

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 330  
3077172

BETWEEN

ASHLEY GIBSON  
Applicant

AND

WEDGELOCK EQUIPMENT  
LIMITED  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person  
Maria Austen, counsel for the Respondent

Investigation Meeting: 30 June 2021 at Wellington

Submissions Received: Orally on the day from the Applicant  
Orally and in writing on the day from the Respondent

Date of Determination: 18 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ashley Gibson asks the Authority to order Wedglock Equipment Limited (Wedglock or the company) to comply with a Record of Settlement (the settlement agreement) entered into by the parties, and signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 13 December 2018.

[2] Mr Gibson also asks the Authority to impose a penalty on Wedglock for its failure to comply.

[3] Wedgelock says it has complied with all terms of the settlement agreement and opposes the imposition of a penalty. It alleges Mr Gibson failed to comply with one of the agreed terms of settlement but seeks no redress for the alleged breach.

### **Background**

[4] Mr Gibson was employed as a Design Engineer with Wedgelock, a specialist engineering company based in Upper Hutt. An issue arose in the course of his employment, and he resigned in October 2016. Mr Gibson and Wedgelock, through its Chief Executive Officer, Matthew Calvert, entered into the mediated settlement agreement which was expressed at clause 10 of that document as being:

“...full and final settlement of the all matters between the Employer and Employee arising out of their employment relationship and its termination, including all claims (whether existing, or within reasonable contemplation arising from matters to the date of this agreement) which either party has or may have against the other in respect of the Employee’s employment or its termination.”

[5] The mediator certified that, before she signed the settlement agreement, she had explained to the parties the effect of s 149(3) of the Employment Relations Act 2000 (the Act) and was satisfied they understood the effect of that subsection and had affirmed their request for her to sign the agreed terms of settlement.

[6] The settlement agreement contained 11 numbered clauses, one of which I have already cited above at [4]. The only other clause that needs to be disclosed is clause 2, which Mr Gibson claims has been breached by Wedgelock:

“The Employer agrees to complete a further air quality test within a reasonable timeframe. The Employer agrees to advise the Employee whether the results of that air quality test were positive or negative. The Employee agrees that the Employer will not be required to provide to the Employee the air quality test report.”

[7] On 26 July 2019 Mr Gibson wrote to Wedgelock through his legal representative. He referred to clause 2 of the Record of Settlement, noting that a reasonable period of time had passed and he had not received the results of the air quality test. Mr Gibson asked Wedgelock to advise:

1. Who did the air quality test;
2. What date the test was completed; and

3. What the outcome of the test was (positive or negative).

[8] Wedgelock responded through its legal representative on 30 July 2019 that air quality testing had been completed and that “no negative or adverse results were found.” The company advised it did not agree to engage with Mr Gibson any further. It said it had complied with the terms of settlement and, in particular, clause 2, and that it was not required to provide the other information he had requested.

[9] Mr Gibson wrote again to Wedgelock seeking the following information, so he could be assured the test had been completed:

1. Who did the air quality test; and
2. The date the test was completed.

[10] Wedgelock’s response was that it would not be entering into any further correspondence with Mr Gibson. It reiterated the company had complied with the terms of the settlement agreement, and in particular clause 2, by providing Mr Gibson with the results of the air quality testing. It noted Wedgelock had not agreed to provide details on who had undertaken the air quality test, or the date of the testing: it had agreed only to inform Mr Gibson whether the results were positive or negative. It confirmed its advice that “the results were negative”.

[11] Mr Gibson asserts Wedgelock’s reason for not supplying the information he has sought is not sufficient. He claims it was inherent in the settlement agreement that he (Mr Gibson) must be able to confirm that air quality tests had been undertaken.

[12] The parties attended mediation over an extended period but were unable to resolve the matter.

[13] At a case management conference with the parties in August 2020, the parties were advised that the Authority’s investigation would be confined to Wedgelock’s compliance with the terms of the settlement agreement. It would not deal with the issues that had resulted in the parties entering into that settlement agreement.

[14] This determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

## Issues

[15] The first issue for determination is whether Wedgelock fulfilled its obligations under clause 2 of the Record of Settlement.

[16] If I find it did not fulfil its obligations, the issues of whether compliance should be ordered, and whether a penalty should be imposed on Wedgelock, will be considered.

### **Was there a breach of clause 2 of the settlement agreement?**

[17] In considering Mr Gibson's submissions, I have taken into account a "synopsis of argument" document he filed in the Authority in March 2021. I have considered that, and a second document Mr Gibson filed in response to Mr Calvert's evidence in April 2021, as supplements to his oral submissions at the conclusion of the Authority's investigation meeting.

[18] I have, however, disregarded the information and opinion Mr Gibson provided in those documents about air quality issues at Wedgelock's premises and about the company's management of his concerns over those issues both during and after his resignation from Wedgelock.

[19] Those matters, which also featured in Mr Gibson's oral submissions, can be assumed to have played a large part in the mediation that led to the settlement agreement and are not matters that have a bearing on my determination of this compliance application.

[20] On the matter of the timeframe, Mr Gibson submitted Wedgelock did not comply with clause 2 within a reasonable period. He said it was not reasonable or acceptable for Wedgelock to carry out the air quality testing six months after the mediated settlement was entered into.

[21] Mr Calvert gave evidence in the course of the Authority's investigation that the air quality testing had been carried out in early March 2019. He said it was a busy time and he left for an overseas business trip immediately afterwards without thinking to advise Mr Gibson of the results. When Mr Gibson asked for the results in late July 2019, he was provided with that information. He was not given the additional information he requested as that was not required by clause 2 of the settlement agreement and the company did not wish to divulge it.

[22] In Mr Calvert's view Wedgelock had carried out the testing within a reasonable timeframe and advised Mr Gibson that no negative or adverse results were found when he made

enquiry about the outcome. This fulfilled the company's obligations under clause 2 of the settlement agreement in his view. Mr Calvert rejected Mr Gibson's allegations regarding both the testing and the reporting.

[23] In submissions for Wedgelock its counsel, Ms Austen, noted the settlement agreement did not define what a reasonable timeframe ought to be. She referred the Authority to *Marlow v Yorkshire New Zealand Ltd* in which former Chief Judge Goddard held a settlement agreement to be a contract which:

“...like any other, is capable of disagreement as to its meaning and effect.”<sup>1</sup>

[24] Where the agreement had been reduced to writing, the intention of the parties must be:

“...construed in the usual way by reference to the document itself, without regard to the subjective understanding of the parties or other extrinsic evidence of what may or may not have been in the minds of the parties.”<sup>2</sup>

[25] The issue of the interpretation of settlement agreements was also considered by former Chief Judge Colgan in *Edminstin v Sanford Ltd*, in which he referred to an agreement to settle litigation as being “...a contract (but not an employment agreement) to be interpreted as such.”<sup>3</sup> The “uncontroversial and binding” principles from the *Vector*<sup>4</sup> judgments of the Supreme Court, which took as their starting point the natural and ordinary meaning of the words, were to apply to such documents. Even where the words used appeared to be plain and unambiguous, there should be a cross-check of their interpretation by reference to the context in which the contract was entered into.

[26] In considering what might constitute a “reasonable” time frame in the context of the settlement agreement between Mr Gibson and Wedgelock, I have looked at the other clauses that imposed obligations on one or other of the parties. Those clauses that imposed financial obligations specified a precise time period within which payments were to be made. Clauses that contained provisions imposing ongoing obligations on one or both parties neither contained, nor required, timeframes. Apart from those clauses, only one specified no time frame for the completion or fulfilment of an obligation on a party. That was the clause Wedgelock alleges Mr Gibson breached, but over which it seeks no redress.

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<sup>1</sup> *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 2000, 206 at 214.

<sup>2</sup> Above at 214.

<sup>3</sup> *Edminstin v Sanford Ltd* [2017] NZEmpC 70 at [37].

<sup>4</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5.

[27] I consider that, in the context of the settlement agreement, the lack of a defined period within which further air quality testing had to be completed was deliberate as was the lack of a definition of what constituted a “reasonable time frame” for doing so. What is reasonable can be interpreted in the circumstances at the time.

[28] Mr Gibson did not challenge Mr Calvert’s evidence about the testing being carried out in early March 2019 and I accept Mr Calvert’s evidence on that matter. I consider that three months from the settlement agreement becoming final and binding on the parties was within the “reasonable time frame” specified by clause 2, given the proximity to Christmas and the statutory and other holidays usually observed, and taken, during December and January each year.

[29] In making that finding, I have also taken into account that it was a further four months from March 2019 before Mr Gibson queried whether the testing had been carried and what the results were. At that point he noted, through his lawyer at the time, that a reasonable period of time had passed.

[30] If the agreement between the parties had been for Wedgelock to disclose who had completed the air quality testing or what date it was completed, those details would have been incorporated into the settlement agreement. Again, I consider the omission of such details to have been deliberate. I do not accept Mr Gibson’s assertion that Wedgelock was obliged to provide them.

[31] It was, however, obliged to advise Mr Gibson of the outcome of the tests and it did not do that proactively, instead waiting until he made enquiry. Clause 2 does not specify a time frame for that advice to be provided to Mr Gibson: the way the clause is written the “reasonable time frame” applies only to the completion of the testing.

[32] A common sense reading of the provision might be that Wedgelock’s advice to Mr Gibson of the test results would be provided immediately following the completion of the tests, or at least within a week or two of that date. In the absence of a specific time frame in clause 2 for the provision of the advice, however, I am unwilling to find Wedgelock breached the clause by waiting until Mr Gibson requested the information before providing it to him.

## **Conclusion**

[33] I have found Wedgelock completed the further air quality testing within a reasonable time frame as required by the settlement agreement. The test results were advised to Mr Gibson upon his request. While it would have been preferable for Wedgelock to advise him at, or close to, the time the tests were completed, that was not specifically a requirement of clause 2.

[34] Mr Gibson was not entitled under the terms of the settlement agreement to any more information than that which Wedgelock provided to him.

[35] Mr Gibson's application for a compliance order is declined as is, accordingly, his request for the imposition of a penalty.

## **Costs**

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[37] If they are not able to do so and an Authority determination is needed, Wedgelock may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Gibson will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[38] If the Authority were to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Trish MacKinnon  
Member of the Employment Relations Authority

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<sup>5</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)