

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 235
3126514

BETWEEN	JURIJS RUDNICKIS Applicant
AND	POWERCO LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Jurijs Rudnickis, in person for the Applicant Philip McCarthy, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	21 May 2021 from Applicant 10 May 2021 from Respondent
Determination:	31 May 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jurijs Rudnickis seeks compliance with a record of settlement with his former employer Powerco. Mr Rudnickis says Powerco have breached the agreement under s 149 of the Employment Relations Act 2000 (the Act) in a number of ways. An investigation meeting is scheduled for 11 August 2021 in Wanganui.

Non-publication and exclusion of documents

[2] During a case management conference, Powerco sought orders excluding all documents from the Authority's investigation that relate to mediation on the grounds

of confidentiality and admissibility under the Employment Relations Act 2000 (the Act). Powerco also seeks suppression of the record of settlement.

Submissions

[3] The parties provided written submissions. Powerco submits that section 148(1) and (3) of the Act 2000, requires all documents and information created or made for the purposes of mediation be kept confidential between the parties and provides that this information is not admissible in the Authority.

[4] In response, Mr Rudnickis strongly objects to the exclusion of any documents and would like all the material filed by him to be considered at the scheduled investigation meeting. Mr Rudnickis says that one of his grounds for claiming that Powerco has been non-compliant with the record of settlement (leading to breaches) include that Mr Rudnickis did not enter into the agreement on a fully voluntary basis and that he was pressured into resigning and entering into a legally binding agreement. He says this is in breach of the clause in the record of settlement that reflects the legally binding nature of the agreement.

Discussion

[5] In essence Mr Rudnickis' submission is that mediation confidentiality should be waived in this case because he wishes to rely on what happened at mediation to show he did not enter into settlement voluntarily. There are several issues raised at this preliminary stage; whether a s 149 agreement is voidable, the effect of mediation confidentiality and whether involuntariness is correctly a compliance matter and therefore can be considered by the Authority.

Mediation confidentiality

[6] Mediation is confidential and there are specific provisions in the Act designed to ensure the starting point is that all information created for or submitted or discussed during mediation is kept confidential. Section 148(1) of the Act provides that without consent of the parties, all information created or made for the purposes of mediation, including information disclosed orally is protected by confidentiality.

[7] In addition, no evidence is admissible in any proceedings that is confidential by virtue of it being information connected with mediation (s 148(3)).

[8] It is clear to the Authority that this is an appropriate matter in which to make the orders sought. The rules that govern confidentiality are clearly set out in the Act, however, because of the issues raised by Mr Rudnickis about involuntariness, I will briefly consider that issue.

Agreed terms of settlement

[9] There are specific provisions in the Act about the effect of records of settlement relating to employment relationship issues. Section 149(3) of the Act provides:

Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed 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 sections 36-40 of the Contract and Commercial Law Act 2017; and
- (b) Except for enforcement purposes no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[10] This provision means that agreements signed under it are final, binding and enforceable by the parties and except for enforcement purposes, no party can seek to bring those terms before the Authority or court. Although the case law provides there are some grounds for setting aside a s 149 agreement, these are generally limited to situations when a party lacks mental capacity or duress.¹

[11] Based on the material currently available to the Authority, the claim is that agreement was not totally voluntary. Neither incapacity or duress appear to be alleged. If duress had been alleged that would be undermined by the fact that Mr Rudnickis has acknowledged that he sought legal advice. He may also have had legal representation at mediation although that is not confirmed in the material currently before the Authority.

¹ *TUV v Chief of the New Zealand Defence Force* [2018] NZEmpC 154 at [50].

[12] Claims of involuntariness and duress would also be undermined by the provision of legal advice, and that the effect and implications of signing a s 149 agreement were explained and the parties' understanding of what this means was checked and certified by the mediator. The mediator on the day has certified that the parties wished to enter into the agreement, understood the implications and wanted the agreement to be certified.

[13] There also appears to be an allegation in the documents attached to the statement of problem that Mr Rudnickis was induced to settle by misleading information. I note at this point that no evidence has been given or tested but even if that were correct, it would not necessarily be enough because of the way the statute is worded.²

[14] At this preliminary stage, it appears s 149 applies to Mr Rudnickis' settlement agreement meaning it is enforceable and its terms cannot be brought before the Authority except for enforcement purposes.

[15] On that basis it is clear to the Authority that this is an appropriate matter in which to make an order to exclude from the Authority's investigation meeting all material covered by mediation confidentiality.

[16] The record of settlement is also a confidential and cannot be published because to do so would be both a breach of the Act and the agreed terms of the agreement. Accordingly no order for suppression (non-publication) of the record of settlement will be made.

[17] It is noted that Mr Rudnickis' statement of problem raises other issues arising from the settlement agreement that are more correctly matters of enforcement such as monies not paid, and agreements that either party will do something or refrain from something. For completeness, the record of settlement is able to form part of an Authority investigation into enforcement (s 149(3)(b)).

Outcome

[18] The following order is made:

² Employment Relations Act 2000, s 149(3)(ab) and Contract and Commercial Law Act 2017, s37.

- (i) All documents (including any excerpts) filed in the Authority that relate to mediation are to be excluded from the Authority's investigation.

Sarah Kennedy
Member of the Employment Relations Authority