IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 366
3024095

BETWEEN	D J LEWIS Applicant
A N D	SEALINK TRAVEL GROUP NEW ZEALAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Alex Kersjes, advocate for the Applicant Jessie Lapthorne, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	16 March, 27 April, 18 June, 24 September and 8 October 2018 from Applicant 9 March, 15 June and 1 October 2018 from Respondent
Date of Determination:	23 November 2018

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. **D J Lewis's claim of unjustified dismissal is barred by an agreement in accord and satisfaction which he reached with SeaLink Travel Group New Zealand Ltd.**

B. **Mr Lewis's claim for breach of the duty of good faith by SeaLink Travel Group New Zealand Ltd is not barred.**

C. **Costs are reserved.**

Employment relationship problem

[1] D J Lewis was employed by SeaLink Travel Group New Zealand Ltd (SeaLink or the company) for about six years prior to being made redundant. He then returned to SeaLink in 2016 and was employed for about two months. SeaLink provides ferry services in the Auckland region.

[2] In 2016 Mr Lewis was appointed as a casual procurement administrator to provide additional support as annual leave cover. This was for a fixed term from 5 May to 17 June 2016. Once Mr Lewis started work, he and SeaLink entered into another employment agreement involving a permanent procurement co-ordinator role commencing on 8 June 2016. However, after a discussion between himself and the SeaLink Chief Executive Officer Mark Gibson, Mr Lewis finished employment with SeaLink on 29 July 2016.

[3] Mr Lewis claims that he was unjustifiably dismissed. The statement of problem also alleges that SeaLink failed to act in good faith towards Mr Lewis.

[4] SeaLink denies Mr Lewis's claims. It also says that the parties reached an agreement that Mr Lewis resign from his employment and that the agreement resolved all issues between the parties.

[5] The Authority decided, with the parties' agreement, to determine on the papers the preliminary issue of whether Mr Lewis's claims are barred. The matter did not proceed in a straight-forward manner, with the Authority seeking further evidence and submissions and SeaLink obtaining representation part way through the process. I received statements from Mr Lewis and Mr Gibson.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Concerns about the job

[7] After Mr Lewis became a permanent employee, he became concerned about the stability of his role. The employee whose leave he had initially covered, was

effectively doing the same role as him and it seemed that there was not a position for both.

[8] The offer of permanent employment appears to have been on the expectation that the other employee was going to retire. Mr Lewis worried when he did not hear anything definite about the retirement.

[9] Mr Lewis had previously experienced redundancy and was anxious about it happening again. He took four days off work which he indicated to Mr Gibson, in a 19 July 2016 email, was due to symptoms related to the work situation.

[10] On 21 July 2016 Mr Lewis sought a meeting with Mr Gibson, which was arranged for the following day. Prior to the meeting Mr Lewis was told by the human resources manager that the other employee was staying on. At that point no formal restructuring proposal had been tabled.

The meeting

[11] On 22 July 2016 Mr Lewis and Mr Gibson met. The two men give inconsistent evidence about what happened there.

[12] Mr Lewis says the meeting was informal and only lasted ten minutes at most. He describes there being "no fluffing around with words". He felt the purpose of the meeting was for the CEO to tell him why there was no role and to formalise Mr Lewis's departure. He says that Mr Gibson was apologetic, outlining when Mr Lewis would be leaving and offering that he could work from home. Mr Lewis says that he did not expect Mr Gibson to say that. I find this somewhat surprising as Mr Lewis had set up the meeting because he was concerned about the security of his job.

[13] Mr Lewis says that there was no negotiation; he was just told how he would be leaving. There was no discussion about a grievance or settling any claim. Rather the discussion was just confirming his departure and what the final pay and notice would be.

[14] Mr Gibson says that at the meeting Mr Lewis said he understood the plans had changed within SeaLink and that he did not have a role within the company anymore. Mr Lewis raised concerns about a lack of clarity from SeaLink around his role and

how the longevity of his role with SeaLink had been represented to him. Mr Gibson did not agree with all that Mr Lewis said.

[15] Mr Gibson reports that Mr Lewis was concerned about how a redundancy would look and wanted to discuss how his departure would be communicated. Mr Lewis asked if they could discuss an agreed exit for him from SeaLink and said that he wanted to have a discussion about what a fair and reasonable exit from the company would look like for him.

