IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 294
3081638

	BETWEEN	DARYL SWAN Applicant
	A N D	ALLIANCE GROUP LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Angela MacKenzie, counsel for the Applicant Shaun Brookes, counsel for the Respondent
Investigation Meeting:	25 February 2021
Submissions Received:	12 March 2021 and 30 March 2021 from the Applicant 13 April 2021 from the Respondent
Date of Determination:	12 July 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Daryl Swan worked at Alliance Group Ltd's processing plant at Lorneville. On 20 January 2018 Mr Swan was involved in an incident about whether he was entitled to take his tea break in a particular location. In this incident, it was alleged he failed to follow the instruction of a supervisor and then swore at that supervisor. Mr Swan was suspended. Alliance investigated what occurred and commenced a disciplinary process. The result of the investigation and disciplinary process was that Alliance issued Mr Swan with a final written warning.

[2] Mr Swan was unhappy with how Alliance handled the investigation and disciplinary process, including the outcome; through his solicitor (LEF)[1] he raised a personal grievance for unjustifiable action causing disadvantage.

[3] Mr Swan's personal grievance was based on three concerns:

(a) That his immediate suspension was unjustified.

(b) That the investigation into what occurred was not actioned satisfactorily, particularly the time it took Alliance to interview employees and assess what occurred.

(c) That the final written warning was not justified.

[4] Mr Swan and LEF attended mediation with Ken Smith, Legal Counsel at Alliance, and Kate Brady, Regional HR Manager at Alliance, on the morning of 3 July 2018.

[5] After the mediation, in the afternoon of 3 July 2018, a record of settlement was completed with LEF signing on behalf of Mr Swan and Mr Smith signing for Alliance.

[6] This record of settlement was then certified by a mediator with that mediator completing the certification on the record of settlement on 11 July 2018 (the Record of Settlement).

[7] However between the Record of Settlement being signed by the parties and the certification being completed by the mediator, Mr Swan decided to withdraw his agreement to the settlement set out in the Record of Settlement. Mr Swan felt he had only agreed because of pressure placed on him during the mediation and he was not happy with the settlement terms. Mr Swan told LEF this. Mr Swan then tried to tell the mediator this but did not speak to him until after the Record of Settlement had been signed by the mediator.

[8] Mr Swan believed matters between himself and Alliance had not been settled so he tried to advance his personal grievances with Alliance. Mr Swan made no progress on this so he

[1] In lodging his claim in the Authority and in the course of my Investigation Meeting, Mr Swan made various allegations against his solicitor in regard to events that occurred during mediation; allegations that have potential to harm the solicitor's reputation. Mr Swan's solicitor participated in my Investigation Meeting and had the opportunity to present their response to those allegations. I have made decisions about what occurred between Mr Swan and his solicitor in mediation, rejecting Mr Swan's allegations. Notwithstanding this I consider it appropriate to anonymise the solicitor's name in order to protect them from any misinformed reputational damage arising out of Mr Swan's allegations. Mr Swan's solicitor will be referred to as LEF.

lodged a statement of problem in the Authority claiming unjustifiable action causing disadvantage.

[9] Alliance responded to Mr Swan's claim stating that the personal grievance giving rise to his claim had been settled and as a result the Authority has no jurisdiction to hear his claim. Alliance says the Record of Settlement meets the statutory requirements and is binding and enforceable. As an alternative it says, if the Record of Settlement is not binding and enforceable, there is in any event a settlement agreement between the parties based on the agreement reached in mediation.

[10] Mr Swan says the Record of Settlement is not binding and enforceable because any agreement to the terms of settlement on his part was only due to duress placed on him during the mediation and because he withdrew his consent to the terms of settlement prior to the mediator signing the Record of Settlement. As a result, the Record of Settlement does not meet the statutory requirements of s 149 of the Employment Relations Act 2000 (the Act) and it is not binding and enforceable.

[11] The parties agreed that I would resolve the issue of the status of the Record of Settlement and if required the question of whether, in the alternative, there is a settlement agreement between the parties as a preliminary matter.

[12] There are three possible outcomes in terms of resolving the preliminary matter:

(a) I find that the Record of Settlement is binding and enforceable – if so then Mr Swan's claim cannot proceed.

(b) I find that the Record of Settlement is not binding and enforceable but that there is a settlement agreement – if so the question of whether Mr Swan's claim can proceed turns on the terms of settlement, that is, whether the claim was settled.

