

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 276  
3091232

BETWEEN      VERNON COETZEE  
Applicant

AND              OAMARU MEATS LIMITED  
Respondent

Member of Authority:      David G Beck

Representatives:              David Balfour, advocate for the Applicant  
Louise Laming, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      11 May, 29 May and 15 June 2020 from the Applicant  
12 June 2020 from the Respondent

Date of Determination:      9 July 2020

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment relationship problem**

[1]      Vernon Coetzee worked for Oamaru Meats Limited (“OML”) as a maintenance electrician/engineer in a meat processing plant from 20 April 2018 until 6 September 2019.

[2]      Mr Coetzee’s application to the Authority claims that OML unjustifiably dismissed and/or disadvantaged him during a redundancy process that he believes was pre-determined and effected without due regard to good faith obligations. Mr Coetzee claims he was then coerced and/or misled into signing a full and final settlement agreement without being allowed to seek advice on such and that he should be free to pursue an earlier personal grievance challenging the proposed redundancy.

[3]      OML contends that Mr Coetzee’s employment ended during a period of consultation on a restructuring proposal that Mr Coetzee asked to be curtailed.

[4] OML deny coercing or misleading Mr Coetzee into a settlement agreement and seeks to rely upon the settlement agreement, that was not signed by a mediator pursuant to s 149 Employment Relations Act 2000 (“the Act”), as evidencing “accord and satisfaction” preventing or estopping Mr Coetzee pursuing his personal grievance.

[5] At a case management teleconference the parties agreed that the sole issue of whether the settlement agreement prevented the personal grievance proceeding could be considered ‘on the papers’. Although the accounts of each party were not tested by cross-examination I am confident that the affidavits and associated documentation provided are sufficient for me to determine this matter. Both parties were provided with opportunities to supplement their initial evidence.

### **The preliminary issue**

[6] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on a single issue but I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties’ submissions and attached documentation.

[7] The sole question to be addressed is: Does the fact that he entered into a settlement agreement prevent Mr Coetzee pursuing a further personal grievance?

### **What caused the employment relationship problem?**

[8] Mr Coetzee worked for OML as a Maintenance Electrician/Engineer from April 2018 until 6 September 2019 when his position was proposed to be disestablished as set out in a letter from OML’s Director/CEO, Richard Thorp, of 26 August 2019 due to the company wishing to reduce their operating capacity.

[9] In an email response of 26 August, Mr Coetzee indicated that he was aware of OML’s shareholders questioning profitability and operational standards but he challenged the basis of his role being identified as potentially surplus.

[10] Mr Thorp met Mr Coetzee on 26 August. Mr Coetzee claimed that he was not offered representation at this meeting apart from a suggestion that a plant manager attend with him. Mr Thorp who initiated the meeting, says he did commence the meeting by offering Mr

Coetzee be represented but Mr Coetzee declined this. Mr Thorp strongly denies offering the plant manager as a support and the plant manager concerned provided evidence that he was absent on the day. In the event, Mr Thorp only briefed Mr Coetzee about the proposed restructuring that he intended to then set out in writing - it was described by Mr Thorp as a 'heads up' meeting.

[11] Mr Thorp then emailed Mr Coetzee early morning of 27 August explaining the restructuring proposal's rationale and its potential impact on Mr Coetzee's position. The email concluded:

If you have any further questions please either ring me or email and or we can meet at any time to discuss, if you have any alternative ideas that I could consider other than my current proposal I welcome any feedback or thoughts.  
Please note in the letter I provided you yesterday the consultation process requesting feedback has two weeks with the deadline being Friday 6<sup>th</sup> September, *if at any time you need representation or support at the meetings we have, please bring someone along to assist with understanding the information and the process (my emphasis).*

[12] Mr Coetzee promptly emailed Mr Thorp on 27 August identifying a "personal grievance for unjustified disadvantage", claiming that he was currently occupying a maintenance manager's role and that his position should not be considered surplus and he sought mediation.

[13] Mr Thorp responded by email the same day, indicating that the restructuring was proceeding and that he would meet with Mr Coetzee for his feedback. Mr Thorp did not give a time and he did not specifically address the request for mediation. Mr Thorp claimed that no disadvantage had occurred as nothing had changed in Mr Coetzee's role. The email concluded:

In respect to your questions on the role you hold is the Maintenance Electrician as per your contract and Phil is the Maintenance co-ordinator, with you reporting to him.

[14] As context, Mr Coetzee's colleague, Phil Beresford, had left his position of Engineering Manager with OML for three months in April 2018 and during that period Mr Coetzee covered his responsibilities.

[15] Upon Mr Beresford returning in July 2018 and assuming a new role of Engineering Co-ordinator, Mr Coetzee resumed reporting to him but retained some of Mr Beresford's previous responsibilities.

[16] Mr Coetzee responded by email of 27 August; initially indicating that he understood the restructuring consultation process was proceeding and “that it is not a final decision”. He then reiterated his personal grievance claim was that he felt he had been appointed as the maintenance manager when Mr Beresford left – a position, he claimed was not properly formalised despite a promise to enter a new employment agreement but was in his view, ongoing.

[17] Mr Thorp replied by email of 28 August, providing Mr Coetzee’s requested complete pay records that designated him as “Maintenance Engineer” and he indicated:

...it is very clear to me and others that your position reports to Phil who has the position of Maintenance Co-ordinator.

