NOTE: This determination contains an order prohibiting publication of certain information at [71]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 237
3126514

	BETWEEN	DRF Applicant
	AND	OLP Respondent

Member of Authority:	Sarah Kennedy
Representatives:	DRF in person Philip McCarthy, counsel for the Respondent
Investigation Meeting:	11 August 2021
Submissions Received:	Up to 1 February 2022 from the Applicant 11 August 2022 from the Respondent
Date of Determination:	3 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] DRF was employed by OLP on 8 January 2018 as a project manager. Several employment concerns were raised by both parties about the other over the course of the employment relationship.

[2] On 24 April 2019, the parties attended mediation and signed a record of settlement (settlement agreement) under s 149 of the Employment Relations Act 2000 (the Act). DRF resigned from his employment, and the parties agreed that he receive certain payments. There was a confidentiality clause as well as restrictions on what either party could say about the

other. In addition, the agreement was to be a "full and final settlement of all issues "known and unknown" between the parties.

[3] The matter currently before the Authority is to determine whether DRF can set aside the settlement agreement on the basis that he lacked capacity to understand what he was agreeing to, and that he did not enter into the settlement agreement voluntarily because he was under duress or undue influence or both.

[4] OLP relies on the terms of the full and final settlement and says there is insufficient evidence to support the application to have the settlement agreement set aside. It also denies that it has breached the settlement agreement in any way.

The Authority's investigation

[5] For the Authority's investigation written witness statements were filed from DRF, and OLP's technical capability manager (OLP's manager) and occupational health advisor (OLP's health advisor). All witnesses answered questions under oath or affirmation from me and the parties' representatives or from the parties themselves. OLP's counsel gave oral and written closing submissions. The parties were informed that there was to be no recording of the investigation meeting.

[6] DRF was given leave to provide additional information, that was important to his timeline of events. It was requested from another agency, and he wanted it to confirm there had been criminal activity at a previous workplace. The relevance was that DRF believes that what happened previously in Wellington, was happening in his new location and workplace. His alleged mental incapacity results in part from this background. The information was never received by the Authority but in December 2021, DRF lodged further submissions about the information he had received.

[7] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[8] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Non-Publication

[9] The Authority has the power to prohibit publication.[1]

[10] DRF wished to ensure there was no further impact on his health and wished to keep his personal health information confidential and applied to have his identity kept confidential. The respondent, OLP did not oppose that application and submitted that its name and the name of its witnesses would likely identify the applicant because of where they work and live, and accordingly sought non-publication of those details.

[11] The starting point when considering non-publication is open justice. However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.[2]

[12] DRF's submissions centred around the impact on him and his mental health. On hearing submissions from both parties, I was persuaded that identification by the community of either party to this dispute would impact on DRF's health and his ability to participate in the process and therefore would not assist the Authority's investigation. I was also satisfied that there was no public interest in publication of DRF's personal health information on the basis it is private and sensitive information.

[13] I was satisfied it is in the interests of justice and the public interest to have the identifying details of the parties and the personal health information about DRF be subject to a non-publication order.

[14] DRF's identifying details and details of his health information and the name of OLP and its witnesses are prohibited from publication.

Applicant's health

[15] At the start of the hearing DRF asked the Authority to be aware of his mental health during the investigation meeting. On questioning it was established a health diagnosis had been given some years earlier, but no specific information was provided about the currency of the diagnosis or the impact of that diagnosis on DRF's competency during a proceeding. DRF

[1] Employment Relations Act 2000, Schedule 2, clause 10(1).
[2] *Erceg v Erceg* [2016] NZSC 135 at [3].

stated that he wanted to continue, because he felt well enough to participate in the meeting but wanted the Authority to be aware that he would need frequent breaks.

[16] I was satisfied after discussion that what DRF was referring to did not displace the presumption that any party to a matter before the Authority is competent to give evidence[3] and ensured additional breaks were provided during the investigation meeting.

[17] After the investigation meeting, DRF made an application to the Authority seeking an order that he undergo a full psychiatric assessment by a fully qualified mental health specialist to establish his fitness to testify further before the Authority. As there has been no requirement for further evidence before the Authority that application was not considered.

Background

[18] DRF was employed at OLP from 8 January 2018 to 24 April 2019. There was no disagreement between the parties that over the course of the employment relationship, DRF raised several complaints with OLP including but not limited to poor business practice, bullying, racial and sexual harassment and safety at work. OLP also raised concerns on more than one occasion with DRF about interpersonal issues in the workplace.

[19] DRF gave extensive evidence about the background to the employment issues at OLP. He has a genuinely held belief that "gangs" controlled his previous workplace and then the workplace at OLP. DRF firmly believes that because he made it clear he wanted no part in criminal activity or gangs, he has been subjected to many years of harassment at home and at work.

[20] On 24 April 2019, the parties attended mediation and agreed to enter into the settlement agreement under s 149 of the Act. The settlement terms were agreed in mediation and DRF resigned from OLP. At the request of the parties a Ministry of Business, Innovation and Employment (MBIE) mediator certified those agreed terms of settlement under s 149 of the Act.

[21] DRF says the background he describes has significantly impacted on his mental health and contributed to his lack of capacity, by reason of his mental health, to enter into the settlement agreement with OLP on 24 April 2019. He also claims he was placed under duress

[3] Employment Relations Act 2000, Schedule 2, clause 9.

and undue influence by OLP and its actions which contributed to him being "forced" to sign the settlement agreement.

[22] DRF says he suffers from a mental health condition, arising from his move to New Zealand, and difficulties faced when settling and adjusting to a different culture away from his family. DRF lodged multiple documents in the Authority both before and after the hearing and referred me to a document confirming a mental health diagnosis in 2017.

[23] DRF explained the condition as transient and curable, but aggravated by bullying, social exclusion, crimes against him, and people arguing with him. He says his condition was aggravated through working for OLP. This meant as he came under stress at work, it caused him not to sleep and he needed medication. He would feel tired in the morning and there were side effects from the medication.

[24] Ultimately his submission is that he was extremely unwell at the time he resigned, resulting from a number of factors. DRF sets it out as follows:

> … due to the rushed settlement process, inadequacy of the legal representation and the advice he received, his own mental incapacity, undue influence exerted on him, that the Applicant was not technically able to fully understand and reasonably accept the effect and implications of the signed settlement agreement in their entirety, even though he was technically represented and technically received independent legal advice.

[25] In addition, DRF explains the lack of voluntariness in this way: he has suffered through a campaign against him at work and is trapped by the gangs and cannot sell his house or move to a safer area because no bank would back him. On Saturdays and Sundays, he is scared to leave his house, does not use his private land and does not live a "fulfilling, free and productive life" because of this situation. The effect, he says, on him from signing the agreement, was not fully understood and therefore he cannot have entered into it voluntarily.

[26] OLP accepts that at times it expressed concern for DRF's welfare and mental wellbeing to ensure that it was providing a healthy and safe workplace for DRF. Mostly the concerns arose from the nature of the complaints DRF raised. OLP says in each instance DRF either; provided a medical certificate certifying he was mentally and physically fit; or refused offers of support; or denied that he was mentally unwell.

[27] OLP denies it has breached the settlement agreement in any way. Both parties had legal representation at mediation. OLP's manager, accepting that mediation was hard, nonetheless was comfortable from his perspective that DRF understood at mediation that he was resigning from his employment at OLP, that he was to receive payment and that it was a full and final settlement of all matters between the parties.

[28] It was also submitted on OLP's behalf that because DRF had the benefit of the agreed payment for several years and the fact he is also seeking at the same time to enforce the settlement agreement, this undermines any assertions of involuntariness or that DRF lacked the requisite mental capacity at the time.

Issues

[29] The Authority needs to determine the following issues:

(a) Whether, given DRF's mental health condition, he lacked capacity to understand what he was agreeing to?

(b) Whether DRF was under duress or indue influence when he signed the settlement agreement?

(c) If yes, should the settlement agreement be set aside?

(d) If no, has OLP breached several terms of the record of settlement.

Section 149 agreements

[30] Section 149 of the Act is intended to ensure that the terms of settlement agreements reached by the parties in mediation are final and binding once signed by a mediator. The mediator may sign settlement at the request of the parties but must first explain to the parties that the terms of settlement agreements are final, binding and enforceable and that the settlement itself cannot be challenged. They must also be satisfied that the parties affirm their request after that explanation is provided. In addition, an agreed settlement cannot be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 on the basis of misrepresentation, repudiation or breach.

[31] Section 149 of the Act does not provide a statutory bar to setting aside a settlement agreement where one of the parties lacks capacity. This is because where a party lacks capacity

to enter into a settlement agreement there can be no "agreed terms of settlement" to which s 149 could apply.[4]

[32] The Court of Appeal observed in *TUV v Chief of New Zealand Defence Force*:[5]

> The purpose of s 149 is to prevent the reopening of a valid settlement agreement. But Parliament did not in our view intend the limit procedural safeguards in s 149 to override the important protections for individuals and for the public interest reflected in the law relating to validity of contracts. Facilitating settlement of employment disputes is an important objective. So too is certainty. But these objectives do not trump the policy objectives and basic legal values reflected in the law relating to capacity, and in the law concerning other grounds for finding that a contract is void or is liable to be set aside.

Mental incapacity

[33] A contract is voidable by a party to the contract if, at the time of entry into the contract:[6]

(a) that party lacked the mental capacity to enter into the transaction; and

(b) the other party knew or ought to have known of that lack of capacity.

[34] Counsel for OLP also referred the Authority to a definition in the High Court Rules where an "incapacitated person" is defined as a person who, by reason of physical, intellectual or mental impairment, is not capable of understanding the issues on which his or her decision would be required…. or unable to give sufficient instructions.[7]

DRF's Mental health

[35] DRF gave evidence of a mental health condition diagnosed in 2017 that was aggravated by working for OLP and says his medical records show he was "extremely disturbed at the time" from the condition, stress and side effects of medication.

Events before mediation on 24 April 2019

[36] OLP says it was involved in continuous and ongoing employment processes with DRF. An HR advisor provided support and investigated several bullying and harassment-related complaints DRF made about unwanted comments or interactions DRF believed were racial or sexual in nature.

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[4] *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, at [38] – [49].
[5] Above n 4 at [42].
[6] *O'Connor v Hart* [1985] 159 at 174.
[7] High Court Rules, Rule 4.29 "incapacitated person".

[37] A further complaint was made by DRF on 29 June 2018 and OLP started investigating that complaint and others. The parties attended mediation on 21 August 2018. An independent investigation was also commenced into a complaint made on 29 June 2018 about DRF, which culminated in a disciplinary meeting on 23 January 2019.

[38] In March 2019, OLP commenced initial investigations into a report about a close call traffic incident at a road work site and a further complaint DRF made about racial and ethnic harassment at work.

[39] Then on 21 March 2019, DRF made a comment in an email about events in the news media in New Zealand, that led OLP to be concerned. OLP's health advisor met with DRF the same day. DRF shared details about the long running conflict with his neighbours, the background to the racial discrimination he said he was experiencing and the complaint he had recently made to police about his neighbours.

[40] The file note records DRF confirmed he felt safe in the workplace and was well enough to be at work, in fact, he said he came into work at the weekends because he felt safe. Nonetheless, because of his comment in the email, they discussed professional health support for him, particularly as there was mediation scheduled.

[41] DRF declined OLP's offer of a health assessment saying he would make his own arrangements to support his psychological wellbeing, that he did not believe he was mentally ill, and that he felt safe at work, other than the concerns about racial and ethnic harassment.

[42] DRF also communicated an inability to fit into the workplace and said that was causing a serious employment problem for DRF. OLP then proposed mediation as a result of that statement.

[43] Prior to mediation, scheduled for 16 April 2019, OLP became aware that DRF was no longer legally represented. It offered DRF a period of special leave before mediation so he could prepare, and to pay a contribution towards his legal representation.

[44] Mediation was adjourned to 24 April 2019 to allow DRF's new counsel additional time to prepare and take instructions. DRF was on paid special leave from 15 April 2019 until his resignation on 24 April 2019. OLP also arranged and paid for flights for DRF's legal counsel and paid for accommodation costs for both the lawyer and DRF.

[45] OLP's Manager gave evidence that there was nothing at mediation to suggest DRF lacked capacity to agree to the terms set out in the settlement agreement. He also noted that OLP had never had concerns about DRF's ability to perform the role he was employed to do. The concerns the parties had been raising and addressing with each other were largely about interpersonal issues in the workplace.

Legal counsel

[46] DRF submits he was not properly represented because his lawyer was inexperienced in employment law. The lawyer did not give evidence, but DRF supplied emails showing his counsel did alert him to the fact that she was inexperienced in employment law and asked him to consider whether he still wished to engage her. It is recorded in writing that he agreed to have her represent him and mediation was adjourned to allow time for her to take further instructions and travel to meet DRF. One benefit of this counsel for DRF was that they were both able to communicate with each other in an additional language, which DRF has said was of assistance to him.

[47] As an observation, lack of capacity is more difficult to establish by virtue of the fact of representation by a lawyer. As a general proposition, lawyers have duties to both their clients and the court to act in their client's best interests. If DRF's lawyer had concerns about DRF's ability to understand what was being said she would have had a duty to raise that and there is no evidence that occurred.

[48] Furthermore, the language assistance made it more likely DRF knew what was being proposed and little or not knowledge of employment law is required to know a resignation means cessation.

Mental incapacity - conclusion

[49] DRF is relying on an earlier mental health diagnosis as a basis for the claim of mental incapacity at the time he entered into the settlement agreement, together with the impact of various other stresses on him at the time, including stress arising from the employment relationship and the number of issues each party had with the other.

[50] Because there is reliance on a diagnosis from 2017, it would have been preferable to have had expert medical evidence to assess the currency and implications of that diagnosis on DRF at the time he signed the settlement agreement. In the absence of expert medical evidence,

I have reviewed the medical information lodged in the Authority and my conclusion is that those records show DRF's contacts with health professionals to assist with stress caused by both the employment issues and stresses at home. I cannot see any reference to incapacity although I accept that question was not asked of the health professionals he was consulting at that time.

[51] I note in the time leading up to the settlement agreement being signed, DRF had the ability to respond in writing to OLP. The correspondence between the parties before mediation shows DRF had a clear understanding of both his concerns and expectations of his employer. He also understood what the concerns were about him and was able to articulate why he disagreed that those were valid. He also felt he was being treated unfairly and had started additional proceedings in another forum against his employer.

[52] DRF accepted in cross examination that when he signed the settlement agreement, he knew he was resigning his employment and that he was receiving a payment, but went on to say, he signed under duress and undue influence caused by his mental health condition deteriorating because of the amount of pressure he was under.

[53] There is no doubt as to the level of stress DRF was under at the time, but ultimately DRF gave evidence that he knew he was resigning when he signed the record of settlement document. I am also persuaded by the evidence and submissions of OLP that DRF was competent at his job, therefore, it is unlikely there could be mental incapacity just in relation to the employment relationship matters.

[54] This means that I am satisfied on the evidence presented to the Authority that DRF was aware of and understood the key elements of the settlement agreement in that he was resigning, receiving a payment and that he was relinquishing his right to take any further action against OLP. This means he was capable of understanding the issues on which his decision would be required and was able to give sufficient instructions

[55] I reach this conclusion based on the oral evidence, the medical notes, the fact of legal representation and that the mediator certified the agreement.

Undue influence and duress

[56] Turning now to consider involuntariness, DRF also said in evidence that he was "forced" to sign and that he signed under duress and undue influence caused by his mental health condition deteriorating because of the amount of pressure he was under.

