IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 13A/07
CRC 19/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	STEPHEN ABERNETHY Plaintiff
AND	DYNEA NEW ZEALAND LIMITED Defendant

Hearing: 19 and 20 June 2007 (Heard at Nelson)
Closing submissions filed and dealt with by telephone conference held on 3 July 2007

Appearances: Nicole Ironside, counsel for plaintiff
Shan Wilson, counsel for defendant

Judgment: 12 July 2007

JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] This judgment deals with the plaintiff's challenge to a determination of the Employment Relations Authority, issued on 10 May 2007, which found that he was barred from pursuing his grievances against the defendant (Dynea) because "*Under the verbally agreed terms, he has received accord and satisfaction.*"

[2] The plaintiff, if he is successful in this challenge, seeks to have his claims that he was unjustifiable disadvantaged and dismissed and his application for interim reinstatement heard by the Court rather than by the Authority. Because of the urgency attaching to the application for interim reinstatement Chief Judge Colgan set a timetable for a full Court to determine the question of what was before the Court, and I commenced a hearing de novo in respect of the Authority's determination that

there had been an accord and satisfaction, immediately after the full Court hearing of the legal issue. The hearing before me was not expressed to be contingent upon the decision being released by the full Court.

[3] The full Court has issued its decision determining the issue in the plaintiff's favour: see *Abernethy v Dynea New Zealand Limited* unreported, Chief Judge Colgan, Judges Travis and Shaw, 10 July 2007, CC 13/07. It has found that the Court can consider the plaintiff's interim reinstatement application and his substantive grievances if his challenge against the Authority's determination that his claims are barred by an accord and satisfaction is successful.

[4] The issue of whether the plaintiff's grievances were barred was determined by the Authority as a preliminary issue after Dynea lodged a statement in reply in the Authority protesting its jurisdiction and raising the accord and satisfaction defence. An urgent investigation meeting was convened by the Authority to deal with this preliminary issue. Its determination also found that a letter sent by the plaintiff to Dynea on 10 February 2007 did not raise a personal grievance. At the direction of the Chief Judge that issue was also addressed before me as part of the de novo hearing of the challenge. There are, therefore, two issues before me for resolution:

a) did the parties reach a full and final settlement of all employment relationship matters between them by way of an oral agreement on 22 February 2007? and

b) did the plaintiff's 10 February letter to Dynea raise a personal grievance?

Was there an accord and satisfaction?

[5] An accord and satisfaction is an agreement supported by consideration to settle a genuine dispute between the parties, see *Graham v Crestline Pty Limited* unreported, Chief Judge Colgan, 15 September 2006, AC 53/06**.** Whether an accord and satisfaction has been reached is a question of fact and requires the finding of a meeting of the minds of the parties. There is no issue in this case that there was a genuine dispute and that there was mutual consideration to support the alleged oral agreement to settle the plaintiff's claims.

[6] It was common ground that the onus was on Dynea to establish the existence of the accord and satisfaction and, for this reason, although it was the plaintiff's challenge, Dynea presented its case first. It is also common ground that, although some or all of the negotiations between the parties were on a "without prejudice" basis, the Court was free to examine all of the material put before it, including the documentary material, the evidence of the oral negotiations and the evidence of the steps taken by the parties after the oral agreement was allegedly entered into. The latter were said, by Dynea, to demonstrate the existence of the agreement and, by the plaintiff, to demonstrate there was no such agreement.

[7] The evidence before the Court did not go into the circumstances which the plaintiff alleges gave rise to his personal grievances and consequently this judgment will not deal with these matters except in the barest outline.

Background facts

[8] In January 2007 the plaintiff was employed by Dynea in Nelson in the position of senior process technician. In that month Dynea commenced a disciplinary investigation into certain actions of the plaintiff. The plaintiff contacted Brent Climo, a self employed mediator and employment advocate, who advertised his services in the Yellow Pages, and asked him to be his representative at an investigation meeting. Details of the attendances at various meetings were not provided. On 31 January, at a meeting involving the plaintiff, Sharon Adlam, the site manager of Dynea's Nelson premises, and Cleve Reed, the New Plymouth site manager who was also responsible for human resources and health and safety issues throughout Dynea's New Zealand operations, the plaintiff was told he was demoted with a reduction in salary and was given a final written warning.

[9] Following the 31 January meeting Mr Climo left Mr Reed a message that the plaintiff wanted "*to do a deal*". Mr Reed telephoned back and explained that the plaintiff had not been dismissed but it was over to him if he still wanted to do a deal. There is a conflict between Messrs Reed and Climo as to what was said at this discussion but for present purposes it is not necessary to resolve it. The following day, 1 February, the plaintiff had an accident at work and was off on accident compensation for the ensuing weeks.

[10] On 14 February 2007 the plaintiff's wife delivered a letter dated 10 February to Dynea's Nelson plant. In that letter the plaintiff raised concerns about the disciplinary process and said he believed the demotion and his final written warning were unfair and unwarranted. He went through the incidents in some detail and asked that the disciplinary decision be reconsidered. The letter prompted Mr Reed to telephone Mr Climo who was unaware of the letter. Mr Climo undertook to speak to the plaintiff about it and to come back to Mr Reed.

[11] Mr Climo met the plaintiff and his wife on 16 February and told them that Mr Reed was not happy with the 10 February letter and considered that it amounted to an appeal and that Mr Reed said that he would set the letter aside. Mr Climo told the plaintiff that the letter was too strong and may have damaged the plaintiff's relationship with Dynea and, if the case was reopened, there was the possibility of a dismissal. They discussed the various options open to the plaintiff, one of which was the negotiation of an exit package. They discussed the amount of such a package.

[12] Because this matter may go further before another Judge and because the negotiations that did take place were on a "without prejudice" basis and intended to be confidential, I do not propose setting out the details of what was discussed or the final terms that may have been agreed, except insofar as this may be necessary for the purposes of this judgment. As a result of their discussions it was agreed that Mr Climo would ask for $A.

[13] The next week a meeting was arranged for 21 February to talk through the plaintiff's options with Mr Climo. The meeting took place at the Dynea plant in Richmond, and was attended by Ms Adlam and Mr Climo, with Mr Reed on a speaker phone from New Plymouth.

[14] At the outset Mr Climo said that everything to be discussed was on a "without prejudice" basis and Mr Reed and Ms Adlam agreed with this. Mr Climo put several options to Dynea which were rejected. He then asked them if they would consider, on a "without prejudice" basis, an exit package. Ms Adlam was reluctant to do so, but Mr Reed was prepared to discuss it, stating that confidentiality was of concern to Dynea. Mr Climo suggested a liquidated damages clause to overcome Mr

Reed's concerns about any breach of confidentiality. He then sought the figure of $A as he had been instructed to by the plaintiff. This was to be paid under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) as distress compensation. This was rejected, and, after a private discussion between Mr Reed and Ms Adlam, they offered $B as a one-off payment on the basis that Dynea would not consider a counter-offer.

[15] Mr Reed and Ms Adlam also raised a concern that the plaintiff could take the compensation money and then later come back to the Department of Labour's Occupational Safety and Health division (OSH) about his health and safety concerns. It was agreed that, although the settlement would be in full and final settlement of all employment matters, Dynea could not prevent OSH from issuing the plaintiff with a subpoena on safety matters. Mr Reed said that any settlement had to include a condition that if the plaintiff was contacted by OSH he was only to discuss the incident in which he had been injured and not raise any other health and safety concerns. Mr Reed also indicated that if these terms were acceptable to the plaintiff then he would have to give a written resignation to Dynea which would be effective from 23 February 2007. It was also agreed that the plaintiff would receive a certificate of service.

[16] Mr Reed, in his brief of evidence, said that Mr Climo had explained to them that there was a standard format for addressing the Employment Relations Act 2000 and that Mr Climo would draw up a settlement agreement which could be signed off by a mediator. Mr Reed said he understood this would be helpful in making a compensation payment under s123(1)(c)(i) of the Act. He claimed that Mr Climo never said that the deal would be in any way conditional upon the mediator signing off the settlement agreement and that the discussion about this was only ever in the context of the mediator signing to confirm the deal that had been done between Dynea and the plaintiff.

[17] Mr Climo in his brief of evidence agreed he said that he had a standard Department of Labour template which was the format for dealing with employment disputes under the Employment Relations Act 2000 and which he would use to draw up the proposed terms of the exit package. His brief then went on to state:

I said that the Record of Settlement would need to be approved by both parties and signed off by a Department of Labour mediator. Cleve said that he was agreeable to adopting this process. He said that he had been involved in this before. He indicated to me that he understood what I was talking about. He asked me to explain the process for the benefit of Sharon because she had had limited involvement in this process.

[18] Mr Climo then said in evidence that he explained to Ms Adlam that the record of settlement was also for the protection of Dynea because it would include a full and final settlement clause, would have the liquidated penalty clause and would preserve confidentiality. His brief of evidence then went on to state:

> *63. I explained to Sharon the process to follow once I had drawn up a Record of Settlement. I said that I would post 3 copies to Sharon. If she was happy with the terms, then she would need to sign three copies of the Record of Settlement and then send the 3 copies to Stephen for his approval. I said that once the parties had approved and signed the Record of Settlement then it would be sent to a Department of Labour mediator. The mediator would get in touch with each party to confirm that each party understood the terms and were happy with them. I said that once the mediator had signed the Record off then there was a binding contract. Sharon appeared to understand my explanation of this process. She agreed to adopt this process. At the end of this explanation, I wrote down Sharon's work address so that I knew where to send the Record of Settlement.*

[19] The substance of Mr Climo's evidence was put to Mr Reed in cross-examination by Ms Ironside for the plaintiff. I find this is a critical part of the evidence on which the case will turn and therefore set out the extract from the transcript in full. After putting to Mr Reed the provisions of s149 of the Act, with which Mr Reed said he was not at all familiar, the following exchange is found:

