

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Tairi (Applicant)
AND Bay of Plenty District Health Board (Respondent)
REPRESENTATIVES David Bruce, Advocate for Applicant
Mark Beech, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 25 May 2006
DATE OF DETERMINATION 27 July 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Tairi lodged a personal grievance with the Authority on 23 November 2005. (It was raised with the respondent on 2 December 2002).

Mr Tairi submits that he was unjustifiably dismissed from his employment on 21 November 2002. To remedy his alleged grievance he seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i).

In response the respondent has lodged an application to strike out the applicant's statement of problem on the grounds that:

1. The applicant and respondent reached accord and satisfaction when they agreed to the additional sum of three weeks payment in full and final satisfaction of all employment related issues between the applicant and the respondent. The terms of the agreement were carried out in full by the respondent.
2. If accord and satisfaction has been reached, then it is abuse of process for the applicant to make a claim on the original cause of action and such an abuse may be prevented by the Court in the form of a strike out application.

In support of its application the respondent filed an affidavit by Alan Wilson, General Manager of Bay of Plenty District Health Board.

This Determination addresses the preliminary question as to whether or not the parties reached an agreement in accord and satisfaction in relation to the termination of Mr Tairi's employment by the Board.

Background

This matter has a lengthy and somewhat confused history. Mr Tairi commenced employment with Bay of Plenty District Health Board on 22 April 2002. He was employed as a carpenter.

From an early point in his employment, concerns surfaced in respect of his performance and in relation to his qualifications. The concerns relating to Mr Tairi's qualifications were, I believe, resolved in September 2002 but his performance continued to cause concern.

At some stage during his employment Mr Tairi joined the New Zealand Building Trades Union.

A meeting was held between the applicant and Board representatives on 7 October 2002. The applicant was assisted at this meeting by union official Pat Roberts and a local delegate Jim Parrish. The outcome of this meeting was that Mr Tairi was issued with a final written warning in relation to his performance.

On 20 November 2002 Mr Tairi attended another meeting with Board representatives. Again he was assisted by Mr Roberts and Mr Parrish. At the end of the meeting Mr Wilson, General Manager advised Mr Tairi that he would be recommending to the Chief Executive that Mr Tairi's employment be terminated.

Immediately following the meeting Mr Roberts met with Mr Wilson. The result was that the Board agreed to pay Mr Tairi the following payments:

- Back pay in recognition of the production of his Advanced Trade Certificate qualification.
- Normal pay up to 22 November 2002.
- Two weeks pay in lieu of notice.
- A further three weeks pay.

Mr Tairi left his employment on 20 November 2002. Mr Wilson wrote to Mr Tairi on 21 November confirming his dismissal and confirming the above payments. The promised payments were deposited to Mr Tairi's bank account on 22 November and accepted by him.

Issue for Determination

The respondent has raised a defence of accord and satisfaction in respect to Mr Tairi's claim he was unjustifiably dismissed. If the Authority finds the parties reached a settlement in full and final settlement of all employment related issues then the Authority may not proceed to hear and determine the substantive claim. The preliminary issue for determination is:

Did the payment of three weeks pay over and above the entitlements due to Mr Tairi amount to a settlement in accord and satisfaction of any claims he might have against the Board in relation to the termination of his employment?

Position of the parties

Applicant

The applicant accepts he was represented by the Union at the meeting on 20 November 2002 and that the Union was authorised to act for him.

Mr Tairi's evidence, and that of his wife, was that following the statement by the Board that it intended to dismiss him, Mr Roberts of the Building Trades Union met alone with Board representatives. He and his wife remained behind with Jim Parrish the local delegate.

His evidence is that Mr Roberts returned to speak with them, he advised that he had reached agreement with the Board to pay back pay (in recognition of his Advanced Trade Certificate), two weeks notice and three weeks pay in recognition that it would be difficult to find a new job prior to Christmas. Mr Tairi said he was also told that was as much as the Board would pay in the matter and that the Union would not take the matter further as it had already spent too much money on it. He was also told the Union had reached agreement with the Board that it would not take the matter further but that he (Mr Tairi) was free to do so.

It is the applicant's position therefore, that the payment made to him by Bay of Plenty Health Board on 21 November represented entitlements payable to him on the termination of his employment and did not amount to a full and final settlement of any claims he might have against the Board in relation to his dismissal.

In support of his position Mr Tairi relies on communications from Pat Roberts in relation to the arrangements agreed which confirm there was no full and final settlement in the matter.

Mrs Tairi's evidence supports that of her husband.

The following week the Tairi's met with an employment lawyer with a view to commencing a personal grievance action against the Board. It was Mr Tairi's evidence that their legal representative referred to the Board's written statement that a payment was made in full and final settlement of employment issues and questioned Mr Tairi about that statement. It was Mr Tairi's evidence that he told his new representative that it meant nothing to him and that Mr Roberts had said he had been wrongfully dismissed and that he was free to take a claim against the Board. On his instructions Ms Burley submitted a grievance on his behalf.

In June 2005, the firm that had been pursuing the claim advised that it could no longer pursue the matter and it was subsequently taken up on their behalf by Mr Bruce, Mr Tairi's current representative.

In conclusion it was Mr Tairi's position that he would never have agreed to the payment made as being in full and final settlement and no agreement was made with him to that effect. He never signed any agreement of full and final settlement and neither did the Union.

Unfortunately Mr Roberts died at the end of 2005 and has not been available to assist the Authority in its investigation into this matter.

Respondent

Mr Wilson, General Manager of Tauranga Hospital gave evidence for the Board. He submitted that on 20 November 2002 he concluded (on behalf of Bay of Plenty Health Board) that there was little option but to terminate Mr Tairi's employment.

He said that while he had good feedback regarding Mr Tairi's punctuality and attendance that did not negate the fact that his performance was poor. He told Mr Tairi that he would be suspended for the rest of the week (until 22 November 2002) to allow the Chief Executive of Bay of Plenty District Health Board to consider the termination based on the information received at the disciplinary meeting.

He also told Mr Tairi that if his termination was confirmed it would be effective from 25 November 2002.

Mr Wilson's evidence was that following that meeting he and Catriona MacFarlane of HR had discussions about Mr Tairi's termination with Pat Roberts, the representative from the New Zealand Building Trade Union who was acting on behalf of Mr Tairi. Mr Roberts was concerned that Mr Tairi was being dismissed close to Christmas and wanted more termination pay for his client to compensate for the difficult labour market around that time and to resolve matters.

It was Mr Wilson's evidence that he and Mr Roberts agreed that in full and final settlement of any employment related issues between Tauranga Hospital and Mr Tairi they would pay two weeks ordinary pay in lieu of notice and three weeks ordinary pay in addition. It was Mr Wilson's evidence that the Board does not throw money at settlements and that he would not have obtained the Chief Executive's sign off for the additional three weeks pay unless it had been in full and final settlement of all employment related matters. Concluding on this point he said he could not ever remember making an ex gratia payment unless it was in full and final settlement of an action or potential action.

He said it is not normal practice for such agreements to be recorded in writing unless the agreement is reached in mediation.

Mr Wilson's evidence was that on 21 November, after consultation with the Chief Executive, he wrote to Mr Tairi advising that his termination had been confirmed. He further advised that Mr Tairi's last day of employment with the Bay of Plenty District Health Board would be 22 November 2002 and his final pay would be deposited into his account on the same day. He reiterated in the letter that two weeks ordinary pay in lieu of notice, plus a further three weeks ordinary pay was in full and final settlement of any employment related issues. That letter was copied to Pat Roberts at the New Zealand Building Trade Union.

Mr Wilson submitted that if there had there been any misunderstanding in relation to the full and final nature of the settlement in the matter then he would have expected an immediate response from Pat Roberts.

It was Mr Wilson's evidence that they received advice (dated 2 December 2002) that Mr Tairi was raising a personal grievance against the Bay of Plenty District Health Board on the basis of unjustified dismissal. It was Mr Wilson's evidence that a number of attempts were made to resolve the issue by Mr Tairi's solicitors. However, the Board has resisted these attempts as it is in the firm belief that the money paid to John on 22 November 2002 was in full and final payment of all employment related issues.

