IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 525
3145101

	BETWEEN	JAMES SMALLEY Applicant
	AND	HAMILTON HINDIN GREEN LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Shaun Brookes, counsel for the Applicant Tim McKenzie, counsel for the Respondent	
Investigation Meeting:	29 July 2022	
Submissions Received:	20 July 2022 from the Applicant 6 July 2022 from the Respondent	
Date of Determination:	11 October 2022	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Smalley was employed by Hamilton Hindin Greene Limited ("HHG") from 8 January 2001 until 23 March 2018, latterly as a financial adviser pursuant to an individual employment agreement. Mr Smalley has worked in various capacities for HHG including being a director, employee, and a contractor.

[2] Mr Smalley's application to the Authority claims that HHG incorrectly calculated his accumulated holiday pay entitlements upon the ending of his employment by failing to take proper account of his remuneration package that included salary and bonus payments. Mr Smalley says HHG also owe him one month's notice pay and that he was incorrectly paid when taking sick leave or for working on public holidays.

[3] Mr Smalley accepts whilst being legally represented by an experienced employment lawyer, he signed a full and final settlement agreement ending this employment relationship with HHG.

[4] Mr Smalley suggests the existence of and quantum of his outstanding entitlements is still in dispute and not fully resolved by the settlement agreement or that the agreement should be set aside as he was the subject of a misrepresentation by HHG that he relied upon (i.e. that he was paid wages in advance, he had received his correct holidays entitlements and the settlement agreement's clause 5, preserved his ability to claim any statutory shortfalls).

[5] HHG contends that Mr Smalley's claims cannot proceed because of the scope and nature of the full and final settlement agreement and that common-law principles pertaining to full and final settlements apply. HHG says misrepresentation has not been made out as the alternative ground to cancel the agreement.

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 although I record the submissions greatly assisted my task.

[7] At issue is whether the second settlement agreement (discussed below), purportedly 'full and final', can be used as a 'shield' by HHG preventing Mr Smalley pursuing a further personal grievance related to claims for underpayment of holiday and leave entitlements and general wage arrears.

[8] The settlement agreement was not executed in accord with section 149 Employment Relations Act 2000 (the Act) and thus not affirmed by an MBIE mediator. However, for enforcement and interpretation purposes, the matter falls within the ambit of s 161(1)(r) of the Act, as the Supreme Court in *FMV v TZB* observed "the controversy arose during the course of the employment relationship and in the work context". [1] The Supreme Court noted this jurisdiction of the Authority, includes post-employment obligations that were entered into during the employment relationship – even where the effect of entering those obligations was part of ending the relationship. [2]

What caused the employment relationship problem?

[9] The dispute arose out of two separate but interlinked settlement agreements the parties entered.

The first settlement agreement

[10] In mid-2017, HHG raised issues with Mr Smalley that were compromised by the parties executing an undated settlement agreement (the first settlement agreement). Both parties were represented by very experienced employment lawyers.

[11] The settlement agreement primarily provided for Mr Smalley resigning his then permanent Financial Advisor role on 13 August 2017 but thereafter, being employed in the same capacity on a fixed term basis "(from 21 September to 21 March 2017)". The settlement agreement wrongly recorded the expiry of the fixed term engagement – indisputably this was a mutual mistake as the fixed term ended, as envisaged, on 23 March 2018 having been extended two days by a later settlement agreement.

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[1] *FMV v TZB* [2021] NZSC 102 at [94].
[2] Ibid at [99] – [100] see also article: *The Exclusive jurisdiction restated: what is to be determined by the Employment Relations Authority following FMV v TZB*, Michael Leggat, [2022] Employment Law Bulletin (NZ) 55.

[12] Remuneration for the fixed term engagement was expressed in the settlement agreement as being on the "same base salary as his current employment agreement. The Employee will be entitled to be considered for a discretionary bonus only".

[13] Mr Smalley also committed in the first settlement agreement to endeavour to divest himself of his HHG shareholdings. The first settlement agreement also contemplated, upon expiry, a potentially ongoing engagement for Mr Smalley as either an employee or a contractor.

[14] Whilst the parties' employment relationship continued, the first settlement agreement purported at clauses 14 and 15, to be:

> ….. in full and final settlement of any claims the parties might reasonably be expected to be aware of, which they may have against each other arising out of the employment relationship, up until the date of the agreement being signed.
>
> And.
>
> In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wages Act 1983, or the Holidays Act 2003, as defined by the Act).

[15] The first settlement agreement whilst dealing with numerous contractual issues, was silent on dealing with holiday pay and no documentary evidence was provided of Mr Smalley being paid out his accumulated holiday pay upon him relinquishing his permanent position. Both parties accepted that HHG offered to pay Mr Smally accumulated holiday pay out but by mutual agreement this did not occur and the fixed term extension treated Mr Smalley's employment as 'continuous' for the purpose of preserving and accumulating leave entitlements. At the time, Mr Smalley entered into the first settlement agreement no dispute about his accumulated holiday pay quantum had been identified and he recalled agreeing with HHG that he not work through his notice period and he commenced the fixed term earlier than envisaged in the settlement agreement on 23 August 2017.

Second settlement agreement

[16] At the end of the fixed term employment agreement, the parties executed a second settlement agreement on 23 March 2018 ending the employment relationship and separately entering an independent contracting agreement. These agreements were accompanied by extensive email correspondence between the parties prior to execution and during such exchanges Mr Smalley identified a dispute about the calculation of his accumulated holiday pay.

[17] Clause 4 of the second settlement agreement states:

> Subject to the parties' rights of enforcement, the parties agree that this Agreement and the settlement hereto is in full and final settlement of nay claims whatsoever that the parties have against each other. Specifically, any claims the Employee has against the Employer, or any associated or related company, or any officers or employees of the Employer whether arising out of any alleged breach of privacy, the Employees employment, the termination thereof, pursuant to statute, common law, by way of contract or otherwise, and includes any claim for damages, accrued salary, holiday pay, pay in lieu of notice, compensation bonus and any other entitlements.

[18] However, clause 5 then qualifies the above, by stating what is the statutory position set out in s 238 of the Act (no contracting out by agreement) [3] :

> In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined in the Act).

What were the parties' intentions?

[19] Email correspondence between the parties' respective counsel leading up to the conclusion of the second settlement agreement show that HHG initially agreed to extend the fixed term period of employment from 21 March to 23 March 2018 but on the latter date, HHG exerted time pressure on Mr Smalley to conclude a settlement agreement by the end of

[3] Section 238 Employment Relations Act 2000, **No contracting out -** The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

the business day (5pm) or face the prospect of no ongoing relationship. At the time, by email of 23 March 2018 (prior to the imposed deadline), Mr Smalley's counsel initially suggested to HHG's then counsel, that the 'final offer' settlement agreement provided could not be executed as:

> …. the agreement purports to have James waive any claim to holiday pay or bonus etc and the employer has not yet provided a final breakdown of his final pay. Once that is provided James can check off his entitlements and if they are correctly accounted for the deed can be provided.

[20] In response, HHG's counsel insisted his client required that the settlement agreement be executed that day but acknowledged:

> I note that the issue as to James' contractual and statutory entitlement can not be resolved until next week, given that HHG's payroll provider is not working today. James is of course protected in this respect by clause 5 of the settlement agreement.

[21] Without further comment, Mr Smalley's counsel then provided the text of the settlement agreement by return email just prior to 5pm on 23 March 2018.

[22] The existence of the holiday pay and final pay issue being unresolved is reinforced by email correspondence after the second agreement was then signed by Mr Smalley and provided to HHG on 28 March. This includes an email of 28 March 2018 outlining Mr Smalley's final pay calculation and a further exchange and meeting between the parties on 29 March and an email exchange between the parties on 10 April 2018. Thereafter the matter remains unresolved, whilst Mr Smalley took some time to pursue his claims that fact does not weigh upon his ability to do so.

Assessment

[23] It is clear the parties' mutual intention and understanding in entering the second agreement was, despite the restrictive wording in clause 4, that the issue of holiday pay would be resolved post-agreement. Therefore, this was not an agreement with full accord and satisfaction being recorded.

[24] Counsel for the respondent submits the Authority approach to the issue of interpreting the full and final nature of the settlement agreement be on a principled, objective based analysis taking contextual factors into account (citing *Crossen v Yangs House Limited*) [4]. Whilst agreeing to a certain extent on this approach, a further threshold issue fatal to the respondent is that s 238 of the Act provides no contracting out of statutory entitlements are possible "despite any provision to the contrary in any contract or agreement". [5]

[25] It is the Authority's view that the only shield or exception to prevent any holiday pay quantum dispute being deemed full and final, is if the settlement agreement was enacted under s 149 of the Act as expounded by Smith J, in the circumstances described in *Crossen*. [6] However, the facts in *Crossen* that led to a decision that finality be preserved in ostensibly similar circumstances to the present situation, are distinguishable. In *Crossen* the existence of a dispute about holiday pay was foreshadowed as part of a personal grievance prior to the s 149 agreement being entered into and Judge Smith's decision concerns a broader analysis of s149 agreements and the need to preserve the sanctity of such settlements made in mediation to meet distinct statutory intentions. [7]

[26] In *Crossen,* Judge Smith also drew attention to an earlier decision of the Employment Court, *Ashish Maharaj v Wesley Mission Incorporated* as evidence that parties can compromise a claim for arrears of minimum wages where the quantum is in dispute [8] In *Crossen* Judge Smith accepted as not being in error, the Authority's earlier decision [9] that the s 149 settlement agreement resolved all outstanding issues including wages and holiday pay claims but opined: "That is conceptually different from forgoing an undisputed entitlement as part of a deal". [10] I find the latter comment assists in the context of Mr Smalley's claim where the facts show at the time of enacting the second settlement agreement the existence of a

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[4] *Crossen v Yangs House Limited* [2021] NZEmpC 102 at [12].
[5] Section 238 Employment Relations Act 2000.
[6] *Crossen,* above n 7, at [40].
[7] At [45]-[46].
[8] *Ashish Maharaj v Wesley Mission Incorporated* [2016] NZEmpC.
[9] *Crossen v Yang House Ltd* [2020] NZERA 295 (Member O'Sullivan).
[10] *Crossen,* above n 7, at [46].

disputed holiday pay entitlements was at issue but not addressed in either of the settlement agreements.

[27] Here, section 4 of the second settlement agreement stated:

> Subject to the parties' rights of enforcement, the parties agree that this Agreement and the settlement hereto is in full and final settlement of any claims whatsoever that the parties have against each other. Specifically, any claims the Employee has against the Employer, or any associated or related company, or any officers or employees of the Employer whether arising out of any alleged breach of privacy, the Employees employment, the termination thereof, pursuant to statute, common law, by way of contract

[28] However, section 5 of the second settlement agreement appears to plainly qualify the above, by stating what is essentially the statutory position set out in s 238 of the Act that:

> In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined in the Act).

[29] In considering the above clauses together and contextual email exchanges leading up to the settlement agreement being executed that show unresolved matters, I prefer the latter (section 5) as being expressive of the parties' actual intentions. As such, I have no need to consider the issue of any potential misrepresentation except to agree with the respondent counsel's submission that the threshold for establishing such is a high one.

Conclusion

[30] Given the above, I do not consider the second settlement agreement prevents Mr Smalley pursuing his identified personal grievance claims. The Authority will be in contact with the parties shortly to timetable an investigation meeting to deal with the substantive issues.

Finding

[31] **I find that Mr Smalley can pursue his personal grievance. He is not prevented from doing so by either of the settlement agreements he entered.**

Costs

[32] Costs are reserved pending the Authority's determination of Mr Smalley's personal grievance.

David G Beck

Member of the Employment Relations Authority