New Zealand Employment Relations Authority Decisions

TUV v WXY (Christchurch) [2017] NZERA 1222; [2017] NZERA Christchurch 222 (19 December 2017)

Last Updated: 15 January 2018

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 222
3007591

BETWEEN TUV Applicant

A N D WXY Respondent

Member of Authority: David Appleton

Representatives: TUV's son, Advocate for Applicant

Jordan Boyle, Counsel for Respondent

Investigation Meeting: 14 November 2017 at Nelson

Submissions Received: 24 November and 15 December 2017 from Applicant

30 November 2017 from Respondent

Date of Determination: 19 December 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

A. **I decline to set aside the record of settlement on the basis of mental incapacity.**
B. **I decline to set aside the record of settlement on the basis of duress.**

C. Costs are reserved.

Prohibition from publication order

[1] On 15 September 2017 I issued a prohibition from publication order sought by the respondent prohibiting from publication the names of the parties, any information that might lead to the identification of the parties and the evidence given or pleadings lodged in the name of any party or witness. This was granted on the basis that the parties entered into what the respondent regards as a binding, confidential settlement agreement, recorded in a certified record of settlement.

[2] My order was to remain in effect until the Authority had determined the preliminary issue that is the subject of this determination. That is, whether the applicant could set aside the record of settlement on the grounds that she did not have capacity to enter into it (being unsound of mind) and/or she entered into it under duress. My prohibition from publication order specified that, if the applicant succeeded in her application and elected to set aside the record of settlement, the order would no longer apply. If the applicant did not succeed, then the non-publication order would remain in place.

[3] For the reasons set out in this determination, the applicant has not succeeded in her application. Therefore, the prohibition from publication order remains in place, and becomes permanent, unless subsequently revoked by the Authority or a higher court. The applicant shall be referred to in this determination as Mrs TUV, her advocate (her son) as Mr TUV and

the respondent as WXY or the respondent1.

Employment Relationship Problem

[4] Mrs TUV alleges that she was the subject of workplace bullying, harassment, racism, ageism, social isolation and breaches of her privacy while she worked for WXY between

2010 and 2015.

1 These letters do not relate to the names of the parties in any way.

[5] On 1 December 2015 Mrs TUV signed a record of settlement pursuant to s 149 of the Employment Relations Act 2000 ("the Act"), in accordance with the terms of which, *inter alia,* she resigned from her employment, received certain payments, and agreed not to speak ill or make disparaging comments of the respondent. In addition, the record of settlement was stated to be "the full and final settlement of all matters between the applicant and the respondent arising out of their employment relationship".

[6] The matter currently before the Authority is to determine whether Mrs TUV can set aside the record of settlement on the basis that she was not of sound mind at the time she signed it and/or that she signed it by reason of duress. No assessment of capacity was carried out (or requested) at the time Mrs TUV signed the record of settlement.

[7] The respondent relies on the terms of the full and final settlement to apply for a strikeout of Mrs TUV's claims on the basis that it is frivolous.

[8] This determination therefore addresses the preliminary issue of whether Mrs TUV can set aside the record of settlement.

The legal principles to be applied

[9] Section 149 of the Act sets out the effect of a record of settlement entered into pursuant to that section. The section provides as follow:

149 Settlements

(1) Where a problem is resolved, whether through the provision of mediation

services or otherwise, any person—

(a) who is employed or engaged by the chief executive to provide the services; and

(b) who holds a general authority, given by the chief executive, to

sign, for the purposes of this section, agreed terms of settlement,— may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

(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) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as

if the minor were a person of full age and capacity.

(4) A person who breaches an agreed term of settlement to which subsection

(3) applies is liable to a penalty imposed by the Authority.

The Authority's jurisdiction to declare a s 149 record of settlement voidable

[10] Judge Inglis (as she was then) examined the question of whether a record of settlement entered into pursuant to s 149 of the Act is enforceable when it contained a penalty clause. This was in the case of *8I Corporation and 8I Limited* v *Sebastian Marino*2. Whilst *8I Corporation* relates to the enforceability of the record of settlement rather than whether it can be set aside, it is a useful authority to consider in light of the apparently clear cut and unambiguous terms of s 149(3) which states that the terms are "final and binding on, and

enforceable by the parties and that the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017".3

[11] At paragraph [18] of *8I Corporation* Her Honour Judge Inglis stated the following:

[18] What is the s 149 sign-off process directed at? As Mr Towner points out, s.149(3) is, on its face, clearly directed at supporting finality and certainty in settlement agreements, and limiting the Court's ability to scrutinise terms of settlement and to decide which terms should and should not be enforced. However, it seems to me that the operative word is *limit*, not *prohibit.* In this

2 [2017] NZEmpC 69.

3 Formerly s.7 of the Contractual Remedies Act 1979.

regard s.149 itself makes it clear that terms of settlement may be brought before the Court for *enforcement purposes* (s.149(3)(b)).

[12] Judge Inglis also concluded that s 149(3)(b) is akin to a privative provision. At paragraph [27] Her Honour stated the following (citation omitted):

[27] The most troubling logical corollary of the plaintiffs' interpretation of s.149 is that s. 149 settlement agreements would be the only agreements known to law which could contain otherwise unlawful terms; which could not be called into question in the Employment Court and which the Court would be required to enforce. This would fly in the face of established law, that "a court will not enforce a contract which, or the purpose of which, is illegal either under statute or under the general law". Such a result would, in my view, require very clear exclusory language particularly in the context of legislation underpinned by notions of equity and good conscience.

[13] At paragraph [37] of *8I Corporation*, Her Honour stated the following:

[37] While there is scope for arguing on the literal wording of the provision that a penalty clause contained within a s.149 settlement agreement falls beyond the Court's reach, I consider that had Parliament intended to override the common law provision it would have done so expressly, as it did in enacting s.113, which displaces the common law right for an employee to claim wrongful dismissal and sue for damages for breach (by providing that the only way to challenge a dismissal is by way of personal grievance). Parliament did not take this step. It follows that s.149(3) should not be read in a restrictive way contended for by the plaintiffs.

[14] At paragraph [45] of *8I Corporation*, Her Honour stated the following:

[45] While the Act provides that mediator signed-off agreements are full and final and enforceable, and may not be called into question, this is predicated on the earlier operation of a protective safety mechanism for the parties. A literal interpretation of s.149 would mean that a mediator approved by the Chief Executive to undertake employment mediations in circumstances involving acknowledged imbalances of power and vulnerability, could discharge their obligations (activating the far reaching consequences in s.149(3)) simply by repeating the words in s.149(3)(a),(ab) and (c), and by being satisfied that the parties understood that the terms of their proposed agreement were final and binding and enforceable; could not be cancelled under s.7 of the Contractual Remedies Act 1979; and (except for enforcement purposes) could not be brought before the employment institutions. There will be no need to ensure that the parties, however vulnerable or lacking in capacity (through age or otherwise), understood the substance of the proposed terms and/or whether they were otherwise lawful.

[15] On the basis of *8I Corporation*, I am satisfied that, notwithstanding the apparent prohibition on the Authority potentially setting aside the terms of the record of settlement on the application of Mrs TUV, they do not override common law principles such as those which exist to protect someone who suffered from a significantly diminished ability to assess her best interests and where the stronger party knew of the weaker party's disability or disadvantage and took advantage of it in an unconscionable way.

[16] Having established that a s 149 record of settlement is capable of being set aside on the application of a party by reason of her incapacity or duress having been exerted upon her, I now turn to these common law concepts.

Capacity

[17] With respect to mental capacity to enter into a contract, there are two leading

New Zealand cases. The first is the Privy Council case of *O'Connor v Hart4* which at page

171, held the following:

An unconscionable bargain ... would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. "Fraud" in its equitable context does not mean, or is not confined to, deceit, "it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties"; *Earl of Aylesford v Morris* [1873] UKLawRpCh 28; (1873) 8 Ch App 484, 490. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

[18] A non-exhaustive list of principles relating to the New Zealand approach to the law in this area was set out by the Court of Appeal in *Gustav & Co Limited* v *Macfield Limited5* which, at [30] enumerated the following:

1 Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.

4 [1985] UKPC 17; [1985] 1 NZLR 159.

5 [2007] NZCA 205.

2 This equitable jurisdiction is not intended to relieve parties from "hard" bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.

3 A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.

4 If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.

5 Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must "take advantage of" that disability or disadvantage.

6 The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.

7 "Taking advantage of" (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:

... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.

8 If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

[19] The Court noted that, while factors such as a marked imbalance in consideration or procedural impropriety were generally present in unconscionability cases, neither was a pre- requisite for relief.6 However, if there was no significant imbalance in consideration or if the weaker party received full independent advice it was unlikely that any issue of unconscionability would arise7.

[20] Whilst the finding of the Court of Appeal in *Gustav* that Mr Parkinson's terminal liver cancer meant he was unable to adequately look after Gustav's interests was overturned by the Supreme Court, the Supreme Court affirmed the Court of Appeal's statement of law to be the correct approach8.

[21] The common law in relation to incapacity due to unsoundness of mind was considered in an employment context in *Penney* v *Fonterra Co-Operative Group Limited9* where, at paragraph [37], the Court stated in relation to a non-section 149

settlement agreement:

Such a submission can only succeed where it is established on the evidence that the person seeking to avoid the agreement was deprived of reason to the point of mental incapacity. Such incapacity may be the result of mental illness, dementia or, in rare cases, the effect of alcohol or other drugs. It must also be established that the other party knew or ought to have known of the incapacity. Even then, incapacity will only render the agreement voidable. If the agreement is subsequently affirmed when the person concerned is no longer incapable, it will be valid. Even putting all of Ms Penney‟s evidence on this issue at its highest and taking it at face value, it falls a very long way short of establishing those factors. It is also clear that Ms Penney implicitly affirmed the settlement agreement in the days following 12 August 2009 when she demanded payment in reliance on the agreement.

6 at [31].

7 at [31].

8 *Gustav & Co Limited* v *Macfield Limited* [2008] NZSC 47 at [6].

9 [2011] NZEmpC 151.

Duress

[22] With respect to the common law concept of duress, the concept was considered in a New Zealand context in the Court of Appeal case of *Pharmacy Care Systems Limited v Attorney-General10. Pharmacy Care* held that the reach of the concept of duress is broad and may encompass economic duress. At [98] Hammond J. summarised the elements of duress in seven points, as follows:

(i) There must be a threat or pressure.

(ii) That threat or pressure must be improper.

(iii) The victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced.

(iv) The threat or pressure must actually induce the victim's manifestation of assent.

(v) The threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative.

(vi) Duress renders the resulting agreement voidable at the instance of the victim.

This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement.

(vii) The victim may be precluded from avoiding the agreement by affirmation.

[23] Entering into an agreement reluctantly, or even very reluctantly, because the alternative is more unpleasant does not, in itself, amount to duress so as to make the

agreement voidable. See, for example, *Marston* v *Moor11*.

10 CA 198/03, 16 August 2004.

11 [2013] NZHC 2249.

The circumstances leading to the signing of the record of settlement

[24] It appears that the respondent began to have concerns about Mrs TUV's performance from around June 2013 and noted that she appeared to be forgetful and prone to make errors from that period onwards into 2015. According to Mrs TUV she was subjected to close monitoring of her performance and by February 2015 was suffering stress and anxiety. She took a day off on sick leave on 13 February 2015 and was referred to counselling in April

2015. On 17 April 2015 Mrs TUV's GP assessed her as being unable to work from that date due to work related stress, causing moderate to severe depression and anxiety. The GP signed Mrs TUV off for "a long period of stress leave, at present 3-6 months, however this may be longer".

[25] On 19 June 2015 Mrs TUV underwent a neuropsychology assessment by Dr Lea Galvin. In the report prepared by Dr Galvin, she reported that Mrs TUV's current neuropsychological profile included the following:

• Intact overall intellectual functioning.

• Intact processing speed.

• Intact verbal articulation and verbal comprehension.

• Intact working memory.

• Intact executive functioning.

• Mildly impaired simple and divided attention and

• Verbal memory within Low Average.

[26] The report found that Mrs TUV displayed two specific areas of relative weakness, attention to verbal information and recall of verbal information, although these were not significant weaknesses. The report stated that Mrs TUV presented with "an overall intact

neuropsychological profile" and that her "global intellectual functioning (fell) within the

Average Range and [was] consistent with estimates of her pre-morbid functioning".

[27] According to Mr TUV, Mrs TUV's son, Mrs TUV suffered "an acute stress reaction" at the end of August 2015. Mr TUV (who is a training to be a doctor) stated in the statement of problem the following:

The stress and anxiety for [Mrs TUV] resulted in severe depression – this manifested into an acute time-limited mental disorder (previously referred to as a mental breakdown) on the 22nd August 2015. [Mrs TUV] was taken to her GP who instructed her family to remove [Mrs TUV] from her currently [sic] employment environment as soon as possible as [Mrs TUV]'s life was now becoming a concern.

[28] By this time Mrs TUV was being represented by an advocate who had raised a personal grievance on behalf of her by way of a letter dated 18 August 2015. On 9 September

2015 Mrs TUV's GP stated that Mrs TUV was "still experiencing significant disability resulting from stress in the workplace and will not be fit to return to work for the next six months".

[29] On or around 25 September 2015, Bartlett Law started to represent Mrs TUV. In November 2015 the respondent and Barlett Law commenced negotiations with respect to Mrs TUV's employment. Mr TUV states in the statement of problem that, in December 2015:

Mrs [TUV]'s health declines to a point where Mrs [TUV]'s GP in addition to Psychologist Dr Lea Galvin, instruct Mrs [TUV] to be removed from the workplace negotiation environment as her mental health was at a severely low and critical level which was considered a serious threat to her life. With poor legal representation, a mass of pressure from the [WXY], Mrs [TUV] reluctantly signed a settlement as she could not fight the [WXY] due to her poor health.

Mrs [TUV] did not want to sign but was forced to due to the pressure applied by the [WXY] at a time when Mrs [TUV] was psychologically exhausted.

[30] The settlement agreement was signed on 1 December 2015.

[31] Mrs TUV was represented in the latter part of the negotiations by a senior associate at

Bartlett Law, Ms Charlotte Bates. The Authority saw a number of emails passing between

Ms Bates and a solicitor acting on behalf of the respondent, who shall be referred to as 'Mr QRS' in this determination as he is associated with the respondent. These emails show that, on 24 November 2015, Mr QRS sent a draft record of settlement to Ms Bates which he understood reflected the agreement that had been reached in principle between WXY and Mrs TUV concerning the end of her employment. On 30 November 2015 Ms Bates returned the record of settlement with some changes "which reflect what has been agreed in principle between the parties".

[32] On 30 November 2015 Ms Bates wrote the following to Mr QRS:

Dear [Mr QRS],

Apologies but I have just received some further instructions from Mrs [TUV] and have made a further changes [sic] to clause 1 as per the attached document. The amendment is based on the fact that Mrs [TUV] may need to discuss her employment at [WXY] with her medical practitioners and insurers and does not want to be in breach of the Terms of settlement if she does so.

Again, please contact me if you have any queries or require any further information.

[33] On the morning of 1 December 2015 Mr QRS emailed Ms Bates to say that the amendments were all accepted. He had added dates and executed the agreement on behalf of WXY. Ms Bates responded by saying that she would forward it to Mrs TUV for her to sign and would then send it back to Mr QRS to be sent to the mediation services.

[34] On 7 December 2015 Ms Bates emailed Mr QRS with the record of settlement signed by Mrs TUV. Ms Bates provided to Mr QRS Mrs TUV's telephone numbers so that she could be contacted by the mediator.

[35] The record of settlement seen by the Authority was signed by Mrs TUV and Mr QRS both to signal their agreement to the ten clauses making up the substance of the agreement and to confirm the effects of the terms of settlement once the mediator signed it. On the following page the usual mediator's certification had been signed by Mr Peter Franks, an experienced and long serving mediator of the Ministry of Business, Innovation and Employment. The certification includes the confirmation that "before [he] signed the agreed

terms of settlement [he] explained to them the effect of ss 148A, 149(1) & (3)". It also contained a confirmation that Mr Franks was "satisfied that the parties understood the effects of ss 148A, 149(1) & (3) and have affirmed their request that [he] should sign the agreed terms of settlement".

The issues:

[36] The issues that the Authority must determine are whether Mrs TUV can set aside the record of settlement on the basis that:

a. She did not have the capacity to understand the record of settlement she entered into; or

b. She entered into the record of settlement under duress.