(c) I find that the Record of Settlement is not binding and enforceable and there is no other settlement agreement – if so Mr Swan's claim can proceed.

Evidence of what occurred during mediation and subsequent events connected with the mediation

[13] In order to investigate and determine this preliminary issue I had to consider evidence of what occurred at mediation and after that in terms of the Record of Settlement being agreed (or not) and then signed.

[14] Section 148 of the Act provides that people who participate in mediation, which is provided pursuant to s 145 of the Act, must keep any statement or document created or made for the purpose of mediation or any information provided orally in mediation, confidential. So that applies to the evidence I needed to consider.

[15] However, one of the exceptions to the requirement of confidentiality attaching to mediation is where the parties consent to disclosure. After discussing this aspect with counsel at the investigation meeting I am satisfied that by the parties proceeding with the investigation meeting, including by lodging and serving written evidence and documents prior to the investigation meeting, they consented to me hearing the evidence of what occurred at the mediation and after it.

Is the Record of Settlement binding and enforceable?

Section 149 of the Act

[16] A record of settlement is a record of the terms of settlement agreed between parties that has been certified by a mediator pursuant to s 149 of the Act.

[17] Section 149 of the Act provides:

> (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
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> (a) who is employed or engaged by the chief executive to provide the services; and
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> (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—
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> may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.
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> (2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,
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> (a) explain to the parties the effect of subsection (3); and

(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request

(3) 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 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.

(3A) ….

[18] In this case there are terms of settlement that have been certified by a mediator in accordance with s 149 of the Act; the Record of Settlement. However, Mr Swan says the circumstances leading up to the Record of Settlement being certified by the mediator mean it is not binding and enforceable.

Mr Swan's arguments as to why the Record of Settlement is not binding and enforceable

[19] The possible grounds for Mr Swan's assertion that the Record of Settlement is not binding and enforceable include:

(a) LEF did not have authorisation to sign the Record of Settlement on Mr Swan's behalf.

(b) The Record of Settlement was not completed with the necessary mediator's certification prior to Mr Swan withdrawing his agreement to the terms of settlement.

(c) The Record of Settlement was only entered into by Mr Swan under duress.

(d) Mr Swan was mistaken as to the terms of settlement in the Record of Settlement.

[20] Before I turn to analysing these possible grounds there is a threshold question to address. Section 149(3)(b) of the Act states that where agreed terms of settlement have been signed by a mediator in accordance with s 149 then those terms of settlement cannot be brought before the Authority except for enforcement.

[21] In this case there is a record of settlement that sets out terms of settlement, which has been signed by a mediator. So, applying s 149(3) of the Act it appears that Mr Swan cannot challenge the record of settlement as he does, in the Authority.

[22] This position is not, however, absolute. In a judgment of the Employment Court, *TUV v WXY*, Chief Judge Inglis clarified the possible exception to this, where a record of settlement may be brought before the Authority or the Court.[2] Chief Judge Inglis decided that she could consider the circumstances under which an agreement certified pursuant to s 149 of the Act was agreed, where it was alleged one party did not have the requisite mental capacity. The purpose of that consideration was to establish if the terms had been agreed; s 149 refers to the "agreed terms" being subject to the s 149 certification by a mediator. And as the Chief Judge stated:

> [45] … Section 149(3) is directed at limiting the circumstances in which parties can revisit their agreements by seeking to bring the terms of settlement before the Court (including, for example, in instances of settlor remorse). It is not directed at deeming the validity of the agreement itself.
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> [46] If that is correct, and if the plaintiff can establish that she did not have the requisite mental capacity to enter into the settlement agreement in this case, then s 149(3) would not be engaged. That is because the fundamentals of contractual formation would not have been made out and there would be no agreement for s 149(3) to leverage off. Such cases are likely to be rare because of the hurdles that must be overcome in establishing, for example, lack of mental capacity, knowledge and unconscionability.
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> [Footnote omitted]

[23] So, if I am satisfied that any of the grounds Mr Swan raises for challenging the Record of Settlement relate to the fundamentals of contractual formation, essentially whether the terms can be properly said to have been agreed by the parties, then I can consider that argument; but if the argument advanced does no more than suggest Mr Swan no longer wishes to be bound by the agreement (for whatever reason) then I cannot consider that.

Relevant events

[24] The relevant events in relation to the Record of Settlement are:

(a) The parties attended mediation on 3 July 2018.

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[2] *TUV v WXY* [2018] NZEmpC 154.

(b) In mediation the parties reached an agreement on how Mr Swan's personal grievance would be settled, however the terms of that settlement could not be recorded in a record of settlement at the mediation as neither the mediator nor the parties had access to a computer at the mediation.

(c) LEF wrote the terms of settlement down and Mr Swan signed this note of the terms of settlement. LEF did this to ensure Mr Swan knew what the terms of settlement were and to ensure he had acknowledged, by signing, that he accepted those terms; this was the basis on which LEF believed they could then sign the Record of Settlement on Mr Swan's behalf.

(d) The mediator then completed the formalities for certification by taking the parties through the terms of settlement, explaining the effect of s 149(3) of the Act and having the parties affirm that they wished to have the mediator sign the terms of settlement.

(e) After the mediation, in the afternoon of 3 July 2018, LEF used the note of the terms of settlement to draft the Record of Settlement. LEF signed the Record of Settlement on behalf of Mr Swan.

(f) That same afternoon, LEF sent the signed Record of Settlement to Mr Smith. Mr Smith promptly signed the Record of Settlement and returned it to LEF. And LEF then sent the Record of Settlement to the mediator for him to sign.

(g) On 3 July 2018, Ms Brady processed a reduction of Mr Swan's final written warning to a written warning; this being a term of settlement, which was recorded in the Record of Settlement.

(h) On 4 July 2018, LEF sent an invoice to Mr Smith for Alliance to pay legal fees for Mr Swan; this also being a term of settlement, which was recorded in the Record of Settlement. Mr Smith approved payment that day and payment was subsequently processed and sent to LEF on 9 July 2018.

(i) On 10 July 2018, Mr Swan spoke to LEF and told them he had been coerced or bullied into accepting the settlement and he was not happy with the terms of

settlement and no longer agreed to them. Mr Swan told LEF that he was going to speak to the mediator.

(j) LEF then sent an email to Mr Smith which stated:

> [Mr Swan] has advised me that he believes the Record of Settlement was entered into by him by duress (from me). I am no longer acting for Mr Swan but he has asked me to send this email to you.

(k) Mr Smith then spoke to the mediator later on 10 July 2018. The mediator advised Mr Smith that there had been a delay in him signing the Record of Settlement but it was done.

(l) On 11 July 2018 the mediator emailed copies of the Record of Settlement signed by him to Mr Smith and LEF; the mediator's certification was dated 11 July 2018.

(m) LEF then emailed the mediator advising that Mr Swan had withdrawn his agreement to the Record of Settlement and that he was alleging that he had agreed to the settlement under duress. A copy of this email was sent to Mr Smith and he responded stating that Alliance's view was the Record of Settlement was valid.

(n) Mr Swan spoke to the mediator late on 11 July 2018 but he had not spoken to the mediator between 3 July 2018 and the evening of 11 July 2018.

LEF had authority to sign the Record of Settlement

[25] In the course of giving evidence Mr Swan initially denied signing the handwritten note of the terms of settlement that was disclosed as part of the evidence. Mr Swan said he had initialled a note of the terms of settlement and he had not signed any note or written record of the terms of settlement. He also suggested the terms of settlement in the note he initialled were different to those in the signed note. Mr Swan then went on to say the signed note must have been created after the mediation with a copy of his signature inserted into the note.

[26] I take this argument to be that Mr Swan is alleging he did not agree to the terms of settlement and LEF had no authority to draft and then sign the Record of Settlement as they did. As this argument goes to the fundamentals of contractual formation I can consider it.

[27] Mr Swan's allegations, that he had initialled a different note of the terms of settlement, that he had not signed the note of the terms of settlement and that the signed note produced as evidence was essentially a forged document, were only raised for the first time when Mr Swan gave oral evidence in the investigation meeting.

[28] When LEF was told of these allegations they strenuously and emphatically denied them. In support of this denial LEF produced the original signed note of the terms of settlement and reaffirmed their written evidence under affirmation, that Mr Swan had signed the note in the mediation and they confirmed in oral evidence that the original signed note produced in the investigation meeting was the only note of the terms of settlement and there was not a second note that had been initialled.

[29] When the original copy of the note was produced Mr Swan accepted he may have signed it, but he insisted there was a second different note of the terms of settlement that he had initialled. At the end of the investigation meeting I gave Mr Swan time to locate this second initialled note so he could disclose it as evidence. Mr Swan was not able to find the second initialled note.

[30] My finding of fact is that Mr Swan did sign the handwritten note of the terms of settlement that LEF produced at the investigation meeting. There is no substance at all in the allegation that Mr Swan's signature was in some way fraudulently inserted into the note. I also find that there was not a second note of the terms of settlement that Mr Swan had initialled. Therefore I conclude Mr Swan did agree to the terms of settlement as evidence by his signature.

[31] Given that LEF had written confirmation that Mr Swan accepted the terms of settlement agreed in the mediation, I find they had authority to draft the Record of Settlement and sign it on Mr Swan's behalf.

[32] This aspect of Mr Swan's argument does not succeed.

The Record of Settlement was not signed by the mediator prior to Mr Swan withdrawing his agreement to the terms of settlement

[33] The question of whether the mediator was right to sign the Record of Settlement is not a question that goes to the fundamentals of contractual formation, that is whether the terms of

settlement were agreed terms. A challenge of any sort to the mediator's signing of a record of settlement pursuant to s 149 of the Act cannot be brought before the Authority.

[34] The mediator's signature stands as evidence that the mediator was satisfied that the requirements of s 149(2) of the Act had been met and that is beyond challenge.

[35] This aspect of Mr Swan's argument does not succeed.

Mr Swan was not coerced into signing the Record of Settlement

[36] Mr Swan also made a number of allegations in his evidence about the behaviour of LEF and the mediator putting pressure on him to accept the terms of settlement. The crux of Mr Swan's argument being that he only agreed the terms of settlement under duress.

[37] This is an issue going to the fundamentals of contractual formation and therefore an argument I am prepared to consider.

[38] Mr Swan's evidence regarding the alleged duress was disputed by LEF.

[39] In assessing the evidence to establish whether Mr Swan's allegations are founded I have considered the relevant case law principles relating to credibility and making findings of fact when there is disputed evidence.[3]

[40] Having undertaken this assessment I conclude that I prefer the evidence of LEF. Mr Swan's account of what occurred was inconsistent and appeared unreliable, his account of what happened did not appear credible nor did it hang together in terms of what he alleged occurred nor did it make sense in terms of the behaviour a representative and a mediator would undertake simply to obtain a settlement.

[41] I find that LEF and the mediator did not act as Mr Swan alleges and there is no basis for the duress argument.

Mr Swan may have been mistaken as to the terms of settlement but this is of no consequence

[42] In the course of the investigation meeting it became apparent that Mr Swan's issue with the Record of Settlement was that its terms meant he could not revisit the issue at the heart of

[3] *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673.

the events on 20 January 2018; the issue of whether he was right or wrong in taking his tea break in the area he did and therefore whether his supervisor was right to reprimand him and direct him as he did.

[43] This positions sounds as an argument centred on mistake. Mr Swan says he was mistaken as to the terms of settlement as he believed he could still pursue the issue relating to tea breaks. This is an issue going to the fundamentals of contractual formation. I also note that the elements of, and the effect of, mistake as set out in sections 21 – 32 of the Contract and Commercial Law Act 2017 are not specifically excluded in s 149(3) as other provisions Contract and Commercial Law Act 2017 are – sections 36 to 40 relating to misrepresentation. So, I can consider Mr Swan's argument as it relates to mistake.

[44] An analysis of Mr Swan's assertions – that he was mistaken as to what was being settled – shows that he does not meet the requirements of sections 21 – 32 of the Contract and Commercial Law Act 2017:

(a) Mr Swan's mistake was not known to Alliance.

(b) Alliance did not enter into the Record of Settlement under any mistake as to the terms of settlement, either the same mistake as Mr Swan alleges he suffered from or another mistake.

[45] On this basis Mr Swan's argument as to mistake does not succeed.

The Record of Settlement is binding and enforceable

[46] I am satisfied that:

(a) Mr Swan agreed the terms of settlement set out in the Record of Settlement.

(b) The Record of Settlement was signed by the mediator.

[47] Therefore the Record of Settlement is binding and enforceable.

What is the effect of the Record of Settlement on Mr Swan's claim?

[48] As a result of my conclusion, that the Record of Settlement is binding and enforceable, Mr Swan's claim cannot continue on the Authority as it has been settled by the Record of Settlement.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority