

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 325
3093154

BETWEEN

LAYTON EVENSON
Applicant

AND

GISBORNE ENGINEERING LIMITED
Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Ira White, advocate for the Applicant
Juane van Vuuren, advocate for the Respondent

Investigation Meeting: On the papers, with input up to and including 31 July 2020

Date of Determination: 18 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Layton Evenson signed a record of settlement (ROS) under s 149 of the Employment Relationship Act 2000 (the Act) on 11 December 2019. The ROS had been signed by Gisborne Engineering Limited (GEL) on 9 December 2019 and the ROS was signed by a mediator from Ministry of Business Innovation and Employment (MBIE) on 11 December 2019.

[2] The ROS was signed as a full and final settlement of all matters between the parties arising out of their employment relationship. The agreement in paragraph 6 went on to provide:

For the avoidance of doubt, the terms of the agreement, including waiving Layton's debts to GEL are in full and final settlement of any claims whatsoever that either party has against the other or in future may have against the other (including any associated or related entity to the company and their respective officers, directors and/or employees) whether arising out of the employee's employment or pursuant to statute, by way of contract or otherwise ...

[3] In other words, the ROS was a comprehensive full and final settlement of all matters between the parties.

[4] Mr Evenson claims that GEL has breached clause 3 of the ROS which provides:

Upon execution of this agreement by both parties and within 48 hours of certification by the mediator, GEL will ensure Layton and his partner Tamara may collect their belongings from the container at GEL's premises. If the aforementioned signing by both parties and certification by the mediator has taken place, Layton and Tamara may remove their belongings, under GEL supervision, on Thursday 12 December at 12:00 o'clock midday.

[5] Specifically, Mr Evenson claims GEL breached the ROS by removing his items from the container and placing them by the gate. He reads clause 3 of the ROS as requiring GEL to leave the items in the container so he could collect them from the same. Further, he says his items were damaged by this action of GEL and claims damages in respect of this of some \$9,830.92. He further claims costs of assessing the damages, of some \$1,500 plus GST.

[6] The parties have agreed that the Authority would deal with this matter on the papers. Both sides filed briefs of evidence and submissions.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[8] The essence of Mr Evenson's claim is that when he arrived on 12 December 2019 to uplift his items, he found they had all been stacked on to pallets and left at the front of the carpark. He states that this was not what was agreed to. He states that his possessions had been damaged because of exposure to rain, mud and had been gouged.

[9] Mr Evenson's partner Tamara Toon also gave evidence that upon arriving at their home items were so damaged that a number had to be dumped. They had either suffered water damage or had been broken. Photographic evidence was submitted.

[10] GEL gave evidence through their production manager Natasha Carruthers and through the workshop supervisor, project manager and site health and safety representative Kevin Elvy. Ms Carruthers stated that on the morning of 12 December 2019 GEL yard was not able to accept outsiders. This was because of a health and safety notice issued some days prior. Accordingly, in order to honour the ROS, a decision was made to remove the belongings out

of the container to the front gate. She states that it only took three wooden 2.5 x 1.5 metre pallets. She states that the equipment was not damaged or soaked with water. The belongings were under tarps and placed on to a waiting crate. She points to the photographic evidence showing that the belongings were packed nice and neatly on each crate without any signs of mud or damage.

[11] Mr Elvy also confirmed the health and safety concerns. They had received a visit from Work Safe NZ Health and Safety representatives who had reviewed their workplace health and safety procedures against the requirements of the legislation.

[12] The General Manager for GEL also submitted evidence regarding the reason why items were moved out of the container to the front of the yard. Again, the driving reason was health and safety. He stated that the removal of items was not done out of spite nor bad faith but because of health and safety concerns and that reasonable steps were taken to ensure the safety of the items. In fact he said, it made collection of the items easier. He also pointed to the fact that rainfall for the entire day was some 4.1 millimetres which he said could not drench items, even more so when they were covered by tarpaulins and outside only for a very short period of time. Other witnesses gave similar evidence regarding the conditions of items the thrust of which covered the reasons they were moved and the fact that no items were damaged or broken.

Analysis

[13] Section 149(3) of the Act restricts a party's ability to revisit a settlement agreement. It provides that:

Where, following the affirmation referred to in sub-section (2) of a request made under sub-section (1), the agreed terms of settlement to which the request relates assigned by the person empowered to do so, -

- (a) Those terms are final and binding on, and enforceable by, the parties and (AB). The terms may not be cancelled under s 7 of the Contractual Remedies Act 1979; and
- (b) Except for enforcement purposes, no party may seek to bring these terms before the Authority or the Court, whether by action, appeal, application review, or otherwise.

[14] The underlying policy intention is clear. It is to facilitate the full and final settlement of employment relationship issues via a mediated process. In this case, the terms of settlement purported to cover future events.

[15] As Judge Inglis noted in *Lumsden v Sky City Management Limited*:¹

The avenues for redress post settlement are not completely cut off, as s 149 itself makes clear. Section 149(4) enables a party to seek the imposition of a penalty in respect of any established breach of a s 149 settlement agreement.

...

[16] As the ROS has been complied with to the extent Mr Evenson has uplifted his belongings, the Authority has no jurisdiction to entertain any claim for damages to the property as outlined in his statement of problem. Section 149 of the Act simply does not give it that power.

[17] The Authority however does have the power to impose a penalty on GEL if there has been a breach of the agreement.

[18] The purpose of paragraph 3 of the ROS, was to enable Layton to collect his belongings. I do not perceive there to be any particular significance in collecting those belongings from a container, as opposed from the gate.

Conclusion

[19] It seems to me there has been no breach of the ROS although if indeed items were damaged that is most unfortunate. I accept the evidence of GEL that if there was a breach (which I doubt) then it was unintentional. Certainly, there was no compelling evidence showing deliberate damage. However if there was, the Authority has no jurisdiction in respect of compensation for damages and loss. The Authority's jurisdiction under s 149 of the Act is limited to enforcing the provisions of the ROS and where appropriate awarding penalties.

[20] As I am not convinced there has been a breach of the ROS by GEL I decline to award a penalty.

Costs

[21] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority

¹ [2017] NZemPC 30 para 12.