> ***Q.*** *Now it was important for the company to make a final and binding agreement wasn't it?*
> ***A.*** *Yes it was.*
>
> ***Q.*** *Yeah because you'd want to be able to enforce that record of settlement if Steve didn't adhere to the terms.*
> ***A.*** *Correct.*

Q. *And you agreed, in resolving this dispute that you had with Steve, to adopt that process, to adopt the section 149 process in resolving the dispute. You agreed to adopt that process. The section 149 process.*
A. *Yes we did.*

Q. *And it was through that section 149 process that you intended to conclude an agreement with Steve.*
A. *Well I have to raise a concern that I have had. We never dealt with section 149 during that discussion at all. It was mentioned as a number. Mainly it was Brent dwelt* [on] *doing it under section 123 which was some tax free payment paid to an employee when you've sorted out all the differences and you've signed it off and agreed that that was it. Section 149 was actually never gone into in any detail by Brent.*

Q. *Well he said to you that there was a standard format for dealing with employment disputes under the Act.*
A. *Yes he did say that.*

Q. *He said that.*
A. *Yes.*

Q. *So you accept his evidence, a standard format for dealing with employment disputes under the Employment Relations Act?*
A. *Yes.*

Q. *And he also said that he had a standard Department of Labour template.*
A. *No he didn't say. He just said he had a standard template for it.*

Q. *Okay, a standard template which he would use to draw up the proposed terms of exit package?*
A. *Correct, yes.*

Q. *And he said that a record of settlement would need to be drawn up.*
A. *Yes.*

Q. *Sent to each party.*
A. *Yes.*

Q. *Approved.*
A. *Approved? What do you mean by approved?*

Q. *Well each party, when one party got the terms of settlement they would be able to read it and look at it and make sure that they were happy with it. They – right?*
A. *No. Brent would draw up the terms of agreement. He would sent* [sic] *it through to us for signing and then we would pass it on to Steve.*

Q. *But you had an opportunity to approve it didn't you?*
A. *Oh yes yes.*

Q. *And so then did Steve didn't he?*
A. *I guess, yes.*

Q. *You guess, yes. So you agree that we could approve it and then Steve could approve it?*
A. *Yes.*

Q. *And you had to sign it and then Steve had to sign it?*
A. *That's true yes.*

Q. *And then Brent said it would be signed off by a Department of Labour mediator.*
A. *He didn't actually use the words "signed off". He said it would go to a mediator yeah.*

Q. *Well you accept though that it was going to be sent to a mediator to be signed.*
A. *Yeah. Yeah.*

Q. *Okay? And Brent no doubt would have said it would have to be signed by a mediator.*
A. *Well I don't recall the word "signing" but he did say it would go through to Mediation Services. So -*

Q. *But you would admit that you would submit the record of settlement to the Mediation Service for signing by a mediator.*
A. *Yeah, okay.*

Q. *And you said you were agreeable to adopting that process.*
A. *That's correct.*

Q. *And you said that you'd been involved in it before?*
A. *Yes I have.*

Q. *And you indicated to Brent that you understood what he was talking about.*
A. *That's correct.*

Q. *And he asked you – well you asked Brent to explain the process for the benefit of Sharon.*
A. *True.*

Q. *Because she had had limited involvement in that process.*
A. *That's correct.*

Q. *I take it you were still on the phone at this stage?*
A. *Yes we were.*

Q. *So then Brent explained to Sharon the importance of a record of settlement just so she had a bit of background information on it. Said it was important protection for the company.*
A. *That's correct.*

Q. *And would include clauses like "full and final settlement".*
A. *True.*

Q. *And not bringing up a personal grievance subsequently.*
A. *True.*

Q. *And Brent said that a record of settlement would also have a liquidated penalty clause.*
A. *That's correct.*

Q. *And that meant that if confidentiality was breached by Stephen then the company would be able to sue him.*
A. *Correct.*

Q. *For the compensation money that it had paid him.*
A. *Correct.*

Q. *And he also said that the record of settlement was protection for Steve because he didn't want to have to pay tax on the money that the company paid him.*
A. *That's true yes.*

Q. *And then Brent explained to Sharon the process that was going to be followed in that he was going to draw up the record of settlement.*
A. *Correct.*

Q. *And he was going to post three copies to Sharon and if she was happy with the terms she would have to sign the three copies of the record of settlement.*
A. *Correct.*

Q. *And send three copies to Stephen for his approval.*
A. *True.*

Q. *And then once the parties had approved and signed the record of settlement then it would be sent to a Department of Labour mediator?*
A. *Correct.*

Q. *And then he said the mediator would get in touch with each party?*
A. *He said that the mediator could get in touch but I think that was just to make sure that both parties were happy.*

Q. *Well the reason being to confirm that each party understood the terms.*
A. *Correct.*

Q. *And were happy with them?*
A. *Correct.*

Q. *And said that once the mediator had signed the record of settlement there'd be a binding contract.*
A. *Correct.*

Q. *So Brent said all that, you accept that?*
A. *Yes.*

Q. *And Sharon – well you don't know, you weren't there, you didn't see what Sharon appeared to understand but to Brent, Sharon appeared after that explanation to understand the process.*
A. *Yes.*

Q. *And she also agreed to adopt that process.*
A. *Yes.*

[20] After this meeting Mr Climo met with the plaintiff and his wife on 22 February. Although the plaintiff gave extensive evidence I do not intend to canvass it in detail as this case turns on the communications between Mr Climo, who was then the plaintiff's authorised representative, Mr Reed and Ms Adlam. Suffice to say the plaintiff was disappointed with the outcome of the negotiations and was also not happy with the amount of compensation being offered by Dynea. He instructed Mr Climo to re-negotiate the sum and Mr Climo said that he would try.

