IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 2
5357633

	BETWEEN	DOUGLAS EVANS Applicant
	AND	BUILDING CONNEXION LIMITED t/a ITM Respondent

Member of Authority:	David Appleton
Representatives:	Douglas Evans, in Person Kay Chapman, Advocate for Respondent
Investigation Meeting	12 December 2011 at Nelson
Submissions Received:	12 December 2011 from Applicant 12 December 2011 and 23 December 2011 from Respondent
Date of Determination:	10 January 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

A. The Applicant did not agree to a full and final settlement of all matters relating to his employment and accordingly his personal grievance may proceed.

B. Costs are reserved

Employment relationship problem

[1] Mr Evans has raised a personal grievance that he had been harassed in the workplace, giving rise to a disadvantage claim; that his employment agreement had been breached and that he had been constructively dismissed from his employment.

[2] The respondent, apart from denying the allegations in general terms, asserted that Mr Evans had no right to raise a personal grievance on the grounds that he had signed a binding agreement in full and final settlement of all matters connected with his employment, thereby precluding him from raising a personal grievance.

[3] The purpose of the Authority's investigation meeting was to determine as a preliminary matter whether or not Mr Evans had signed a settlement agreement which had the effect of settling all matters arising from the employment.

The facts

[4] Following a period of absence caused by sick leave after a non work related injury to his back, Mr Evans resigned his employment by way of an email on Monday, 4 July 2011 by giving 4 weeks' notice as required by his employment agreement. When asked by his manager where he was going, Mr Evans stated that he was intending to work for one of the respondent's main competitors. This caused the respondent some anxiety as Mr Evans worked as a Frame and Trusses Detailer, entailing the pricing of building components, which, in the respondent's view, involved commercially sensitive information. The respondent did not wish Mr Evans to work out his notice while working as a detailer in case he conveyed commercially sensitive confidential information to the respondent's competitor when he commenced working for them. Accordingly, the respondent decided to require Mr Evans to spend his notice on duties other than detailing.

[5] The respondent was entitled to vary Mr Evans' duties pursuant to clause 3.3 of his employment agreement, which stated:

> *We may vary your duties where it becomes necessary in the interests of the Company. No variation will take place without prior discussion with you, and any variation will reasonably take into account the position and your skills. In addition [to the responsibilities set out in the position description] you shall carry out all reasonable and lawful work-related requests and instructions made by us from time to time.*

[6] I am satisfied that this clause entitled the respondent to engage with Mr Evans about changing his duties at the time.

[7] The problem encountered by the respondent in achieving a change of duties for Mr Evans was that the respondent had received medical certificates from Mr Evans' GP which appeared to prevent Mr Evans from carrying out a wide range of the duties otherwise available in the respondent company; namely mainly manual duties which Mr Evans had been advised he was unable to carry out due to his back problem.

[8] The evidence before the Authority from both parties seemed to agree that, apart from Mr Evans' own job as a detailer, which the respondent did not wish Mr Evans to continue doing, there were few other duties available which Mr Evans could have carried out during his notice period without the risk of harm to his back injury. There was disagreement between the parties as to whether the respondent had offered Mr Evans the job of pricing items in its retail department or of supervising staff. Mr Evans' evidence was that the only jobs offered to him were those of a manual nature, which he had been unable to carry out and so had had to decline. He says that he would have accepted pricing and supervisory work had it been offered. The respondent's evidence was that Mr Evans had refused to carry out any other duties, including those which did not involve a manual element.

[9] On a balance of probabilities, I prefer the evidence of Mr Evans on this matter, for the following reason. The respondent had argued in evidence that the doctor's certificates had prevented Mr Evans from carrying out even sedentary work because of restrictions on sitting, twisting and bending. This evidence does not fit with an assertion that it had tried to offer Mr Evans work which it says it believed Mr Evans could do, such as pricing retail items or supervising. I do not believe the respondent would have offered Mr Evans pricing or supervisory work whilst at the same time believing that Mr Evans' medical restrictions prevented him carrying out sedentary work.