The evidence

Mrs TUV

[37] Mrs TUV gave evidence to the Authority by way of a brief of evidence and oral evidence. In her written evidence she stated that she had a breakdown in mid-August 2015 and could not remember all the details. She remembered terrible anxiety so that she could not function normally.

[38] Mrs TUV wrote that she recalled speaking to her son by phone one day; she lives in Blenheim and he was in Auckland. She says that it seemed that she was speaking to him one minute and the next minute he was standing beside her. She said that she has been told that during the phone conversation her son became so worried that he flew home the next day.

[39] Mrs TUV said that she did not have much memory of the following months. She was in contact with her GP and her son began to take care of things. She said she could not function properly despite her best efforts. All she knew was that the problem was getting sorted. She could remember that they hired a lawyer but she did not know at what stage.

[40] Mrs TUV said in her written evidence that she did not have a memory of the time she signed the agreement. She could not remember the day or the mediator who rang her. Mrs TUV says that she has made great progress over the past year but there is a blurry period in her memory between August 2015 and February 2016.

[41] During her oral evidence, Mrs TUV initially had only a vague memory of the events after she ceased to attend work, although her memory grew a little clearer as her evidence continued. She said she did not remember agreeing to resign from her employment. She did eventually remember speaking to Ms Bates and did eventually remember signing the agreement, saying words to the effect of "I was asked to sign it, and I did".

[42] In her answers to cross examination questions, Mrs TUV said that she did not think she was mentally disordered. She also agreed that, when she had the neuropsychological assessment in June 2015, she had not wanted to return to her previous role. She also agreed that she had told her GP on 28 August 2015 that she had had an 'acute stress reaction' and that she was then 'ready to move forward'.

[43] Mrs TUV also agreed that she had signed a claim form for income protection benefit on 8 October 2015, and that the doctor before whom she had signed the form had believed that she had been of sound mind. Mrs TUV also gave her verbal consent to a claims manager to collect personal data in an interview on 18 November 2015. The form records Mrs TUV (not her son) giving the assessor detailed information about her life. Mrs TUV agreed that the assessor had not raised concerns about Mrs TUV's mental capacity or state of mind.

[44] Mrs TUV was asked whether she knew that she had agreed to leave her employer when she signed the record of settlement. She replied that she wanted to "just finish it for now" and agreed that she knew that she would be leaving her employment "for now". She also said she had signed the agreement "because it gets rid of that". She said that she did not sign

the agreement so much to get the money “but to start a fresh life”.

Dr Levien

[45] There was placed before the Authority a copy of a report prepared on behalf of Sovereign by Dr Tom Levien, a consultant psychiatrist. This was prepared because Mrs TUV was in receipt of income protection from Sovereign due to occupational disablement. The assessment had been requested as Mrs TUV’s family wished to determine ongoing disability in support of an income protection claim.

[46] Dr Levien’s report was dated 25 August 2016. The report set out details from a perusal by Dr Levien of her GP records which referred to her “not being properly oriented” in August

2015 and being diagnosed with “acute stress reaction”. The report was not particularly helpful with respect to Mrs TUV’s state of mind in December 2015 given that it was assessing her in August 2016 with respect to ongoing entitlement to income protection payments. However, it does show that Dr Levien believed that Mrs TUV had suffered possible major

depression in April 2015 and, in August 2016 fulfilled criteria under DSM-V12 for ‘anxiety

disorder NOS’13.

[47] Mrs TUV also put before the Authority a letter from Dr Levien dated 19 May 2017 which Mr TUV had commissioned to provide an opinion with regards to Mrs TUV’s capacity to sign a full and final settlement agreement with the respondent on 1 December 2015. In this letter Dr Levien stated that it was his opinion that Mrs TUV was likely to have been suffering from a significant depressive episode with ongoing anxiety symptoms at the time of signing the settlement agreement. He stated that it was his opinion that Mrs TUV’s ability to understand all the relevant information within the document is likely to have been impaired secondary to difficulties with her attention and concentration as a consequence of her mental

illness.

12 Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.

