

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Peter Francis Scrimgeour (Applicant)

AND The Wellesley Limited (Respondent)

REPRESENTATIVES Peter Scrimgeour on his own behalf
Wayne Coffey for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 10 August 2005

MEETING

DATE OF 29 August 2005

DETERMINATION

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. The applicant, Mr Peter Scrimgeour, makes a number of claims about his treatment during the course of his employment with the respondent (the Wellesley) and the way it implemented a settlement agreement reached between the parties in June 2003. He assured the Authority that the issues raised here were the only issues remaining between him and the Wellesley.
2. The Wellesley claims that it has fulfilled all its obligations under the settlement agreement and that Mr Scrimgeour's present claims are vexatious.

The Facts

3. Mr Scrimgeour started work for the Wellesley, which runs the Wellesley Club, as a management cadet in February 2001. Over the course of 2002/03 Mr Scrimgeour had raised a large number of concerns about the way he was being treated at work. These were resolved by way of a settlement agreement prepared by his solicitor and signed by the parties on 3 June 2003.

4. Amongst other things, the record of settlement stated the following:

“Following referral of employment relationship problems, raised by the employee, to mediation, the parties have reached the following agreement, in full and final settlement of all issues between the parties.

1. *The employee’s current employment shall terminate, by reason of redundancy, four weeks from the date of this agreement. During this four week period, the employee shall be rostered for work, and paid for at least 40 hours at week, at current hourly rates...*
2. *On termination, the employee shall be re-engaged for a fixed term of three months. The employee shall be rostered for work, and paid for 24 hours per week at an hourly rate of \$11.00...”*

5. The settlement agreement and the circumstances that led to its signing were examined by my colleague Dennis Asher in a previous case involving these parties (WA103/04, 9 August 2004), where it was determined that the record of settlement was valid, including the variation to the date of payments to be made by the Wellesley under clause 3, which had been disputed by Mr Scrimgeour at the time. Mr Scrimgeour had also claimed that he had been unjustifiably dismissed and forced/pressured into signing the agreement. Those claims were dismissed.
6. A week or so before that investigation meeting Mr Scrimgeour had added a number of other issues, by way of a ten page letter to the Authority, which have in essence been recreated in the current application before me. Mr Scrimgeour claims that Mr Asher did not take these additional matters into account in his original determination, but Mr Coffey was adamant that the Authority had ruled against them all.
7. I have considered all of Mr Scrimgeour’s claims in the light of Mr Asher’s determination, without determining whether Mr Coffey’s assertions about the conduct and outcome of that investigation meeting were correct. It is clear, however, that once the Authority has determined a matter it cannot be re-litigated by way of filing a new application (as per the legal principle of *res judicata*). Similarly, where a settlement agreement between parties is made in full and final settlement of all issues between

them, then any issues that have been raised previously are covered by that settlement agreement: *Gawthorne v. Attorney-General* [1996] 2 ERNZ 68.

8. Thus in the current matter before me, claim 1 relating to an alleged breach of good faith in employment relations; claim 3 relating to alleged reduced hours of work and overnight payments; claim 4 relating to alleged underpayment of overtime hours; and claim 5 relating to Mr Scrimgeour allegedly having to wrongly pay for coffee, were all raised by Mr Scrimgeour as employment relationship problems before the settlement agreement had been signed. It therefore follows that they can not be contested in the Authority, as the parties have reached agreement in full and final settlement of all the issues between them, including those mentioned above. I therefore dismiss those parts of the claim.
9. Claim 2 related to Mr Scrimgeour's claim that he should have been paid \$11 per hour, not \$9.30, in accordance with the settlement agreement. The issue of correct payments to Mr Scrimgeour during the three month period is an important one for determination. I accept that the settlement agreement did not provide for a new employment agreement to apply. The parties already had in place an employment agreement, which came into effect on 20 February 2001. It follows that that employment agreement remained in place, except insofar as it was superseded by particular provisions of the settlement agreement. Other than the fact that the employment agreement would be for a fixed term of three months, the only other change relates to Mr Scrimgeour being rostered for work and paid for 24 hours per week at an hourly rate of \$11. It is accepted by the parties that the reference to 24 hours per week was as a minimum number of hours, not the actual number of hours per week to be worked.
10. The matter is complicated by the fact that the individual employment agreement did not provide for hourly rates. Instead, the only relevant clause is one entitled "Payment". It states:

"The employer shall pay the employee an weekly amount of \$300 net, with a \$50 weekly travel allowance payable fortnightly in arrears and to be direct credited to such bank as may from time to time be nominated by the employee. The above payment covers the first 40 hours of the week, and the overnight stays included in this period. Additional hours will be paid at \$10 per hour and overnight stays at \$25 for the night..."

11. Mr Scrimgeour claims that he should have been paid \$11 per hour for that three month period, but his payslips show that he was paid 80 hours per fortnight at \$9.30 and that he was paid overnight allowances and travel allowances on top of that. Mr Coffey explained that the reason for that was that the pay arrangements were not changed in the pay office for the duration of the three month employment agreement, but that the settlement agreement was reached on the basis that Mr Scrimgeour would receive a guaranteed minimum number of hours at a guaranteed minimum total payment averaging \$11 per hour. However, that rate was to be calculated after taking account of the allowances.
12. Were this the usual case whereby workers are paid on an hourly basis, plus allowances, then Mr Scrimgeour would have been correct in his claim. However, Mr Scrimgeour was not an hourly worker who was paid allowances on top of his hourly rate. His employment agreement provided a complicated formula for the assessment of weekly pay, inclusive of travel and overnight allowances, covering the first 40 hours each week. Once Mr Scrimgeour worked beyond 40 hours per week he would be paid at an hourly rate of \$10, and would be paid for any overnight stays in addition to that.
13. I find that the settlement agreement replaced the above clause in the employment agreement in toto. Taking into account the separate “allowances” (so-called by the payslips designed under the previous agreement) Mr Scrimgeour was in fact paid at least \$11 per hour, if not substantially more.
14. I am supported in this interpretation of the employment and settlement agreements by the fact that Mr Scrimgeour, who appeared to consistently question any payment that he did not necessarily agree with, raised no concerns whatsoever about his pay with the Wellesley during the course of the three months period. He claims to have been too scared to do so, but I reject this on the basis that this did not prevent him from challenging the date of payment of the compensation the Wellesley had agreed to pay him under the settlement agreement. I therefore dismiss this claim.
15. Mr Scrimgeour also sought a penalty for the alleged breach of the \$11 clause against the Wellesley, and Mr Coffey and a Mr Richard de Graff, as individuals. Further to the claim being dismissed on the facts, I note that neither Mr Coffey nor Mr de Graff

were ever made parties to this employment relationship problem. Accordingly, they have never been properly served within the 12 months required for the filing of a penalty.

16. The final claim is for bonuses not paid to Mr Scrimgeour during the period of his three month fixed term agreement. Mr Scrimgeour was paid bonuses throughout the period of his earlier employment with the Wellesley. I accept, however, Mr Coffey's evidence that the bonus payments were entirely discretionary. The written employment agreement does not contain any reference to the bonuses and Mr Scrimgeour could provide no other evidence to support his claim that these were an agreed part of his remuneration, rather than a discretionary bonus. I therefore dismiss that claim as well. Therefore all of Mr Scrimgeour's claims have been dismissed.

Costs

17. Costs are reserved.

G J Wood
Member of Employment Relations Authority