[21] The plaintiff attended his doctor later that day who extended his coverage on ACC for a further 30 days until 22 March 2007. This meant that the plaintiff would be able to resume work at the next scheduled roster date for him, which was 27 March.

[22] Mr Climo contacted Mr Reed. They discussed the question of compensation and he put the plaintiff's counter-offer. Mr Reed's reaction was to say that he would not accept any counter-offer and he repeated the original offer. Mr Climo then contacted the plaintiff and said that Dynea would not agree to any increase in the amount. The plaintiff's response was along the lines that he was disappointed but had no choice in the amount that Dynea was offering. Mr Climo told the plaintiff that he would draw up a record of settlement and he explained the process of approval and signature by the mediator in the same way he had explained it to Mr Reed and Ms Adlam. He warned the plaintiff of the consequences of breaching the agreement after it was signed off, with respect to the confidentiality clause, but he did not specifically mention any liquidated penalty clause. He told the plaintiff that the compensation would be paid within 7 days after the mediator had signed off the record of settlement, at the same time the plaintiff would get the certificate of service.

[23] Mr Climo then rang Mr Reed and told him words to the effect that they had a deal and that he was drawing up the record of settlement. Mr Reed told him to use Ms Adlam's name because the agreement could be delivered faster to her in Nelson. Mr Reed then called Ms Adlam and explained that Mr Climo would be sending the agreement to her.

[24] Mr Climo then drew up the record of settlement, phoned Ms Adlam on 22 February and confirmed that he would be sending it through to her. On the telephone they went through the terms of the settlement and Ms Adlam took notes of what was to be included.

[25] On 23 February Ms Adlam received in the post the typed record of settlement together with a handwritten note from Mr Climo. That note simply stated that he enclosed three copies of the settlement agreement and, "*if happy sign 6 times (2 per copy) and send to Steve with instructions to sign 6 times also then post to Mediation Services*". As was said by Ms Wilson, counsel for the defendant, the letter was not marked subject to negotiation or signing by the mediator, nor was it marked "without prejudice" until it was signed by the parties.

[26] The enclosed "*Record of Settlement*" which apparently followed a template provided by the mediation service, contains a heading "*Agreed Terms of Settlement to Employment Relationship Problems*", under which five terms are set out. It states that the parties request a Case Facilitator from the Department of Labour to sign these terms because the employment problems between them have been resolved and they wish them to be final, binding and enforceable on them. It concludes with the following:

> *I _____ of _____ Case Facilitator, certify that:*
>
> *(a)* *I am employed by the Chief Executive of the Department of Labour to provide mediation services under the Employment Relations Act 2000; and*
> *(b)* *I hold a current general authority from the Chief Executive to sign, for the purposes of s.149 of the Act, agreed terms of settlement; and*
> *(c)* *I have been requested by the parties to sign the attached agreed terms of settlement; and*
> *(d)* *Before I signed the agreed terms of settlement I explained to them the effect of s.149(3); and*
> *(e)* *I am satisfied that the parties understood the effect of that subsection and have affirmed their request that I should sign the agreed terms of settlement*
>
> *I now sign the agreed terms of settlement pursuant to s.149(1) & (3).*

[27] Ms Adlam signed the record as requested and sent the copies to the plaintiff. She told a number of staff that the plaintiff was resigning. The plaintiff received them on Saturday 24 February. He read them through with his wife. They were not

happy with the record. They thought they were being pushed into accepting an exit package, and that the settlement figure was not enough to compensate him for the loss of his job. Also because his ACC had been extended, if he resigned as at 23 February, this could affect the ACC payments he was to receive. This was the first time he had seen the terms written down and he thought they were not fair or reasonable. He claimed he did not even understand some of them, in particular the confidentiality clause and the liquidated penalty clause, the latter of which had not been mentioned by Mr Climo previously. The plaintiff was also left in doubt as to whether he could continue to speak to OSH if they questioned him about the health and safety aspects of Dynea. The plaintiff and his wife resolved to obtain advice from a solicitor before going any further with the record of settlement. On a recommendation from a friend they obtained legal advice from the firm Fletcher Vautier Moore. It was there that they met Ms Ironside.

[28] That same weekend the plaintiff received a phone call from Montana Higgins, his supervisor at Dynea, who said that he had heard the plaintiff was resigning. The plaintiff says he told Mr Higgins that he had not resigned, there was a deal being discussed but he had rejected it and that his ACC had been extended for another 30 days until 22 March. He would be back at work after that. Mr Higgins was not called to contradict this evidence.

