IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 215
3034471

	BETWEEN	AHMED ALKAZAZ Applicant
	AND	ASPARONA LIMITED First Respondent
		DELOITTE LIMITED Second Respondent
		DELOITTEASPARONA LIMITED Third Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in person June Hardacre for Respondents
Investigation Meeting:	22 January 2019
Submissions received:	25 January 2019 from Applicant 22 January 2019 from Respondent
Determination:	11 April 2019

DETERMINATION OF THE AUTHORITY

A. The record of settlement is binding and enforceable.

B. Mr Alkazaz does not have a personal grievance for unjustified disadvantage.

C. Mr Alkazaz's application for penalties for breach of the record of settlement is declined.

D. Costs are reserved.

Employment relationship problem

[1] Mr Ahmed Alkazaz was employed by DeloitteAsparona Limited as an Oracle Education Consultant. His initial appointment was with Asparona Limited from 16 September 2013. In 2014 his employment was transferred with his agreement to DeloitteAsparona Limited. His employment relationship ended on 29 August 2016.

[2] During April 2016 DeloitteAsparona embarked on a restructuring process. The position held by Mr Alkazaz was affected by the restructuring. The parties entered into discussions about the ending of Mr Alkazaz's employment during June and July. These discussions concluded with the parties signing a record of settlement on 4 and 5 July 2016 which was signed by a Mediator employed by the Ministry of Business Innovation and Employment (MBIE) on 7 July 2016.

[3] Mr Alkazaz has applied to the Authority for a compliance order against DeloitteAsparona and has asked the Authority to impose a penalty for breaches of the Privacy Act, Human Rights Act and the record of settlement.

[4] In addition Mr Alkazaz claims one or more conditions of his employment were affected to his disadvantage during his employment by the unjustifiable actions of DeloitteAsparona and that he was unjustifiably dismissed.

[5] DeloitteAsparona denies all of Mr Alkazaz's claims. It says the record of settlement and s 114 of the Employment Relations Act (the Act) both act as a bar to Mr Alkazaz's claims for personal grievance and any claim for a penalty is also time barred. DeloitteAspanora denies the Authority has jurisdiction to impose penalties for breaches of the Privacy Act 1993 and Human Rights Act 1993 and denies it has failed to comply with any provisions of the Act.

Respondent

[6] During the course of these proceedings a question about the correct naming of the respondent arose. DeloitteAsparona Limited says it was Mr Alkazaz's employer and applied to have the first and second respondents struck out.

[7] Mr Alkazaz objected to this application.

[8] This determination confirms the oral indication I gave to the parties at the investigation meeting that at the time the events relating to this matter arose the correct employing entity was the third respondent DeloitteAsparona Limited. In a memorandum to the Authority dated 15 November 2018 Mr Alkazaz acknowledges that in November 2014 he accepted a transfer of his employment from Asparona Limited to DeloitteAsparona Limited. That was Mr Alkazaz's employer and this is consistent with the record of settlement signed in resolution of the employment relationship in 2016 which cites DeloitteAsparona as the employer party.

Issues

[9] In order to resolve Mr Alkazaz's employment relationship problems I must determine the following issues:

a) Is the record of settlement enforceable?

b) Does the record of settlement act as a bar to Mr Alkazaz raising personal grievance claims?

c) Did DeloitteAspanora breach the terms of the record of settlement and if so should penalties be imposed?

d) Does the Authority have jurisdiction to investigate and determine claims made pursuant to the Privacy Act 1993 and Human Rights Act 1993?

[10] 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 as a result. It has not recorded all evidence and submissions received.

Relevant terms of the record of settlement

[11] The record of settlement is between Mr Alkazaz and DeloitteAsparona and was signed by DeloitteAsparona on 4 July and by Mr Alkazaz on 5 July 2016. Both

parties had the benefit of legal advice during the process leading up to the signing of the record of settlement.