13 Not otherwise specified.

[48] Dr Levien states that Mrs TUV does not have a memory of signing the document and this in itself would indicate that her mental state was impaired at that time. He states:

In order to have full capacity to sign this legal document, [Mrs TUV] would have needed to have shown the ability to process the information rationally and come to a logical conclusion after weighing up the possible outcomes. I do not believe that this would have been possible in [Mrs TUV]’s case, secondary to her ongoing anxiety and depression. Her son also reports that at this time her GP was stating to both [Mrs TUV] and the family that there were severe physical and mental health issues emerging secondary to the stress of the process that she was going through. He advised that she should cut all ties with her employer in order to try and improve her physical and mental health.

It is my opinion that [Mrs TUV]’s mental health condition at the time of signing this legal document was highly likely to have resulted in significant incapacity with regard to the specific task of understanding the document, understanding the risks and potential benefits to her and understanding the consequences of signing this document.

In conclusion, [Mrs TUV] would have likely had impaired capacity in making a decision to sign this legal document in the following areas:

1. She would have had difficulty understanding the information relevant to the decision secondary to difficulties with concentration and attention.

2. She would have had difficulties retaining that information secondary to difficulties with concentration and attention and likely difficulties with her memory at that time.

3. She would have had difficulty weighing the information up as part of a process of making a decision secondary to her difficulties with attention and concentration and also likely ongoing depressive symptomatology (with a negative future outlook) leading to a wish to sever her ties with her employer as advised by her General Practitioner.

[49] In the Authority’s investigation meeting Dr Levien said in his evidence to questions from the Authority that he had made his assessment in retrospect, and that he would find it hard to say that Mrs TUV would not have been able to have understood the broad effects of the record of settlement but that understanding the more complex ramifications would have been beyond her capacity.

[50] Dr Levien also said that depression, which he believed Mrs TUV was suffering from, could have coloured her view of the future, and that people make different decisions when

depressed compared to when they are well. Dr Levien did accept that removing stress was part of managing the condition, and that Mrs TUV would have been advised to have done this.

[51] Dr Levien said that a layman would have difficulty in realising that someone suffering from depression was without capacity, unlike when someone was suffering from dementia, for example. He also said that capacity can fluctuate in people with depression depending on their levels of anxiety.

[52] Dr Levien said that, when he assessed Mrs TUV, he did not assess her for capacity, and that a capacity assessment is very task specific, and capacity may vary depending on the complexity for the task. He also said that the threshold for finding capacity or not would vary depending on the importance of the task. Dr Levien gave the example of the difference between assessing someone's capacity to consent to give blood against assessing someone's capacity to consent to have their kidney dialysis withdrawn, where the threshold for accepting there was capacity would be set much higher. He also said that Dr Galvin probably would not have assessed Mrs TUV for capacity.

[53] Dr Levien agreed that Mrs TUV not now remembering having signed the record of settlement was not in itself a sign of a lack of capacity at the time of signing it.

Ms Bates

[54] Ms Bates gave oral evidence to the Authority, and provided copies of hand written file notes she had made of her conversations with Mrs TUV and her employer. Mrs TUV had waived her legal privilege in respect of this evidence. Ms Bates said that Mrs TUV had appeared capable of understanding what she was saying to her, and that no flags were raised about her ability to understand everything she said.

[55] Ms Bates said that she had raised Mrs TUV's mental health in her negotiations with the employer, in the sense that she had attributed Mrs TUV's anxiety to her employment,

which the employer had denied. Ms Bates said that she had spoken to Mrs TUV on

2 December, and explained the terms of the settlement agreement to her. She said that Mrs TUV's son had been contacting her primarily, so she was mindful of the need to get clear instructions from Mrs TUV herself. She also said that she wanted to make sure that Mrs TUV had time to consider matters properly.

[56] Ms Bates agreed that, when she spoke to Mrs TUV on 2 December, she was coherent and cogent. The Authority saw Ms Bates' notes of the conversation. She had recorded that Mrs TUV had said that she had spoken to her son and that he was "hurting". She also recorded that Mrs TUV stated: "If I'm happy, he's happy". Ms Bates had also recorded that Mrs TUV had stated "I've had enough & want it sorted". Mrs TUV ended by saying "thank you for everything".

[57] I was impressed by Ms Bates' oral evidence, which was clear and credible. In particular, she had kept reasonably comprehensive hand written attendance notes of her conversations with various people while acting for Mrs TUV, including Mrs TUV herself.

Mr Franks

[58] Whilst Mr Franks, the mediator, clearly spoke to Mrs TUV, as he has signed a certificate to say that he did, s 148(2) of the Act makes it clear that no person who provides mediation services may give evidence in any proceedings about the provision of the services or anything related to the provision of the services that comes to his knowledge in the course of the provision of the services. As a consequence of this provision, it is my view that Mr Franks is statutorily prohibited from answering any questions about his conversation with Mrs TUV, as he did so in the course of the provision of the mediation services.

[59] As, it follows, Mr Franks would have a complete defence to refusing to attend the Authority's investigation meeting, and to refusing to answer any questions put to him, I concluded that nothing was to be gained from asking or requiring Mr Franks to attend the Authority's investigation meeting.

[60] Mr TUV submits that "s 148 does not protect Mr Franks from his errors". However, that submission is predicated on the assumption that Mr Franks did commit any errors, for which there is no evidence. In any event, even if Mr Franks did make an error in the provision of his services, those errors would have been committed during the provision of the mediation services and, again, s 148 is likely to preclude the Authority from asking any questions about that in my view.

Discussion

[61] In assessing capacity, it is necessary to consider the following elements:

a. Did Mrs TUV lack capacity to understand the agreement she entered into?

b. If she did lack capacity, was the respondent aware of that lack of capacity, or ought it reasonably have known about that lack of capacity?

c. If the respondent was aware of that lack of capacity, was an unconscionable bargain entered into?

Did Mrs TUV lack capacity to understand the agreement she entered into?

[62] I find on the evidence presented to the Authority that Mrs TUV was aware of and understood the following key elements of the record of settlement:

a. That she was agreeing to leave the employment of the employer; and b. That she was to receive some pay.

[63] I reach these conclusions in reliance on Ms Bates' notes and Mrs TUV's oral evidence.

[64] What is less obviously clear is whether Mrs TUV understood that she was relinquishing her right to sue the employer, which is the third key element of the agreement. I

have little doubt that Ms Bates explained that aspect of the agreement to Mrs TUV, as did Mr Franks pursuant to his duty under s 149(2) of the Act. Whilst Mrs TUV had little memory of the conversations by the time of the Authority's investigation meeting, that does not necessarily indicate that she did not have capacity at the time she signed the agreement.

[65] On balance, given the oral evidence of Ms Bates, and her notes, I believe that Mrs TUV did understand that she was relinquishing her right to sue the employer. Even though Mrs TUV's oral evidence suggested that she thought she was only leaving her employer temporarily, I infer from the evidence that she meant that she had hoped that she could start afresh, and that signing the agreement drew a line under the previous unpleasant experiences she had been having with her employer. Dropping any claims she may have had against the respondent was an integral part of that fresh start, and I believe that Mrs TUV understood that.

[66] Putting this another way, I find that Mrs TUV was able to assess her best interests at the time she signed the agreement, and knew that she needed to remove herself from the employer so she could get better mentally. Her work had become a major stressor for her, and leaving work definitively removed that source of stress.

[67] Dr Levien's expert view is that Mrs TUV did not have legal capacity, and Mr TUV relies heavily on that opinion in his submissions. Dr Levien's view was reached by way of inference, based on his reading of medical reports about Mrs TUV prepared prior to her signing the agreement and his subsequent psychiatric assessment several months later. I do not question Dr Levien's methodology, including its retrospectivity, or his reasons for concluding what he did. His inference does not obviously fall outside of the range of reasonable conclusions given the information he had available to him.

[68] However, it is clear to me that the inference which Dr Levien drew from the medical information he had available has been displaced by the oral evidence presented by Mrs TUV and, in particular, the contemporaneous notes of Ms Bates and her oral evidence. I am also mindful that Dr Levien said in his oral evidence that the effects of depression upon capacity

may vary with the degree of anxiety present. Obviously, Dr Levien could not create retrospectively an exact picture of Mrs TUV's state of mind at the time she had the record of settlement explained to her and when she signed it.