[29] The plaintiff endeavoured to get hold of Mr Climo. They finally made contact on 26 February. The plaintiff raised his concerns with Mr Climo, one of which was his future ACC payments. Mr Climo said that he would check on the ACC situation. He rang the plaintiff back to say that he did not think that it would impact on the ACC payments. The plaintiff said he was not happy with a number of aspects of the record of settlement and wanted to seek legal advice on it.

[30] After the plaintiff and his wife had obtained legal advice they saw Mr Climo on 27 February and asked for his notes and told him that they had obtained legal advice as they were not happy about the terms. Mr Climo offered to see if he could get the resignation date changed but the plaintiff told him not to bother, as Dynea had made it clear their offer was one-off and they would not be moved on that.

[31] Shortly after this meeting Mr Climo received a telephone call from Ms Adlam, who phoned him from Singapore asking what had happened and why the agreement was not going ahead. Ms Adlam's evidence was that she made the call on 1 March from Singapore as she was concerned they had not heard anything and they had not yet paid the compensation figure. Ms Adlam was concerned about the outcome of that conversation and expressed the view that she thought that Dynea had been set up. About 20 minutes after that call, Mr Reed phoned Mr Climo and asked what had happened. Mr Climo told him that the plaintiff was not going ahead with the record of settlement. Mr Reed asked something to the effect of why it had tipped over and Mr Climo replied something to the effect that "…*sometimes if you squeeze too hard, that's when things tip over*." There may have been a brief discussion about ACC obligations but the conversation was quite short.

[32] It is clear therefore that Mr Reed and Ms Adlam knew at least by 1 March, that the plaintiff was not proceeding with the deal and, arguably, earlier due to the conversation between the plaintiff and Mr Higgins.

[33] There was extensive evidence as to the steps the parties then took, with each party claiming that this evidence showed that either an agreement did or did not exist. I do not propose setting out all this evidence in detail as it was equivocal as to whether a final and binding accord had been reached.

[34] The plaintiff's solicitors wrote to Dynea on 27 February saying that he would not be able to resume his duties from 22 February for 30 days, alleging that Dynea had acted in a manner which was both unfair to the plaintiff and which had disadvantaged him in his employment, that they would be writing shortly to set that out in full and that he intended to return to his usual position in Dynea as soon as he had medical clearance. Mr Reed accepted in evidence that when he received this letter he knew that there had been no concluded agreement and that the record of settlement had not been sent to the mediator. Mr Reed sent the letter to Dynea's solicitors. There was no reply to the letter of 27 February.

[35] On 6 March Ms Adlam wrote to the plaintiff telling him that he would be paid for 23, 24 and 25 February 2007 to bring his payments into line with ACC, that his holiday pay had not been paid out as they were awaiting written confirmation of

his verbal resignation, that any further ACC reimbursement would be sent direct to ACC to administer and that from 26 February Dynea would not be paying him via the company's employer's reimbursement agreement with ACC. It also referred to his need to make a manual payment to the superannuation scheme by cheque and, as Dynea would be unable to deduct his fortnightly social club contributions because ACC would be making the payments of compensation in the future, he would need to arrange a manual payment to Dynea's social club in the interim. The plaintiff arranged these payments.

[36] On 7 March the plaintiff's solicitors sent a 22-page letter to Dynea raising a disadvantage grievance and setting out in detail the background to his claims. At the conclusion of this letter it states the plaintiff's intention to return to his position as senior process technician on his first rostered shift which would be 27 March 2007, after he was declared to be fit to return to work. It threatened interim reinstatement proceedings into that role if he was not so reinstated. Mr Reed sent the letter on to the defendant's solicitors but there was no reply to it. The plaintiff's solicitors wrote again to Dynea on 14 March noting that they had not received a reply, that the plaintiff wished to progress his personal grievance, that they had arranged a mediation and confirming his intention to return to his position as senior process technician on 27 March.

[37] On 15 March the defendant's solicitors wrote to the plaintiff's solicitors stating that Ms Wilson had been heavily involved in an urgent case and had not been able to finalise a response, that rather than a mediation there should be a meeting between the parties and their representatives and they suggested 22 March. The plaintiff's solicitors responded that this would be suitable and a meeting duly took place in Nelson on that day.

[38] Extensive notes were provided of that meeting. At the outset Ms Wilson stated that rather than deal with the points raised by the plaintiff, Dynea asserted (I find for the first time) that the matter had been settled by way of a verbal agreement even though the record of settlement was not signed by the plaintiff. Ms Ironside's response was to say that those negotiations had been conducted on a without prejudice basis and no final agreement was reached. Ms Wilson told the plaintiff that Dynea had allowed him to remain in employment while it sought legal advice so

he would keep receiving his ACC payments but that from 23 March he would no longer be an employee of Dynea.

[39] Subsequent to that meeting the defendant paid the plaintiff the agreed compensation and holiday pay, which monies have been held in the plaintiff's solicitor's trust account since that time.