Do you have feedback on the restructure proposal or can we discuss when you return to work on Monday, next week.

[18] Mr Coetzee in a 28 August email gave “feedback on proposal as requested” expressing a view that OML should retain both his and Mr Beresford’s position to ensure adequate maintenance cover. Mr Coetzee after receiving a Facebook suggestion from Mr Beresford that he try this approach, also offered to reduce his hourly rate of pay and made a plea to remain employed to support his application for NZ residency status.

[19] Mr Thorp by return email re-stated that Mr Coetzee reported to Mr Beresford and thanked him for his feedback on the restructuring proposal, concluding “[W]e can discuss further when you back next week”.

[20] The parties met on 30 August at Mr Coetzee’s request. At the beginning of the meeting Mr Coetzee signed a declaration indicating that he had declined “[T]he opportunity of representation”.

[21] Mr Thorp claims Mr Coetzee requested an exit package at the 30 August meeting but was told OML wished to conclude the consultation process and to consider any more feedback by 6 September.

[22] In his first brief of evidence, Mr Coetzee omitted to mention the 30 August meeting and when pressed provided an amended statement that indicated he did initiate this meeting but he did not disclose what was discussed other than a claim that he had been offered the

plant manager as a support person and he signed a waiver believing it was to indicate he did not want that manager to support him.

[23] The waiver however, only refers to Mr Coetzee being offered and declining representation. It also stated “[I] know at any time I can request representation if I decide different”.

[24] In his third affidavit Mr Coetzee claimed the 30 August meeting was a “private meeting” that he had arranged with the sole purpose of trying to persuade Mr Thorp to retain him in OML’s employ.

[25] Mr Thorp provided an email exchange of the day prior to the 30 August meeting in which Mr Coetzee confirmed that he would be attending alone. Mr Thorp also recalled being approached by Mr Beresford prior to the meeting, who advocating on Mr Coetzee’s behalf, indicated that Mr Coetzee wanted the matter tidied up so he could just move on. Mr Coetzee denies that at this point he had indicated to Mr Beresford he wanted an exit package and suggests he was still pressing at this point to retain his job.

[26] Mr Thorp claimed no discussion about another manager being present took place at the 30 August meeting and Mr Coetzee signed the waiver at the commencement of the meeting. He also recalled Mr Coetzee outlining his belief that he was the maintenance manager but that he also sought an exit package. They then agreed to meet on 6 September ostensibly to finish the consultation period of the restructuring (Mr Thorp had earlier indicated that a final decision would be made on 9 September).

[27] Mr Thorp claims that in the interim, he was approached by Mr Beresford on Mr Coetzee’s behalf, indicating Mr Coetzee wished to have his notice paid out so he could just leave. Mr Beresford affirmed this approach took place in an affidavit that has also indicated that he was aware of Mr Coetzee’s concerns. Mr Beresford corroborated Mr Thorp’s position that Mr Coetzee pressed him “on multiple occasions” to speak to Mr Thorp to “speed the process along”.

[28] Mr Beresford says Mr Thorp maintained a stance in discussion with him, that he wanted to complete the restructuring consultation process.

[29] Mr Beresford also provided a Facebook exchange indicating that Mr Coetzee had obtained legal advice on 27 August around how he should respond to the restructuring proposal.

[30] Mr Coetzee, without going into detail, initially claimed Mr Beresford's statement was "untrue and false". However, Facebook exchanges seem inconsistent with this premise and until this dispute arose, they appear to have been friends that socialised outside of work or at least were on cordial terms sharing a similar cultural background.

[31] After the 30 August meeting (a Friday), Mr Thorp indicated Mr Coetzee did not contact him further and Mr Coetzee was on sick leave for two days the following week.

[32] Mr Coetzee then met Mr Thorp on 6 September. Mr Coetzee claims the meeting arose out of the 26 August letter and was initiated by Mr Thorp and that he thought it "...was to be for me to give feedback on the proposed restructure". Mr Thorp corroborates this and recalls he reaffirmed the date at the end of the 30 August meeting and at the time his intention was to stick to the consultation process.

[33] Mr Thorp claims he offered Mr Coetzee representation at the beginning of the 6 September meeting and Mr Coetzee declined it – Mr Coetzee claims he was only offered the plant manager as a support person whom he declined. Mr Thorp strongly and convincingly denied in his affidavit offering the plant manager as a support person and given Mr Thorp's reasons for this denial that was based on his significant experience of involvement in such situations. I find this to be credible.

### **The 6 September Meeting**

[34] The accounts of the meeting differ (as below). No notes were disclosed but there was a suggestion that Mr Coetzee recorded the meeting on his phone. Mr Coetzee initially did not disclose the fact that he had recorded the meeting (Mr Beresford claims Mr Coetzee disclosed this to him). When asked by the Authority to clarify this, Mr Coetzee indicated that he recorded meetings (plural) and conceded that he disclosed this to Mr Beresford. He then says of the recordings that he has "since deleted them as I have read that I cannot use them".

[35] I do not consider Mr Coetzee's explanation on his deletion of the recordings to be plausible and note that Mr Coetzee's accounts of the meetings appear to be selective in their

recall or at best fragmented when it would make sense even if I accept he deleted the recordings, to take a transcript of each meeting and present a more coherent account in evidence at the first opportunity he was given to do so. In the absence of the recordings and the manner by which they were deleted it is also open to infer that the content did not accord with Mr Coetzee's subsequent recall of the conversations.

