IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 733
3191419
& 3262679

	BETWEEN	DAVE JAQUES Applicant in 3191419 and Respondent in 3262679
	AND	AURORA LAW LIMITED Respondent in 3191419 and Applicant in 3262679

Member of Authority:	Alastair Dumbleton
Representatives:	Dave Jaques in person Rebecca White, counsel for Aurora Law Ltd
Submissions received:	27 and 29 November, 6 December 2023
Determination on the papers:	7 December 2023 in Auckland

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In an amended statement of problem lodged in the Authority on 16 May 2023, the applicant Dave Jaques asked for an order cancelling a Record of Settlement which he and Aurora Law Ltd, and a mediator, signed on 10 November 2017.

[2] The Record of Settlement (ROS) was signed under s 149 of the Employment Relations Act 2000 (the ER Act) after mediation during which its terms were agreed.

[3] Cancellation of the ROS was sought by Mr Jaques pursuant to s 28(2)(c) of the Contract and Commercial Law Act 2017 (CCLA), which provides for the granting of relief from mistake including cancellation by order of a court.

[4] Should an order be made cancelling the ROS, Mr Jaques asks the Authority to investigate and determine the employment relationship problem lodged in the Authority in October 2017 and purportedly resolved by the ROS.

Jurisdiction of the Authority to order cancellation

[5] Following a case management conference with Mr Jaques and counsel for Aurora Law, Ms White, the Authority directed that it would determine as a preliminary issue, whether it had jurisdiction to cancel a ROS.

[6] The Authority in consultation with Mr Jaques and Ms White directed that it would not hold an investigation meeting, as permitted by s 174D of the ER Act.

[7] To that end the parties provided information, evidence, and legal submissions. Unsworn but signed statements were received from Mr Jaques and Mandy Rusk, the director of Aurora Law. As the matter was to be determined on the papers, oral examination or cross-examination of witnesses was not intended.

Determination of the Authority

[8] The Authority issued a determination on 2 October 2023 [1], in which its conclusion was expressed as follows;

> [55] Following the Court of Appeal judgment in *TUV*, the Authority concludes that it may examine the terms of settlement signed by Mr Jaques and Aurora Law, and the circumstances in which those terms were agreed to. The Authority may also determine whether there is any basis for cancelling the ROS under s

[1] *Dave Jaques v Aurora Law Ltd* [2023]

> 28 of the CCLA and s 162 of the ER Act, and it may make any orders it considers just in the circumstances.
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> [56] Given the untested nature of the evidence or information provided by Mr Jaques and Ms Rusk, the Authority makes no findings as to whether there was a qualifying mistake under s 24 of the CCLA, or Mr Jaques knowledge of such mistake, or whether by action or inaction he affirmed the terms of settlement, or whether the benefit he received from the settlement was substantially less than the benefit Aurora Law received.

[9] The parties were urged to resolve matters by further mediation or other consensual process, but if they could not do that the Authority said it would give further directions for an investigation meeting to be held, to enable a determination to be given of the cancellation application.

Application to reopen the investigation

[10] Aurora Law has now applied under clause 4 of Schedule 2 of the ER Act for an order of the Authority reopening its investigation in this matter.

[11] That application (under ERA number 3262679) is based on an objection to parts of the Authority's determination of 2 October 2023 as being findings of fact and law, made when Aurora Law had understood such findings would not be given by the Authority unless agreement had been expressly given by Aurora Law.

[12] Parts of the Authority's contextual description of the 'factual situation' have the appearance of findings, which the Authority had confirmed to the parties would be limited to the jurisdictional question [2] requiring an answer.

Objection to reopening

[13] Mr Jaques has opposed the application on the grounds that there has not been any investigation to reopen. He contends any reference to possible facts by the Authority was only *obiter* to give context to the legal issue being determined. He

[2] Email messages from Ms White of 17 August 2-023 and the Authority of 21 August.

raises other peripheral matters and notes that no challenge to the Employment Court has been made to the determination.

The investigation commenced when the statement of problem was lodged, and it remains open.

[14] Section 158 of the ER Act provides that 'proceedings before the Authority are to be commenced by the lodging of an application'. An application is a request to the Authority for it to resolve an employment relationship problem. An investigation begins with that step and is not started only when a statement in reply is lodged.

[15] There has been investigation. What has not been held is an investigation *meeting.* If the investigation has closed, it can be reopened.

[16] In the Authority's view, in this case there is an ongoing investigation of which an earlier part was closed when the Authority determined the jurisdictional issue, about the availability of cancellation as a remedy for mistake in connection with a ROS.

[17] If part of an investigation can be closed, part can be reopened.

Reopening ordered

[18] Reopening is discretionary under clause 4 of Schedule 2 of the ER Act. The Authority is satisfied that there are grounds for reopening, arising from the Authority's presentation of matters that were not agreed by Aurora Law.

[19] While the contentious findings were included in the 2 October 2023 determination to give context, they were not findings necessary to support the Authority's conclusion about jurisdiction.

[20] The terms of the reopening order are that the Authority's determination of 2 October 2023, in so far as it made or appeared to make findings of fact and law on matters other than the central jurisdictional question, is modified to remove the parts objected to by Aurora Law and as set out in the table to Ms White's memorandum of 27 November 2023.

[21] The parties are not prevented before or during the pending investigation meeting from providing evidence or information to the Authority, about those matters to which objection has been taken by Aurora Law.

[22] The Authority's determination of 2 October 2023 is modified by removing contentious passages. The determination is now as follows.

Jurisdiction to cancel a Record of Settlement

[23] Aurora Law contends the Authority lacks jurisdiction to cancel a ROS for mistake. If that submission is not upheld, Aurora Law contends that cancellation is not available in the circumstances because, if there was a mistake,

- Mr Jaques was aware of the situation he says he was mistaken about
- Aurora Law was not aware of the existence of a mistake
- The mistake was not material to Mr Jaques, and performance of the parties' bargain did not result in any substantial disadvantage to Mr Jaques
- By his action or inaction, Mr Jaques affirmed the ROS and is estopped from seeking cancellation of it.

The undertaking of Aurora Law – deed of assignment

[24] As a term of their recorded settlement the parties agreed;

> 3. The Employer will enter into a deed of assignment to Dave Jaques of debt in respect of all invoices issued to [*client's name*], in aggregate no less than $43,292.20. The Employer shall have no claim to any funds paid by [*client's name*] in respect of such invoices.

[25] The debtor was a client of Aurora Law and had been provided legal professional services by the law firm. As an employee of Aurora Law, Mr Jaques performed work in providing those services.

[26] Aurora Law considered the client became indebted to it for an amount of fees and raised invoices for the services provided.

Invoiced amounts written off

[27] About three weeks before mediation and signing of the ROS, Aurora Law zero rated the invoices it held for the services it had provided to the client. Ms Rusk agreed to do this to facilitate the client's files being uplifted. In her witness statement she said [3], 'credit notes recorded that they had been issued due to the uplift'.

[28] Mr Jaques believes that this action of the law firm cancelled the invoices or made them unpayable, and they therefore became unenforceable by him against the debtor. Although Aurora Law subsequently gave an undertaking to assign its interest in the debts to him, Mr Jaques believes they were worthless when that occurred, although he claims he did not know that at the time.

[29] Mr Jaques was aware that Aurora had zero rated the invoices, for on 10 October 2017 after he learned that had been done, he emailed Ms Rusk and expressed dissatisfaction.

[30] Several weeks later on 3 November 2017, in settlement of the employment relationship problem, Ms Jaques, Aurora Law and the mediator signed the ROS which included the undertaking to assign specified debt.

[31] This was followed by the execution of a deed of assignment, which was signed by Aurora on 14 November and by Mr Jaques on or about 23 November.

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[3] At para 23.

Cancellation of a ROS

[32] The Authority is asked to determine, as a preliminary question, whether it has jurisdiction to cancel terms of settlement in a ROS, where the decision to enter into those terms by one or both parties was influenced by mistake.

[33] If the Authority determines it has jurisdiction, orders will not be made until the parties have had an opportunity to be heard further if they wish. In that event, to get a better picture the Authority will require evidence from Mr Jaques and Ms Rusk about their exchanges in mediation before the undertaking was agreed to by them. Confidentiality has been waived by the parties.

Section 149 Settlements

[34] The ROS was entered into under s 149 of the ER Act. The extent to which terms of settlement may be disturbed once a ROS has been signed, is expressly limited by s 149(3);

- terms of settlement are to be final and binding on the parties – (a)
- they may not be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017 (CCLA) – (ab)
- they are not to be brought before the Authority except for enforcement purposes – (c)

[35] The exclusion of ss 36 to 40 of the CCLA, removes the remedy of cancellation of terms of settlement where there has been failure to perform the settlement or where it has been induced by misrepresentation.