[40] In accordance with the advice that had been given by the plaintiff, both personally and through his solicitors, that he was intending to return to work, he duly attended work on 27 March. His access card did not work and he was invited to leave. He claims that this amounted to an unjustified dismissal.

Discussion

[41] Counsel provided detailed final submissions which, even if summarised, would unduly lengthen this judgment. I will address the salient features under this heading.

[42] Ms Ironside submitted that the parties had agreed to adopt the s149 process. This section provides:

> ***149 Settlements***
>
> *(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—*
> *(a) who is employed or engaged by the chief executive to provide the services; and*
> *(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—*
> *may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.*
>
> *(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—*
> *(a) explain to the parties the effect of subsection (3); and*
> *(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.*
>
> *(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—*
> *(a) those terms are final and binding on, and enforceable by, the parties; and*
> *(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*

> *(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether by action, appeal, application for review, or otherwise.*
>
> *(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.*

[43] As will be seen, and was properly conceded by Mr Climo in cross-examination, nowhere in this section does it require a mediator to check that the parties understand the terms of the settlement agreement itself. What the mediator must do is to ascertain that the parties understand the effect of the mediator signing the agreed terms of settlement.

[44] Notwithstanding the omission from s149, as to an enquiry into the parties' understanding of the terms of their agreement as Ms Ironside submitted, the report from the Employment and Accident Insurance Legislation Committee on the Employment Relations Bill and Related Petitions clearly indicates that the committee thought that the mediator must ensure that the parties understood the terms and effect of private settlements, before the terms became final and binding on the signature of the mediator. The Report when dealing with clause 161 (which became s149 in the current Act) stated:

> *One legal group and a community organisation suggested that mediators should be able to seal settlements that parties have made between themselves.*
>
> *The intention of this clause is to provide that mediated settlements will be enforceable under the bill, and it allows the mediator to ensure that the parties understand the terms and effect of those settlements. This ensures that the process is neutral and fair to both parties. This clause can therefore be extended to allow mediators to sign settlements reached by the parties themselves, after ensuring that they understood the terms and effect of those settlements.*
>
> *The majority recommends that clause 161(1) be amended to allow mediators to sign the agreed terms of settlement reached privately by the parties.*

[45] This accords with Mr Climo's understanding of both the s149 procedure and what he said was the practice of the mediation service and what he claims he told the

parties. Ms Wilson submitted that the fact the settlement agreement was not signed by a mediator in accordance with s149 did not mean that the oral agreement was not binding on the parties. If the mediator signed the agreement under s149 then the parties would have had the ability to enforce the agreement under s151 through a compliance order. She cited *Graham* where the parties had agreed in a telephone call to settle all claims between them including a personal grievance. The parties had there discussed a deed of settlement but this had not been prepared. The argument for the grievant was that the agreement was conditional on being reduced to writing and signed. Chief Judge Colgan held:

> *[57] … While I accept that the parties recognised the desirability, if not the need, to record their agreement in writing and to perfect it with other written documentation (for example, the completion of a share transfer form by the plaintiff), I do not accept that the evidence shows an intention only to be bound upon execution of an agreement in writing. The terms of the parties' agreement are clear. …*

[46] Ms Wilson contended that at no time had Mr Climo said that the agreement reached was conditional upon a record of settlement being signed by the parties and instead he had told Mr Reed that they had a deal. She observed that when Mr Climo sent the record of settlement to Ms Adlam for signing he did not state that it was conditional upon being signed, or that the settlement was not valid or binding, nor did he refer to the record of settlement as still being subject to approval by the plaintiff. She submitted there was nothing to suggest to Dynea that it had anything but a binding oral agreement which the record of settlement simply confirmed in writing. She relied on the Authority's determination that, as the record of settlement had not been marked as a draft or as being subject to the plaintiff's personal approval, negotiations had been completed. She referred to cases where the Authority had found that oral agreements can be binding even if they have not been signed under s149.

[47] Ms Wilson also submitted that Dynea did not accept that it had agreed that the settlement was not binding until the mediator signed the record of settlement. The mediator's signature was merely helpful in terms of making a compensation payment under s123(1)(c)(i) of the Act more readily recognised by the Inland

Revenue Department. She contended that, although Mr Climo had said that the parties had to approve the record of settlement, his later communications and his writing to Ms Adlam were repeatedly along the lines that the plaintiff had accepted the settlement terms and agreed to them. She submitted it was entirely reasonable for Dynea to have taken from these communications that the record of settlement was agreed and approved by the plaintiff.

[48] Ms Wilson also argued the plaintiff was estopped from denying the existence of the oral agreement because Dynea had acted in reliance on the agreement to its detriment. I reject that argument because the steps taken by Dynea to pay the agreed compensation and to replace the plaintiff were taken several weeks after Dynea was informed that the plaintiff had resiled from the oral agreement and was intending to return to work when he was fit to do so.