[10] On Tuesday, 5 July 2011, a meeting took place between Mr Evans, Mr Rodney Woolfe, a director of the respondent, and Mr James Heckler, the respondent's Frames and Trusses Manager, to whom Mr Evans reported. How that meeting was conducted was a matter of intense disagreement between Mr Evans and the respondent. However, it was common ground that the outcome of the meeting (which included an adjournment of between 45 minutes and 1½ hours), was that a document had been signed by Mr Woolfe and Mr Evans, which stated the following:

> *Dear Doug,*
>
> *Following on from verbal discussions today the 5th July 2011 between Rodney Woolfe and yourself, Building Connexion Limited has agreed to accept from you a reduced termination notice period of two weeks – effective from the 4th July 2011.*
>
> *At the conclusion of business on Friday 15th July 2011 your employment with our company will cease. At that time we will pay out your accumulated annual leave entitlement.* [Added in

> manuscript were the words: *you will be paid two weeks normal pay over this period*.]
>
> *This is a full and final settlement of your employment arrangement with Building Connexion Limited.*
>
> *Yours sincerely*
> *Rodney Woolfe*
> *Group Operations Manager*
> *Building Connexion Limited*
>
> *Signed in acceptance Douglas Charles Evans*

[11] Although Mr Evans had dated the agreement 4 July 2011, he accepted that he must have made a mistake in that respect and that it should have been dated 5 July 2011.

[12] It is Mr Evans' evidence that, during the meeting of 5 July which resulted in him signing this agreement, Mr Woolfe had informed him that Mr Woolfe would not give him a reference and that he would see to it that Mr Evans would never work for an ITM franchise in New Zealand, saying that he *would see to it*. Mr Evans asserted that the respondent would not offer him any work that he could do and it would not pay him his one month's notice. Mr Evans stated that Mr Woolfe had also said that he would not pay Mr Evans his holiday pay until Mr Woolfe had talked to his lawyers.

[13] Mr Evans said that he had been feeling pressured and bullied, had not been asked if he wanted a representative present and had only been given 10 minutes' notice of the meeting.

[14] Mr Evans' evidence continued that he had mentioned in his meeting with Mr Woolfe that he may raise a complaint about alleged breaches of health and safety on site and that Mr Woolfe had replied *good luck with that* and had said that he would not pay out one month's notice but that, as he legally had to give Mr Evans two weeks' notice to make him take his holidays, he would pay him two weeks' wages and then his holiday pay.

[15] Mr Evans states that when the written agreement had later been produced to him by Mr Woolfe, the wording had not been as they had discussed and he had had to get Mr Woolfe to write in manually a sentence relating to the holiday pay. Mr Evans also complained that he had not been given a chance to seek legal advice on the contents of the agreement, nor on Mr Woolfe's assertion that he would not pay out

Mr Evans' holiday pay unless Mr Evans signed the agreement. Mr Evans also asserted that Mr Woolfe had said that it was *now or never*, thereby putting pressure on Mr Evans to sign the agreement.

[16] Mr Evans accepts that the settlement agreement binds him with respect to receiving two weeks' pay and holiday pay as detailed in the agreement, but denies that he had intended to settle any other claims including claims for harassment or alleged breaches of health and safety. His evidence was that no one explained to him what the words *full and final settlement* meant.

[17] Mr Evans stated that he put in a claim to the company by way of an email dated 19 July 2011, 14 days after he had signed the settlement agreement, because the health and safety and HR manager, Peter Rutherford had advised him prior to him signing the settlement agreement that he should put his health and safety complaint in writing.

[18] The respondent's evidence with respect to the meeting on 5 July is quite different from Mr Evans'. Mr Woolfe stated in evidence that he had told Mr Evans that making allegations of breaches of health and safety would make it difficult for Mr Evans to find another job because it was a small industry and Nelson was a small place. He said that he had told Mr Evans that he wanted him to be able to leave the company with his head held high and that he wanted to give him a reference. He denied that he had said that he would see to it that Mr Evans would never work for an ITM franchise in New Zealand again.

[19] Mr Woolfe stated that, having heard from Mr Evans that he only wanted to do his usual job and could not do anything else, he suggested to Mr Evans that he should put himself back on ACC for his notice period to get himself right before he started his new job. He stated that Mr Evans had at that point broken down, saying that he had not been getting paid ACC and that ACC were investigating him. (Mr Evans strongly denied that he had broken down.)

