

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 681
3263419

BETWEEN KAMAHL SANTAMARIA
Applicant
AND TELEVISION NEW ZEALAND
LIMITED
Respondent

Member of Authority: Rachel Larmer
Representatives: Emma Butcher, counsel for the Applicant
Emma Peterson and Niranjanaa Ram, counsel for the
Respondent
Investigation Meeting: On the papers
Submissions and Other Information Received: 24 April 2024, 6 May 2024, 8 May 2024, 29 May 2024,
5 June 2024, 20 August 2024 and 4 November 2024
from the Applicant
24 April 2024, 23 May 2024, 6 and 7 June 2024, and 19
August 2024 from the Respondent
Determination: 18 November 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Preliminary determination

[1] This is a preliminary determination about whether the Authority has jurisdiction over claims that arose after the parties had signed a settlement agreement but before it was certified by a mediator from Mediation Services under s 149 of the Employment Relations Act 2000 (the Act).

The respondent - TVNZ

[2] The respondent, Television New Zealand Limited (TVNZ) is a Crown entity company that operates as a commercial broadcaster. It is governed by the Crown

Entities Act 2004 and the Companies Act 1993. It is also governed by the Television New Zealand Act 2003 and the Broadcasting Act 1989. TVNZ has a Board of Directors appointed by the Minister of Broadcasting (as it was at the material time, but which is now the Minister for Media and Communications) and the Minister of Finance.

The applicant - Mr Santamaria

[3] Mr Santamaria is a public figure and senior journalist with almost 25 years' experience. Mr Santamaria was employed by TVNZ as a presenter on the television show "Breakfast". His first day on air was 27 April 2022. Mr Santamaria was stood down from work on 18 May 2022 and did not return to the workplace, or do any work, before his employment ended on 31 May 2022. His absence from the Breakfast program so soon after his first day on air attracted media attention, inquiries and comment.

The Record of Settlement

[4] The parties entered into a Record of Settlement that was certified under s 149 of the Act by a mediator from the Ministry of Business Innovation and Employment (MBIE) on 2 June 2022 (the RoS). Both parties signed the RoS on Saturday 28 May 2022.

[5] On 31 May 2022 TVNZ, via counsel, submitted the signed RoS to MBIE's Mediation Services, for a mediator to certify. Before doing so, the mediator had to contact each party in accordance with the requirements of s 149(2) of the Act. That occurred in the normal way, so there was no issue taken by the parties regarding the validity of the mediator's certification of the RoS under s 149 of the Act.

[6] In accordance with clause 1 of the RoS, Mr Santamaria's employment ended on Tuesday 31 May 2022 as a result of his resignation.

Mr Santamaria's claims

[7] Mr Santamaria lodged an amended statement of problem (ASoP) with the Authority on 27 March 2024, that included claims TVNZ had breached the RoS in multiple ways. In particular, Mr Santamaria alleged that TVNZ had breached:

- (a) Its s 4(1A)(b) duty of good faith in the Act by not being active and constructive in maintaining a productive employment relationship, or being responsive and communicative during his employment;

- (b) An implied contractual obligation to provide a safe working environment to him during his employment; and
- (c) Clauses 6, 7 , 8 and 9 of the RoS.

[8] For ease of reference the first two claims in paragraph [7] (a) and (b) above are referred to in this determination as “the new claims”.

[9] It was clear the Authority had jurisdiction to investigate the claims in paragraph [7](c) above. However, there was a dispute between the parties about whether the Authority had jurisdiction to investigate the new claims. Although Mr Santamaria did not go into detail about the nature of these claims, they related to alleged acts/omissions by TVNZ regarding media queries/coverage over the period 28 to 31 May 2022, being the four days prior to his resignation when he was not at work and was not working.

[10] Mr Santamaria lodged a second amended statement of problem (2ASoP) on 4 November 2024. This included new claims that involved various allegations that TVNZ had conducted itself in a way that had undermined the benefit of the bargain the parties had entered into under the RoS. He claimed TVNZ was legally responsible for its newsroom undermining and/or breaching the RoS. The 2ASoP also identified other alleged breaches by TVNZ of the RoS which included:

- (a) Alleged disparagement of Mr Santamaria;
- (b) Disclosure of information that was not already in the public domain;
- (c) Failure to take all reasonable steps to give effect to the bargain recorded in the RoS;
- (d) Breaching an implied term of the RoS that it would not undermine the bargain contemplated by the RoS, by acting in a way that undermined the benefit of that bargain.

[11] The 2ASoP referred to new alleged breaches of the RoS that Mr Santamaria identified had arisen over the period 29 May to 31 May 2022 (the date the mediator certified the RoS) as well as over the period from 1 June to 27 July 2022. These are referred to in this determination as “the additional claims”.

[12] The time for TVNZ to lodge its second amended statement in reply (2ASiR) had not yet expired by the time this preliminary determination was released. Given the

information and evidence TVNZ has provided to date, the Authority anticipated that the additional claims Mr Santamaria made in the 2ASoP 's would be disputed.

The jurisdictional dispute

[13] TVNZ disputed the Authority's jurisdiction over the new claims in the ASoP which Mr Santamaria said had occurred over the four day period from 28 May to 31 May 2022. TVNZ noted Mr Santamaria had not raised concerns that it had breached its statutory good faith or implied contractual obligations to him during that four day period until some eighteen months later, when he lodged his first statement of problem (SoP) with the Authority on 17 November 2023.

[14] TVNZ said the new claims were barred by clause 11 of the RoS and pursuant to s 149(3) of the Act, because they were covered by the parties' "full and final settlement of all claims either party may have against the other, arising out of Mr Santamaria's employment with TVNZ (including the cessation of that employment)."

[15] Mr Santamaria said his new claims were not covered by the RoS because he said he had not agreed to compromise them, as they had arisen after he had signed the RoS on 28 May 2022. Mr Santamaria also said that s 149(3) of the Act did not bar the new claims, because there was no "agreed terms of settlement" (as per s 149(3) of the Act) in the RoS that would "settle" the new claims he wanted to pursue.