It is on that basis that the Board submits that John cannot bring a personal grievance against the Board because he received a full and final settlement, which was paid on 22 November 2002.

It submits that Mr Tairi's claim should be struck out.

Relevant Documentation

On 21 November 2002 the Board wrote to Mr Tairi and copied the letter to Pat Roberts at the New Zealand Building Trades Union. In that letter written by Alan Wilson stated:

“Your final pay shall be deposited directly in your bank account on Friday. Your final pay shall be made up as of the following:

- *Back payment to your commencement date of 22 April 2002, of the difference between Grade 5 and Grade 8 in recognition of the production of your Advanced Trade Certificate qualification. This payment will be based on the rate for Grade 8 as printed in the Expired Trades, Stores, Drivers and General Services Collective Employment Agreement (1 March 2001 – 31 August 2002) on which your individual employment agreement is based;*
- *Your normal pay up to and including Friday 22 November;*
- *Two week ordinary pay in lieu of **notice plus a further three weeks ordinary pay as full and final settlement of any employment related issues as agreed with your Union representative (Pat Roberts, New Zealand Building Trades Union);*** (Emphasis mine).
- *Any outstanding leave owing.*

Your final pay slip will be forwarded to you on Friday”

On 27 November 2002 Mr Tairi took advice from Ms Burley, a legal practitioner in Tauranga. On 2 December 2002 Ms Burley wrote to the Bay of Plenty District Health Board for the attention of Alan Wilson. That letter stated:

“We act for John Tairi. We have your letter dated 21 November 2002 dismissing Mr Tairi from his employment with Bay of Plenty District Health Board in his position as carpenter which commenced on 22 April 2002.

On behalf of Mr Tairi we advise that pursuant to this letter he raises a personal grievance against Bay of Plenty District Health Board pursuant to s.103 (1)(a) of the Employment Relations Act 2000 for an unjustifiable dismissal on 21 November 2002.

Mr Tairi’s personal grievance of unjustified dismissal is both there being no substantive justification for his dismissal and that the procedure employed by Bay of Plenty District Health Board leading to and determining in his dismissal was unfair and flawed.

We look forward to hearing from you as a matter of urgency in relation to the above grievance before our client determines how to proceed.

Should you wish to discuss the matter please refer to contact me”.

On 4 December 2002 Mr Wilson replied to the above letter. In that letter he said:

“Thank you for your letter dated 2 December 2002 advising us that you are acting for John Tairi in the matter of the personal grievance he has raised with the Bay of Plenty District Health Board.

It is our belief there was substantive justification for Mr Tairi’s dismissal and that it was carried out in a procedurally fair manner.

Our preference therefore would be to proceed directly to a mediation should your client decide to pursue this matter further”.

The parties attended mediation on 19 February 2002. The issues between the parties were not resolved and following mediation Mr Wilson wrote to Mr Tairi's representative Kavita Suri-Clark at Nikki Burley's office. That letter was dated 28 February and it read:

"I refer to the mediation hearing on 19 February 2003 which was attended by myself, Colin Gauld, Ray Ferguson and Sharon Stephenson from Bay of Plenty DHB. I also refer to the letter dated 21 November 2002 to John setting out the details of his dismissal and the terms and conditions of the termination. I attach a copy of this letter for your information.

You will note that John was offered a payment in full and final settlement of any employment relationship issues. This was accepted by your client on this basis. It was a final and binding settlement. Accordingly there are no outstanding issues for resolution, nor any basis upon which your client can properly seek compensation

Accordingly we are treating this matter as at an end".

Over the ensuing months there were discussions and communications between Ms Burley's office and Mr Roberts relating to the status of the agreement reached on 20 November 2002. On 3 February 2004 Mr Roberts issued the following written statement. It is not addressed to anyone.