[57] The Court of Appeal in *Tinkler v Fugro PMS Pty Ltd & Pavement Management Services* considered that in circumstances where duress was claimed it would be necessary for the victim to establish the seven elements referred to by the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney General*:

- There must be a threat or pressure.
- That threat or pressure must be improper.
- The victim's will must have been overborne by the improper pressure so that his or her free will and judgement are displaced.
- The threat or pressure must actually induce the victim's manifestation of assent.
- The threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim with no reasonable alternative.

[58] Undue influence is aimed to prevent one party taking unfair advantage of a weakness or necessity of the other party. Furthermore, while influence may legitimately be exerted on a contracting party, the line is drawn at undue influence.

[59] I am satisfied DRF agreed to leave his employment at that point when he signed the settlement agreement and he was paid an amount of money which was not plainly unjust. There were no other terms of the agreement that put an unjust burden on DRF or conferred an unjust benefit on the employer.

[60] While DRF's evidence was that he was forced to sign, and that the implications were not known to him at the time, there is no evidence of any threat or pressure put on DRF directly by OLP specifically to sign the agreement. I accept that he found himself in circumstances that were stressful and overwhelming, however, something more would be required for a claim of involuntariness to be made out.

[61] Any assertion the imbalance of power was taken advantage of by OLP, can be countered in this case by the provision of legal advice, including at earlier meetings and mediation, the provision of extra time, and certification by the mediator.

[62] Even taking all of DRF's evidence on this issue at its highest and taking it at face value, it falls short of establishing the factors required to show involuntariness. There is no reason to set aside the settlement agreement.

Enforcement for non-compliance of s 149

[63] Having determined that the settlement agreement remains a full and final settlement, I need to consider DRF's claim that OLP did not comply with clauses 2 and 8 in that there was a breach of confidentiality and payment has not been made in full.

[64] The relevant clauses provide the following:

> 2. The Employer agrees to pay to the Employee:
>
> (a) The taxable amount of 11 months base salary inclusive of notice; and
>
> …
>
> Payment will be made by direct payment to the Employee's nominated bank account within 14 days of the execution of the Record of Settlement by both parties and a Mediator.
>
> …
>
> 8 All discussions, circumstance and correspondence leading up to an including this Record of Settlement will remain confidential to the parties and their representatives unless otherwise required by law. ...

[65] OLP says it has made the required payment based on DRF's payslips of 11 months gross base wages. I find the perceived shortfall is explained by the difference between net wages and gross wages. In these circumstances, I find that OLP has not breached clause 2 of the settlement agreement.

[66] DRF also says there has been a breach of the confidentiality clause when WINZ, on DRF's behalf, contacted OLP's manager who said that DRF was difficult to deal with. The contemporaneous note of that conversation recorded by the WINZ employee was provided by DRF and it records:

> Advised employer the client felt he was being disadvantaged in his employment because of his work history with that company. The employer advised over the

> phone that he would not and has not hindered any opportunities for the client and would still employer contractors [sic] if he was employed with them, and that there are several other companies in the North Island region that would have no connection with OLP that he could also apply with and agreed with my suggestion that it may be possible he is struggling for other reasons.

[67] OLP's manager says he has read the file note above, provided with DRF's evidence and it is consistent with his recollection of that conversation. He also says he did not refer to the settlement agreement in the conversation and simply said DRF had resigned. Nor does the file note record that OLP's manager said DRF was difficult to deal with as alleged.

[68] OLP has no knowledge of and has not been involved in DRF's subsequent job applications after resigning from OLP. Except for one company, OLP has not been contacted by or communicated with any organisations DRF says he has applied for jobs with. In the case of the one company that is an exception, OLP's manager says OLP received one email requesting information about DRF, and it did not respond to the request.

Outcome

[69] The record of settlement between DRF and OLP remains final, binding and enforceable. This means that DRF cannot take any further action against OLP.

[70] OLP has not breached clauses 2 or 8 of the settlement agreement between the parties.

Non-publication order

[71] Under clause 10(1) of schedule 2 to the Act, DRF's identifying details and details of his personal health information and the name of OLP and its witnesses are prohibited from publication.

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, OLP may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum DRF would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[73] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[8]

Sarah Kennedy
Member of the Employment Relations Authority

[8] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1