

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 178/08
5101335

BETWEEN BEAUMONT DAWSON
 Applicant

AND TUWELL TRUST LTD
 Respondent

Member of Authority: James Wilson

Representatives: Alan Taylor for the applicant
 Steven Spackman for the respondent

Investigation Meeting: 16 April 2008 at Hamilton

Determination: 15 May 2008

DETERMINATION OF THE AUTHORITY

The identity of the respondent

[1] In his statement of problem the applicant, Mr Beaumont Dawson, identified his employer as Wayne Maxwell. At the Authority's investigation meeting it became clear that Mr Dawson's employer was Tuwell Trust Ltd. By agreement the name of the respondent in this case is amended to Tuwell Trust Ltd (Tuwell).

Mr Dawson's employment relationship problem

[2] Mr Dawson was employed by Tuwell Trust, as a driver, from July 2007 till his dismissal on 10 September 2007. Mr Dawson says that his dismissal was unjustified and seeks compensation from Tuwell for wages he has lost, compensation for hurt and humiliation, reimbursement of penalty fees for loan repayments he was unable to meet and a contribution towards his costs.

Background

[3] Tuwell Trust hold a contract with Waste Management Ltd to collect and dispose of refuse in the Hamilton City area. In terms of that contract Mr Dawson was Tuwell's "designated driver" but with the approval of Waste Management Ltd, employed Mr Dawson.

[4] After receiving a number of complaints Mr Maxwell rang Mr Dawson on the weekend of 8 & 9 September 2007, advising him not to come to work on the Monday. On Monday 10 September Mr Maxwell again spoke to Mr Dawson, this time telling him he was dismissed.

[5] On Tuesday 11 September Mr Dawson, with Mr Taylor as his representative, met with Mr Maxwell who was accompanied by Mr Ian Sterling. During this meeting the parties reached an agreement *in full and final settlement of all Mr Dawson's claims ... in any way connected with the employment relationship*. After the meeting this agreement was written up by Mr Taylor and sent to Mr Maxwell. Although the parties never actually signed this document, both Mr Maxwell and Mr Dawson say that the terms of settlement were what they had agreed.

[6] The relevant parts of this agreement are set out below:

The parties agree that settlement was reached on the following terms

1. *Beaumont Dawson was employed by Wayne Maxwell as a truck driver until Monday, 10th September 2007 – when the employment relationship ended.*
2. *Wayne Maxwell will pay Beaumont Dawson (by weekly deposit into Beaumont's bank account on the agreed pay-day)*
 - *all wages due up to 10th September 2007.*
 - *An additional two weeks wages (i.e. two weeks @ 40 hours x \$14.50 per hour)*
 - *Holiday pay based on a calculation of 8% of the total gross earnings during the period of employment.*

3. *Wayne Maxwell will provide all practicable assistance to support Beaumont Dawson in his attempts to gain future employment in the trucking industry.*
4. ...
5. *This agreement is in full and final settlement of all claims of any nature that either party have or may have against the other arising from events that are in any way connected with the employment relationship.*
6. *The parties agree to keep the terms of this agreement strictly confidential.*

[7] Mr Dawson says that the payment due on the 13 September 2007 was not lodged to his bank account on that day but, after Mr Taylor had contacted Mr Maxwell, the money was paid the next day. The following week once again the agreed payment (due on 20 September) was not initially made. On this occasion Mr Dawson approached Mr Maxwell directly and the money was once again paid a day or so late.

[8] Mr Dawson says that following the difficulties in obtaining the first two payments he spoke to Mr Taylor and they (he and Mr Taylor) decided to cancel the agreement. Mr Taylor subsequently wrote to Mr Maxwell 21 September 2007, saying:

It is with some concern that I received notification from my client on Thursday morning that his wages have again not been deposited in his bank account on the agreed day.

To confirm our discussions on two occasions last week -- this is a breach of your responsibility as an employer; and also a breach of clause 2 of the memorandum of settlement faxed to you for consideration following the meeting we held on the 11th September, 2007.

I was then further concerned to receive your telephone call on Thursday afternoon advising me that you had received text messages from my client asking for his pay - and you made the threat to me that further communications of this type from my client would result in "us having to go to court" and that you "will extend the process out for two years, and also advise WINZ that he had been dismissed for misconduct".

I now have to advise you that these developments mean that the negotiated settlement is null and void - and my instructions are to pursue the matter further through the Employment Relations Service for unjustified dismissal, lost wages until further employment is able to be obtained, reimbursement of associated expenses and compensation for distress and humiliation.

[9] Bank statements produced to the Authority by Mr Maxwell show that payments were made to Mr Dawson on 13, 20, and 27 September 2007. Mr Dawson acknowledges that he received these payments and, despite Mr Taylor's letter of 21 September, he did not return any of the payments to Mr Maxwell. Following the Authority's investigation meeting Mr Maxwell has confirmed that the last payment listed in the *memorandum of settlement* i.e. holiday pay owing, has not been paid to Mr Dawson.

Preliminary issue for determination

[10] Before proceeding to determine whether or not Mr Dawson has a personal grievance it is first necessary to consider the status of the *memorandum of settlement*. In short if the memorandum of settlement is binding and enforceable then that agreement precludes Mr Dawson from pursuing the remedies he seeks. If the settlement had not been honoured it would be open to Mr Dawson to pursue compliance proceedings to ensure the terms of the settlement were honoured by Tuwell Trust.

[11] Mr Dawson entered into a full and final settlement with his employer. Despite that settlement not being signed by the parties, or endorsed by a Department of Labour mediator, there is no doubt that in ordinary circumstances it would be binding and enforceable. The agreement was freely negotiated between the parties and I am confident that both understood the implications of the terms to which they were agreeing. Mr Dawson agreed to settle *all claims of any nature connected with the employment relationship*. Mr Maxwell (for Tuwell Trust) agreed to pay Mr Dawson a series of payments. These terms were committed to writing and both parties agree that that document encapsulated the agreed terms.

[12] With the exception of the payment of holiday pay Tuwell Trust has honoured the terms of that agreement, albeit some 24 hours late for two of the three wages payments listed. I note that the “agreement” to pay holiday pay simply records a statutory entitlement and such payment would have been payable irrespective of whether or not the settlement had been reached. I also note that the memorandum of settlement does not stipulate a timeframe for the payment of holiday pay although, of course, the Holidays Act requires that such payment be made at the time an employee ceases employment.

Determination

[13] Mr Dawson entered into a full and final settlement with his employer. Despite the slight delay in payments, that agreement is binding on both parties. Tuwell Trust have for all intents and purposes honoured this agreement and must be able to rely on it to protect them from *all claims of any nature from Mr Dawson*. **The memorandum of settlement agreed between Mr Dawson and Tuwell Trust on the 11 September 2007 is binding on the parties and precludes Mr Dawson from pursuing a personal grievance claim against Tuwell Trust Ltd.**

Payment of holiday pay

[14] Mr Maxwell acknowledges that Tuwell Trust has not, to date, paid Mr Dawson for outstanding holiday pay. **Tuwell Trust is ordered to pay Mr Dawson, within 14 days of the date of this determination, holiday pay calculated at 8% of Mr Dawson's gross earnings during the period of his employment.**

Costs

[15] Although Tuwell Trust were represented at the Authority's investigation meeting, very little preparation was required and the meeting itself lasted less than half a day. Had Mr Maxwell been more forthcoming in his dealings with the Authority and Mr Dawson's representative and responded more promptly to various correspondence, both he and Mr Dawson would have been spared at least some of the expense incurred. Under all of the circumstances I do not believe it would be equitable for costs to be awarded to either party in this case. **Costs will lie where they fall**

James Wilson

Member of the Employment Relations Authority