The Authority's investigation

[16] By agreement with the parties, the preliminary jurisdiction issues were determined 'on the papers'. The parties lodged an Agreed Statement of Facts (ASoF), which also attached relevant documents to it.

[17] Mr Santamaria lodged two affidavits for himself.

[18] TVNZ lodged an affidavit from Brent McAnulty, TVNZ's Chief Operating Officer, who at the material time was both TVNZ's General Counsel and Corporate Affairs Director. Mr McAnulty was responsible for all legal matters, government relations and external media communications. TVNZ also lodged an affidavit from Nicola Simpson, who at the material time was TVNZ's Chief People Officer. Ms Simpson is no longer employed by TVNZ, as she is a Chief Operating Officer at another entity.

[19] Both parties lodged written submissions.

[20] After the Full Employment Court's decision in *MW v Spiga Limited* was released on 8 August 2024, the Authority asked the parties if a non-publication order or anonymisation of the parties' names was needed in order to preserve the confidentiality of the RoS.¹ Both parties informed the Authority that was not appropriate.

[21] Mr Santamaria lodged a second amended statement of problem (2ASoP) and a removal application for this matter with the Authority on 4 November 2024. TVNZ has not yet had an opportunity to respond to those applications, so the removal application has not yet been allocated to an Authority Member.

Relevant background

[22] After the parties signed the RoS on Saturday 28 May 2022 Mr Santamaria's resignation was publicly reported by TVNZ's newsroom. TVNZ received requests for interviews and comments from media agencies, including from its own newsroom. Mr Santamaria was approached by Stuff New Zealand seeking comment on his situation.

[23] On Sunday 29 May 2022 counsel for Mr Santamaria forwarded to TVNZ's counsel (on an open basis) a text Mr Santamaria had received from a journalist working in the TVNZ's newsroom, seeking his comment for a story.

[24] Mr Santamaria's counsel asked TVNZ's counsel to obtain instructions from TVNZ on how the request aligned with its obligations under the RoS and in terms of its "duties to ensure TVNZ is a safe place of work for Kamahl while he remains an employee". Mr Santamaria's counsel also pointed out that the parties were restrained from making any comment other than what had been agreed, and TVNZ was expected to advise its reporters accordingly.

[25] TVNZ's counsel replied by stating that TVNZ had a separation between its news and corporate operations, which meant its news team were entitled to report on all issues "without fear or favour" including issues concerning TVNZ, which meant it could not

¹ *MW v Spiga Limited* [20024] NZEmpC 147.

instruct its reporters not to report on TVNZ matters, such as Mr Santamaria's resignation.

[26] TVNZ confirmed that its reporters would be seeking information, as other media outlets were, and that it could not control who its reporters went to or what questions they asked. TVNZ did however confirm that "the release we agreed upon has been distributed to staff and those in TVNZ who know the settlement are sticking to that wording".

[27] All mainstream media outlets covered Mr Santamaria's departure from TVNZ, including TVNZ's newsroom. TVNZ's newsroom published an article online regarding Mr Santamaria's resignation. TVNZ's 6 pm news broadcast also covered the story.

[28] The copy of the article that Mr Santamaria gave the Authority included comment "from a spokesperson for the Broadcasting Minister Kris Faafoi", which had been made in response to a number of questions from One News about whether the Minister was aware of any complaints.

[29] The article recorded TVNZ's response to questions it had been asked about the reported complaint, which was that it would not be commenting further and that TVNZ did "not comment publicly on the existence or substance of any individual's employment matters."

[30] On Monday 30 May 2022 counsel for Mr Santamaria emailed TVNZ about a number of matters, and also recorded that he "remained an employee with continuing rights, which were reserved."

[31] TVNZ's newsroom published further articles about Mr Santamaria's resignation on 30 May 2022. The first article that was provided to the Authority was headed "Kamahla Santamaria resignation: Breakfast host thanks viewers". The last sentence of that article stated:

TVNZ communications says his [Mr Santamaria's] departure was related to a "personal matter" and would not provide further information.

[32] The second article that the Authority was provided with was headed "Kamahla Santamaria: Govt wants recruitment assurances from TVNZ Board." This article referred to the fact that the Government's request for assurances had come after the resignation of Mr Santamaria, "who quit after a month into the job". This article

recorded that “TVNZ hasn’t commented on reports that it was after a complaint of inappropriate behaviour.” The second article also recorded that:

1News sent further questions to TVNZ on Monday. It says it does carry out reference checks for prospective employees, but sometimes not for internal candidates or previous employees.

TVNZ’s Board said it will respond to the Broadcasting Minister.

[33] On 31 May 2022 TVNZ’s then CEO, Simon Power, sent an internal email to all of TVNZ’s employees. A public statement was also issued by Mr Power in response to media enquiries.

[34] Mr Power’s email to TVNZ staff stated, “As you know, I’m not able to comment on specific employment matters, but I do want to share my thoughts at a general level.” The email said TVNZ treated issues concerning the behaviour of its team members extremely seriously, treated them confidentially, and investigated swiftly with the number one priority being to support and care for any individual who raised an issue. The email also said harassment or inappropriate behaviour in the workplace would not be tolerated and that TVNZ was committed to providing a working environment that was inclusive and respectful.

[35] Mr Power also stated that the Minister of Broadcasting had been advised that the recruitment policy had not been followed consistently and needed to be reviewed, and that a senior employment lawyer had been asked to review TVNZ’s policies, processes and practices to ensure they were fit for purpose and appropriately robust. When the review was complete, TVNZ said it would share any recommendations with staff.

[36] The public statement that was issued in response to media enquiries recorded in the subject line “Re: Interview request Simon Power”. The email said Mr Power was not available for an interview, but TVNZ attached his public statement which could be attributed to him. Essentially the same information that had been communicated to staff was recorded in the public statement. Namely, that TVNZ was undertaking an external review into its recruitment policies, processes and practices to ensure that they were fit for purpose and appropriately robust. That the general recruitment policy had not been followed and applied consistently, which is why it needed to be reviewed, and that a senior employment lawyer was going to conduct the review.

