

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 488
3095632

BETWEEN EDWIN (EDDIE) WOOD
Applicant
AND BLUE SKY MEATS (N.Z.)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Riki Donnelly, counsel for the Applicant
Janet Copeland, counsel for the Respondent

Investigation Meeting: 23 June 2021 at Invercargill

Submissions received: 5 August 2021 from the Applicant
2 August 2021 from the Respondent

Determination: 5 November 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The claims are dismissed.**
- B. Costs are reserved, in accordance with the timetable set out below.**

Employment Relationship Problem

[1] This problem originally involved a number of applicants. However, by effect of a third amended statement of problem, there remains only a claim by Edwin (Eddie) Wood. It was agreed that the Authority would first consider whether Mr Wood was precluded from

bringing his claim by a record of settlement between him and Blue Sky Meats (N.Z.) Limited (BSM).

[2] Evidence and submissions from both sides was considered at the investigation meeting. Following that meeting, counsel drew my attention to a recent Employment Court judgment¹ relevant to the present issues. They each provided helpful additional submissions. This determination resolves whether Mr Wood's claim can proceed.

Background

[3] I should first outline the circumstances.

[4] Mr Wood was Union Secretary of the Otago-Southland branch of the New Zealand Meat Workers Union (NZMWU).

[5] There was correspondence in 2018 between solicitors acting for Mr Wood and BSM. It is helpful to mention the dates: 2 August, 10 August, 16 August, 29 August, and 13 September.

[6] Todd Grave was BSM's chief executive. He wrote to Mr Wood on 8 October 2018 about the seasonal return to work. The letter also referenced a matter relevant to the solicitors' correspondence. Mr Wood's solicitor replied to BSM's solicitor on 11 October. Issue was taken about the direct communication, an information request was repeated and personal grievances were raised. Remedies were proposed. That drew a detailed response from BSM's solicitor on 29 October. Mediation was proposed.

[7] There was a detailed response on 1 November from Mr Wood's solicitor. Mediation through MBIE was agreed.

[8] There was further correspondence between solicitors in November.

[9] Mr Wood and BSM signed a record of settlement, on 3 December 2018. It follows a common format and was signed and certified by a mediator in accordance with s 149 of the Employment Relations Act 2000 on 4 December 2018. I set out relevant parts:

¹ *Crossen v Yangs House Limited* [2021] NZEmpC 102.

1. The Employee raised a personal grievance ...The parties have agreed to resolve the matters relating to the employment relationship on the terms set out...

...

6. The Employee will be paid all entitlements due and owing to the Termination Date, including any accrued unused holiday pay.

...

8. The terms of this Record of Settlement:

a. are reached ... in full and final settlement of any claims that the parties have, or in the future may have, against the other (including any claim the Employee may have arising from or related to employment with the Employer) except to the extent that such claim relates to post-employment obligations referred to in this Record of Settlement ...

...

9. In reaching this Record of Settlement the parties confirm that:

a. no minimum entitlements (...as defined by the Employment Relations Act 2000) have been foregone; and

...

10. The parties agree that a Mediator ... should sign this Record of Settlement because the parties wish these terms to be final, binding and enforceable on them.

...

[10] The Record expressly prohibits, except for enforcement purposes, either party bringing the terms before the Authority. It refers to s 148A of the Act and includes the Mediator's certification that he was advised by the parties that no minimum entitlements (as defined) had been foregone.

[11] Mr Wood's employment with BSM ended on 29 November 2018 and he resigned as Union Secretary on 5 December 2018.

[12] NZMWU had been involved in litigation with a different company that ended with a 2016 judgment by the Court of Appeal.² The Court upheld an earlier finding that a statutory paid rest break had to be paid at the rate the employee would be paid if they were working. There was a consequential issue about when contractually agreed penal rates should be applied. Jess Vickery is BSM's chief financial officer. Her evidence, which I accept, is that similar issues were raised between NZMWU and BSM. The company applied principles (as it assessed their effect) from the *Lean Meats* judgment in its business from January 2018 and also back-paid arrears. BSM advised NZMWU about its calculation methodology. There was correspondence about the application of *Lean Meats* between the respective lawyers for NZMWU and BSM in May, June and August. The parties' views differed.