[12] The parties requested a Mediator from MBIE to sign the terms of settlement under s 149 of the Act. The Mediator signed the record of settlement on 7 July after satisfying himself that the parties understood that the settlement was final and binding and enforceable and affirmed their request that the Mediator signs the settlement document.

[13] Of particular relevance to this matter are clauses 5 and 8 of the record of settlement which state:

> 5. Neither party to this agreement will make any derogatory comments about the other and will not engage in any intentional behaviour connected to the other which is likely to impact negatively or cause embarrassment or distress to the other.
>
> …
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> 8. The agreement is reached in full and final settlement on all matters between the parties arising out of the employment relationship between them. Except for enforcing this agreement, neither party may take any further proceedings against the other arising from the relationship. The Employee agrees that the terms of this agreement are reached in full and final settlement of all claims he may have against the Employer, associated and related companies or any partners, officers, employees or personnel of the Company, whether arising by way of contract, statute or otherwise.

Enforceability of the record of settlement

[14] Section 149(3) of the Act states that where a settlement agreement is signed by a mediator who holds an appropriate authority from the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE), the agreed terms of settlement are final and binding, enforceable, may not be cancelled and except for enforcement purposes cannot be brought before the Authority.

[15] Mr Alkazaz has asked the Authority to set the record of settlement aside on the basis that he was under duress when he signed it. As noted by the Employment Court it is not uncommon for settlement negotiations to occur at a time of great stress, when

the employment relationship has deteriorated and working relationships have fractured.[1]

[16] For the reasons that follow I am satisfied the record of settlement was not obtained under duress. Contractual duress is the imposition of improper pressure by threats that coerce a party to enter a contract.[2] Illegitimate pressure must be exerted and that pressure must have compelled the person to enter the contract.

[17] As I understand his claim Mr Alkazaz identifies two factors giving rise to his claim of duress. These are his financial situation and that he was under undue pressure.

[18] To support his claim that he was suffering from financial distress at the time he signed the record of settlement, Mr Alkazaz has provided the Authority with emails to his manager requesting an advance on his salary. The request was declined. The declining of a request for a $2,000 advance was not an unreasonable action on the part of DeloitteAsparona and does not amount to improper pressure.

[19] Mr Alkazaz says he was under undue pressure when he signed the record of settlement. The record of settlement arose out of negotiations after DeloitteAsparona had started consultation over a proposal to disestablish of the role filled by Mr Alkazaz. In the absence of an agreed resolution DeloitteAsparona would no doubt have continued with its restructuring process. That situation is not uncommon and does not amount to improper pressure.

[20] Mr Alkazaz says that at the time the discussions took place over the ending of the employment relationship he was feeling stressed because he was awaiting the grant of a residency application and the loss of his employment meant he would lose everything he had worked for since arriving in New Zealand three years earlier.

[21] Mr Alkazaz says he asked for an opportunity to stay in his employment until his residency application had been granted but his request was ignored. He says that when he signed the settlement agreement he was under duress due to his visa situation. Mr Alkazaz acknowledges he signed the record of settlement in good faith so that he could move on and find further employment which he did.

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[1] *TUV v WXY* [2018] NZEmpC 154 at [22].
[2] *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] NZLR 463 at [19], [20] and [66].

[22] The record of settlement was negotiated through lawyers acting on instructions from their clients. While there was inherent stress involved in Mr Alkazaz's situation there was no illegitimate pressure which compelled him to enter into the record of settlement and there is no evidence of any threats made to Mr Alkazaz to coerce him to enter into the record of settlement.

[23] The terms of the record of settlement are enforceable.

Personal grievances

[24] In his statement of problem Mr Alkazaz claims he was unjustifiably dismissed and that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of DeloitteAsparona.

Unjustified dismissal claim

[25] DeloitteAsparona says the Authority does not have jurisdiction to investigate and determine any claims by Mr Alkazaz because clause 8 of the record of settlement is a bar to him raising any employment relationship problems after 7 July 2016 when the record of settlement was signed by the mediator.

