IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2020] NZERA 487
3056474

	BETWEEN	RICKY OSGOOD Applicant
	AND	WRIGHT TANKS LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	P J Drummond, counsel for the Applicant Andrew Wright, for the Respondent
Investigation Meeting:	28 February 2020 at Palmerston North
Submissions [and further Information] Received:	On the day of the investigation from the Applicant Nothing from the respondent
Date of Determination:	27 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Ricky Osgood lodged various claims against his former employer, Wright Tanks Ltd (Wright Tanks) alleging he was unjustifiably dismissed, and owed wages. The Authority met with the parties to investigate those matters in late February 2020.

[2] The director-sole of Wright Tanks, Mr Andrew Wright, says Mr Osgood's claim should not proceed because there is a prior 'Record of Settlement' between them (the settlement agreement) that resolved all matters connected to Mr Osgood's employment.

Brief Summary of relevant information

[3] Mr Osgood worked for Wright Tanks for almost 7 months in 2018. He was employed to drive and operate a hiab truck (the hiab). At the time of his appointment however, the hiab was under construction and Mr Osgood duties were largely confined to labouring work.

[4] The events leading to the dismissal began during an informal conversation with Mr Wright in the week 16-21 September 2018. There are several factual disputes concerning when exactly the discussion occurred, what was communicated, and whether Osgood was given a draft settlement agreement at the end of it. I shall return to those matters.

[5] The parties do agree however, that during the discussion Mr Wright told Mr Osgood that there was no further work for him as the crane on the hiab remained unfit for purpose. There is no dispute Mr Wright offered to pay Mr Osgood a "settlement" of $1,500 which Mr Osgood accepted. There was as a loose arrangement that if the crane became operative over the next few weeks and Mr Osgood was still out of work, they may revisit the issue of further work.

[6] Mr Osgood left the work premises soon after the end of the discussion and did not work again for Wright Tanks.

[7] On Thursday evening (20 September 2018) Mr Wright sent a text message to Mr Osgood asking him to "Drop in to see me tonight or tomorrow mate, …"

[8] At 9.06 am on Friday 21 September 2018 Mr Wright sent another text message, stating:

> What time will you call in? I'll meet you here to sign for the cash.
> I need a time so I can sort my day.

[9] Mr Wright and Mr Osgood met sometime in the early afternoon of 21 September 2018 and signed a document entitled: **RECORD OF SETTLEMENT (s 149 EMPLOYMENT RELATIONS ACT).** I have not set out all the terms recorded within the document but the following are material:

> **Agreed terms of record of settlement between the parties**
>
> 1. The employer has made the employee redundant from his position with it effective from the 20th September 2018. The employee has been paid all entitlements including holiday pay up to and including 20th September 2018.

> 3. This is in full and final settlement of all matters between the parties after negotiation.
> …
> 5. The employer will pay to the employee $1,500 (one thousand five hundred dollars) under s 123(1)(c)(i) of the Employment Relations Act 2000.
> …
> 11. This record of settlement represents a full and final settlement between the parties on any and all claims associated with the employee's employment with the employer.

[10] The record of settlement was not signed by a mediator.

[11] Mr Osgood was paid $1,500.11 (nett) that day. A payslip for the period ending 21 September 2018 records a gross payment of $2,025.84 was made comprising: one day's pay (8 hours) equalling $180.00 gross; holiday pay of $675.84 gross, and; a redundancy payment of $1,170 gross.

[12] Mr Osgood subsequently obtained advice and raised a personal grievance seeking compensation for the dismissal, arrears of wages, payment of contractual notice, and penalties from Wright Tanks.

The Authority's investigation

[13] Mr Osgood was assisted by his representative at the Authority's meeting and provided written and oral evidence. Wright Tanks was not represented during its interactions with the Authority, although there is some correspondence that demonstrates it was in receipt of professional advice for a short period prior to the Authority's investigation.

[14] Mr Wright attended the Authority's investigation meeting on behalf of Wright Tanks and answered questions, albeit he did not provide a written brief of evidence.

[15] At the conclusion of evidence concerning Mr Osgood's dismissal and claims for arrears of wages and penalties, Mr Wright accepted the Authority's proposal to first determine whether the settlement agreement precluded any liability on those matters. This was suggested so as to allow an opportunity for Wright Tanks to resolve Mr Osgood's claim if the Record of Settlement was found to not prevent Mr Osgood from pursuing his claims.

[16] As a consequence this determination is limited to making findings as to whether the settlement agreement is binding on the parties.

[17] This determination has been issued outside the timeframe set out at s 174C(3) of the Employment Relations Act 2000 in circumstances the Chief has decided, as he is permitted by s 174C(4) to do, are exceptional.

What is the effect of the record of settlement?

[18] The onus lies with Wright Tanks to establish, either under s 149 of the Act , or in accordance with the relevant principles of contract law as they concern "accord and satisfaction", that the Record of Settlement prevents the Authority from investigation and determining Mr Osgood's personal grievance and associated claims.

Is the settlement agreement enforceable under s 149 of the Employment Relations Act 2000?

[19] The Act provides some guarantees and protections to settlement agreements made in accordance with s 149 of the Act. In particular s 149(3)(a) provides that terms of settlement between parties will be final, binding, and enforceable once an authorised mediator is satisfied the parties understand the effect of the agreement, and certifies the document to that effect.

[20] Mr Wright accepts the settlement agreement was never sent to Mediation Services and was therefore not certified. Wright Tanks cannot therefore rely on s 149 of the Act to protect it from Mr Osgood's claims and does not apply to the circumstances of this case.

Is the settlement agreement enforceable as a matter of accord and satisfaction?

[21] Although the settlement agreement as not signed by a mediator, a settlement agreement may, in any event, be enforced where the parties have reached accord and satisfaction in respect of the terms of the agreement.

[22] The legal term "*accord and satisfaction*" refers to a circumstances where a party has purchased from another a release from an obligation. The accord is the agreement which releases the obligation. Satisfaction is the consideration (usually of a financial nature) promised to make the agreement operative.

[23] Whether parties have reached an agreement in accord and satisfaction requires an examination of the circumstances which led to the settlement. In *Graham v Crestline Pty Ltd*,[1] the Court set out conditions necessary to establish accord and satisfaction, as follows:

---

[1] *Graham v Crestline Pty Ltd* [2006] 1 ERNZ 848

> … 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 to satisfy the claim.

[24] Before examining whether the circumstances leading to the record of settlement reflect an accord and satisfaction between the parties, it is useful to firstly resolve when the discussion which led to Mr Osgood's redundancy occurred, and when was Mr Osgood given a copy of the proposed settlement agreement. Findings on these matters is important because they are likely to impact on my inquiry as to whether there was a meeting of the minds regarding the purpose and effect of the settlement agreement.

When was the discussion?

[25] Mr Wright says the conversation concerning Mr Osgood's employment occurred on Monday, 17 September 2018 whereas Mr Osgood said it was Thursday, 20 September 2018.

[26] Whatever the date on which the discussion was held, it is common ground that by the end of it Mr Osgood's employment had ceased, and the offer to pay $1,500 as a "settlement" had been made and accepted. It follows that that discussion leading to the cessation of Mr Osgood's employment is likely to be that as recorded in the settlement agreement, namely 20 September 2018. I note Wright Tanks provided no explanation as why 20 September 2020 was selected as a cessation date if the discussion leading to the end of Mr Osgood's employment had occurred earlier.

When was the record of settlement given to Mr Osgood?

[27] Applying the finding made above, it is clear the settlement agreement cannot have been given to Mr Osgood on the 17th of September 2018 where the discussion on the issue had yet to take place. I have also preferred Mr Osgood's evidence to the effect that he was unaware of a written settlement document until he was presented with it on 21 September 2018.

[28] Had Mr Wright given Mr Osgood a copy of the draft settlement to review and consider at the end of their discussion on 20 September 2018, I find it more likely than not that there would have been some inquiry by Mr Wright (in one or other of his subsequent text messages that evening or the following morning) as to whether the document was acceptable, given he was seeking to finalise the end of Mr Osgood's employment. No mention of the settlement agreement is made in either of Mr Wright's text messages.

Was there a genuine dispute between the parties?

[29] This aspect of inquiry focusses on the discussion in which Mr Osgood was advised his position was redundant and what was communicated between the parties on this issue.

[30] In a letter drafted on Wright Tanks' behalf dated 1 August 2019, there is an inference that the discussion leading the termination of Mr Osgood's employment was initiated by Mr Osgood. The correspondence suggests Mr Osgood advised Mr Wright he needed time away from work to address some personal matters and that Mr Wright then proposed Mr Osgood's position be made redundant where the hiab was not yet functional. However, Mr Wright acknowledged during his testimony that the topic of redundancy was introduced into the parties' conversation prior to Mr Osgood's personal disclosures and volunteered that Mr Osgood did not tender his resignation.

[31] Mr Wright says it was agreed between them that Mr Osgood's role would end by way of redundancy. Mr Osgood said that he felt had had no choice but to accept Mr Wright's view that there was no work for him. Both witnesses agree Mr Osgood became upset during the discussion between the pair, but neither party asserts Mr Osgood's response was related to Mr Wright's view about the availability of work.

[32] No evidence was given by either party to demonstrate Mr Osgood challenged the basis on which Wright Tanks decided to end the employment relationship or the process by which that decision was made before he signed the Record of Settlement.

The requirement for a "meeting of the minds"

[33] In *McHale v The Open Polytechnic of New Zealand*,[2] the Court characterised "accord and satisfaction" in the following way:

> …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 mixed question of fact and law.[3]

[34] Mr Osgood said that when Mr Wright volunteered to pay him "a settlement" it was couched in such a way that he thought Mr Wright wanted to "*help me out.*" Mr Wright's oral testimony accords also with that of Mr Osgood and is candid. He says he offered the payment

---

2 *McHale v The Open Polytechnic of New Zealand* [1993] 1 ERNZ 186

3 At pg 203

to "*keep* [Mr Osgood] *out of trouble"* while he looked for work. That evidence reinforces an appearance that the offer did not arise as a consequence of a live dispute between them.

[35] In *McHale* the Court went on to note that a party's willing and informed assent to a settlement is likely to be demonstrated if there is evidence that the party obtained independent advice regarding proposed terms of settlement. This observation was reinforced in *Evans v Building Connexion Ltd t/a ITM*,[4] where, the employer's omission to advise an employee that he could seek legal advice as to the terms of settlement it had proposed, or to explain the meaning and effect of a "*full and final settlement",* precluded a finding that the employee had entered into the settlement willingly and informed.[5]

[36] During questioning Mr Wright conceded he "*probably*" didn't tell Mr Osgood that he could seek independent advice in respect to the settlement or explain what was meant by the phrase "*full and final settlement*". That Wright Tanks also did not obtain legal advice prior to signing the Record of Settlement does not lower the standard of comprehension needed for two parties to a settlement to achieve accord and satisfaction.

[37] The circumstances leading to the settlement do not persuade me that that Mr Osgood was, in any meaningful way, cognisant of the consequences of the settlement Wright Tank proposed. There is no evidence to suggest Mr Osgood was aware the arrangement entailed an exchange by both parties or that the offer, and its acceptance was on the basis that Mr Osgood would forgo a right to pursue a legal claim against Wright Tanks.

[38] If it could be said that there was a meeting of the minds by the parties in this case, it did not include a payment of money in exchange for a release from an obligation. Rather, the evidence leads me to conclude that the offer was regarded by both parties as a gratuity, with the execution of the record of settlement perceived as a payroll formality as illustrated in Mr Wright's text message on 21 September that Mr Osgood to come in and "*sign for the cash".*

Summary of findings on whether accord and satisfaction was reached between the parties

[39] I am not at all satisfied a genuine dispute existed as a necessary precondition on which a contract of accord and satisfaction may arise has been met. Nor is there any evidence to establish Mr Osgood was informed about the nature of the exchange Wright Tank proposed or

---

4 *Evans v Building Connexion Ltd t/a ITM* [2012] NZERA Christchurch 2

5 Above at [31]

afforded an opportunity to obtain advice. I am unwilling to conclude there was an accord or meeting of the minds as to meaning and effect of the settlement agreement in the circumstances of this case.

[40] Although not determinative in this instance, it is further questionable as to whether the terms of settlement were supported by consideration where the sum of money paid to Mr Osgood was substantially less than the $3,397.44 (gross)[6] he was contractually and statutorily entitled to receive at the end of his employment in any event.

[41] Wright Tanks has not been able to establish any of the components on which it could be objectively concluded that the parties reached accord and satisfaction.

Finding on preliminary matter

[42] For the reasons set out above, the settlement agreement signed by the parties is not binding between them. Mr Osgood is free to pursue his personal grievance and wage claims against Wright Tanks Ltd.

[43] The Authority will be in touch with the parties in due course to discuss arrangements to process Mr Osgood's claims.

Costs

[44] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

[6] The total sum owed for: four days' wages, 2 weeks' contractual notice, and holiday pay.