to their employment relationship." As Amazonia is a party to this arrangement, it would be entitled to take advantage of the "full and final" nature of the settlement, especially in circumstances where shares and share options are the subject of the agreement, and the terms indicate that a compromise agreement regarding these has been entered into.

[45] In addition, the agreement resulted in the ending of Mr Harding's employment with Ziwi, and it was his employment with Ziwi that gave him rights to acquire shares in Amazonia.

[46] Taking all this into account, my view is that the agreement effectively brings to an end all claims as between Mr Harding, Ziwi, and Amazonia, and this would include the share options Amazonia refers to.

Consideration

[47] Amazonia says that the agreement did not include any consideration for it, only for Ziwi, therefore the agreement cannot be binding on it. Amazonia states that the agreement settled the employment dispute between Mr Harding and his employer Ziwi, but as there is no employment relationship between Mr Harding and Amazonia, there was no consideration to bind Amazonia to the arrangement.

[48] I have already mentioned above that the terms included in the agreement provided for Mr Harding to return 400,000 shares already held in his name to Amazonia, in exchange for 308,000 shares. This exchange, clearly in Amazonia's favour, suggests that Amazonia did receive consideration. In addition, Mr Harding had other rights to receive shares (or share options) in Amazonia. As part of this agreement, he waived those rights. This then is another type of consideration for the benefit of Amzonia, not just Ziwi.

[49] Amazonia attempts to distinguish these matters, and says that they do not amount to consideration. In relation to the 400,000 shares returned by Mr Harding, it

states that this particular clause in the document should be read as being "in exchange for the consideration received by the applicant under the same clause.".

[50] The sub-clause in question, clause 4(a) of the document, provides that Mr Harding surrender, or to put it in simple terms, returns the 400,000 Amazonia shares he held to Amazonia. It appears that Mr Harding had paid $200,000 for these shares, and owed a further $200,000 to Amazonia in respect of them. Amazonia agreed to return the $200,000 that Mr Harding had paid, and to release Mr Harding from the associated debt and security arrangements. This clause is clearly to Amazonia's benefit, and detrimental to Mr Harding. Mr Harding gives up all 400,000 shares and any gains on them, and receives back only the amount he deposited. Amazonia is then free to keep or dispose of these 400,000 shares as it sees fit. In isolation, it is hard to see why Mr Harding would agree to this.

[51] The following sub-clause, clause 4(b), then provided that Mr Harding would be gifted 308,000 shares from Amazonia. This clause is clearly to Mr Harding's benefit, and in isolation, it is hard to see why Amazonia would agree to this. However, this sub-clause was not negotiated in isolation (and is not even a stand-alone clause). It is part of what is clearly a compromise agreement, where Mr Harding surrenders current shares and future rights in exchange for a specified amount of shares in the present. Both Mr Harding and Amazonia gain certainty, among other benefits.

[52] Amazonia makes the same argument about sub-clause 4(c), which provides that Amazonia will indemnify Mr Harding from any tax implications. Amazonia says that this is a provision for the sole benefit of Mr Harding, and therefore Amazonia receives no consideration for it, and it cannot be binding on it. The same comment as above applies. These clauses are part of a series of points which result in Mr Harding receiving a certain number of shares now, in exchange for giving up existing and future rights to other shares. There is benefit to both parties in this exchange.

[53] I note that the language used in these sub-clauses, eg that Mr Harding will "transfer" a certain number of shares, and that he will then be "gifted" a different number of shares in return, is the same as the language used in the email of 12 May 2023, when the respondents' proposed this arrangement. Any issue of separate consideration for Amazonia could have been proposed at that time, or in the email of

17 May which attached a draft record of settlement in a form suitable for signing, which included the clause providing for tax implications to be borne by Amazonia. It was not.

[54] On the facts of the matter, Amazonia received consideration for the shares it gives to Mr Harding. The contract between Mr Harding and Amazonia is not void for want of consideration.

Was the Agreement Conditional?

[55] Amazonia says that the agreement was conditional, on two grounds. Firstly, that it was conditional on both parties signing the document. Second, that it was conditional on a Mediator countersigning the document.

[56] Amazonia says that the contract between the parties was conditional on all three parties signing, and that this is shown by the reference in the covering email sent by respondents' counsel to the applicant on 17 May 2023, which ended: "please send us a signed version and we will get it signed and executed". Amazonia now argues that the phrase "we will get it signed and executed" should be interpreted to mean that the agreement was conditional on all parties signing the document.

[57] However, this is not what the plain words of the covering email of 17 May actually says. There is no mention of a condition. In addition, the agreement itself does not state that it will only become binding on the parties once all have signed. The contrary is suggested by the inclusion of a clause (clause 13) that allowed for the agreement to be executed in counterparts. If this was intended by Amazonia, then it would have been open to Amazonia to insert such a condition into the draft agreement (as other clauses and specific wording were inserted) before sending it to Mr Harding and asking him to sign if acceptable to him. Amazonia did not do this.