"Statement of Claim – Pat Roberts

- 1. I reiterate no full and final settlement was negotiated between the NZ Building Trades Union and the Tauranga Hospital Board on behalf of Mr John Tairi.*
- 2. I told the Human Resource Manager in one of the buildings corridor that as far as the Union was concerned the offer by the Tauranga Hospital Board was as far as the Union was prepared to negotiate and if John Tairi wished to pursue the matter further he was free to do so through the Mediation Service.*
- 3. I cannot recall receiving a letter sent by the Tauranga Hospital Board to the Union claiming it was in full and final settlement nor can I find it in the file.*
- 4. Neither John Tairi or myself at any stage accepted the offer from the Tauranga Hospital Board as a full and final settlement.*
- 5. Neither John Tairi or myself at any stage signed a document to say that it was a full and final settlement which would have only taken a few minutes to prepare by the Hospital Board."*

Discussion and Findings

Unfortunately the agreement reached between Mr Roberts and Mr Wilson was not reduced to writing and signed by both parties. That is not fatal to a finding there has been accord and satisfaction and my determination will have require me to first make findings as to what the discussions between Mr Roberts and Mr Wilson were about and what they agreed to (to be inferred from their discussions and conduct at the time as disclosed by the evidence).

In arriving at findings and a determination in this matter I have had regard to the evidence, submissions of the parties, statutory provisions and relevant case law including (among others) *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206; *Cabletalk Astute Network Services Ltd v*

Cunningham [2004] 1 ERNZ 506. I have also had regard to the findings in Wilson & Horton and Anor v Eyre CA 40/67 (cited in Marlow above). There are some parallels between that case and this in that the respondent Mr Eyre denied giving counsel instructions to settle his libel action and denied the applicant's claim there had been a binding and final settlement in the matter. I also note the principle stated in that decision.

"If, whatever a man's real intention may be, he has so conducted himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Smith v Hughes (1871) LR 8 QB 597 Blackburn J at 607.

Mr Wilson was the only person party to the discussions on 20 November 2002 who was available to give evidence to the Authority. As noted, Mr Roberts died in November 2005.

I found Mr Wilson to be a most credible witness.

On the other hand I found the Tairi's to be credible witnesses and Mr Roberts's written statement of 3 February 2003 is consistent with their position.

Noting the parties were poles apart on the issue in question and searching to identify any source of misunderstanding between the parties I noted (during the investigation meeting) a postscript to the notes of the meeting on 20 November 2002. That postscript read: "*Note: Pat Roberts BZBT(sic) agreed not to pursue mediation if we agreed to a paying (sic) John an extra 5 weeks pay*".

I put it to Mr Wilson that Mr Roberts had communicated that *the Union* would not pursue a grievance in return for notice plus three weeks pay while leaving it open for Mr Tairi to pursue a claim himself. Mr Wilson said he would have laughed at such a suggestion and would not have entertained it.

Findings

Sections 18 (3) & 236 of the Act together provide that an employee may authorise a Union to represent him or her in relation to their individual employment rights. It is not in dispute that NZ Building Trades Union was authorised to represent Mr Tairi in the disciplinary proceedings he faced in October and November 2002 and in the discussions which followed the meeting of 20 November.

It is a cornerstone of the Act that parties to employment relationships must deal with each other in good faith and must not whether directly or indirectly, do anything to mislead or deceive each other or that is likely to mislead or deceive each other (S.4 (1)(a)&(b)). Employment relationships bound by the good faith provisions of the Act include those between employer and employee, a union and an employer and a union and its members.

I find that following the meeting between the parties on 20 November 2002 where the Board's intention to terminate Mr Tairi's employment was communicated, there was a meeting between Mr Roberts and Mr Wilson (with his HR advisor). At that meeting Mr Roberts expressed concern that it was proposed to terminate Mr Tairi's so close to Christmas noting it would be difficult for him to find a new job. He asked for more termination pay. In response, I find that Mr Wilson agreed to a payment of three weeks pay over and above Mr Tairi's contractual entitlement to two weeks notice. This payment was tagged to an acceptance that it represented a full and final settlement of all employment related matters between the parties.

I find this was agreed to by Mr Roberts. I find further, that Mr Roberts did not communicate to Mr Wilson that the settlement was limited only to *the Union* not pursuing action on behalf of Mr Tairi leaving it open for Mr Tairi to take action himself. I find that Mr Wilson would not have accepted such a proposal had it been made.

If Mr Roberts harboured a view that the settlement was limited to the Union not taking action for Mr Tairi leaving Mr Tairi free to take action himself it is not a position that can be supported by the Authority. Mr Roberts acting as Mr Tairi's agent reached an agreement on the termination of Mr Tairi's employment to conclude all matters between the parties. To find otherwise would offend against the good faith provisions of the Act with govern relationships between parties. It would also be inconsistent with the principle stated in *Smith v Hughes* cited above.

These findings should not be taken as criticism of the NZ Building Trades Union or Mr Roberts who could not be heard on the matter. It could be the case that Mr Roberts was mistaken in his view of the settlement and Mr Tairi's rights after agreement was reached between himself and the Board.

Conclusion

Given the Union's authority to reach agreement on Mr Tairi's behalf, the subject of the discussions between Mr Roberts and Mr Wilson and the fact that agreement was reached between Mr Roberts and Mr Wilson on terms which included payments in excess of Mr Tairi's contractual rights on termination (terms which were complied with by the Board), I find that Mr Roberts and Mr Wilson reached an agreement on 20 November to resolve all employment related matters between the Board and Mr Tairi.

If there were any doubt on the matter the situation was made crystal clear in Mr Wilson's letter to Mr Tairi that he accepts he received on Saturday 23 November. In that letter Mr Wilson confirmed Mr Tairi's termination and the agreement reached. He stated that Mr Tairi's final pay would be made up of a number of elements including:

“Two weeks ordinary pay in lieu of notice¹ plus a further three weeks ordinary pay as full and final settlement of any employment related issues as agreed with your representative (Pat Roberts, New Zealand Building Trades Union)”.

That letter was copied to Mr Roberts. Mr Roberts could not later recall the letter. In any event Mr Tairi and his wife met with his new legal advisor on 27 November where this issue was specifically raised. Mr Tairi's evidence was that he told Ms Burley the statement that the payment of 3 weeks pay was in full and final settlement of employment related issues meant nothing to him. He advised her that the Union had told him he had been wrongfully dismissed and that he could take it further. All this demonstrates that both Mr Tairi and his new advisor (and possibly Pat Roberts) were aware (at the latest by 27 November 2002) that the sum paid to Mr Tairi on termination included a sum in consideration of a full and final agreement of all matters relating to the employment. If that was not the Tairi's understanding or that of Mr Roberts or Ms Burley (on their instructions) then it was incumbent on one of them to make that clear by immediately writing or otherwise communicating with the Board with Mr Tairi writing out a cheque for the three weeks pay and returning it to the Board. That was not done and the Board was entitled to take the acceptance of the payment as confirmation of the agreement reached.

I have considered whether the Board's failure to point out the full and final nature of the settlement in its letter to Ms Burley of 4 December amounted to the Board accepting a submission of

¹ The contract provided for 2 weeks notice on termination.

grievance. I find not. Firstly the agreement in accord and satisfaction had been paid and accepted by that time and secondly the Board has held throughout that full and final agreement had been reached with the Union on behalf of Mr Tairi. The Board cannot be condemned for agreeing to meet with the applicant in mediation to explain its position to him and his new representative.

Determination

The agreement reached between Bay of Plenty District Health Board and Mr Roberts on behalf of Mr Tairi was an agreement in accord and satisfaction in relation to all matters relating to Mr Tairi's employment with the Board and the termination of his employment. The accord was the agreement itself and the satisfaction was the consideration of three weeks pay over and above Mr Tairi's contractual entitlements on termination.

That being the case the Authority declines to consider the substantive claim lodged by Mr Tairi that his dismissal was unjustified.

Costs

Costs are reserved. The parties are requested to attempt to resolve the issue of costs between them. If they are unable to do so they are to file and serve submissions to allow the matter to be determined.

|
Janet Scott
Member of Employment Relations Authority