

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 649
3176307

BETWEEN	SHANE HAWKINS Applicant
AND	KUSTOM PRINT & SIGNS LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Joshua Pietras, counsel for the Applicant Pauline Brown for the Respondent
Investigation Meeting:	Determined on the papers
Submissions received:	3 November and 30 November 2022 from Applicant 30 November 2022 from Respondent
Determination:	8 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hawkins was employed by Kustom Print & Signs Limited (Kustom Print) until his employment ended by mutual agreement on 25 March 2022.

[2] The parties signed a record of settlement recording how Mr Hawkins' employment would end. One of the agreed terms was that Kustom Print would pay to Mr Hawkins any outstanding wages and holiday pay entitlements that remained. Kustom Print says that Mr Hawkins' employment ended on 25 March 2022, and it has paid everything owing. Mr Hawkins says he is owed an additional 3 weeks wages and

accompanying holiday pay, as his employment agreement provided for a 3 week notice period.

[3] The disagreement has come to the Authority for determination.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Hawkins, and from Ms Pauline Brown, director of Kustom Print. The parties also provided the Authority with written submissions. I then proceeded to determine the matter "on the papers" with the agreement of the parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (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

[6] The issues requiring investigation and determination were:

- (a) Did the record of settlement require Kustom Print to pay to Mr Hawkins the sum of three weeks pay plus associated annual holiday pay and Kiwisaver contributions, in respect of a contractual notice period?
- (b) If so, what awards should be made to Mr Hawkins, including interest?
- (c) If so, should a penalty be awarded against Kustom Print for non-compliance with the record of settlement?
- (d) Should either party contribute to the costs of representation of the other party?

Facts

[7] Mr Hawkins was employed by Kustom Print as a sales and support person. In March 2022, a dispute arose between the parties as to the amount of fuel Kustom Print would pay for. Mr Hawkins left the workplace with his last day at work being 14 March 2022, and the parties began to negotiate how his employment would end.

[8] On 18 March 2022, Ms Brown sent a draft record of settlement to Mr Hawkins. The covering email specified that wages would be paid up to Monday 14 March on the basis of “time worked”.

[9] Mr Hawkins sought legal advice. He also used his time away from work to attend another job interview on 22 March 2022. He signed and returned the record of settlement on Friday 25 March 2022. Ms Brown also signed the record of settlement on 25 March 2022.

[10] On Saturday 26 March, Mr Hawkins emailed Ms Brown with a letter of resignation. The letter stated:

I would like to inform you that I am resigning from my position as Sales Representative for Kustom Print & Signs Ltd. My last day of employment will be 25 March .

[11] The record of settlement was countersigned by an experienced Mediator from Mediation Services, on 30 March 2022.

[12] On 1 April 2022, Kustom Print made payment to Mr Hawkins. This payment covered all the agreed payments in the record of settlement, but did not include any payment for a notice period.

[13] Ms Brown explains that Mr Hawkins was paid correctly up until the date of 25 March 2022, which was the date that his employment ended, as stated his letter of resignation, though this letter was not sent until 26 March.

[14] Ms Brown says that Mr Hawkins was not paid for any notice period, because he did not give any notice. Instead, his resignation was immediate. She also says that the record of settlement does not require her to make an additional payment for notice that was not given or worked.

[15] Mr Hawkins says that the record of settlement does require Kustom Print to pay him out his contractual notice, because clause 4 of the record of settlement states:

The Company will pay the Employee any outstanding wage and holiday entitlements that remain under the employment relationship.

[16] Mr Hawkins says this requires the payment of his contractual notice.

What does the Record of Settlement Say?

[17] The record of settlement is an agreement made in accordance with the requirements of section 149 of the Act. This means that:

- a. The terms of the record of settlement are final and binding on, and enforceable by, the parties;
- b. The parties may bring the terms of the record of settlement before the Authority for enforcement; and
- c. A person who breaches an agreed term of a record of settlement is liable to a penalty, if one is imposed by the Authority.

[18] Mr Hawkins is essentially seeking that the Authority enforce what he says was a term of the record of settlement, that Kustom Print pay him his contractual notice period, plus the usual holiday pay and Kiwisaver entitlements that come with that.

[19] I must therefore determine what clause 4 of the record of settlement requires.