[37] The media statement from Mr Power also said:

While I can't comment on specific employment matters, we do not tolerate any form of harassment or inappropriate behaviour in the workplace. If a team member raises an issue concerning the behaviour of another staff member it's taken extremely seriously, treated confidentially and investigated swiftly.

Our number one priority, regardless of other matters, is to support and care for the individual who raises the issue. We are committed to providing a working environment that is inclusive and respectful.

The wellbeing of our people and providing a safe workplace is TVNZ's top priority. Any concerns from staff are always taken very seriously and we have robust structures in place to support our people in all areas of our organisation.

[38] Along with other media outlets, TVNZ's newsroom reported Mr Power's public statement online and on its 6pm news broadcast.

[39] Mr Santamaria did not raise any issues directly with TVNZ after he had signed the RoS but before the mediator had certified it. On 28 and 29 May 2022 (before the mediator's certification of the RoS) Mr Santamaria's Public Relations (PR) representative and Mr McAnulty communicated about how media queries should be addressed. They discussed whether the agreed media communication strategies that had been recorded in clauses 7 and 8 of the RoS needed to be amended, but the Authority was told that no request was made by Mr Santamaria's representatives to do so.

[40] Mr Santamaria did not raise any issues directly with TVNZ after his employment had ended on 31 May 2022 regarding the significant media coverage that had followed the announcement of his resignation, until he lodged his SoP in November 2023, almost eighteen months later. Although in August 2023 Mr Santamaria had published some complaints on his website, TVNZ was not put on notice about Mr Santamaria's new claims against it until the SoP was served on it on 20 November 2023.

The affidavit evidence

Mr Santamaria's evidence

[41] Mr Santamaria said the RoS only resolved claims that had already arisen, or which may arise, concerning what had happened in his employment up to 28 May 2022, which was the date he had signed the RoS. From his perspective, that involved the way TVNZ had handled the original complaint and the disciplinary process against him. Accordingly to Mr Santamaria that was the particular dispute the RoS had settled, so it did not cover the new claims as those related to media coverage about his situation.

[42] Mr Santamaria said his counsel's email to TVNZ after the RoS had been signed by the parties, that had reminded it of its obligations to him as an employee and reserved his rights to make claims against TVNZ, was evidence that future claims had not been settled by the RoS.

[43] Mr Santamaria disputed TVNZ's evidence that he should have known there would be intense media coverage about him after he signed the RoS and that he should have contemplated possible claims arising from that when he signed the RoS.

[44] Mr Santamaria confirmed he had expected media attention regarding his resignation from TVNZ, which is why it was specifically provided for in the RoS. However, he pointed out the new claims were about acts and omissions that had occurred after the parties had signed the RoS, so he could not have known about them when he signed the RoS and therefore could not have settled them.

[45] Mr Santamaria said he did not receive information about the full nature or extent of the media enquiries that TVNZ had received while he was still employed, although he said he obtained that information subsequently.

TVNZ's evidence

[46] Because Mr Santamaria is a well-known public figure, and was a new presenter on the Breakfast show, there was significant media attention surrounding his disappearance from the show shortly after he had joined TVNZ. The parties therefore knew there would be a media spotlight on Mr Santamaria, and that there would be considerable media interest in his resignation.

[47] The parties fully appreciated that queries about Mr Santamaria's employment and departure would likely continue after his departure from TVNZ, which was the background against which they agreed on the communications plan that was recorded in clauses 7, 8 and 9 and on the mutual non-disparagement obligations recorded in clause 6 of the RoS.

[48] The media communication strategies were recorded in clauses 7 and 8 of the RoS. Clause 7 set out the specific comment to be made by TVNZ in the 72 hour period following the announcement of Mr Santamaria's resignation. Clause 8 reserved the parties the right to discuss and agree a public statement regarding the events that had

led to Mr Santamaria's resignation, should media queries continue in the four weeks after its announcement.

[49] Clause 9 of the RoS imposed confidentiality obligations on the parties. It also required TVNZ to direct those employees who knew the reasons for Mr Santamaria's resignation to keep all matters relating to it confidential.

[50] The parties also discussed the need for Mr Santamaria to have public relations representation, and his PR representative spoke to Mr McAnulty about how media queries should be responded to on 28 May 2022. It was apparently agreed that not giving any more information to the media was the best course of action. Mr McAnulty also said that he and another TVNZ employee had communications with Mr Santamaria's PR representative again on the morning of 29 May 2022 regarding proposed amendments to the agreed statements in the RoS, although those did not eventuate.

[51] Ms Simpson said the parties communicated regarding the significant media coverage as they had recognised the need for a detailed communication plan to preserve Mr Santamaria's reputation. She said that the parties also discussed Mr Santamaria's view that people within TVNZ were already talking about the relevant matters.

[52] Ms Simpson's affidavit said she instructed TVNZ's counsel to convey to Mr Santamaria's counsel that she was concerned "the horse had bolted on the confidentiality of the issue both internally and externally". Ms Simpson's affidavit recorded:

At the forefront of our mind was that there needed to be a proper resolution to the dispute that addressed all issues [Mr Santamaria] had in relation to his employment, as well as the end of his employment, with TVNZ. We knew that a robust communication plan would need to be included given the significant media coverage of Mr Santamaria's disappearance from "Breakfast". We also knew that this would increase significantly after Mr Santamaria's departure.

[53] TVNZ said the parties recognised that a quick resolution and a strong communications strategy was necessary, because the longer Mr Santamaria's absence was left unexplained (and the situation unresolved) the more potential there was for gossip and rumour to fill the gaps.

[54] Ms Simpson said that clauses 7 and 8 of the RoS were specifically included because the parties were aware various outlets of the New Zealand media, including TVNZ's newsroom, were likely to report on Mr Santamaria's absence and resignation.

[55] Ms Simpson's affidavit stated:

At no point did Mr Santamaria or his legal representative request any special approach in relation to TVNZ's own newsroom. ...

It did not occur to us that an experienced journalist working in TVNZ's newsroom would think for a moment that TVNZ would not report on the matter in the same way as any other New Zealand media.