[58] In the absence of such a clear provision, in either the document or the 17 May email, I am of the view that it would not be appropriate to infer such a clause wholesale into the agreement itself, which is what Amazonia is asking the Authority to do.

[59] In addition, Amazonia relies on the email from counsel for the respondents on 19 May 2023, providing the contract as signed by Ziwi to Mr Harding, where counsel stated in the covering email: "On this basis, and the fact we have an agreement in principle, I am happy for you to vacate the mediation date." Amazonia states that an

agreement in principle is a phrase to describe an agreement which is not legally binding. However, the reference to an agreement in principle was made only after the agreement had been accepted and signed by Mr Harding (and after it had also been signed by Ziwi). If Amazonia wished the agreement sent to Mr Harding to be treated as an "agreement in principle", then it needed to convey that to him, and what Amazonia intended that phrase to mean, before he signed, not some days after he had already signed and returned the document in the absence of such a qualification.

[60] Amazonia also submits that it was a "shared intention" that the agreement would only be binding on all parties after all had signed. However, there is no correspondence from Mr Harding or his counsel that says this, and this is clearly contrary to Mr Harding's actions in filing this proceeding. I do not accept this submission is an accurate reflection of what occurred.

[61] Amazonia also submits that the agreement was conditional on being counter-signed by a Mediator in accordance with s 149 of the Act. The agreement contained a well-recognised clause requesting that the terms be counter-signed by a Mediator from the Ministry of Business, Innovation and Employment and "we wish them to be final, binding, and enforceable on us". Amazonia states that these terms create a conditional agreement, and that there is no binding accord until the document has been signed by all three parties and a Mediator.

[62] Without the counter-signature of a Mediator, a record of settlement, even if signed by both parties, will not attract the statutory protections and obligations set out in subsections (3), (3A), and (4) of s 149 of the Act. This is often expressed as creating an agreement which is "full and final" and not able to be challenged. In the absence of a Mediator's counter-signature, a settlement document then becomes or remains a contract between the parties, subject to the usual processes of contract law.

[63] The counter-signing of a record of settlement by a Mediator is a statutory mechanism to engage the Mediator's statutory powers as set out in s 149 of the Act. It is possible to enter into an agreement without having it signed by a Mediator, and to resolve an employment relationship problem by way of a contract. The Mediator's counter-signature is only needed to invoke the additional statutory protections and obligations into that contract. Without the Mediator's counter-signature, agreement and a binding contract can still exist.

[64] The same point may be made as before, that if Amazonia wanted to ensure that the agreement was conditional upon, and would not come into effect until, signing by all three parties and counter-signature by a Mediator, then it was open to Amazonia to have added such a provision to the agreement itself. It did not do so. It did not communicate this position to Mr Harding until after there had arisen a dispute as to whether Amazonia would be bound by the agreement it had put forward.

[65] I find that the agreement was not conditional upon the signatures of all parties, nor was it conditional on the signatures of all parties and a Mediator.

Lack of Accord and Satisfaction

[66] Amazonia states that, as there was no dispute between it and Mr Harding (unlike the employment relationship problem between Ziwi and Mr Harding), then there can be no accord and satisfaction (and by implication, no binding contract).

[67] The difficulty with this submission is that the dispute between Mr Harding and Ziwi affected Amazonia in a very real way – Amazonia is effectively the owner of Ziwi, and Mr Harding held shares in Amazonia. Both the grievance and the matter of shares and share options needed to be resolved in a manner satisfactory to all three parties. In addition, if Amazonia had believed at the time that it did not need to be involved in the resolution of the dispute, it would have been open to it to communicate this to both Mr Harding and Ziwi, and take no further part in negotiations or to be named as a party to the record of settlement document. Amazonia did not communicate this at the relevant time/s, and went as far as being a named party in the agreement it presented to Mr Harding together with Ziwi.

[68] On the facts before me, this argument is not made out.

Lack of Compliance with Modification Clause

[69] Amazonia submits that the agreement acts to change the terms of the loan agreement and security deed between itself and Mr Harding, and these other documents provide that they can only be effectively altered in writing and singed. Therefore, because Amazonia has not signed, the agreement cannot be effective (presumably, cannot be effective as relates to the share transfer arrangements already discussed).

[70] The agreement was in writing and signed by Mr Harding and Ziwi. Amazonia's argument is self-servingly circular. It is effectively suggesting that the agreement cannot be effective because it is not signed, and it will not sign because it does not want the agreement to be effective. This is a re-phrasing of the arguments already considered above, that the document is not a binding contract unless signed in some special way which Amazonia has only just now raised. Amazonia did not raise any of these issues before its offer was accepted by Mr Harding. They cannot be effective now.

Orders

[71] The record of settlement signed by Mr Harding on 17 May 2023 is binding and enforceable on him and on Ziwi Limited and Amazonia Midco 1 Holdings Limited.

[72] It should be performed in accordance with its terms.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If they are not able to do so and an Authority determination on costs is needed Mr Harding may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Amazonia would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[75] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[6]

Claire English
Member of the Employment Relations Authority

[6] Please note the Authority's Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2