[13] NZMWU was also involved in other related litigation in other locations with different companies in the meat industry. The litigation followed on from collective bargaining there and disagreement about the treatment of rest breaks for piece workers. The employers considered that piece rates incorporated payment for rest breaks. NZMWU's defence included a counter-claim that donning and doffing gear for production and breaks was work for the purposes of the Minimum Wage Act 1983 and the statutory breaks regime. Following earlier interlocutory steps, these matters were heard before the Employment Court in September 2018, subject to judgment in December 2018.³

[14] Mr Wood attended the Employment Court hearing. Given his NZMWU involvement, he was familiar with the issues resolved by *Lean Meats* and being argued in the *Ovation* case. Mr Wood had also been involved in delivering a letter from a lawyer acting for NZMWU (not his solicitors) to BSM in May 2018, raising the *Lean Meat* issue.

[15] The significance of the doffing and donning issues in the *Ovation* case more widely for the meat industry was recognised by the Court when it granted intervener status for the Meat Industry Association of New Zealand.⁴ Mr Grave's evidence, which I accept, is that NZMWU told BSM in September 2018 that it would pursue a donning and doffing claim against the company. Ross Smith is BSM general manager of operations. I accept Mr

² *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495.

³ *Ovation New Zealand Limited v NEW Zealand Meat Workers and Related Trades Union Incorporated* [2018] NZEmpC 151.

⁴ *Ovation New Zealand Limited v NEW Zealand Meat Workers and Related Trades Union Incorporated* [2018] NZEmpC 101.

Smith's evidence that around the time of the September Court hearing, Mr Wood explained to him the basis of the *Ovation* case doffing and donning claim and its potential relevance for BSM.

The proposed claims

[16] There are five issues in the amended statement of problem. Mr Wood says that BSM failed to provide contractual and statutory rest and meal breaks because of the doffing and donning requirement, which time was work. Mr Wood says that BSM, by the way it treated rest breaks, failed to pay overtime in accordance with the employment agreement. The third issue arises from BSM paying Mr Wood a taxable "break allowance", until March 2018. The fourth issue is a claim that Mr Wood was not paid for the time he spent donning and doffing, and walking before and after each shift and for breaks. It relies on the Minimum Wage Act 1983. Finally, there is an issue about the rate at which payment was made for rest breaks from March 2018. Various determinations are sought. However, in substance they are part of an action to recover arrears of wages payable to Mr Wood, yet to be quantified.

[17] The arrears claims variously would canvass compliance with employment standards and minimum entitlements during Mr Wood's employment, together with how they interact on the relevant employment agreement provisions.

[18] There is also a penalty claim for breach of good faith, breach of the statutory rest break provisions, and failure to provide time and wage records.

Can these claims proceed?

[19] In *Crossen*,⁵ the Employment Court considered an employee's challenge to the determination of the Authority, dismissing her arrears claims based on the Minimum Wage Act 1983 and the Holidays Act 2003, because she was subject to a record of settlement under s 149 of the Employment Relations Act 2000 expressed by clause 10 as a full and final settlement of all matters between the parties arising out of their employment relationship. The Court confirmed that (footnote omitted):

...interpreting the settlement agreement is an objective exercise to ascertain the meaning it would convey to a reasonable person having all of the background knowledge reasonably available to the

⁵ *Crossen v Yangs House Limited*, above n1.

parties in the situation they were in at the time of the agreement. In this exercise context is significant and taking it into account does not depend on establishing any ambiguity in the agreement being interpreted.

[20] The Court did not accept the case for the employee that the words of clause 10 of her Record of Settlement should be read in a qualified way, restricted only to the personal grievance claims, not her claims for statutory minimum entitlements.

[21] Here, clause 1 introduces the settlement. Mr Wood raised a personal grievance claim. That is one type of employment relationship problem. The parties agreed to resolve “the matters relating to the employment relationship”. These words indicate that the settlement extended beyond just the personal grievance claim mentioned in the opening sentence. The words used in clause 8(a) emphasise the breadth of the parties’ settlement. The full and final settlement captures “any claims” the parties have, or in the future may have, against the other. Only an employee can raise a personal grievance claim, but potential claims by the employer were also settled. None had been foreshadowed in the correspondence. Current and future claims were settled. These words are more specific than the words considered by the Court in *Crossen*, but their meaning is no less broad. Their breadth is reinforced by the words in parentheses that refer to any claim the employee may have arising from or related to employment with the Employer. Only future claims within a narrow compass are permitted.

[22] In *Crossen*, the employee had initiated the dispute through her representative’s correspondence. The letter raised both a personal grievance and a claim for arrears of wages and holiday pay. There was evidence that the employer sought the inclusion of the words “full and final”, before execution of the record of settlement. These contextual matters supported a broad reading that the parties intended a comprehensive settlement.

[23] Here, the correspondence on Mr Wood’s behalf that was the catalyst for the Record of Settlement did not raise the rest breaks, doffing and donning and Minimum Wage Act issues. It focussed on an unrelated matter and the grounds for a personal grievance claim arising directly and indirectly as a result. However, the evidence establishes that the background knowledge reasonably available to the parties at the time they negotiated and concluded the Record of Settlement included awareness of the prospect of claims by employees (including Mr Wood) against BSM based on the principles in *Lean Meats* and those at issue in *Ovation*.

In short, the present claims by Mr Wood were not referred to, but the possibility that there might be such claims by employees, including by Mr Wood following the termination of his employment, was in the background.

[24] The contextual matters do not support a narrow approach to construing the words used by the parties in the Record of Settlement. I conclude that the present claims are included in “the matters relating to the employment relationship” (clause 1) and are “claims that the parties ... may have ... arising from or related to employment” (clause 8(a)). The present claims are part of the full and final settlement.

[25] In *Crossen*, the Court considered a submission that it was not legally possible for the parties to have compromised Mrs Crossen’s statutory minimum entitlements. The submission was based on provisions in those statutes, read alongside the prohibition against a mediator signing a settlement agreement where a party agrees to forgo those entitlements, and the right to recover arrears despite acceptance of payment of a lower rate or an agreement not to recover arrears. The Court distinguished between forgoing statutory minimum entitlements and resolving disputes about the existence or extent of those entitlements.⁶ The law did not permit the former, but did permit the latter. Because the Record of Settlement in *Crossen* did not involve forgoing an undisputed minimum entitlement, the settlement agreement operated to prevent her claims for minimum entitlements.

[26] The same principle applies in this case. At the time of the Record of Settlement, Mr Wood did not have undisputed minimum entitlements. As with other BSM employees, Mr Wood had a potential claim for arrears of an unquantified sum. Any claim and quantification would depend on unresolved factual and legal issues. Legal issues extended to the interaction between contractual arrangements and statutory entitlements. I conclude that the law did not prevent Mr Wood entering into a Record of Settlement by which he compromised a right to pursue such claims in the future.

[27] By clause 6 of the Record of Settlement, Mr Wood was to be paid “all entitlements due and owing to Termination Date, including any accrued unused holiday pay”. I do not read these words as extending to the minimum entitlements which are the subject of the

⁶ *Crossen v Yangs House Limited*, n1 at [40].

present claim. They must mean any final wages and holiday pay. If construed more widely, they would defeat the finality of the settlement.

Submissions for Mr Wood

[28] In this determination, I have not followed the approach taken by counsel for Mr Wood. However, there are several cases cited that I should mention. In *Fay v Commercial Helicopters Ltd*,⁷ the Authority accepted that there may be instances where a change in the law, making the situation different to what was known at the time of agreement, might be sufficient to set aside a declared term of finality. The Authority cited another Authority case⁸ as an example. *Fay* was a case where the finality provision in the settlement agreement prevented a later attempt to claim minimum entitlements of wages and holiday pay, as a potential minimum entitlements claim could not have been unknown to the worker at the time of the Record of Settlement. *Fay* bears some similarity to this case.

[29] In *Cleverley*, the Authority found as a fact that Ms Cleverley was unaware until 2014 of the possibility of a minimum wage claim for her sleepover duties performed before 2011. In light of that, the Authority determined that the 2011 Record of Settlement, despite an express reference to “statutory entitlements”, could not be interpreted as a valid settlement of minimum entitlement claims. Rather, Ms Cleverley was forgoing minimum entitlements by the Record of Settlement. It was not a valid Record of Settlement, so s 149 of the Employment Relations Act 2000 did not apply. Applying common law principles, the Authority determined that the words of settlement did not extend to the possibility of a minimum entitlement claim based on sleepover duties. Mr Wood’s situation differs from that of Ms Cleverley. The possibility of the present claims were well understood by him and BSM.

Conclusion

[30] The claims for arrears and for a penalty based on breaches of sections 4A, 69ZF, 130 and 133 of the Employment Relations Act 2000 must be dismissed because the Record of Settlement prevents Mr Wood from making these claims.

⁷ *Fay v Commercial Helicopters Ltd* [2020] NZERA 287.

⁸ *Cleverley v Selwyn House School Trust Board* [2016] NZERA Christchurch 43.

[31] I am asked to reserve costs. If there is a claim, it should be made by lodging and serving submissions within 28 days. The other party may then lodge and serve submissions in reply. I will then determine the issue of costs.

Philip Cheyne
Member of the Employment Relations Authority