[56] TVNZ said Mr Santamaria's position that the settlement was limited to claims that had arisen, or may arise, concerning what had happened in his employment up until the date he had signed the RoS was inconsistent with the parties' discussions. TVNZ said the parties wanted to ensure there was a full and final settlement of all disputes, current or future, between the parties because they wanted there to be a final resolution of all matters. That was why clause 11 of the RoS recorded that there had been "full and final settlement of all claims either party may have against the other".

[57] Ms Simpson said the words "may have" were included in the RoS because the parties were aware further potential issues could potentially arise due to the fact this was a public resignation that would attract considerable media coverage, both within TVNZ and externally. She said:

We explicitly stated that the record of settlement was in full and final settlement of issues arising both out of his employment at TVNZ and the cessation of his employment so as to ensure all claims were covered.

[58] TVNZ therefore said the RoS covered all actions/omissions and potential claims either party had with respect to Mr Santamaria's employment, and the termination of his employment. This any and all issues that occurred up to and including his last day of employment on 31 May 2022. The purpose of having the RoS certified by a mediator from MBIE was to ensure there had been a full and final settlement of all claims Mr Santamaria had, or may have, against TVNZ in connection with his employment and the ending of it.

[59] TVNZ therefore said the RoS had clearly barred any potential new claims that had arisen over the period Saturday 28 May (the date the parties signed the RoS) to Tuesday 31 May 2022 (being Mr Santamaria's last day of employment).

The issues

[60] The following issues are to be determined:

- (a) Does the Authority have jurisdiction to investigate Mr Santamaria's new claims that allegedly occurred/arose over the period 28 to 31 May 2022?
- (b) What if any costs should be awarded to the successful party?

Does the Authority have jurisdiction to investigate Mr Santamaria's new claims that allegedly occurred/arose over the period 28 to 31 May 2022?

Section 149 of the Act

[61] Section 149(1) of the Act provides that a mediator employed/engaged by MBIE may sign agreed terms of settlement.

[62] Section 149(2) of the Act provides that before a mediator may sign a s 149 settlement agreement they must explain to the parties the effect of subsection (3) of the Act. The mediator must explain the effect of s 149(3) of the Act to the parties. The mediator must also be satisfied that the parties still wanted the mediator to sign the agreed terms of settlement under s 149(1) of the Act, in the knowledge that s 149(3) of the Act made the terms of settlement final, binding and enforceable.

[63] Section 149(3) of the Act states:

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 party empowered to do so,—

- (a) those are final and binding on, and enforceable by, the parties; and
- (ab) the terms may not be cancelled under sections 36 to 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.

Interpretation principles

[64] The Supreme Court's decision in *Vector Gas Limited v Bay of Plenty Energy Limited*, which is the leading case on contractual interpretation, required a principled

approach to be taken to contract interpretation, with any dispute as to meaning to be objectively determined.² The Supreme Court in *Vector Gas* held:³

The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. Language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. **The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.** The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time. (Emphasis added.)

[65] The contextualised approach to the interpretation of contracts endorsed by the Supreme Court in *Vector Gas* has consistently been applied in the employment jurisdiction.

[66] In *Crossen v Yangs House Limited* the Employment Court stated that:⁴

It was common ground that interpreting the settlement agreement is an objective exercise to ascertain the meaning it would convey to a reasonable person having all of the background reasonably available to the parties in the situation they were in at the time of the agreement. In this exercise context is significant and taking it into account does not depend on establishing any ambiguity in the agreement being interpreted.

The ability of parties to compromise future potential claims

[67] A settlement will usually be limited to claims both parties were aware of at the time the settlement was entered into. However, future potential claims can also be compromised, provided clear language was used in the terms of settlement to do so. Accordingly, it is a question of fact and interpretation of the whole of the RoS, including the circumstances in which it was entered into, as to whether potential future claims were intended to be barred in this case.

[68] The terms of settlement must be construed by giving effect to what the parties intended, as “ascertained from the words used in the factual matrix.”⁵ Claims a party

² *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444.

³ *Vector Gas Ltd* above 22, at 457.

⁴ *Crossen v Yangs House Ltd* [2021] NZEmpC 102 at [12].

⁵ *Rickards v Ruapehu District Council* [2003] 1 ERNZ 400.

was unaware of could be compromised, provided the language used in the settlement made it clear the parties had intended for that to occur.

Relevant case law

[69] In *Maharaj v Wesley Wellington Mission Inc* the Employment Court held that the use of the words “full and final settlement of any and all matters between the parties” in a s149 settlement under the Act was clear enough wording to have compromised the new wage arrears claim the employee wanted to pursue.⁶ The Court concluded that the settlement was designed to be comprehensive, ensuring the whole dispute was resolved.

[70] Mr Maharaj argued (among other things) that he was not aware there was a potential cause of action arising from wage arrears under the Minimum Wage Act 1983 when he entered into the settlement, because the Full Employment Court had not issued its judgment in *Idea Services Limited v Dickson*, dealing with entitlement to payment for sleepovers.⁷ That argument did not succeed.

[71] The Court concluded the s 149 settlement was designed to be comprehensive, ensuring the whole dispute was resolved, as it had covered “any and all matters between the parties arising out of the employment relationship”.⁸ Therefore, the clear wording used by the parties had compromised all causes of action or claims between them, so Mr Maharaj was unable to pursue a new claim.

[72] In *Kaipara District Council v McKerchar* the Employment Court considered a strike out application based on a non-s 149 settlement, and concluded the settlement provided an absolute defence to claims the Council had wanted to pursue against Mr McKercher.⁹

[73] At issue was whether the Council’s claim against Mr McKerchar for penalties for breaches of his employment agreement should be struck out because they were barred by a non-s 149 settlement agreement, which had negotiated his resignation.¹⁰ The Council said its claims should not be barred, because at the time the Deed of

⁶ *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129.

⁷ *Idea Services Ltd v Dickson* [2009] NZEmpC 116.

⁸ *Maharaj* above n6, at [39].

⁹ *Kaipara District Council v McKerchar* [2017] NZEmpC 55 at [266], [246] and [263].

¹⁰ *Kaipara District Council* above n9.

Settlement was signed it did not know, or at least did not know sufficiently, of the breaches on which its new claims against Mr McKerchar were based.

[74] The full and final nature of the settlement agreement in *Kaipara District Council* was stated as follows:¹¹

This Deed is executed by the parties in full and final settlement of all matters, rights and obligations arising from the employee's position of employment with the employer, and is in full satisfaction of any actual or potential disputes, grievances, actions or other issues between the employee and the employer arising out of the employee's position in employment with the employer, whether out of statute, common law, equity, or otherwise.

[75] The Court said these words had to be interpreted both in the context of the whole agreement and in light of the circumstances in which it was entered into by the parties. That included the Deed of Settlement as a whole, but also the context of the parties' relationship, including the events leading up to the execution of the settlement.¹²

[76] The Court concluded that the parties had intended the settlement to ensure there would be no subsequent litigation between them arising out of the employment relationship.¹³ The Council was therefore barred from bringing its new claims. The inclusion of the word "potential" in the settlement showed the Council was aware of Mr McKerchar's performance of his contractual duties at the time of the settlement agreement.

[77] In *Crossen v Yangs House Limited* the s 149 settlement agreement under the Act stated that it was:¹⁴

In full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.

[78] The Court said that read as a whole, the settlement favoured a broad meaning be given to the words the parties had used, as opposed to a narrow interpretation. The Court held that the use of the words "all matters" and the expressions "relating to" and

¹¹ *Kaipara District Council*, above n9, at [31].

¹² *Kaipara District Council* above n9, at [246] and [263].

¹³ *Kaipara District Council* above n9, at [263] to [269].

¹⁴ *Crossen* above n4, at [12].

“employment relationship problem” suggested the parties had intended an expansive interpretation of their settlement.¹⁵

[79] The Court held that the inclusion of a non-disparagement clause in the s 149 settlement agreement under the Act and an express agreement to confine any public comment to the statement recorded in clause 2 of the settlement agreement indicated the parties had intended there to be a “comprehensive compromise”.¹⁶ The words used in the settlement had settled “all outstanding issues between Ms Crossen and Yangs House”, so she could not pursue her wage arrears and holiday pay claims.¹⁷

[80] In *Alkazaz v Deloitte (No 3) Limited* at issue was whether the s 149 settlement agreement under the Act barred the employee from bringing claims of racial harassment and wage arrears/breach of contract.¹⁸ The full and final nature of the settlement was recorded as follows:¹⁹

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.

[81] The Court considered it was material that in addition to the “full and final settlement” clause referred to above, the settlement also contained an employee acknowledgement clause that stated:²⁰

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 [...] whether arising by way of contract, statute or otherwise.

[82] In *Alkazaz* the employee was aware of the circumstances of his remuneration and the conduct he viewed as racial discrimination, so he could have had a claim for those matters at the time the settlement was entered into. Given that knowledge,

¹⁵ *Crossen* above n4, at [27].

¹⁶ *Crossen* above n4, at [28].

¹⁷ *Crossen* above n4, at [49].

¹⁸ *Alkazaz v Deloitte (No 3) Ltd* [2022] ERNZ 829.

¹⁹ *Alkazaz* above n18, at [74].

²⁰ *Alkazaz* above n18, at [81].

together with the acknowledgement clause, the Court concluded the employee's new claims were barred by the settlement agreement.²¹

Full and final nature of the RoS settlement

[83] The material clause in the RoS regarding the full and final nature of the settlement was clause 11. The mediator's attestation also recorded the final and binding nature of the RoS settlement.

[84] Clause 11 of the RoS stated:

TVNZ will pay and Mr Santamaria will accept the payments and benefits referred to in this agreement in full and final settlement of all claims either party may have against the other, arising out of Mr Santamaria's employment with TVNZ (including the cessation of that employment).

[85] The mediator attestation and signoff stated:

Before I signed the agreed terms of settlement I explained to the parties the effect of ss 148A, 149(1) and (3). I am satisfied that the parties understand the effects of ss 148A, 149(1) and (3), and they have advised me that no minimum entitlements have been foregone in the reaching of this settlement and have affirmed their request that I should sign the agreed terms of settlement.

What did the RoS settle?

[86] The Court in *Kaipara District Council* recognised that potential claims could be compromised (in exchange for valuable consideration) even if the parties had not discussed them, or if the facts of such a claim were not known to the parties that time, provided the parties were "sufficiently aware" of such potential claims.²²

[87] In *Kaipara District Council* the Employment Court held:²³

The Court must approach the exercise of determining a disputed meaning by concluding what an independent, relevantly informed, third party would say the words mean. **Irrelevant to this exercise are post execution assertions by the parties as to their intended meanings.** (Emphasis added)

[88] The key issue in this case therefore was whether the term "full and final settlement of all claims either party may have" was sufficiently clear to have

²¹ *Alkazaz*, above n18, at [77], [78] and [85].

²² *Kaipara District Council* above n9, at [210] to [217].

²³ *Kaipara District Council* above n9, at [34].

compromised the new claims. Read as a whole, the RoS was clearly intended to bring a final conclusion to all actual and potential issues between the parties.

[89] In *Crossen* the Court favoured giving a broad meaning to the words “in full and final settlement of all matters between the applicant and respondent arising out of their employment relationship.”²⁴ The Authority has therefore adopted the same approach.

[90] Clause 11 in the RoS in this matter clearly and unambiguously settled on a “full and final basis” all claims the parties “may have” arising from Mr Santamaria’s employment and the ending of it. The reference to settling “all claims” the parties “may have” demonstrated the parties had turned their minds to the possibility of potential future claims they had not already specifically identified.

[91] That objectively indicated the parties had intended to settle all claims they may have, including those that had not yet been raised/discussed. The clear use of these words in the RoS indicated that the parties intended to settle on a “full and final settlement” basis all claims, including any potential claims that were at that time unknown.

[92] The express reference to resolving all issues arising out of “Mr Santamaria’s employment” and “the cessation” of it objectively indicated the settlement was intended to be comprehensive, because it effectively covered everything to do with the employment relationship.

[93] The language used in the RoS made it clear it was intended to cover all matters arising out of Mr Santamaria’s employment and its cessation, which included the period up to and including 31 May 2022. This compromised the new claims he wanted to pursue, as the new claims had obviously arisen out of his employment. Accordingly, these were the very types of claims that the full and final settlement clause in the RoS, and the mediator certification, was aimed at addressing.

[94] The Court in *Kaipara District Council* referred to dictionary definitions to assist it with interpreting what the parties had objectively intended by the use of the word “potential.”²⁵ The Court concluded the reference to “potential” in the Deed of

²⁴ *Crossen* above n4, at [12].

²⁵ *Kaipara District Council* above n9, at [291].

Settlement had encompassed future claims, even where the Council was not fully aware of all of the circumstances involved in such claims.

[95] The use of the word “potential” in *Kaipara District Council* was analogous to the use of the word “may” in the RoS in this matter. In both instances the words used in the s 149 settlement referred to something that was possible but not yet in existence. The dictionary definitions of “may” support that view, in particular:

- (a) Cambridge Dictionary (online edition) defines “may” as “used to express possibility”;
- (b) Merriam-Webster (online edition) defines “may” as “used to indicate possibility or probability”;
- (c) Collins English Dictionary (online edition) defines “may” as something “to indicate that something will possibly happen or be true in future, but you cannot be certain”.

[96] The Employment Court in *Crossen* held that the inclusion of a non-disparagement clause, and an express agreement to confine any public comment to what had been recorded in the RoS indicated that the parties had intended there to be a “comprehensive compromise”.²⁶ That was also the case in this matter.

[97] Support for the Authority’s view that the RoS was intended to settle everything to do with the parties’ relationship, and the ending of it, can be found in a broader reading of the RoS as a whole, such as:

- (a) The mutual non-disparagement clause;
- (b) The carefully worded message the parties agreed would be released about Mr Santamaria’s resignation;
- (c) Mr Santamaria’s release from his restraint of trade obligations;
- (d) The agreed comment the parties would make in response to media queries;
- (e) The ability to discuss and agree a public statement regarding the events that had led to Mr Santamaria’s resignation, if media queries continued in the four weeks following his resignation;

²⁶ *Crossen* above n4, at [28].

- (f) The confidentiality obligations regarding the existence and terms of the RoS;
- (g) The obligation TVNZ had to direct employees who had previously been identified as knowing about the reasons for Mr Santamaria's resignation to keep all matters relating to it strictly confidential.

[98] Taken together, a reasonable and properly informed third party would likely consider the parties had intended to resolve all issues between them, not just those that related to the original complaint and disciplinary process against Mr Santamaria.

[99] Mr Santamaria's submission that the words "any claim [he] may have" should be interpreted to mean any claims he was able to identify from the issues that had arisen in the employment relationship up to the date he had signed the RoS was not accepted. His interpretation strained the plain meaning of the words used, and artificially limited what the parties had likely objectively intended the settlement to cover.

[100] Accordingly, the Authority's provisional view was that, on the face of it, the words used in the RoS were clear and unambiguous, having regard to the overall circumstances and context that existed at the time the RoS was entered into. Namely, clause 11 in the RoS appears to have been intended to settle all claims either party may have had about Mr Santamaria's employment and the ending of it.

[101] Due to the parties' negotiations and the extensive media interest in his matter, Mr Santamaria must have been aware that there was a possibility of new issues arising due to future media attention following the announcement of his resignation. The good faith issues and breach of contract claims that Mr Santamaria wanted to pursue were fundamental to the issues under discussion by the parties which had resulted in them entering into the RoS.

[102] Even if Mr Santamaria was not aware of the exact basis of his new claims, or all the facts associated with the new claims were not known, or the new claims had not been discussed between the parties, the language the parties used in the RoS was clear enough to have compromised the potential new causes of action.

[103] The finality of the settlement was effectively acknowledged by Mr Santamaria in his 2ASoP when he stated the RoS was intended "to draw a line under the matter."

What was the context in which the parties entered into the RoS?

[104] Context is a necessary part of ascertaining meaning. The Supreme Court in *Vector Gas* recognised words that were plain and unambiguous on the face of it from a reading of the contract in issue, could be susceptible of being altered by the particular context of a matter, provided it was objectively established that the parties had intended their words to mean something else due to the particular circumstances within which the words had been used.²⁷

[105] In *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* the Employment Court held that it was a valid part of the interpretation exercise to cross-check interpretation against the contractual context.²⁸

[106] Having reached a provisional view that clause 11 on the face of it had barred future potential claims, it was appropriate for the Authority to cross check that by reviewing the context and objective purpose of the RoS. The purpose of this cross check of the contextual circumstances of the RoS was intended to ascertain whether the parties had objectively intended for the words in clause 11 to have a meaning other than their plain and ordinary meaning.

[107] Media attention, media coverage and media communications were at the forefront of the parties' minds at the time they entered into the RoS. All of this was expected to significantly increase once Mr Santamaria's resignation was publicly known. Alleged breaches of good faith and of contractual obligations, which are what the intended new claims also involved, were also some of the issues that must have been at the forefront of the parties' minds during the settlement negotiations, given the nature of Mr Santamaria's concerns.

[108] The parties were aware of the stress and strain the publicity that occurred had already caused Mr Santamaria and his family. The parties also reasonably anticipated that media attention was likely to escalate after his resignation became public, and both parties wanted to agree on a process as part of their settlement that had comprehensively addressed that future situation. To that extent, the settlement clearly had to be future focused, so was not just be confined to what had already occurred.

²⁷ *Vector Gas Ltd* above n2, at 459.

²⁸ *New Zealand Professional Firefighters Union v NZ Fire Service Commission* [2011] NZEmpC 149 at [17].

[109] The relevant context to the parties signing the RoS on 28 May 2022 was that they knew:

- (a) Mr Santamaria had been away from work since 18 May 2022;
- (b) Mr Santamaria would remain employed until his resignation under the RoS took effect on 31 May 2022;
- (c) There would be a delay between the parties signing the RoS and the mediator certifying it;
- (d) Mr Santamaria would not be attending work, or undertaking any work, in the days between him signing the RoS and the date his employment ended;
- (e) The only issue that could therefore potentially arise between Mr Santamaria signing the RoS and his employment ending would therefore likely relate to media coverage/queries and communications;
- (f) The parties turned their minds to that possibility, and agreed on specific clauses that set out an agreed communication strategy (clauses 4 and 6), addressed how potential media queries would be responded to (clauses 7 and 8), and which covered confidentiality obligations (clause 9);
- (g) Neither party had reserved any actual or potential claims which were not to form part of the settlement, which indicated that the RoS was intended to be a comprehensive, not partial, settlement;
- (h) The RoS was stated to be a “full and final settlement of all claims either party may have arising out of Mr Santamaria’s employment with TVNZ and the ending of it”, indicating it was to cover everything;
- (i) The parties intended for the RoS to be final, binding and enforceable under s 149(3)(a) of the Act, as was evident by their request that the mediator certify the RoS.

[110] TVNZ told Mr Santamaria’s counsel on 29 May 2022 that it could not control who its reporters approached for information or what they asked, and that it could not instruct them not to report on Mr Santamaria’s situation. He therefore knew TVNZ’s position on those issues before he affirmed to the mediator on 2 June 2022 that the RoS should be certified.

[111] TVNZ had also confirmed to Mr Santamaria that those in TVNZ who knew about the settlement would be “sticking to that wording”, so he knew that the only communications that would be released by TVNZ (ie the personnel who had personal knowledge of the circumstances of his resignation) was what the parties had recorded in the RoS. The terms of the RoS therefore made it clear that it was objectively intended to have covered future media communications in a very specific manner.

[112] Mr Santamaria did not raise or reserve or otherwise put TVNZ on notice that he had new claims he believed would not be covered by the settlement before the mediator certified the RoS on 2 June 2024. His failure to do so would have led TVNZ to reasonably believe that the RoS had in fact resolved all issues between the parties once and for all. Mr Santamaria’s failure to raise the new claims until almost eighteen months later indicated he had also likely believed the RoS had settled all issues between the parties. No other explanation was provided for such an extensive delay.

[113] Mr Santamaria did not tell the mediator he believed he had new claims that were not covered by the RoS. Therefore, when the mediator contacted Mr Santamaria on 2 June 2022 to confirm he was aware the RoS was final, binding and enforceable and could not be cancelled or brought before the Authority or court, except for enforcement purposes, Mr Santamaria affirmed to the mediator that he understood, and he still wanted the mediator to sign the RoS.

[114] Clause 10 of the RoS also stated “The parties record that they have each had a reasonable opportunity to take independent advice as to the meaning and terms of the agreement.” Mr Santamaria was represented throughout the process by experienced counsel. He therefore must have known what the RoS meant, in terms of prohibiting him from pursuing the new claims, before he asked the mediator to sign it.

[115] The communications Mr Santamaria’s counsel had with TVNZ’s counsel on 29 and 30 May 2022 were insufficient to have fairly or properly put TVNZ on notice that Mr Santamaria had new claims that had arisen after he had signed the RoS on 28 May 2022 that he wanted to pursue. Nor did Mr Santamaria’s PR representative inform Mr McAnulty during their communications on 28 or 29 May 2022 that Mr Santamaria believed he had new claims that arose out of the media communications that had occurred since Mr Santamaria had signed the RoS.

[116] There was no provision in the RoS to require TVNZ to correct inaccurate media coverage, or to prevent their employees from asking questions regarding Mr Santamaria or to prevent its newsroom from reporting on the story.

[117] Mr Santamaria had engaged his PR representative at least by 28 May 2022 when TVNZ were informed of the name of that individual. He therefore had someone with extensive media experience available to deal with the media inquiries that were being received. That person also had direct communications with TVNZ, so had an opportunity to raise on Mr Santamaria's behalf any matters of concern with TVNZ, prior to the mediator certifying the RoS in this matter. However, that did not occur.

[118] Therefore, when TVNZ's representative (as per the requirements of s 149(2)(b) of the Act) affirmed to the mediator on 2 June 2022 that they should certify the RoS, TVNZ was not aware that Mr Santamaria believed he had new claims against it that the RoS had not settled.

[119] The circumstances in which the RoS was entered into supported the Authority's provisional view that the parties had objectively intended for the RoS to resolve all matters between them, particularly arising from media attention, including any claims Mr Santamaria "may have" up to and including the date his employment ended.

Significance of the mediator's certification

[120] The Authority was satisfied Mr Santamaria (who was represented by experienced counsel) must have had sufficient information about the new claims to realise they were a possibility, even if he had not at that point identified specific causes of action, before he had asked the mediator to certify the RoS. The "agreed terms of settlement", as per s 149(3) of the Act, therefore included the new claims, because Mr Santamaria had affirmed to the mediator on 2 June 2022 that he had understood the restrictions s 149(3) imposed on him.

[121] Mr Santamaria could and should have told the mediator not to sign the RoS if he still wanted to pursue the new claims, and/or he could have brought the new claims to TVNZ's attention before the mediator signed the RoS. However, he elected not to do so, which suggested at that time he had also believed that the settlement was intended to have covered everything, as TVNZ said it had.

[122] The parties' request that a mediator certify the RoS made it clear they both wanted to resolve all matters finally and comprehensively between them, in a way that ended further possible litigation arising from the employment relationship or the ending of it.

[123] Because clause 11 of the RoS was an agreed term that had compromised all claims arising from Mr Santamaria's employment and the ending of it. The settlement cannot be brought before the Authority or Court other than for enforcement purposes, in accordance with s 149(3) of the Act.

