

confidential terms of that settlement and that her claim is outside of the statutory 90-day period.

- [2] The parties have not undertaken mediation in respect of this problem: because the problem relates to an existing mediated settlement I was satisfied that further mediation would not contribute constructively to this matter: s. 159 of the Employment Relations Act (the Act) applied.
- [3] During a telephone conference on 4 February 2009 the parties agreed the Authority would determine this matter on the papers and a face to face investigation was not required.

Background

- [4] Ms Bartlett was employed by the Board in 1992 and, since 1994, as a human resources administrator.
- [5] Various issues arose between the parties which caused the respondent to seek the assistance of the Department of Labour mediation service.
- [6] Ms Bartlett was represented at the mediation by a union organiser.
- [7] Mediation was undertaken on 12 May 2008 and resulted in a written, signed settlement (a copy of which is attached to the statement in reply).
- [8] The terms of the settlement included the following:
- a. The terms of settlement and all matters discussed at mediation were confidential to the parties;
 - b. Ms Bartlett resigned with immediate effect;
 - c. Ms Bartlett withdrew all complaints in regard to Board personnel from all authorities other than information provided by the applicant in respect of her separate ACC review/claim;
 - d. A compensatory sum was paid to Ms Bartlett on a without prejudice and denial of liability basis; and

e. It was *“a full and final settlement of all matters between the parties arising out of the employment relationship”* between Ms Bartlett and the Board.

[9] In her statement of problem filed on 27 November 2008 Ms Bartlett said the problem she wished the Authority to resolve was:

Personal grievance for constructive dismissal, unfair treatment and breach of duty of care grounds.

Workplace injuries/poor case management lead to general harassment and bullying by HBDHB HR. CEO ignored complaint re bullying, etc.

[10] As facts that gave rise to the problem, Ms Bartlett referred in her statement of problem to a workplace injury, her intention to review it, and the Board's reaction to her. In particular, Ms Bartlett says she encountered, *“overloading (despite work injuries) isolating commenced”*.

[11] Ms Bartlett also says she *“was asked to attend a meeting on 12/5/08. To my surprise this turned out to be employment mediation and I resigned. I didn't get to have my say. There were lies & serious misconduct by HBDHB”*.

[12] She also makes the claim that, *“Workplace injury leads to forced resignation! Forced resignation is discrimination!”*.

[13] Attached to Ms Bartlett's statement of problem are a number of letters addressed to senior members of the Board's management team including its chief executive officer. The letters are dated from 19 April to 10 May 2008 and make detailed allegations that she had been subjected to workplace bullying and harassment, being isolated and excluded, information and support being withheld, work overloading and gossip spreading and undermining of credibility.

[14] Another letter, dated 5 November 2008, is to an Auckland based employment relations consultant. The letter refers to a conversation that day between Ms Bartlett and the consultant. Set out in the letter, amongst other things, is a summary of events leading up to the settlement, including the applicant's complaints about the actions of various Board employees. It accuses the Board of breaching the confidentiality of the settlement. Ms Bartlett records how on 31 August 2008 she discovered an email dated from January of that

year (i.e. before the mediated settlement) which she says is evidence of an obvious plan by the respondent to exit her. In the letter Ms Bartlett says of the mediated outcome that,

I didn't have the choice if I didn't sign the agreement to return to my work position.

[15] Ms Bartlett sought the consultant's advice as to what if any further legal action she might take.

[16] On the same date, 5 November, and acting on advice and by separate communication, Ms Bartlett advised the Board of a personal grievance of "*constructive dismissal*" (attachment to statement of problem).

The Parties' Positions

Applicant's Position

[17] In her submissions/evidence received by letter dated 18 February 2009 Ms Bartlett repeats her claim that she was discriminated against unlawfully in her workplace because of her injuries/disability, and that she was subjected to harassment and bullying.

[18] Ms Bartlett properly makes a distinction between her ACC claim and employment issues she had with the Board that culminated in a mediation meeting (and settlement, I add) on 12 May 2008. She says she is willing to make a stand for other Board staff, current and former, who have gone through similar situations.

[19] Ms Bartlett articulates her view that the Board "*ruined my health and created further injuries due to poor case management and lack of proper treatment/rehabilitation*" (above).

[20] Attached to Ms Bartlett's submissions/evidence of 18 February are copies of extensive correspondence between herself and the Board from January-May 2008 inclusive.

[21] Amongst other things, Ms Bartlett's submission/evidence of 18 February claims that:

- Her ACC claim was separate from the matters that culminated in the settlement;
- The Board almost immediately breached the confidentiality of the settlement;
- She sought and obtained legal advice and acted on it in part by filing her grievance notification;
- At the 12 May mediation she was not provided with *“a genuine opportunity to comment on the proposal with the HBDHB before any final decision was made, and the employer didn’t get to take into account any comments I would have made”* and *“The HBDHB had no legal grounds for legitimately letting me ... go”* (above); and
- *“Lies and serious misconduct (bullying/harassment/isolating/creating stress) that I found out on 31/8/08 were due to a workplace injury (separate from employment mediation of 12/5/08) are true. Workplace injury leads to forced resignation. Forced resignation is discrimination/constructive dismissal”* (above).

[22] Ms Bartlett says she is currently on a sickness benefit and does not have the financial ability to pay legal costs and does not think the tax payer should be responsible for legal aid *“when I am telling the truth/honest”* (above).

Board’s Position

[23] The Board relies on the settlement as full and final.

[24] The evidence presented to the Authority by Ms Bartlett demonstrates that the alleged grounds for her grievance were matters in the contemplation of the parties at the time that they entered into the settlement. The applicant is therefore barred from pursuing her grievance: *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206; ss 149 (3) (b) of the Act.

[25] Ms Bartlett has in any event failed to meet the evidentiary threshold she was constructively dismissed.

- [26] The Authority does not have jurisdiction to hear the claims made by Ms Bartlett which lie within the Injury Prevention, Rehabilitation and Compensation Act 2001.
- [27] The Board denies breaching the confidentiality of the settlement. Ms Bartlett has failed to evidence any breach.
- [28] Ms Bartlett herself is in breach of the confidentiality of the settlement by discussing it with the Department of Labour, Board employees and an employment relations consultant. However, notwithstanding the costs it has been put to in respect of these proceedings, the Board agrees not to pursue any damages at this time.

Discussion and Findings

- [29] The parties entered into a mediated settlement on 12 May 2008.
- [30] Ms Bartlett signed the settlement as did the mediator and others.
- [31] Section 149 of the Act is clear. Amongst other things it provides that the mediator signing off the settlement must, before signing, explain to the parties, that the effect of their signature is to make the settlement final and finding and enforceable.
- [32] Section 149 also makes clear that except for enforcement purposes, *“no party may seek to bring those terms before the Authority ... whether by action, appeal, application for review, or otherwise”* (ss 149 (3) (b) of the Act).
- [33] It is clear from Ms Bartlett’s correspondence to the Board before the settlement that central to her concerns were claims of bullying, harassment and general unfair treatment. These claims are repeated in Ms Bartlett’s statement of problem filed on 27 November 2008 in support of her claim of constructive dismissal. There is no evidence of any fresh matters emerging after the settlement, but instead – from Ms Bartlett’s perspective – more evidence of the same in support of her allegations prior to the settlement.
- [34] I have no reason to doubt the respondent’s claims that any references to a ‘plan’ in respect of Ms Bartlett related to her ACC rehabilitation and treatment plan, and not a plan to drive her from her employment.

- [35] There is no evidence or reason therefore to conclude other than that all relevant matters were fully contemplated by the parties at the time they entered into their final and binding settlement. It follows that Ms Bartlett is attempting to relitigate those same matters with her claim of constructive dismissal.
- [36] Because there is no evidence of her other than freely entering into the settlement of 12 May I do not accept Ms Bartlett's claim she was not provided with a genuine opportunity to comment at the mediation. Ms Bartlett was represented at the 12 May mediation: there is no evidence before the Authority to cause me to doubt the value of that support person in ensuring the applicant reached an informed decision. It was freely open to the applicant and the respondent to enter into the final and binding settlement they agreed on in which, amongst other things, Ms Bartlett resigned and the Board paid her a sum of money. The finality of the settlement, and the parties' awareness and acceptance of the same, was confirmed by the mediator as part of the formal statutory process.
- [37] There is no evidence of Ms Bartlett's resignation resulting from any inappropriate or unlawful actions on the Board's part, or by anybody else. In other words, there is no evidence of Ms Bartlett being constructively dismissed.
- [38] Having regard to the above, I am satisfied that Ms Bartlett freely and knowingly entered into the 12 May settlement, that the matters she relies on in support of her claim of constructive dismissal were fully contemplated by the parties at the time and there is therefore no reason to regard the settlement as other than final and binding in respect of the application before the Authority.
- [39] For completeness sake I note here that Ms Bartlett's grievance was filed well outside of the statutory 90-day period following her resignation effective on 12 May without any notice period: Ms Bartlett is as statute-barred by the effects of ss. 114(1) of the Act as she is by ss. 149 (3).
- [40] I am not satisfied from the evidence before the Authority that either party has acted in breach of the settlement's confidentiality provisions, particularly as I

find that Ms Bartlett was seeking legal advice at the time she communicated the contents of the settlement to various parties, including a human resources practitioner.

- [41] Ms Bartlett has been deeply aggrieved by the circumstances culminating in her resignation from the Board. However, notwithstanding her ongoing distress, I am satisfied the respondent has not acted unlawfully toward Ms Bartlett.

Determination

- [42] Ms Bartlett's claim of constructive dismissal cannot succeed in the face of her having entered into a final and binding mediated settlement, because her claim is out of time and because there is no evidence to support that claim.

- [43] Costs are reserved. I note here that costs typically follow the event. In this case the Board has succeeded. Costs should be much less than what is typically involved in an Authority investigation as this matter, by agreement, has been done on the parties' written submissions and evidence. Ms Bartlett is a sickness beneficiary. If costs are to be pursued the parties could look at a contribution to fair and reasonable costs by way of an appropriate repayment regime.

Denis Asher

Member of the Employment Relations Authority