[16] Mr Gibson was agreeable. His impression was that Mr Lewis had set up the meeting to discuss his exit from SeaLink and reach an agreement about it.

[17] The two discussed and agreed on the ending of Mr Lewis's employment with SeaLink. This involved him being paid through to the end of the following week with Mr Lewis providing a handover note, and then being paid an additional four weeks' wages on top of that.

[18] Mr Gibson says that a key issue for Mr Lewis during the meeting was the internal messaging around his departure from SeaLink. It was agreed that Mr Gibson would send an email to staff advising that Mr Lewis had resigned because the job's scope was not wide enough for his career aspirations.

[19] Mr Gibson says that he made it very clear at the meeting that any agreement reached around Mr Lewis's exit from SeaLink would need to be in full and final settlement of any claim that he might have around his employment with SeaLink. He says that Mr Lewis understood this and did not make any suggestion that the terms would be anything less than full and final settlement of all issues.

[20] Mr Gibson's view was that, as Mr Lewis had arranged the meeting and was the one who used the meeting as an opportunity to discuss an agreed exit, he was fully aware of what "full and final" meant.

[21] Mr Gibson says that he asked Mr Lewis to consider the offer at least overnight, but Mr Lewis confirmed acceptance the same day, as discussed below.

[22] The two men present somewhat different pictures of the meeting and I must decide whose version of events I find more credible. Despite having filed two statements at the Authority's request, Mr Lewis does not clearly identify how the

meeting was set up and what was said at the meeting. Mr Gibson's evidence is more cogent and is in keeping with emails between the two men, from both before and after the meeting. I prefer Mr Gibson's evidence.

Email exchange

[23] At the meeting on 22 July 2016 Mr Lewis and Mr Gibson reached an understanding regarding Mr Lewis's departure from SeaLink. Mr Gibson emailed Mr Lewis later the same day as follows:

> Further to our discussion this morning the following records our agreement.
>
> Firstly I'm sorry things have ended up this way. The lack of clarity and longevity around your role is unsatisfactory.
>
> However we do not have a role for you going forward.
>
> Despite the conditions of your employment agreement providing for 1 weeks' notice by either party; we agreed the following:
>
> - You'll be paid for your normal hours next week (week of 25 July) in accordance with your employment agreement.
> - SeaLink will pay you an additional 4 weeks' pay in accordance with your employment agreement.
> - Any company property must be returned by the end of next week – Friday 29 July.
>
> You are free to work from home next week and will supply me with a brief handover document on what you have been working on.
>
> DJ please keep in mind this is not about you or your performance. I will happily be the point of reference for any future employer to clarify why you have left.
>
> Please respond that you accept this as full and final settlement.

[24] The one week's notice appears to refer to the employment agreement's trial period which the statement of problem challenges the validity of. The agreement provides otherwise for one month's notice.

[25] Mr Lewis responded the same afternoon:

> Thanks for this confirmation.
>
> I have sent through my findings and recommendations to … this afternoon so she can present at the …meeting … Her and I have pencilled in to meet … to go over any questions she has prior to the meeting. I will forward this to you shortly.

> I will also ensure all SeaLink property is returned prior to next Friday, and in the meantime will redirect enquiries and contacts made accordingly.
>
> I completely understand the vision of the role and promises were not necessarily dealt with or communicated as they should have been, and can appreciate your position on this.
>
> As such, thank you for the gesture of your offer – to which I accept, and thank you for allowing my moving on to be as seamless as possible.

[26] Mr Lewis says that he did not give any real thought to what "full and final settlement" meant. He agrees that the contents of Mr Gibson's email above outlined the men's discussion.

[27] Mr Lewis claims that he was not given the opportunity to seek legal advice around losing his job. However, he does not dispute that Mr Gibson suggested that he take some time to consider the offer and that he did not take until the next day as was suggested to him. He had also had concerns about his position for some time but there is no indication of him seeking advice earlier.

Mr Lewis's departure

[28] Mr Gibson sent out an email in 26 July 2016 to SeaLink staff saying that Mr Lewis had resigned from his position and noting that:

> The scope of the role was not wide enough for DJ to expand his career aspirations.
>
> I wish him all the best with his future and thank him for his contribution.

[29] Mr Lewis was paid though until 29 July 2016 and also received four weeks' additional wages.

Submissions

[30] Submissions on Mr Lewis's behalf refer to the agreement reached as being in the nature of an amount of notice payment, rather than a full settlement of all matters relating to his dismissal. There is said to have been no meeting of the minds.