[36] The relevant summarised accounts of the parties pertaining to the 6 September meeting are:

### **Vernon Coetzee**

[37] Mr Coetzee recalls being asked by Mr Thorp to meet and at the meeting in Mr Thorp's office, after a discussion about representation he was told he was "redundant, effective immediately". He says no discussion took place about his earlier personal grievance. He then claims bargaining commenced on an exit package with Mr Thorp starting from the redundancy being immediate with no need for Mr Coetzee to work out his notice period (the employment agreement had no provision for redundancy compensation beyond one month's notice that also provided for a payment in lieu at OML's discretion).

[38] Mr Coetzee says Mr Thorp then drafted an agreement in a notebook and asked him if he wanted the plant manager to come in and represent him which he declined. After some discussion Mr Thorp presented the hand written agreement for signing – Mr Coetzee claims that he signed it:

.....in order to protect myself as the trust was broken and felt like if I did not sign, he will turn around and not pay my months' [Sic] notice and I was scared.

[39] Mr Coetzee claims he was not directed to seek legal advice on the proposed agreement. He says Mr Thorp then said he could go for the day "...as this was final". In response to a suggestion by Mr Thorp that he was asked to take a photo of the agreement with his phone Mr Coetzee denies this but failed to mention Mr Thorp did forward a photo of the agreement to him.

[40] Before leaving the meeting, he recalls briefly discussing his belief that he was the maintenance manager having been given two pay increases to recognise his extra work but Mr Thorp repeated his view that he was not and Mr Coetzee reported to Mr Beresford. Mr

Coetzee recalls the meeting lasting “no more than 15 minutes” and Mr Thorp ending it by wishing him “best of luck in his future job” and getting up and walking to the door with him following him out. He was provided with a copy of the agreement on his phone. Mr Coetzee then raised a second personal grievance by letter from his advocate of 16 September 2019 claiming in his first affidavit that “[T]his was the first occasion that I accessed external representation or legal advice”.

### **Richard Thorp**

[41] Mr Thorp claimed that he offered Mr Coetzee representation at the beginning of the meeting but he declined and he denies offering the plant manager as a support person to Mr Coetzee. Mr Thorp then indicated that he discussed the position related to the restructuring and indicated no viable alternatives to redundancy existed but the final decision was to be announced on 9 September and he asked if Mr Coetzee had any questions.

[42] Mr Thorp claims Mr Coetzee then changed the direction of the meeting by saying he just wanted the issue “over and done with”. Whilst expressing that the process still had time to run, Mr Thorp indicated he changed his mind based on the 30 August meeting, the pressure he had been getting from Mr Beresford and Mr Coetzee’s relaxed demeanour. Mr Thorp believed that he was sure Mr Coetzee wanted an exit package and he was keen to leave, resolve matters and move on.

[43] Mr Thorp then said they started negotiating and he recalls Mr Coetzee sought a tax - free exit payment. Mr Thorp says when the brief bargaining interchange concluded after a discussion on what was a fair average was to calculate one month’s pay; Mr Coetzee “indicated a strong preference to sign everything then and there, finish his employment on that day and have his final pay processed immediately”.

[44] Despite saying that it was not his usual practice, Mr Thorp drafted the agreement by hand. He did not indicate he explained anything about the import of the terms as written to Mr Coetzee but he recalls being concerned that when it was signed he had offered to send it by photo text via Mr Coetzee’s phone and being surprised earlier that an alert sounded suggesting the phone was charged (whereas, throughout the meeting the phone had been placed flat down on the table and Mr Coetzee had said that the battery was dead). Mr Thorp said this raised his suspicion that Mr Coetzee had recorded their meeting.

[45] Mr Thorp provided Mr Coetzee with a copy of the agreement by texting him immediately after it was signed on WhatsApp and provided evidence of this exchange that included clarifying in response to a further Mr Coetzee text query, that the notice payment was tax free.

[46] Mr Thorp recalls the meeting took 20 minutes (Mr Coetzee says 15 minutes) and he denied having to cut it short for an external meeting (providing evidence to support this). Mr Thorp recalls the meeting ended amicably.

### **Philip Beresford**

[47] Mr Beresford related that he was aware that Mr Coetzee obtained legal advice earlier than he initially disclosed. A text exchange evidences that he had sought advice from the Labour Department (MBIE) and had made an appointment to see “a lawyer” on 28 August 2019. Mr Beresford confirmed that Mr Coetzee, on numerous occasions, pressed him to approach Mr Thorp to seek a meeting and resolve matters so he could leave with an exit payment and not have to work out his notice period.

[48] Mr Beresford says he saw Mr Coetzee after the meeting on 6 September and he indicated that he had reached a settlement was finishing immediately and was really happy about it.

[49] Mr Beresford related that Mr Coetzee had also told him he had other job offers and in a 10 September Facebook message, Mr Coetzee says he was “busy deciding what to take”. Mr Beresford indicated he was not surprised by this as Mr Coetzee had disclosed he was looking for alternative employment some weeks before he left and prior to the restructuring proposal being announced.