[49] Ms Wilson in her final submissions correctly anticipated that the plaintiff would seek to rely on the evidence given orally by Mr Reed in response to Ms Ironside's cross-examination, the passages I have set out above. She submitted that the Court should not rely on Mr Reed's oral evidence over his sworn brief of evidence. She contended that his latter statements were elicited when Mr Reed had been giving evidence all morning, it was coming up to the lunch break and he simply was tired and had lost concentration. She submitted there were contradictions between Mr Reed's evidence just before lunch, to his earlier oral evidence and his brief of evidence and therefore it would not be reliable to refer to those later oral statements.

[50] There was absolutely no evidence that Mr Reed was tired or had lost concentration in the period immediately prior to the lunch break. As Ms Ironside submitted, and the passages of the evidence indicate, Mr Reed was careful and precise in his replies to her questions, responding at some points by clarifying the questions and his answers. Ms Ironside's questions were simple and straightforward, as were Mr Reed's clear responses. Ms Wilson's submissions amounted to an attempt to undermine or impeach the credibility of the main witness for Dynea and I do not accept them.

[51] As against the consistent evidence of Mr Reed and Mr Climo, Ms Wilson referred to the uncontested evidence of Ms Adlam. Ms Adlam's brief says there were no conditions put around the settlement agreement and that she was in no way told that the agreement was not valid or binding, and that the company could somehow change its mind about it, or that the plaintiff could. She noted that the letter referred to signing the agreement if she was "*happy*" but submitted that was only a matter of politeness. This part of her evidence was in the nature of submission rather than evidence of what was actually said. In supplementary oral questions from Ms Wilson the following exchange took place:

> ***Q.*** *Was there anything in your discussion with Brent the day before about it still being subject to Steve's approval, subject to negotiation, conditional, any of those words used.*
> ***A.*** *No. Because he had already said that Steve accepted that in the phone call.*

[52] Ms Wilson's question and Ms Adlam's response appear to relate to her discussion with Mr Climo on 22 February, being the day before 23 February when she received in the post his typed up record of settlement and the cover letter. The statements about the record of settlement being sent for the parties' approval and the signature of the mediator were made on 21 February by Mr Climo, as accepted by Mr Reed in cross-examination. Mr Climo did not say he had used the words "*subject to approval*" or "*negotiation*" or "*conditional*" in his telephone calls to Ms Adlam on 22 February.

[53] Ms Ironside relied on Mr Climo's and Mr Reed's evidence to distinguish the circumstances in the *Graham* case. She observed that in that case there was no suggestion that the parties were intending from the outset to use the s149 process or any other agreed procedure to be followed after the oral agreement was reached.

[54] Ms Ironside observed that in the present case there had been no replies of substance to the plaintiff's solicitor's letters to Dynea until the meeting of 22 March when it was alleged for the first time that the matter had been settled by agreement. She referred to *Fredricsen v Northland Districts Aero Club Inc* unreported, Judge Colgan, 23 April 2001, AC 30/01, in which the Court held that it was relevant to its finding that there was no settlement agreement reached between the parties, and that the employer had first raised it 14 days after the alleged agreement was entered into.

[55] Ms Wilson sought to distinguish the *Fredricsen* case by pointing out that the 22 March meeting was the first opportunity the defendant had to respond in substance to the earlier letter from the plaintiff's solicitors.

[56] I am satisfied from the evidence of Mr Reed and Mr Climo, to which I have referred, that the parties in this case intended from the outset to submit any oral agreement reached to the s149 procedure, as they understood it from Mr Climo's description. This meant that any agreement reached between the negotiating parties was subject to Mr Climo reducing the terms to a written record of settlement which would then be sent to Dynea for its approval and then sent to the plaintiff for his approval. It would then go to the mediation service. The mediator would then get in touch with each party to confirm that they understood the terms and were happy with them and that once the mediator signed the record off then there was a binding contract. Although this process, explained by Mr Climo and accepted by Mr Reed, is not contained in s149, it was the process agreed by the parties. It also accorded with Mr Climo's evidence of the practice of mediators dealing with privately settled matters and what he had told the plaintiff.

[57] Where, as here, the parties have agreed to such a process there is no binding accord until that process has been completed. It is analogous to a situation where the parties have either expressly or impliedly agreed that there will be no binding contractual obligations until a formal document is signed or a procedure has been completed. In such circumstances it has been held not to matter that the party denying the existence of a binding contract prepared the draft contract and sent it to the other side: see *Carruthers v Whitaker* [1975] 2 NZLR 667.

[58] The agreed process was not completed in this case because the plaintiff did not approve the record of settlement and did not submit it to the mediation service for the completion of the process as the parties understood it. Unlike *Graham* the parties agreed to their understanding of the s149 process in advance and the orally agreed terms were subject to the due completion of that process. I therefore find there was no binding accord and the challenge must succeed.