[31] SeaLink stresses that the approach was made to it by Mr Lewis, rather than the other way around. Also, Mr Lewis raised the possibility of a quiet and easy exit from SeaLink and valued the preferred messaging around his departure.

The arrangement

[32] The arrangement between the parties was not referred to a mediator at the Ministry of Business, Innovation and Employment. Section 149 of the Act therefore does not apply.

[33] However, there is a still a question as to whether Mr Lewis reached an agreement which bound him in such a way that he is now barred from pursuing his claims.

Accord and satisfaction

[34] Accord and satisfaction is the purchase of a release from an obligation for valuable consideration. The accord is the agreement which releases the obligation and the satisfaction is the consideration promised which is needed to make the agreement operative. The concept applies to situations involving claims, or potential claims, arising out of an employment relationship.

[35] The question of whether or not there was an agreement in accord and satisfaction reached is a factual one to be determined on the circumstances of each case.[1] The elements required to establish accord and satisfaction are:

(a) that there was a genuine dispute on foot at the time the agreement was reached; and

(b) a finding of an agreement being reached, which requires a meeting of the minds and valuable consideration, which can include the giving up of valuable rights.[2]

[36] Once an agreement in accord and satisfaction is found, there may be a question, as in this case, regarding which claims the agreement bars being pursued. The proper construction of the agreement must be determined.

[37] In *Marlow v Yorkshire New Zealand Ltd*[3] the agreement required the employee to have no claim upon the employer "in respect of your Employment Contract". The Employment Court construed that provision as covering all claims of:

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[1] *Lane v Omera Enterprises Ltd* (unrep) Employment Court, AEC 5/93, 12 February 1993, Travis J
[2] *Graham v Crestline Pty Ltd* [2002] 2 ERNZ 392 at [49] – [50]

> whatever nature and whether already commenced or only potential or inchoate but it must also be limited to claims of the existence of which both parties were aware and to claims of the nature they were discussing… The settlement cannot reasonably be taken to extend to preclude the plaintiff from making claims coming to light later out of unrelated events during the employment. [4]

[38] The consequence in *Marlow* was that the agreement reached regarding the employee's redundancy did not extend to cover her occupational overuse claim.

Dispute between the parties

[39] Firstly I look at whether there was a genuine dispute between Mr Lewis and SeaLink.

[40] Mr Lewis and Mr Gibson met on 22 July 2016 at Mr Lewis's request. Prior to the meeting Mr Lewis had raised concerns with SeaLink about his symptoms which he attributed to the workplace. At the meeting Mr Lewis expanded upon these symptoms. He also expressed his view that there was no longer a role for him within the business and mentioned representations and lack of clarity by SeaLink.

[41] I find that there was a clear dispute about the prospective disestablishment of Mr Lewis's role at SeaLink, SeaLink's representations about longevity of his role and the impact of SeaLink's actions on Mr Lewis's health.

Agreement between the parties

[42] I now look at whether an agreement in accord and satisfaction was reached.

[43] The meeting on 22 July 2016 was used by Mr Lewis as a means to air his contentions and engage with SeaLink regarding alternatives to the prospective disestablishment of his position, particularly his termination for redundancy.

[44] Having accepted Mr Gibson's evidence regarding the meeting, I find that Mr Lewis raised his concerns and proposed that they discuss whether they could reach an agreement involving a fair and reasonable exit from the company.

[45] By the end of the meeting the parties had reached a mutually agreed arrangement. Although not as formal as a usual mediated settlement agreement, Mr Gibson's email of 22 July 2016 sets out the terms of the agreement reached. He asks

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[3] *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 at p 214
[4] *Marlow* at p 214

Mr Lewis to respond that he accepts this as "full and final settlement". Mr Lewis replies by email that he accepts the offer and thanks Mr Gibson for allowing him to move on as seamlessly as possible.

[46] Mr Lewis's statements to the Authority make little reference to these emails, with Mr Lewis saying he did not give "any real thought" to the reference to "full and final settlement" in Mr Gibson's email. He did not raise any question at the time about the nature of the agreement or the condition that it was in full and final settlement.

[47] I am satisfied that, although Mr Lewis may well have been disappointed that the situation had come to this, he was a willing participant in the agreement reached. The only conclusion I can draw from the evidence before me is that Mr Lewis intended, through the agreement, to resolve matters arising from his termination. There was a meeting of the minds.

Consideration

[48] I now look at whether there was valuable consideration.

[49] I do not accept the submission on Mr Lewis's behalf that all that was agreed to was an amount of notice payment. Mr Lewis received somewhat more money than he was contractually entitled to. He was able to work from home on pay for the final week with little work actually being required by SeaLink. He had in fact completed the handover document by the time he sent his acceptance email to Mr Gibson on the Friday before the week working from home. He describes it as easy. He was paid the contractual notice period of a month's notice.

[50] In addition, Mr Lewis gained things other than money from the agreement. Mr Gibson agreed to be a referee for him in future. Having been concerned about redundancy and how that might affect him, Mr Lewis's departure was communicated to other staff as a resignation related to his career aspirations. This was an important consideration for him, as he wanted to feel in control and not feel powerless as in the previous situation.

[51] There was an agreement to purchase a release from obligations with valuable consideration provided. Accord and satisfaction is established.

Unjustified dismissal claim

[52] The question is then one of interpretation: whether Mr Lewis's unjustified dismissal claim is barred by that agreement. The agreement outlined in Mr Gibson's email simply refers to "full and final settlement" without describing what is being settled. The evidence regarding the meeting is that reference was made to any claims around Mr Lewis's employment with SeaLink and that employment coming to an end.

[53] At the 22 July 2016 meeting the parties discussed the difficulties with Mr Lewis's job continuing without the retirement of the other staff member. Prior to the meeting Mr Lewis was clearly concerned that he was going to be made redundant, which would then have given him the prospect of an unjustified dismissal claim. I consider that the reference to full and final settlement encompasses Mr Lewis's unjustified dismissal claim.

Mistake

[54] The Authority raised with the parties the possibility of one or both parties being influenced in entering into an agreement on 22 July 2016, by a mistake regarding the applicability or validity of the one week notice period in the employment agreement's trial period. The Contract and Commercial Law Act 2017 would then have been relevant. Submissions were sought and provided on this issue along with an additional statement by Mr Gibson of 1 October 2018. No additional statement was received from Mr Lewis.

[55] Mr Gibson's email of 22 July 2016 states "Despite the conditions of your employment agreement providing for 1 week's notice by either party; we agreed the following:…SeaLink will pay you an additional 4 weeks' pay in accordance with your employment agreement".

[56] As Mr Lewis had been employed by SeaLink previously, both some years before and immediately prior to signing the permanent agreement, the trial period provision was not valid.[5] However, Mr Gibson's reference to the one week notice period, which applies to the trial period, raised the prospect of the parties not being

[5] S 67A(3) of the Act defines an employee as someone who has not previously been employed by the employer.

aware of the invalidity and considering Mr Lewis to only be entitled to a week's notice.

[57] Submissions for Mr Lewis argued that Mr Gibson must have mistakenly told Mr Lewis that he was entitled to a week's notice, with the purported resulting generosity of an additional four weeks' notice payment. However, there was no evidence provided to support this proposition.

[58] By contrast, Mr Gibson provided a statement and a copy of his diary note regarding the meeting on 22 July 2016. For Mr Lewis the legitimacy of the note was questioned, given what appear to be additions to the entry, as well as its first appearance at this late juncture. Rather than delay this matter further, I have set aside the note and do not take it into account.

[59] Mr Gibson's statement however, is considered, with no evidence by Mr Lewis filed subsequently to contradict it, despite being given the opportunity to provide material in reply. Mr Gibson says that at the meeting on 22 July 2016 the two men discussed what notice Mr Lewis was entitled to and agreed that he would be paid out his four weeks (or one month) notice period in accordance with his agreement, rather than having to work his notice out. Mr Gibson did not recall any discussion regarding a one week notice period. He cannot recall why there is a reference to a one week notice period in the email.

[60] I note that the email does refer to four weeks' pay "in accordance" with the employment agreement, as well as the reference to one week's notice.

[61] In terms of the value of the agreement to Mr Lewis, Mr Gibson says that, in his view, Mr Lewis's main motivation for entering into the agreement was the messaging around his departure and that he benefited by getting the announcement he wanted and not having to work out his notice period. There was evidence from Mr Lewis regarding the importance to him of wanting to feel in control this time.

[62] SeaLink considers that the Contract and Commercial Law Act does not apply as there was no mistake.