[50] An affidavit from a company director operating a local electrical firm in Oamaru, indicated that he had been in discussion with Mr Coetzee since 19 August 2019 and been told that he was looking to resign his position with OML. This progressed to a signed acceptance of an offer on 10 September 2019 to start employment with this firm on 23 September. However, acceptance was revoked by Mr Coetzee on 22 September.

[51] Mr Beresford indicated that at no point did Mr Coetzee discuss with him the issue of not being represented at meetings with Mr Thorp or mention his claim that Mr Thorp tried to

suggest he use the plant manager as a support person. Mr Beresford found this unusual given the level of other frank detail Mr Coetzee had previously discussed about his work situation. This included his recollection of conversation at a barbeque at Mr Coetzee's house that Mr Beresford attended on 7 September and Mr Coetzee relating that "he's got it all sorted out, that he's definitely going to take Richard on and that he had recorded it all".

### **The settlement agreement**

[52] The agreement signed by both parties was hand written in easily legible print and I reproduce it as follows:

Vernon

No representation required

Agreed

Vernon (accompanied by Mr Coetzee's signature)

Settlement 6/9/19

(Full + Final) (Accompanied by Mr Thorp's signature)

Settlement.

1 Months notice of 4 weeks pay paid in liue [sic] of working

That amount will be \$8,400.00 (next pay round)

Plus any entitlements such as sick pay and Holidays

This is a full and final Settlement of ~~the~~ all matters related to the employment + redundancy of Vernon Coetzee

Vernon Coetzee

Signed (accompanied by Mr Coetzee's signature)

Richard Thorp-Coy Director

Signed (accompanied by Mr Thorp's signature)

Items To Take

- Nil items

Assistance of counselling was offered but declined (accompanied by both signatures).

[53] Although not categorised as an s 123(1)(c)(i) payment pursuant to the Act, OML paid \$8,400 as a gross amount, paid out five days of unused sick leave (taxed) and accumulated holiday pay (taxed). Mr Coetzee accepted the payments and evidence disclosed between him and OML's payroll administrator shortly after the 6 September meeting, confirms that he wished it to be paid as soon as practicable.

### **Legitimacy of the agreement**

[54] Whilst Mr Coetzee's advocate, Mr Balfour, has suggested OML framed the agreement as a purported s 149 settlement agreement requiring a mediator's signature and implied that without such a process the settlement is not legitimate this would only be at issue if either party was seeking to enforce the terms of the agreement as the Authority would lack jurisdiction<sup>1</sup>.

[55] In *Singh v Trustees of The Wellington Rudolph Steiner Kindergarten Trust*<sup>2</sup> Judge Perkins observed that:

If s 149 is not used, and the agreement has not been signed off by a mediator, the parties are free to reach an agreement, or accord and satisfaction, which will then fall under contract law. Assuming there is consensus ad idem and all other elements constituting a valid contract are satisfied, the parties will be bound and the terms will be enforceable. The parties may also, in that event, avail themselves of provisions of the Contractual Remedies Act 1979. Enforcement would then be through the ordinary courts having civil jurisdiction.

[56] At issue for OML, is whether the settlement agreement can be used as a 'shield' or an estoppel preventing Mr Coetzee pursuing his personal grievance claim. That is a matter the Authority can deal with pursuant to s 161(1)(r) of the Act as the question in dispute arises out of events that occurred during the employment relationship and it concerns whether accord and satisfaction was evident.

### **Accord and satisfaction**

[57] A leading case examining the elements of accord and satisfaction is *Graham v Crestline PTY Ltd*<sup>3</sup> where Chief Judge Colgan said:

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<sup>1</sup> *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255.

<sup>2</sup> *Singh v Trustees of The Wellington Rudolph Steiner Kindergarten Trust* [2017] NZEmpC 91 at [16].

<sup>3</sup> *Graham v Crestline PTY Ltd* [2006] NZEmpC 93 at [49].

There must first be a genuine dispute between the parties. Secondly, whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.

[58] Taken the above into account, I now examine whether a dispute existed prior to the time the parties entered the settlement agreement, whether there was a meeting of the minds and then I will explore the question of Mr Coetzee's access to representation and legal advice on the content of the agreement. I will conclude by examining how the agreement was arrived upon.

### **Was there a dispute**

[59] On the evidence, it is clear that a genuine dispute had arisen around OML's restructuring proposal. Mr Balfour's submission conceded that a dispute existed but it is important to place that dispute in context and examine Mr Coetzee's contention that the personal grievance he now wishes to pursue was or was not, a distinct or separate matter.

[60] Mr Coetzee had suggested that the role identified to potentially be disestablished was one he did not at the time occupy and he had raised a disadvantage grievance about this. Mr Coetzee also, in giving feedback on the proposal, challenged the validity of the restructuring believing that reducing maintenance cover was not an ideal situation. Mr Thorp engaged with the former part of the dispute setting out a contrary view and sought input on the latter that he agreed to consider as part of the initiated consultation process.

[61] All the above elements are suggestive of the parties having given some prior thought to their respective positions before the 6 September meeting rather than the consequent agreement being sprung on Mr Coetzee without context. It is clear from the evidence provided by Mr Beresford and the timing of Mr Coetzee's first personal grievance, that Mr Coetzee was also accessing legal advice on his situation.

### **Was there a meeting of minds leading to an agreement?**

[62] In considering whether there was a 'meeting of the minds' I am not required to examine the fairness or otherwise of what was agreed but rather the question of whether both parties intended to and did negotiate an agreement.

[63] I have evidence from a third party (Mr Coetzee's co-worker Mr Beresford) that Mr Coetzee was pressing to resolve matters quickly before the consultation period ended because he wanted an 'exit package' so he could move on to another job and he used Mr Beresford as an intermediary.

[64] Despite a request from the Authority that he confirm what employment he subsequently took up after leaving OML, Mr Coetzee did not initially address this and only when pressed did he confirm (in an affidavit in response to OML's affidavits), that he had commenced employment with an Oamaru electrical firm on 24 September 2019 as an electrician in a permanent position. He also conceded that he had turned down another job offer that he had initially negotiated during the restructuring period (as confirmed in affidavit evidence from the director of a local electrical services firm).

[65] I find that that it is more than likely, that Mr Coetzee wished to initiate a discussion on an exit package and was seeking to meet on that basis. This is corroborated by evidence that Mr Coetzee had secured at least one job offer prior to leaving OML and he had expressed several times to Mr Beresford that he wanted his notice paid out.

[66] Mr Thorp knew of Mr Coetzee's desire to seek an exit package when they met on 6 September 2019 but his open correspondence and oral feedback to Mr Coetzee up to that point, maintained that OML wished to proceed with consultation as they were legally obliged to do so. There is nothing untoward to be read into this – it was a cautious and sensible approach.

[67] Mr Thorp then changed his mind at the meeting of 6 September and this is evident from the agreement's content. Although not tested by cross-examination, it is more likely that Mr Thorp did not spontaneously depart from his earlier stance but had gone into the 6 September meeting prepared to negotiate and he had sufficient knowledge to write out a concise settlement agreement that protected OML's interests.

[68] Although it would have been ideal if Mr Thorp had communicated that he was willing on a 'without prejudice' basis to discuss an exit package before they met, I do not find this omission is procedurally deficient enough in itself, to warrant a finding that invalidates the agreement made. Ostensibly, from open correspondence the 6 September meeting was to discuss the outcome of the restructuring but from Mr Coetzee's description of the meeting he

made no attempt to switch the conversation back to this ground before signing the settlement agreement.

[69] In the circumstances, I do not find as credible Mr Coetzee's suggestion that he was shocked by Mr Thorp's approach to the 6 September meeting or that he was 'ambushed'. In the event, Mr Coetzee got what he was seeking – his employer was willing to negotiate. I therefore find there was a meeting of the minds to explore an agreement.

### **Right to representation**

[70] I also find that Mr Coetzee was properly advised of his right to have a representative handle his affairs and he chose to ignore this suggestion on more than one occasion. I do agree that being offered the plant manager as a support person at the 6 September meeting would not be appropriate (I note Mr Thorp strongly and credibly denies this). Mr Coetzee at that point if he was so concerned about this lack of representation, could have simply withdrawn from the 6 September meeting and signalled that he wished to get alternative representation or legal advice. Mr Coetzee also had plenty of prior notice of the meeting as it was discussed at the 30 August meeting, he emailed Mr Thorp saying he would attend alone and he had sufficient time to arrange representation.

[71] Mr Balfour has suggested that the OML's use of the term 'representative' was not specific enough to signal that Mr Coetzee had the right to seek 'legal' advice and Mr Coetzee strongly emphasised this point. I am not attracted to this contention, as apart from 'representative' being a commonly accepted term to mean you can appoint someone to act as your agent or advise you, Mr Thorp's email of 27 August 2019 to Mr Coetzee was quite specific by offering "[I]f at any time you need representation or support at the meeting we have, please bring someone along to assist with understanding the information and the proposal".

[72] In *Alofa v Aotea Centre Board of Management*<sup>4</sup> Judge Travis rejected an argument that it was an employer obligation to ensure an employee was adequately represented (here in the context of a disciplinary meeting) and noted:

Provided it is pointed out to an employee that there is a right to be represented, as was done here, it is up to the employee to arrange appropriate representation and the

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<sup>4</sup> *Alofa v Aotea Centre Board of Management* EmpC, AC 50/01, 30 July 2001 at [28].

employee cannot be heard to complain if that representative fails to undertake the task properly...

[73] Mr Balfour provided no authorities setting out any particular test on what wording should be used. The Act (at s 236) uses the term that an employee may “choose any other person to represent them”. The Act’s predecessor provision (s 59 Employment Contracts Act 1991), also used the term “representative”. I consider in this context, alerting Mr Coetzee of his right to representation prior to and during the meeting of 6 September was sufficient.

[74] In some cases, where for example an employee was young or vulnerable, I would depart from the above view and support Mr Balfour’s concerns but nothing compelling has been advanced by Mr Coetzee that could persuade me of any extraordinary factors I should take into account.

[75] Mr Coetzee also made a claim that he was not advised of the right to seek representation or support in a letter of 26 August but fails to acknowledge the 27 August email from Mr Thorp reminding him of his right to “representation or support”.

[76] Although Mr Coetzee said in his final affidavit that “there is no mention in the hastily drawn-up settlement that he told me I could take independent legal advice” the agreement plainly states at its head “Vernon - no representation required – agreed” and Mr Coetzee placed one of his signatures alongside this portion of the agreement.