[69] On balance, I find that Mrs TUV did not lack the capacity to understand the basic bargain that she had agreed to, and to assess what was in her best interests at the time, even if she did not grasp all of the fine detail of the agreement. Indeed, it is not unlikely that many employees entering into a s 149 record of settlement with their employer will not understand all of the detail of the agreement, especially some of the legal 'boiler plate' clauses that are in all s 149 agreements.

Was the respondent aware of a lack of capacity?

[70] I do not have to go on to decide this having found that Mrs TUV did not lack capacity. However, I will address it briefly. I find that there was no material indication to the respondent which would have reasonably led it to conclude that Mrs TUV lacked capacity to enter into the record of settlement. The medical certificates the respondent received referred to severe anxiety and depression, but that diagnosis in itself would not reasonably lead an employer inevitably to conclude that Mrs TUV lacked the capacity to enter into an agreement with it.

[71] Similarly, its access to the counselling session reports and the neuropsychological reports, and its knowledge that Mrs TUV was not able to return to work would not obviously lead it to conclude there was a lack of capacity for entering into the agreement. Being able to carry out work tasks every day to an acceptable standard is not the same as being able to understand a short agreement largely written in non-legalistic terms.

[72] Most importantly of all, though, is the fact that Mrs TUV had had no direct contact with her employer for months, and was being represented by a lawyer (Ms Bates). The respondent was entitled to rely on that fact to infer that Mrs TUV had capacity to enter into the record of settlement, as it was entitled to rely on its knowledge of Ms Bates' professional

duty to assess her client's capacity and to signal to the respondent if Mrs TUV had been unable to enter into the agreement.

Was the bargain unconscionable?

[73] Again, I do not have to consider this, but will address it briefly. First, I am satisfied that Mrs TUV wanted to leave her employment at the point when she signed the record of settlement. Second, she was paid a sum of money which was not plainly unjust. Just because it could have been more generous does not make the bargain unconscionable. Third, there were no other terms of the agreement which put an unjust burden on Mrs TUV or conferred an unjust benefit on the employer.

[74] Finally, and again importantly, Ms Bates was tasked, as part of her professional duties, to ensure that she was acting in her client's best interests. I am satisfied on the evidence that I heard that Ms Bates discharged that duty. In so doing, she ensured that the bargain entered into by Mrs TUV was not unconscionable and fairly enabled Mrs TUV to achieve what she wanted at that point.

Conclusion

[75] I find that there are no grounds upon which to declare that Mrs TUV lacked the capacity to enter into the record of settlement. It is therefore not voidable, and remains binding on the parties.

Duress

[76] Mr TUV did not address duress in his two sets of written submissions so I can only infer how he believes there may have been duress.

Was there a threat or pressure?

[77] I do not believe there is any evidence at all of an overt threat being made to Mrs TUV

in relation to her signing of the record of settlement. However, there was arguably pressure

on Mrs TUV to leave her employment due to the mental distress she was suffering which she believed was due to the actions of the respondent.

[78] However, even if that is true, and I have made no findings one way or the other in that regard, there was no evidence of any pressure put upon Mrs TUV directly by the respondent specifically to sign the agreement. The pressure, if any, came from Mrs TUV's mental state. Indeed, Mrs TUV was always represented during the negotiations by a professional legal adviser, and at all times, behind the scenes, by Mr TUV. These individuals had the opportunity (and, in Ms Bates' case, the professional duty) to intervene if there was any hint of improper pressure being put upon Mrs TUV to sign the agreement.

[79] Even if her disordered mental state was caused by the respondent's actions, and even if that mental state created a pressure upon Mrs TUV to sign the record of settlement, I am not satisfied that such indirect pressure satisfies the test in *Pharmacy Care*.

[80] In conclusion, I do not accept that Mrs TUV entered into the record of settlement because of duress imposed by the respondent.

Conclusion

[81] The record of settlement remains binding upon Mrs TUV, and she cannot elect to set it aside.

Costs

[82] I reserve costs. The parties are to seek to agree how costs should be dealt with between them. However, if at the end of fourteen working days from the date of this determination the parties have been unable to agree, and the respondent wishes to recover a contribution from Mrs TUV towards its costs, then it should serve and lodge a memorandum

of counsel within a further fourteen working days setting out what contribution it seeks, and the basis for it, and Mr TUV shall have a further fourteen working days within which to respond.

David Appleton

Member of the Employment Relations Authority