[26] The record of settlement was signed off by a mediator who explained the effects of the agreement to both parties including Mr Alkazaz that its terms were final and binding. The parties have agreed that the record of settlement resolves all matters between them. This must include the ending of the employment relationship because that was expressly acknowledged in clause 1 of the record of settlement. I find clause 8 is a bar to Mr Alkazaz from pursuing a personal grievance for unjustified dismissal.

Unjustified disadvantage

[27] In his claims for unjustified disadvantage Mr Alkazaz relies on his claims of duress as well as sections 63A, 68 and 143 of the Act. I have dealt with the issues of duress earlier. Section 63A deals with bargaining for individual terms of employment. Section 68 of the Act deals with unfair bargaining and s 143 of the Act sets out the objects of Part 10 which establishes the institutions.

[28] A cause of action which was not known to the parties at the time the record of settlement was entered into may still be able to be addressed by the Authority.[3] In the particular circumstances of this case I find the prospect that Mr Alkazaz believed he had suffered a disadvantage was not in the contemplation of the parties when they entered into the record of settlement. This finding means clause 8 of the record of settlement is not a bar to Mr Alkazaz pursuing his claim for unjustified disadvantage.

[29] If I am wrong and clause 8 is a bar to Mr Alkazaz purusing his personal grievance then s 114 of the Act is. Section 114 of the Act deals with the timeframe for the raising of personal grievances in the following terms:

> **114 Raising personal grievance**
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> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
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> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[30] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[31] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.[4]

[32] Mr Alkazaz did not raise a personal grievance until he lodged his statement of problem in the Authority on 31 June 2018. At that stage he had cited Deloitte Limited as the respondent. He did not have an employment relationship with Deloitte Limited. He was employed by Asparona Limited and then DeloitteAsparona Limited. Notwithstanding the incorrect naming of the respondent, DeloitteAsparona responded

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[3] *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206.
[4] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

to the statement of problem on 15 August 2018 so it was aware Mr Alkazaz was raising a personal grievance.

[33] The alleged personal grievance relates to the actions of the parties when they entered into the record of settlement.

[34] Mr Alkazaz was legally represented at that time and he failed to raise any personal grievances within the statutory period of 90 days.

[35] For completeness I have also considered whether Mr Alkazaz would be successful in a claim for unfair bargaining pursuant to sections 63A and 68 of the Act.

Section 63A

[36] Section 63A requires employers to provide a copy of the intended agreement under discussion, advise the employee he is entitled to seek independent advice and give him the opportunity to seek that advice and consider any issues the employee raises and respond to them.

[37] Mr Alkazaz has not established any breach of section 63A in respect of the record of settlement. During the process of negotiating his exit from DeloitteAsparona Mr Alkazaz was provided a full opportunity to seek legal advice and the negotiations about the terms of the record of settlement were completed by lawyers acting under instructions for each party.

Section 68

[38] Section 68 states:

> **68 Unfair bargaining for individual employment agreements**
> (1) Bargaining for an individual employment agreement is unfair if—
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> (a) 1 or more of paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (person A); and
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> (b) the other party to the agreement (person B) or another person who is acting on person B's behalf—
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> (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or
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> (ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.

(2) The circumstances are that person A, at the time of bargaining for or entering into the agreement,—

(a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—

(i) age; or
(ii) sickness; or
(iii) mental or educational disability; or
(iv) a disability relating to communication; or
(v) emotional distress; or

(b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf; or

(c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or

(d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.

(3) In this section, individual employment agreement includes a term or condition of an individual employment agreement.

(4) Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.

[39] Mr Alkazaz has not established to my satisfaction any of the tests set out in s 68 of the Act.

Breach of the record of settlement

[40] Mr Alkazaz has asked the Authority to impose penalties on DeloitteAsparona for alleged breaches of the record of settlement. Mr Alkazaz claims DeloitteAspanora breached clause 5 of the record of settlement which states:

> Neither party to this agreement will make any derogatory comments about the other and will not engage in any intentional behaviour connected to the other which is likely to impact negatively or cause embarrassment or distress to the other.

[41] On 4 March 2018 Mr Alkazaz emailed DeloitteAsparona alleging Mr Mark Rosser, Education Manager, had made statements to third parties that were damaging to his reputation. In his email Mr Alkazaz indicates he was still investigating the extent of any comments, inquiries or communications.

[42] In April 2018 Deloitte Limited received a copy of Mr Alkazaz's CV from a recruitment company looking to place Mr Alkazaz into a vacancy at Deloitte Ltd. Mr Wong, a senior recruitment advisor for Deloitte Ltd declined to consider Mr Alkazaz for the position. In response to a request from the recruitment company for feedback on where Mr Alkazaz was lacking for the role Mr Wong referred the recruitment company to a media article published about a previous determination of the Authority regarding Mr Alkazaz and a previous employer. The email contained a link to the article and a comment that the information on the CV was inaccurate.

[43] Mr Wong had received the information about the CV from another member of the team who did not believe the CV was accurate.

[44] On 6 July Deloitte Ltd responded to allegations by Mr Alkazaz that the email to the recruitment company breached clause 5 of the record of settlement. Mr Alkazaz was told the feedback provided to the recruitment company about the inaccuracy of his CV was based on knowledge of his responsibilities during his time at DeloitteAsparona and the assessment was accurate.

[45] Mr Alkazaz believes the comment by Mr Wong that his CV was inaccurate implied he was lying and had fabricated his CV. DeloitteAsparona denies it breached clause 5 of the record of settlement when it sent the link to the article and made the comment about the accuracy of Mr Alkazaz's CV in its April email. It says Mr Wong was not an employee of DeloitteAsparona he was an employee of Deloitte Ltd and so he was not bound by the terms of the record of settlement.

[46] Derogatory is synonymous with disparaging. The Court has approved the following definition of disparage:[5]

(a) Bring into discredit or reproach upon; dishonour; lower in esteem;

(b) Degrade, lower in position or dignity; cast down in spirit; and

(c) Speak of or treat slighting or critically; vilify; undervalue, deprecate.

[5] *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30 at[36].

[47] Mr Wong was responding to an email sent to him in his capacity as a senior recruitment adviser for Deloitte Ltd. He sought advice from a member of Mr Alkazaz's team about the CV. While he may not have been aware of the terms of the record of settlement, DeloitteAsparona was bound to take steps to ensure there was no breach of the terms of the settlement.

[48] The article sent to the recruitment company was a positive article about Mr Alkazaz's success in his previous Authority case including setting out the awards made to Mr Alkazaz. I am satisfied the article was not derogatory and the sending of the link did not constitute a breach of the terms of the record of settlement.

[49] The comment regarding Mr Alkazaz's CV being inaccurate, however, was disparaging as it had the effect of discrediting Mr Alkazaz in the eyes of the recruitment company. The comment was made by Deloitte Ltd on the basis of information it believed to be accurate but was still a breach of clause 5 of the record of settlement. However, the breach was by Deloitte Ltd and not DeloitteAsparona. No penalty will be imposed against DeloitteAsparona for the breach.

[50] Mr Alkazaz says that others also provided information to his previous employer during the Authority's investigation into his claim that he had been unjustifiably dismissed by that company. Mr Alkazaz has failed to establish that any such breaches occurred.

Privacy Act and Human Rights Act

[51] The Authority does not have any jurisdiction to investigate and determine claims under the Privacy Act or the Human Rights Act. The Privacy Commissioner wrote to Mr Alkazaz on 26 November 2018 explaining that the Authority was best placed to address issues of access to information. This is correct where the information is relevant and necessary for the investigation and determination of claims before it.

[52] In this case, DeloitteAsparona and Deloitte Ltd have assured Mr Alkazaz that it does not hold any documents or other information that it has not already provided. I have accepted that evidence and am satisfied on the balance of probabilities that Mr Alkazaz has been provided with all information held by either company relating to these proceedings.

Costs

[53] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so DeloitteAsparona shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Alkazaz shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[54] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority