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Resolving employee and other stakeholder complaints – be careful that your agreement does not come undone

Employment, code of conduct and discrimination disputes often involve non-monetary issues. Claimants may seek that the respondent take specific steps, handle information in a particular way or issue an apology for certain conduct. Offers of settlement in these claims often need to be multi-pronged in order to bring about resolution of the entire dispute.

As a result, if an offer is accepted during ADR it can be complicated to document the agreement "on the spot".

Documenting the agreement

From our experience of handling these matters for public and private sector clients, parties can be motivated to record the agreement in loose terms and express that it is subject to a further document (such as a Deed) that the parties are to agree on. We have observed that temptation particularly in cases where agreement is reached after a drawn-out process. In other cases, a difficulty may be that various "prongs" of the settlement are within the purview of different people and thus formal approval of some aspects of the settlement may take time.

Great care needs to be exercised to ensure that settlements reached are enforceable because of the principle in *Masters v Cameron* [1954] HCA 72. In that well-known case, a sale agreement was made "subject to" a formal contract being prepared. The High Court said that there could be three outcomes:

1. The parties have agreed on all terms and intend to be bound but they wish to record the agreement in a formal document.
2. The parties have agreed on all terms but performance of some or all terms is conditional on a formal document.
3. The agreement is not concluded until there is a formal document.

Recent cases have highlighted the importance of those principles. In *Bell v Singaria (Aust) Pty Ltd T/A Crown on McCredie* [2020] FWC 1181 the parties did not sign the settlement agreement that had been prepared following conciliation. That provided an avenue for the claimant to seek to re-open the dispute, necessitating a further determination (the respondent ultimately succeeded). In a discrimination case *Clonda v NSW Squash Limited* [2020] NSWCATAD 116 the parties did reduce their agreement to writing subject to a deed, but the deed contained "extra provisions" (apparently including non-disparagement) that had not formed part of the original agreement. The Tribunal therefore was not satisfied that the parties "were of the same mind" on the day of the mediation. Thus over the respondent's objection, the proceedings continued.

Recommendation

Obviously a comprehensive written agreement is the safest way to ensure that all parties will be bound by the settlement. But if it is not possible to draft and execute a formal agreement "on the spot", parties should nonetheless endeavour to document the key elements of their agreement so that it fits the first or second category from *Masters v Cameron.* To achieve this, there should be written proof that the essential terms of the settlement are agreed, including the terms of sub-components of the agreement (e.g. a letter of apology or reference). Any terms that a respondent might require in a subsequent Deed (e.g. indemnity, confidentiality, non-disparagement, timeframes) should be raised at the outset and noted in heads of agreement that the parties should sign on the day.

Our application of those principles to a recent settlement involving a self-represented claimant and our public sector client allowed our client to hold the claimant to the agreement, despite the claimant's subsequent attempts to re-agitate the issues.

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