[20] Mr Woolfe stated that he had then suggested that Mr Evans work for two weeks in sedentary work and then take leave for two weeks as he had 18 days' leave owing and that the company could require him to take leave by giving him 14 days' notice. Mr Woolfe said that Mr Evans had replied that he could not do any of the

work that had been suggested, including the sedentary work. Mr Woolfe denied that he had stated that he would not pay Mr Evans the annual holidays he was owed.

[21] Mr Woolfe then gave evidence as follows:

> *I said to him, "how does this sound for an idea. I would have to get it checked out by the HR team, but this is my idea. Keeping in mind you are saying you are unable to work your four weeks notice, that we pay you out two weeks pay and then you get paid your holiday pay".*

[22] Mr Woolfe's stated rationale was that, as Mr Evans had been saying that he was unable to carry out any work available within the company, save for his usual work, and the company had been unwilling to allow him to carry on doing that normal work, the respondent had not been obliged to pay Mr Evans anything during his 4 weeks' notice. Therefore, offering him two weeks' pay would constitute legal consideration for Mr Evans waiving any claims arising out of his employment.

[23] Mr Woolfe asserted that he had explained to Mr Evans on at least two occasions the meaning and effect of the words *full and final settlement*, and that Mr Evans had appeared to fully understand and accept those terms and effect. Mr Woolfe stated that Mr Evans had been pleased to be able to *get on with his life*.

[24] Mr Woolfe accepted that Mr Evans had not had a representative present when he had been in the meeting nor when he had signed the agreement. Mr Woolfe stated, however, that Mr Evans had been speaking about having already sought advice from a lawyer with respect to the alleged health and safety breaches, and that Mr Woolfe had suggested to Mr Evans that he seek legal advice whilst the letter of agreement was being drawn up by HR.

[25] It was Mr Evans' evidence that he had not been asked to seek legal advice, and that he had, in any event, only been given around 45 minutes maximum whilst the letter was being drawn up, that he had no money to ring a lawyer and that any lawyer would not have been available at such short notice. He did agree that he had not asked for any further time.

The law

[26] The respondent relies on the principles of *accord and satisfaction* to argue that Mr Evans is estopped from bringing his personal grievance in the Authority and the courts.

[27] The principles of accord and satisfaction were set out in the Employment Court case of *Harris v Birchwood Farm Holdings Ltd* [2002] 2 ERNZ 392, and applied in the later Employment Court case of *Graham v Crestline Pty Ltd* [2006] 1 ERNZ 848. *Graham* summarised the principles as follows:

> *There must 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 in satisfaction of the claim.*

[28] In this case, there was clearly a dispute between the parties. The issue to determine is whether there was a genuine meeting of minds between Mr Evans and the respondent that Mr Evans would extinguish all of his rights arising out of his employment relationship with the respondent in consideration for 2 weeks' notice and the payment of holiday pay.

[29] Some light can be shed on what is meant by a meeting of minds by considering Goddard CJ's words in the Employment Court case of *McHale v Open Polytechnic* [1993] 1 ERNZ 186, when he identified an essential ingredient of a settlement between an employee and an employer as follows:

> *It has to be remembered that the onus lies on the respondent and that 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 a mixed question of fact and law. One factual element is whether the appellant received competent independent advice: it is not enough that he was seeing lawyers and medical specialists. What information were they given? Did they advise him, as they should have, that he was not obliged and that it was not in his interests to sign? Even if they did, that may not be conclusive against him: Contractors Bonding Ltd v Snee [1992] 2 NZLR 157, a case which is also authority for what I should like to think is the obvious proposition that analysis of all the facts is necessary.*

This case predates the statutory concept of good faith but identifies that a necessary ingredient for accord and satisfaction to be proven is the parties' *willing and informed assent to the settlement,* and that one factual element to consider in answering that question is whether the employee received competent independent advice. For the reasons I set out below, I am not satisfied that Mr Evans gave his willing and informed consent to extinguish all his employment rights, including the right to raise a personal grievance in respect of alleged harassment.

Findings

[30] I will firstly deal briefly with the assertion that Mr Evans entered into the settlement agreement under duress or that he was unduly influenced to do so. As Ms Chapman submits, the test of proving duress and undue influence are very high, and I heard no cogent evidence to suggest that there was duress or undue influence in the legal sense of those expressions.