[20] First, I note that the record of settlement did not say when Mr Hawkins' employment came to an end. It stated that Mr Hawkins "was" employed, but does not state either the start date or the finish date of Mr Hawkins' employment. It also states that Kustom Print will provide a certificate of service "stating the tenure of the employment relationship", but it does not state what that tenure is.

[21] My view is that the employment relationship came to an end on Friday 25 March 2022. This was the date that both Mr Hawkins and Ms Brown signed the record of settlement recording that the employment relationship was over, and putting it in the past. This was also the date that Mr Hawkins himself says was "my last day of employment", in his own resignation letter sent by email on Saturday 26 March at 1.52 pm, but dated 25 March 2022.

[22] This means that as of 25 March 2022, the employment relationship was over. There were no longer any employment obligations between the parties.

[23] Clause 4 of the record of settlement refers to "any entitlements that remain...under the employment relationship". The employment relationship, and any entitlements under it, came to an end on 25 March 2022. Kustom Print was not obliged

to pay Mr Hawkins after the ending of his employment. This means that all entitlements Mr Hawkins had to be paid (including wages, holiday pay, Kiwisaver, and any other matters) were to be calculated and paid up to 25 March 2022. After that, the parties' employment relationship was over, and they had no further employment relationship obligations towards each other.

[24] If the parties had intended that Kustom Print was to pay Mr Hawkins a sum equivalent to his three week's contractual notice period, then it was open to the parties to state this in the record of settlement, whether that be for example, by stating that three week's notice was to be paid, or by setting out an amount of money to be paid to Mr Hawkins in lieu of notice, or by providing for a termination date that included or was extended by those additional three weeks. None of these things was done.

[25] In addition, Mr Hawkins then wrote to Ms Brown the following day, confirming that his last day of work was 25 March 2022. Mr Hawkins did not state in his resignation letter that he was giving three week's notice. Nor did he mention the payment of notice. In fact, he provided no notice at all, as his resignation letter came one day after the date he said his resignation was to take effect. This reinforces my conclusion that at the time of signing the record of settlement, the parties intended to resolve all matters between them as of the date of 25 March 2022.

[26] Mr Hawkins in his own witness statement explained that, on 22 March, he attended an interview for another job, and was told that the job was "as good as his", so he was motivated to sign the record of settlement because of this. This is consistent with him wanting to bring his employment relationship with Kustom Print to an end promptly.

[27] He also says now that he "presumed" that Kustom Print would place him on garden leave for three weeks. However, Mr Hawkins never mentioned this presumption to Kustom Print, and he wrote his resignation letter in a way that was fundamentally inconsistent with this. An unspoken assumption, that was inconsistent with how Mr Hawkins acted in practice, cannot impose an obligation on Kustom Print that is not set out in the record of settlement. The Supreme Court has confirmed that "an undeclared understanding or intention as to the meaning of a contract...is not relevant to the task of contractual interpretation."¹

¹ *Bathurst Resources Limited v L&M Coal Holdings Limited* [2021] NZSC 85, at paragraph [68].

[28] The Employment Court has found that it is appropriate to read the terms of a record of settlement under section 149 of the Act “*broadly*” and that there are good reasons to interpret such agreements in a way that brings a “*comprehensive resolution*” to disputes². Factors that the Court has taken into account in determining that a record of settlement was inclusive of all wage and holiday pay claims include:

- a. That the settlement agreement referred to resolving “all matters relating to an employment relationship problem” between the parties³;
- b. That the settlement agreement was expressed to be “in full and final settlement”⁴.
- c. That the agreement came about in circumstances where the employee had raised a number of different claims against the company, and had negotiated for a resolution as a whole⁵; and
- d. That the employee had been receiving advice during this process⁶.

[29] All of these factors (with the possible exception of Mr Hawkins receiving advice which I discuss below) equally apply in the present case. This reinforces my view that it is not appropriate for me to interpret the record of settlement in such a way that would impose an obligation to pay a sum of money, that is different from and in addition to, the express terms that do exist.

[30] Mr Hawkins told Ms Brown by email that he had sought advice on his employment. After receiving the draft record of settlement, Mr Hawkins emailed Ms Brown again saying he was taking time to seek legal advice. He signed and returned the record of settlement a week after it had been presented to him. Mr Hawkins now says that he did not seek legal advice until after he received payment from Kustom Print. If this is so, this means that Mr Hawkins’ contemporaneous statement to Ms Brown prior to signing that “I am currently getting legal advice”⁷ was untrue. Mr Hawkins however, does say in his witness statement that he “carefully reviewed” the

² *Crossen v Yangs House Limited* [2021] NZEmpC 102, at paragraph [33].

³ *Ibid*, at [27].

⁴ *Ibid*, at [29].

⁵ *Ibid*, at [32] and [33].

⁶ *Ibid*, see references at [21] and [30].

⁷ By email on 23 March 2022.

record of settlement before signing. And it was during this week that Mr Hawkins interviewed for another job.

[31] Weighing all this up, my view is that even if Mr Hawkins' current version of events is accurate, and he did not seek legal advice on the record of settlement before he signed it, this is not enough to overturn the record of settlement. Mr Hawkins was aware of his rights, and was provided with time to exercise them. He gives evidence that he gave the record of settlement careful thought before signing. There is no reason to change the agreement he thoughtfully and deliberately entered into.

[32] Mr Hawkins' claim for the payment of an additional three weeks wages in accordance with the record of settlement is not made out.

Additional Late Claim

[33] The written submissions filed on behalf of Mr Hawkins raised an additional claim, that Mr Hawkins should also be paid wages for the last 9 days of his employment, on the basis that Kustom Print had prevented Mr Hawkins from attending work. This was not a claim that was raised in the Statement of Problem, and nor was it raised at the case management conference where both parties confirmed the issues in dispute for the Authority's investigation were as stated at paragraph [6] above. It is inappropriate for the applicant to attempt to add an additional claim into these proceedings as part of the final document filed. Nevertheless, as Ms Brown responded to this claim directly in her submissions, I have considered this claim on the basis of the documents provided.

[34] Mr Hawkins last attended work on Monday 14 March 2022. He states that on Tuesday 15 March, he had arranged to take leave to attend an obstetrics appointment with his partner⁸. Mr Hawkins does not claim that this was agreed as paid leave.

[35] As for the remaining 8 days, he states: "I made it clear to Pauline that I would not be able to come back to work until the fuel card issue had been resolved".⁹ Ms Brown says that; "Mr Hawkins refused to come to work during this period. We did

⁸ Paragraph 24 of Mr Hawkin's witness statement.

⁹ The ending of Mr Hawkins' employment was triggered by a dispute between the parties as to the amount of fuel Kustom Print would pay for.

request Mr Hawkins attend work, but he refused to do so and that is why wages were not paid [for those days].”

[36] In other words, Mr Hawkins is now requesting payment for 9 days where he did not work, at his election. I do not accept the description made in the submissions for Mr Hawkins that “Kustom Print prevented Mr Hawkins from attending work”. This is not supported by Mr Hawkins’ own evidence, where he says instead that he took the initiative and “made it clear” to Ms Brown he would not attend work while there remained a dispute about payment for fuel. Instead, Mr Hawkins states he made use of his time away from work at Kustom Print to attend a job interview.

[37] In addition, the record of settlement is in full and final settlement, and does not provide for any payment in respect of these unworked days. To the contrary, the covering email accompanying the draft record of settlement drew Mr Hawkins’ attention to the proposal to pay only for and up to his last day worked, which was specified as being Monday 14 March.

[38] Mr Hawkins has not been able to establish – on the basis of his own evidence – that he has any claim to be paid in respect of an additional 1 days’ leave, and 8 days where he chose not to work. In addition, any such claim has already been resolved by way of the record of settlement. If Mr Hawkins wanted to ensure he received payment for those days, he had the opportunity to set this out in the record of settlement. The correspondence between the parties draws attention to the proposed final date of payment as being only up to Monday 14 March, on the basis that this was payment only for “time worked”. Mr Hawkins took time to consider, and told Ms Brown he was taking legal advice. He then chose to sign the record of settlement on this basis. It is not appropriate for the Authority to re-write the record of settlement to impose an obligation that is contrary to and in addition to, what the parties agreed on at the time.

[39] Mr Hawkins’ claim in relation to any additional payment in respect of these 9 days is not made out, for all the reasons set out above.

Orders

[40] The record of settlement has been performed in accordance with its terms. Accordingly, no orders are made for any additional payments to Mr Hawkins.

Costs

[41] The respondent is the successful party in this matter, but as the respondent is self-represented, no issue of costs arises. Accordingly, costs lie where they fall.

Claire English
Member of the Employment Relations Authority