[59] Ms Ironside also made a strong submission that the penalty clause contained in the agreement, which the plaintiff said he neither understood nor agreed to, could

not be binding on the parties and, in any event, was not an agreed term. She cited *Ozturk v Gultekin, (t/a Halikarnas Restaurant)* [2004] 1 ERNZ 572, 574 where, in obiter comments, the former Chief Judge said "*In general, any mediated settlement or settlement recorded by a mediator is enforceable*." Because the jurisdiction under the Act is one of equity and good conscience and courts of equity have always turned their backs on any agreement that imposed a penalty or a forfeiture, the Chief Judge noted that, unless the agreed amount of damages payable in the event of a particular breach was a genuine estimate of the loss that the parties expected, it would be regarded as a penalty and would not be recoverable. The Chief Judge stated:

> *[9] My final observation about the matter relates to the Mediation Service. I do not intend any criticism of the mediator who recorded the settlement. It is really a training issue for mediators. I do not know how prevalent this practice of inserting penalties is, but I do note that it is an obligation of the mediator under s 149 of the Employment Relations Act 2000 to explain to the parties that the terms of settlement are final and binding and enforceable by the parties. Obviously, a mediator is not able to make such a statement to the parties where the settlement contains a penalty which is completely out of proportion, and is unrelated, to any genuine estimate of what the impact of a default under the agreement may be.*

[60] Because of the conclusions I have reached on the lack of a binding accord I do not propose to rule on this submission although I record Mr Reed's acceptance in cross-examination that the liquidated damages clause did not represent a genuine estimate of Dynea's prospective losses.

[61] Further, because of my conclusion that in this case no contractual effect is to be given to the orally agreed terms prior to the parties' approval of the written record and the signature of the mediator, it is not necessary to rule on the submissions of counsel as to the actions of the parties after 22 February. Those actions were somewhat equivocal. Clearly the plaintiff did not submit a written resignation with effect from 23 February and was paid by Dynea for 2 days after that date and thereafter by the ACC. Dynea's solicitor at the meeting of 22 March treated the plaintiff as still being in Dynea's employ until the following day. The contributions the plaintiff had to make to the superannuation scheme and the social club were consistent with continued employment. The plaintiff both personally and through

his solicitors had made it clear that he considered he was still in Dynea's employment and would return to work when he was fit to do so. There was a considerable delay in raising the defence of accord and satisfaction and the case does have some features that are similar to the *Fredricsen* case. All those features are consistent with the view I have reached that the parties' agreed procedure was dependent upon approval of the record of settlement and the signature of the mediator.

The second question - the submission of the grievance

[62] As required by the Chief Judge's minute, both parties addressed whether the plaintiff's letter of 10 February raised a personal grievance. Ms Wilson submitted that there was no material issue as the plaintiff had clearly raised a personal grievance in his solicitor's letter of 7 March 2007. She contended, however, that the 10 February letter did not validly raise a personal grievance.

[63] The Authority had found that the 10 February letter fell short of alleging a personal grievance because it did not seek remedies. Ms Wilson accepted that this conclusion based on the failure to seek remedies could not be sustained, for an employee does not have to be specific about the remedies sought, as this is not required under s114(2) of the Act. Ms Wilson noted that Dynea had not argued this before the Authority. Instead Dynea's submission was that the 10 February letter does not specifically state that the plaintiff is raising a grievance that he wanted Dynea to address, as is required by s114(2) of the Act. The letter simply sought a reconsideration of Dynea's disciplinary decision and did not suggest that the plaintiff might take the matter further if Dynea did not do as he asked.

[64] Ms Ironside submitted there was no express provision in the Act as to what is precisely required to raise a personal grievance but that it was something significantly less formal than a description of its nature, the facts giving rise to it and the remedies sought, citing *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60. She observed that there is no formality required and the words "*personal grievance*" do not have to be used, as all that is necessary is that the employer knows that the employee is raising a personal grievance. She submitted that the protest made by the plaintiff had been clear enough to alert Dynea as to his disagreement with its actions and therefore this constituted a submission of a grievance, citing *Houston v Barker*

(t/a Salon Gaynor) [1992] 3 ERNZ 469. She also observed that the phone call of Mr Climo on 31 January and the letter of 10 February indicated that the parties were intending to communicate to Dynea a grievance about the way the plaintiff had been treated.

[65] I accept both counsel's submission that this issue does not require resolution because the plaintiff's solicitor's letter clearly raised a grievance which was well within the 90-day period. However I express the view that the letter of 10 February, lodging as it does a complaint about the fairness of Dynea's actions and the actions the plaintiff required Dynea to take to reinstate him in his former position and remove the final warning does, in substance, raise a personal grievance. This was addressed by Dynea, and gave rise to the genuine dispute which the parties endeavoured to settle in the negotiations on 21 and 22 February 2007.

Conclusion

[66] The plaintiff's challenge having succeeded, he is no longer barred from pursuing in the Employment Court his personal grievance and his application for interim reinstatement. Because of the urgency attaching to the latter issue, the parties should contact the Registrar to ensure that the necessary documentation is before the Court so that this application can be dealt with urgently. The parties will also need to address the matter of mediation.

[67] Costs in respect of the present matter are reserved and may be addressed when the substantive matters of the challenge have been disposed of by the Court, in accordance with the decision of the full Court.

B S Travis
Judge

Judgment signed at 2.30pm on Thursday 12 July 2007