[31] With respect to the conflicting evidence concerning what was said at the meeting of 5 July, I prefer the evidence of Mr Evans that it was not explained to Mr Evans what the meaning and effects of the words *full and final settlement* were and that he had not been told to seek independent legal advice before signing the agreement.

[32] One reason for my preferring Mr Evans' evidence is that both Mr Woolfe and Mr Heckler gave evidence that Mr Evans' doctor's certificates were contradictory but appeared to prevent Mr Evans from carrying out any work of any kind in any event during his notice period. This interpretation does not appear to be credible if they had been reading the certificates in good faith. Whilst an ARC18 form dated 4 July 2011 presented by Mr Evans did state c*laimant unable to resume any duties at work from 04-07-2011 for 30 days*, it also stated *sedentary duties only. No manual labour. No heavy lifting as above.*

[33] Mr Evans' GP had also written a letter dated 4 July 2011 to clarify the meaning of the ARC18 certificate which had stated:

> *Doug is fit to return to work normal hours today. He is unfit for any duties as stipulated on the form including heavy lifting, repetitive movements, twisting etc for 30 days.*

[34] It is my view that the ARC18 form, when read together with the doctor's letter of the same date, clearly allowed Mr Evans to do sedentary duties for the following 30 days. It is my belief that Mr Woolfe and Mr Heckler were disingenuous in their assertions that they had believed that the certificates essentially prevented Mr Evans from carrying out any work. This calls into question their credibility when they assert that Mr Woolfe had fully explained to Mr Evans the effect of the words *full and final settlement* and had told him to seek independent legal advice.

[35] That finding means that the essential ingredient identified by Goddard CJ in *McHale* for Mr Evans to have entered into the settlement agreement with his *willing and informed assent* has not been satisfied. I do not believe therefore that there had been a meeting of minds to the extent that Mr Evans intended all of his employment rights to be extinguished in return for 2 weeks' pay when he signed the agreement.

[36] In addition, Mr Evans' email of complaint dated 19 July 2011 contains a detailed complaint, but makes no reference to the settlement agreement, or of him having changed his mind about having compromised his employment rights. I believe that this is consistent with Mr Evans believing that the only effect of the agreement was that he was to receive two weeks' pay instead of four weeks' and not that he had settled all matters arising out of his employment.

[37] Even if it were the case that Mr Woolfe had explained to Mr Evans that the settlement agreement was to be in full and final settlement of all matters arising out of his employment, I am troubled by the fact that the meeting had been called without Mr Evans having had a representative or support person with him when he signed the agreement. Even if Mr Woolfe had encouraged Mr Evans to seek legal advice on the settlement agreement, given the respondent's intended effect of that agreement, that it was to extinguish all of Mr Evans' rights arising out of his employment relationship with the respondent, including the right to raise a personal grievance and to pursue a personal grievance in the Authority and/or the Employment Court, it is my view that the respondent was under a duty deriving from s. 4 of the Employment Relations Act 2000 to take reasonable steps to ensure that Mr Evans was not disadvantaged by the proposal and was fully informed of his rights by an independent person.

[38] Section 4 of the Act requires the parties to an employment relationship to deal with each other in good faith and to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. Talking to an employee about the termination of that employment relationship, and the extinguishing of all his rights inherent in it, requires, in light of the s. 4 duty to maintain a productive employment relationship, a particularly high level of care to ensure that there is a level playing field between the employer and the employee. This concept of a level playing field is recognised in the Employment Relations Act 2000 at s. 3(a) (ii), when it states that the object of the Act is to build productive employment relationships through the

promotion of good faith in all aspects of the employment environment and of the employment relationship by, inter alia, acknowledging and addressing the inherent inequality of power in employment relationships.

[39] In my view, in a situation where the respondent sought and obtained advice from their own HR adviser, but Mr Evans did not seek any advice (and had little time to do so), s. 4 of the Act required the respondent to take greater pains that it did to encourage and facilitate Mr Evans to obtain competent independent advice in respect of the draconian effect of the settlement agreement in extinguishing Mr Evans' rights *in toto*.

[40] I accept the submission of Ms Chapman that an employee could halt a legitimate attempt to mediate or settle an employment dispute if the law required an employee always to have an adviser present when a full and final settlement was proposed, by simply refusing to do so. That is not what the law requires however. I do believe that the s. 4 duty requires the employer to take reasonable steps to ensure that the employee takes independent advice before signing away all his rights. What is reasonable will depend on all the circumstances of each case. In this case, I would have expected the respondent to have given a draft copy of the agreement to Mr Evans and to have advised him to take it away and show it to his lawyer or other adviser to get advice on its terms and effects. The respondent may also have found it prudent to have repeated that advice in writing in an accompanying letter. Having been afforded a reasonable and unrushed opportunity to get independent advice, if Mr Evans had chosen to decline it, and had signed the agreement, I would have considered that the respondent would have fulfilled its s. 4 duty. I would also have been much more likely to have found that Mr Evans had entered into the agreement with his willing and informed assent.

[41] The respondent's advocate made submissions that, having given Mr Evans an opportunity to seek legal advice, the respondent's duty stopped there. She drew an analogy with the situation where an employee undergoing a disciplinary process cannot say that a dismissal is unjustified if, having been given the opportunity to have a representative or support person present, he or she declined that opportunity. She also drew my attention to the case of *Alofa v Aotea Centre Board of Management* [2001] AC50/01 in which Travis J held that *the respondent did not have a duty to ensure that the appellant had arranged adequate representation for himself at the*

disciplinary meeting. Provided it was pointed out to an employee that there was a right to be represented, as was done here, it was then up to the employee to arrange appropriate representation and the employee could not be heard to complain if that representative failed to undertake the task properly.

[42] It is my view, however, that one must distinguish between the situation of a disciplinary meeting and a meeting at which the employer seeks to have the employee sign away all his rights deriving from the employment agreement. In a fair disciplinary process, the employee will have been warned well in advance of the disciplinary meeting of its possible consequences. Even then, after dismissal the employee would have the chance to raise a personal grievance, and pursue his or her grievance in the Authority and the higher courts. In this case however, even on the respondent's own evidence, Mr Evans had been advised little more than an hour and a half before he had signed the agreement that it was to extinguish all his rights as an employee.

[43] Another perspective on this matter is the common practice for settlement agreements to be sent to the Department of Labour's Mediation Services pursuant to s.149 of the Employment Relations Act 2000. Section 149 requires the mediator, before signing the agreed terms of settlement, to explain to the parties the effect of s.149(3) and to be satisfied that, knowing the effect of that subsection, the parties affirm their request. Section 149(3) provides that, following that affirmation, the agreed terms of settlement will be final and binding on, and enforceable by the parties.

[44] The respondent accepts that the settlement agreement dated 5 July 2011 had not been sent to the Mediation Service and that, therefore, the Mediation Service had not explained to Mr Evans the effect of signing the agreement. Whilst I accept the submission of the respondent's advocate that a settlement agreement can be binding on the parties even if it is not ratified by the Mediation Service pursuant to s. 149, I raise this as an example of the statutory recognition given to the importance of ensuring that the parties fully understand the effect of the agreement they are entering into.

[45] Given the statutory protections enshrined in s.149 of the Act, the requirements of s. 4, and the principles expressed in McHale, it is my view that the Authority must be extremely cautious before accepting that an applicant has readily signed away all

of his rights in respect of his employment when he had not had a reasonable opportunity to take competent advice on the effects of so signing, had been given little time to obtain that advice and, on his evidence, did not understand those effects.

Conclusion

[46] For the reasons I set out above, I am not satisfied that Mr Evans gave his willing and informed consent to extinguish all his employment rights, including the right to raise a personal grievance in respect of alleged harassment. I believe that the effect of the settlement was limited to Mr Evans agreeing to take 2 weeks' pay for his 4 weeks' notice period together with his accrued holiday pay.

[47] Accordingly, I find that Mr Evans is permitted to continue his claim of constructive dismissal against the respondent and a Directions Conference will be set down in due course in order to progress the matter.

Costs

[48] Costs in this matter are reserved. It is noted that Mr Evans has applied for legal aid and is awaiting a determination on that matter from the Legal Aid Office.

David Appleton
Member of the Employment Relations Authority