[36] Under s 151 of the ER Act, the remedy for repudiation of a settlement is compliance. A penalty for breach of an agreed term of settlement may also be imposed under s 149(4) of the ER Act.

Cancellation for mistake

[37] Section 24 of the CCLA provides that relief may be granted for mistake made by a party in entering into a contract. Mr Jaques claims he made a mistake that qualifies for relief under the CCLA.

[38] The nature of that relief includes cancellation under s 28 of the CCLA, which is a discretionary remedy. A court may make any order that it thinks just, including cancellation and payment of compensation.

[39] The immediate issue the parties have raised for the Authority is whether ss 24 to 30 of the CCLA dealing with relief for mistake, have any application to terms of settlement in a ROS made under s 149 of the ER Act.

[40] Whereas ss 36 to 40 of the CCLA are expressly excluded from being applied to terms of settlement, no reference in that regard has been made to ss 24 to 30.

[41] It is a natural and reasonable inference that if CCLA relief for mistake was intended to be excluded, the ER Act would have expressly said so. The restriction of the exclusion to several identified CCLA sections only, implies that other sections are not excluded, unless that can be plainly seen as necessary to meet the objects and purposes of the ER Act and the apparent policy on which s 149 is based.

[42] The Court of Appeal considered s 149 of the ER Act in *TUV v Chief of New Zealand Defence Force* [4]. The Court held that s 149(3) does not operate as a statutory bar to the setting aside of certified s 149 agreements [5].

[43] The Court drew an inference from s 149(3)(ab) in relation to cancellation under ss 36 to 40 of the CCLA, observing;

> This provision would not be necessary if s 149(3)(a) and (b) precluded a challenge to agreed terms of settlement on any basis whatsoever. The express exclusion of the ability to cancel a settlement under specified provisions of the Contract and Commercial law Act also strongly suggests that the

[4] [2020] NZCA 12
[5] At [84]

> ability to challenge agreed terms of settlement under other provisions of that Act – for example, s 24 in relation to relief for mistake, or s 73 in relation to illegal contracts - is not affected by the general language in s 149(3)(a) and (b) [6].

[44] *TUV* was not a case about mistake but was concerned with an employee's capacity to enter into a contract certified by a mediator under s 149.

[45] Nevertheless, the Authority regards the judgment of the Court of Appeal and its above observations as strongly persuasive.

[46] The Court considered its conclusions were unsurprising, given the purpose of s 149 to prevent the reopening of a valid settlement agreement. It also considered Parliament had not intended to override important protections for individuals reflected in the law relating to validity of contracts, and in the grounds for finding that a contract is void or voidable at inception [7].

[47] The Court drew a distinction between cases of repudiation or failure to perform by one party, and cases where the contract is invalid from the start because of illegality, mistake, incapacity, duress, or other vitiating circumstance. In the former case there is a valid contract, whereas in the latter there may be no contract and consequently no agreed terms of settlement [8].

Conclusion

[48] From the Court of Appeal judgment in *TUV*, the Authority concludes that it may examine the terms of settlement signed by Mr Jaques and Aurora Law, and the circumstances in which those terms were agreed to. The Authority may also determine whether there is any basis for cancelling the ROS under s 28 of the CCLA and s 162 of the ER Act, and it may make any orders it considers just in the circumstances.

[49] Given the untested nature of the evidence or information provided by Mr Jaques and Ms Rusk, the Authority makes no findings as to whether there was a

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[6] At [41]
[7] At [42] and [45]
[8] At [39] and [46]

qualifying mistake under s 24 of the CCLA, or Mr Jaques knowledge of such mistake, or whether by action or inaction he affirmed the terms of settlement, or whether the benefit he received from the settlement was substantially less than the benefit Aurora Law received.

Investigation meeting

[50] If the parties cannot settle matters between them the Authority will require Mr Jaques and Ms Rusk to attend an investigation meeting, so that they can be examined as to their conduct and knowledge in connection with the undertaking given and recorded as a central term of settlement of an employment relationship problem.

[51] That evidence will assist the Authority to determine whether the ROS is able to be cancelled for any reason and, if so, whether as a matter of discretion in all the circumstances it should justly be set aside.

[52] If cancellation is ordered, directions will be considered to restore the parties to their pre-ROS positions as far as that remains possible in the circumstances.

[53] Further directions will be given for an investigation meeting, in consultation with Mr Jaques and counsel for Aurora Law who will be contacted by the Authority.

[54] Costs are reserved.

Alastair Dumbleton

Member of the Employment Relations Authority