### **Negotiation of the agreement on 6 September 2019**

[77] Mr Coetzee described how the 6 September meeting went which he said was short and Mr Thorp moved quickly from telling him he was redundant to putting together a proposal that he wrote out in a notebook. Mr Coetzee then says “[I] did not realise at the time he was using the phrase “full and final” to get around addressing my personal grievance”. This confirms that Mr Coetzee was at least aware of the phrase being used in the agreement. Mr Coetzee has not put forward any alternative meaning he may have construed or indicated that he sought any explanation from Mr Thorp during the meeting or challenged why Mr Thorp used what is a fairly self-explanatory term. It is followed in the text of the agreement by the words “[S]ettlement of all matters related to the employment + redundancy of Vernon Coetzee”. The term ‘Full and final’ is used twice in the short agreement.

## **Content of the agreement**

[78] Whilst it is not appropriate for me to comment on the fairness of the agreement, it has to be noted that contrary to Mr Balfour's submission that what was agreed was "nothing more than Mr Coetzee's statutory entitlement", Mr Coetzee did get valuable consideration by securing monetary recompense in excess of his contractual notice entitlement. This was: his notice period paid tax free (and at a negotiated average amount), unused paid sick leave and an early release from his employment obligations.

[79] The settlement agreement like the majority of agreements struck in such circumstances was a compromise. OML's obvious interest was to prevent further litigation by including a 'full and final' stipulation in the terms. By contrast, the employment agreement did not provide for redundancy compensation so Mr Coetzee gained a benefit he was not contractually entitled to.

## **Was Mr Coetzee pressured into accepting the agreement?**

[80] Mr Coetzee, in raising his personal grievance, first claimed that he was deceived or misled into entering the agreement and then before the Authority now appears to be arguing that he was, as he colloquially put it, "railroaded" or implicitly coerced.

[81] The agreement is concise and expressed in plain easily understood language and Mr Coetzee did not initially disclose any language or literacy difficulties and he is a skilled and qualified individual. However, after filing two affidavits and a submission from Mr Balfour not alluding to the issue, Mr Coetzee in response to affidavits provided by OML, suggested he generally had difficulty with comprehending the subtlety of the English language because his first language was Afrikaans and Mr Thorp had exploited this fact in negotiations with him. OML in response contested this suggestion and that such had not been their experience of Mr Coetzee.

[82] In weighing up this matter I consider that Mr Coetzee not advancing this initially is telling as it should have been a prime ingredient of his claim and nothing in his subsequent account of the 6 September meeting alerted me to any attempt by Mr Thorpe to exploit any language or literacy barrier. My reading of his email exchanges and social chat with Mr Beresford does not give credence to a claim of significant difficulty in expressing himself

clearly in written English and he did not specifically allude to how his claimed lack of picking up the subtlety of English, disadvantaged him in interpreting the settlement agreement before he signed it.

[83] I also do not find that Mr Coetzee could reasonably assume that he had two separate disputes here and only thought that he had settled one (and was free to pursue his earlier personal grievance of alleged disadvantage) – they were inextricably linked.

[84] Logically, if the parties had attended mediation and spent more time on constructing a settlement agreement it would have been unlikely that any settlement would ensue on the basis that an exit package was agreed and Mr Coetzee was free to pursue a personal grievance. Whilst I accept Mr Coetzee’s evidence that the restructuring caused him distress and he felt he had a legitimate grievance over his position being included, Mr Coetzee cannot “have his cake and eat it (too)” as he opted to pursue an exit package.

### **Coercion**

[85] I next turn to Mr Coetzee’s suggestion that he was coerced into an agreement as there is no contention as in cases such as *Marlow v Yorkshire New Zealand Ltd*<sup>5</sup> where the Employment Court had to contemplate whether further claims the parties had not contemplated at the time were at issue.

[86] To establish coercion one has to demonstrate that an agreement was obtained under duress. In *Packwood v ANZ Bank New Zealand Ltd*<sup>6</sup> (a case also involving an unrepresented party and a non s 149 settlement), Judge Corkill, in examining whether a settlement agreement should be set aside, indicates to establish duress the elements to examine are:

- a) Was there a threat or the exertion of illegitimate pressure?
- b) If so, did that threat or pressure result in the individual being coerced into entering the agreement.

[87] Judge Corkill then went on to explain that the exertion of pressure in itself, is not decisive - a successful claimant has to establish that illegitimate pressure is evident and that has to be understood in terms of “lawfulness” with a high bar to establish coercion. The

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<sup>5</sup> *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206.

<sup>6</sup> *Packwood v ANZ Bank New Zealand Ltd* [2019] NZEmpC 130.

overall test is whether there was “no reasonable alternative” available to the party claiming duress in the circumstances.<sup>7</sup>

[88] Compared to other cases<sup>8</sup> and looked at objectively, I do not find Mr Coetzee has brought forward any compelling evidence that he meets this fairly stringent test, in that: he has not indicated that Mr Thorp threatened him in any way or tried to unduly influence or pressure him into signing the settlement agreement. Any uncommunicated perception he claimed to have had at the time is not sufficient and in any case the notion he advanced that he had to sign as he may not get paid his notice period, is not plausible.

### **Good faith/opportunity to access legal advice**

[89] In rejecting the notion that the agreement was obtained by duress or coercion I am obliged to consider s 3(a) of the Act that expresses an object of promoting good faith behaviours in “all aspects of the employment environment” and that s 3(a)(ii) of the Act aims to acknowledge and address “...the inherent inequality of power in employment relationships”.

[90] To assess this in context, turns on what ingredients have been deemed necessary to establish accord and satisfaction as they also bear in some way on good faith obligations, any power imbalance between the parties and the specific contention that OML did not afford Mr Coetzee sufficient opportunity to seek legal advice on the content of the settlement agreement once drafted.

[91] I am assisted by Member Appleton’s approach in *Evans v Building Connexion Ltd (t/as ITM)*<sup>9</sup> who cited what Chief Judge Goddard said in *McHale v Open Polytechnic*<sup>10</sup> that the onus of establishing accord and satisfaction rests with the employer and that:

What has to be proved is the appellant’s willing and informed assent to the settlement (a term to be preferred to the archaic “accord and satisfaction”). This is a mixed question of fact and law. One factual element is whether the appellant received competent independent advice: it is not enough that he was seeing lawyers and medical specialists. What information were they given? did they advise him, as they should have, that he was not obliged and that it was not in his interests to sign? Even if they did, that may not be conclusive against him: *Contractors Bonding Ltd v Snee*

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<sup>7</sup> At [76] – [79].

<sup>8</sup> See also at [87] some brief examples of duress being used to secure agreement.

<sup>9</sup> *Evans v Building Connexion Ltd (t/as ITM)* [2012] NZERA, 12 December 2011, 10 January 2012.

<sup>10</sup> *McHale v Open Polytechnic* [1993] 1 ERNZ 186.

[1992] 2 NZLR 157, a case which is also authority for what I should like to think is the obvious proposition that analysis of all the facts is necessary.

[92] The problem for Mr Coetzee in assessing whether he gave “willing and informed consent” is, he was advised more than once that he had the right to get representation and chose not to obtain such. This included Mr Coetzee signing a 30 August 2019 waiver indicating “[I] have been offered the opportunity of representation and have declined the offer. I know at any time I can request representation if I decide different”.

[93] The 6 September agreement also contains a preamble: “[N]o representation required – agreed”. It also could hardly be argued that Mr Coetzee was unaware per se, of his right to seek advice.

[94] Mr Coetzee is articulate in his correspondence and appears to fully grasp his legal rights. He formulated a personal grievance letter that displays good knowledge of his grievance options and sought a meeting to discuss such. This is indicative of evidence provided that Mr Coetzee had already obtained legal advice earlier than he initially disclosed. Mr Coetzee first tried to suggest that he only sought legal advice from Mr Balfour after signing the settlement agreement but after he had viewed disclosed Facebook exchanges between him and Mr Beresford he conceded that he had sought advice from “the Labour Department” on 27 August who he thought were lawyers.

[95] It is likely this advice (based on how Mr Coetzee described it) was ‘neutral’ and based around how to generally respond to the restructuring proposal but it does display that Mr Coetzee had an understanding of his right to seek advice and the availability of such. In a Facebook exchange of 27 August with Mr Beresford, Mr Coetzee related his consultation with the Labour Department indicating:

They gave me steps to follow asking Richard questions and also explanations on all my questions and i must cc them in my emails. I jave told them everything since I started there, so we will see. [Sic]

[96] Mr Coetzee third written statemnt provided some further clarity saying he contacted a Labour Department lawyer (who he now realises was an MBIE advisor on the 08000 advice service) one day after he received the letter indicating the redundancy proposal to ask how he could issue a personal grievance and then when he did so, he discussed the response from Mr

Thorp with the advisor and was told to seek a meeting. He then said after the 6 September meeting he did not contact Mr Balfour until 19 September.

[97] Mr Coetzee also belatedly, in his third written brief, claimed that Mr Thorp had told him at the start of the redundancy process on 26 August that he should start looking for another job as the company would not be changing their mind. Mr Thorp in evidence had already outlined he took a strict approach to consultation due to his experience of such situations (his emails also support this view).

[98] I find that this late claim should have been identified earlier and I infer that it has no credibility as Mr Coetzee does not refer to this conversation in his 26 August email and then on 27 August in raising a personal grievance nor is this recounted in the second personal grievance letter of 16 September authored by Mr Balfour.

[99] I prefer Mr Thorp's account that up until 6 September he had insisted that the changes proposed were subject to a genuine consultation process and Mr Coetzee did engage and provide feedback on the initial proposal.

[100] I however, find that apart from the conflicting accounts given of the 6 September meeting, that Mr Thorp did not pause during the meeting to specifically explain what 'full and final' entailed in terms of preventing further litigation. There was haste and no suggestion that Mr Coetzee was advised to take the agreement away for legal advice before signing it<sup>11</sup>.

[101] I also find that there was no particular need for OML to resolve matters at this point in time. Mr Thorp had signalled a decision on the restructuring would be made on 9 September. Having said this and bearing in mind that Goddard CJ in *McHale* found this to have significant bearing on satisfying the test that 'willing and informed' assent had occurred, but I am not convinced the agreement should be set aside on this ground alone. This was not a complex transaction that made the absence of properly informed consent a decisive factor. I am also persuaded that Mr Coetzee was pressing Mr Thorp hard for a quick settlement.

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<sup>11</sup> See by contrast the Authority case of *DJ Lewis v Sealink Travel Group New Zealand Limited* [2018] NZERA Auckland 366, 23 November 2018 where the applicant unsuccessfully pursued a similar claim after signing a full and final agreement not made pursuant to s 149 Employment Relations Act 2000 but where the employer party had suggested he seek advice on a draft agreement.

[102] In *Evans*,<sup>12</sup> Member Appleton identified statutory good faith considerations (s 4 of the Act) including that the employer had an obligation to “take reasonable steps to ensure that Mr Evans was not disadvantaged by the proposal and was fully informed of his rights by an independent person”. Here, I have found Mr Thorp fell short of the second element of this expressed requirement but by contrast with Mr Evans’ situation, (who agreed to be paid two weeks in lieu of a one month notice period and eschewed a right to pursue an extant harassment claim and where his agreement was procured by employer threats), the outcome negotiated by Mr Thorp was not draconian and objectively did not disadvantage Mr Coetzee.

[103] In submissions for OML, Ms Laming detailed several contextual factors distinguishing *Evans*, including: the frequency of meetings between the parties (Mr Evans only having one meeting), the suddenness of Mr Evans meeting that led to an agreement, Mr Evans not being apprised of his right to representation and that Mr Evans obtained less than he was contractually entitled to. I find these factors persuasive and sufficient to depart from the finding in *Evans*.

[104] Mr Coetzee has not established that he was coerced, misled or deceived into entering the settlement agreement or disadvantaged by its terms. What is more likely to be reasonably drawn from the evidence, is that Mr Coetzee actively sought a quick settlement of an ‘exit package’ that he felt he could secure directly without representation as he had secured alternative employment (knowing that his position was likely to be made redundant with OML) and he had no wish to work out his notice period.

[105] Mr Coetzee then, after initially ensuring he was promptly paid what he had negotiated, reflected on the bargain that he had struck sought further legal advice and proceeded to challenge the validity of the settlement agreement.

[106] Whilst I do accept Mr Coetzee felt strongly about his position being identified for redundancy exacerbated by his willing commitment to his work at OML and past flexibility and worries about his resident visa status, the fact that he was exploring leaving prior to the restructuring emerging, suggests that he had already come to a decision that he wanted to

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<sup>12</sup>At [37].

leave. Mr Coetzee produced no correspondence to suggest that his immigration status was subsequently jeopardised by him leaving OML.

## **Conclusion**

[107] Given the above, I do not consider the settlement agreement should be set aside. I do make the observation that had OML taken more care in putting the agreement together and perhaps given Mr Coetzee time to consider the offer or utilised a mediator they would likely have achieved the same result but without this current litigation.

[108] Likewise, given that Mr Coetzee clearly wanted a promptly negotiated exit package he may have not ‘tactically’ achieved a comparably favourable result if it was not resolved quickly and he would have had to resort to the costs and risks of prolonged negotiations or at worst, litigation.

[109] Accord and satisfaction is essentially the purchase of a release from an obligation for valuable consideration. The accord is the agreement facilitating the release of the obligation, the satisfaction is the valuable consideration that makes the agreement operative and binding – all were present here and freely consented to by both parties.

[110] I find that OML did enough to bring to Mr Coetzee’s attention that he had a right to seek advice during the restructuring process that coincided with the negotiation he sought on an exit package but he chose to ignore this and he made it clear that he wished to settle hastily in a manner that compensated him over and above his contractual entitlement.

[111] I have found that Mr Coetzee’s earlier personal grievance arose directly out of the circumstances of the restructuring and was not a separate issue or one, not reasonably in contemplation at the time that the settlement agreement was made.

[112] In entering the agreement, I find OML’s Mr Thorp reasonably assumed that Mr Coetzee did not want to seek legal advice and that Mr Coetzee understood or ought to have reasonably understood that the agreement he freely signed covered all employment matters and settled such on a full and final basis.

[113] Having formed a binding agreement it is not open to Mr Coetzee to avoid the terms of such. In essence any attempt to pursue a further claim as a personal grievance is “frivolous”

in terms of Schedule 2, s 12A of the Act<sup>13</sup> allowing the Authority to dismiss the matter before it as this does no more than carry the parties' agreement into effect.<sup>14</sup>

### **Finding**

**[114] I find that Mr Coetzee cannot pursue his personal grievance. He is prevented from doing so by the settlement agreement he sought and freely entered into. Accord and satisfaction is established and this also acts as an estoppel preventing further litigation proceedings.<sup>15</sup>**

### **Costs**

[115] Whilst I have found in favour of OML I also made the observation that the manner of concluding the settlement agreement was not ideal. I suggest that the parties explore settling costs by agreement. If no agreement can be reached, I invite OML to make a costs' submission within 14 working days of his determination being issued and I will provide Mr Coetzee a further 14 days to respond.

**David G Beck**

**Member of the Employment Relations Authority**

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<sup>13</sup> Schedule 2, section 12A Employment Relations Act 2000.

<sup>14</sup> See *STAMS v MM Metals Ltd* [1993] 1 ERNZ 115.

<sup>15</sup> See *CableTalk Astute Network Services Ltd v Cunningham* [2004] 1 ERNZ 506 at [53].