[124] In *Lumsden v Sky City Management Limited* the Employment Court recognised that Parliament had implemented s 149(3) of the Act in order to restrict the circumstances in which a party could pursue matters following a settlement agreement which had been certified by a mediator.²⁹

[125] The settlement agreement in *Lumsden* stated:³⁰

This is in full and final settlement of all matters between [the parties] arising out of their employment relationship including the termination thereof.

[...]

The terms of this settlement [...] are in full and final settlement of all claims whatsoever [the parties] have or may have against the other arising from or related to this employment relationship including the termination thereof.

[126] The Court in *Lumsden* held that Mr Lumsden's constructive dismissal claim was barred by the s 149 settlement agreement under the Act. The Court recognised that parties could limit their ability to pursue claims, and referred to certain safeguards being put in place where individuals will be unable to bring a claim. That included provision for an approved mediator to explain to the parties the impact of a proposed settlement and the restrictions it would place on their ability to pursue a claim at a later date.³¹

[127] The mediator signed the RoS in this matter to record that the matters in s 149(3) of the Act had been explained to the parties, and that the mediator was satisfied the parties understood the effect of ss 148A, 149(1) and 149(3). There was no dispute that the mediator certification had occurred correctly. The Employment Court in *South*

²⁹ *Lumsden v Sky City Management Ltd* [2017] NZEmpC 30 at [21].

³⁰ *Lumsden* above n29, at [8] and [13].

³¹ *Lumsden* above n29, at [20].

Tranz Limited and Ors v Strait Freight Limited stated that the effect of s 149(3)(a) of the Act is that “the agreement may not be the subject of any form of proceedings other than enforcement proceedings.”³²

[128] When Mr Santamaria spoke to the mediator who signed off the RoS on 2 June 2022 after his employment had ended, he was aware of the possibility of the new claims. Mr Santamaria was represented by experienced legal counsel, who would likely have advised him on any issues that had arisen prior to his employment ending, and on the consequences of the s 149 mediator signoff process, before the mediator certified the RoS.

[129] The mediator not only had to explain to Mr Santamaria the effect of s 149(3) in the Act but also be satisfied that, knowing the effect of subsection 149(3) in terms of the restrictions it would impose on him taking any further action in connection with his employment or the ending of it, Mr Santamaria had nevertheless affirmed his request to the mediator that they certify the RoS.

[130] The statutory safeguards built into the s 149 process meant the parties’ s 149 RoS could safely be considered to be intended as a full and final settlement of all matters between them up to and including the end of Mr Santamaria’s employment on 31 May 2022. The new claims Mr Santamaria wanted to pursue arose out of his “employment with TVNZ (including the cessation of that employment)”, so were specifically settled in clause 11 of the RoS on a “full and final settlement of all claims” basis.

[131] Allowing Mr Santamaria to pursue the new claims in the face of the mediator’s s 149(3) certification of the RoS would also have undermined the intended purpose of s 149 which was to reinforce the finality of settlements.³³

Did Mr Santamaria’s counsel raise or reserve his new claims before the mediator certified the RoS?

[132] Mr Santamaria had four days from the date he signed the RoS to it being certified by a mediator within which to raise any new claims with TVNZ. The communications that were sent via his counsel, to the effect that the parties remained in an employment relationship and that TVNZ was expected to meet its obligations to

³² *South Tranz Ltd and Ors v Strait Freight Ltd* [2007] ERNZ 704 at [38].

³³ *Young v Board of Trustees of Aorere College*[3013] NZEmpC 111, at [22].

him as an employer, were insufficient to have appropriately raised the possibility of future claims. The facts of the new claims were not reported to TVNZ until some 18 months after the RoS had been signed.

[133] Mr Santamaria had legal representation, so if he had believed he had new claims that were not covered by the RoS then he had an obligation to raise those with TVNZ before affirming to the mediator he was aware that the RoS could not be actioned, appealed, reviewed or otherwise brought before the Authority or Court, except for enforcement purposes.

Outcome

[134] As was the case in *Kaipara District Council*, the RoS in this matter was intended to record the parties' mutual intention that there would be a clean ending of their employment relationship in a manner that prevented either party from bringing claims that arose out of their employment relationship or the ending of it against each other.

[135] The parties clearly objectively intended to ensure there would be no subsequent litigation between them arising out of the employment relationship, or the ending of it. As Mr Santamaria expressed in the 2ASoP, their intention was "to draw a line under the matter" so he could get on with pursuing his career elsewhere. The parties also wanted to reduce/stop the media attention as soon as possible, so a 'clean break' was an important part of achieving that.

[136] Therefore clause 11 in the RoS was drafted to compromise potential future claims, it was not intended to be limited to only claims the parties were aware of as at 28 May 2022.

[137] A reasonable and properly informed third party would consider the RoS the parties had asked the mediator to sign was objectively intended to address all matters up to and including the ending of Mr Santamaria's employment. Clause 11 was drafted clearly enough to include potential claims either party "may" bring in future, it was not limited to only resolving claims and issues between the parties up to and including the date the parties had signed the RoS.

[138] The Authority does not have jurisdiction over the new claims Mr Santamaria wanted to pursue against TVNZ, as these were settled by the RoS the mediator certified on 31 May 2022, so were barred pursuant to s 149(1)(a) of the Act

What costs should be awarded?

[139] TVNZ is the successful party in this preliminary jurisdiction issue. The Authority has power to award costs to a successful party under clause 15 of Schedule 2 of the Employment Relations Act, as a contribution towards the actual costs incurred by that party.

[140] The Authority uses a “tariff” based approach.³⁴ The current tariff for a one-day investigation meeting is \$4,500.00. This ‘on the papers’ matter should be treated as if it had involved a half-day investigation meeting for the purposes of assessing costs. So the notional starting point is \$2,250.

[141] The parties are encouraged to resolve costs by agreement. However, if that is not possible, then TVNZ may lodge a costs memorandum within 14 days of the date of this determination. Mr Santamaria has 14 days within which to lodge his costs memorandum. The parties are encouraged to identify any factors that should result in the notional starting tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority

³⁴ Employment Relations Authority “Practice Directions of the Employment Relations Authority Te Ratonga Ahumana Taimahi” <www.era.govt.nz>.