[63] Under s 162 of the Employment Relations Act the Authority may, in any matter related to an employment agreement, make any order that the High or District Courts may make under Part 2 of the Contract and Commercial Law Act. That Act

consolidated several pieces of contractual legislation including the Contractual Mistakes Act 1977.

[64] However, on the evidence before me I am not satisfied that there was a mistake by one or both parties which influenced his or their decision to enter into the agreement.

[65] For the sake of completeness I record that, even if it had been established that there was such a mistake, there is a question as to whether the Authority could order any relief. This is based on the Court of Appeal's findings in *JP Morgan Chase Bank NA v Lewis* that the settlement agreement in that case was a new agreement, which was not an employment agreement.[6] The Authority thus did not have jurisdiction under s 161 of the Employment Relations Act and s 162 did not operate as an "independent source of power".[7]

[66] I have not heard submissions on this issue and make no finding on whether the agreement between SeaLink and Mr Lewis was a variation to the employment agreement or was a new agreement.

Conclusion on whether the dismissal claim is barred

[67] For Mr Lewis it was suggested that Mr Lewis was in a vulnerable position in terms of his health and the Authority should take into account the inequality of bargaining power between the two parties. However, the tone of and wording of Mr Gibson and Mr Lewis's 22 July 2016 emails are friendly and appreciative. Mr Lewis thanks Mr Gibson for the gesture of his offer and for allowing him to move on as seamlessly as possible.

[68] Having found that there was no mistake, I confirm that the agreement reached between the parties bars Mr Lewis from pursuing his claim for unjustifiable dismissal.

Good faith claim

[69] Mr Lewis also alleges that SeaLink breached its duty of good faith to him. The question is whether accord and satisfaction bars him from pursing that claim as well.

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[6] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255
[7] *JP Morgan Chase Bank NA v Lewis* above at [74] and [108]

[70] Mr Gibson says that at the 22 July 2016 meeting he made it clear that any agreement was in full and final settlement of any claims which Mr Lewis might have regarding his SeaLink employment and that employment coming to an end. However, the 22 July 2016 email does not refer to which claims or matters the settlement is in full and final settlement of. As described above, the parties had been discussing there not being a position available to Mr Lewis as the staff member expected to retire was apparently not doing so in the next year or so.

[71] Mr Lewis says that in August 2016, a month after his departure he saw an advertisement for what he describes as his role. He believed it to be too much of a coincidence for it not to be his role.

[72] I take it that Mr Lewis's good faith claim relates to being given incorrect or inaccurate information in relation to the other staff member's retirement. He says in his statement that on seeing the ad he found out that "they had lied to me". This claim is not something which he was aware of at the time of the agreement.

[73] A restrictive definition of what has been settled is in accordance with the contra proferentem rule that, where there is ambiguity, that is resolved against the party who put the wording forward. In this case SeaLink put the wording forward.

[74] In *Marlow v Yorkshire New Zealand Ltd*[8] the Court observed that a cause of action which was not known to exist at the time a settlement was entered into, could only be compromised by the clearest words.

[75] SeaLink submits that it would be inequitable for the Authority to carve-out claims founded in good faith and that consideration of such claims would, in any event, be a needless and costly exercise at this point.

[76] I accept that the good faith claim is related to the situation which the parties were discussing. But Mr Lewis only knew that, in his words, he had been lied to once he later saw what he describes as his job advertised. The words in the agreement here do not clearly encompass a claim which the parties had not been discussing and, in Mr Lewis's case at least, was not known about at the time of settlement.

[77] SeaLink emphasises that there is no specific cause of action pleaded regarding good faith. It is certainly true that on the current state of the pleadings there is no

[8] Above n 3

remedy sought for the breach of the duty of good faith. However, the Authority is required to resolve employment relationship problems on their substantial merits, without regard to technicalities.[9] There is the prospect of the pleadings being amended.

[78] A difficulty for Mr Lewis, as referred to in SeaLink's submissions, is whether he has any remedy available, given the prospect of a penalty claim not having been filed thus far and there being a limitation of 12 months from the date of becoming aware of an alleged breach.[10]

[79] However, these are matters which Mr Lewis will need to consider. I find, by a slender margin, that the good faith claim is not barred by accord and satisfaction.

Costs

[80] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority

[9] S 157(1) of the Act
[10] S 135(5) of the Act