

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 91
5406625

BETWEEN TERESA THOMPSON
 Applicant

AND HOUSING NEW ZEALAND
 CORPORATION
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Emily Maea and Viv d'Or, for the Applicant
 Susan Hornsby Geluk, for the Respondent

Investigation Meeting: 6 June 2013

Submissions Received: Orally from the Applicant 6 June 2013
 Orally and in writing from the Respondent 6 June 2013

Determination: 26 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Teresa Thompson was employed by Housing New Zealand Corporation for twelve years until her employment came to an end by reason of medical incapacity in November 2011. In April 2009, some two and a half years before her employment ended, Ms Thompson had entered into a full and final settlement with Housing New Zealand Corporation (Housing NZ or the Corporation) over a particular matter relating to her employment (the incident).

[2] Ms Thompson now seeks to pursue claims in the Authority, based on dissatisfaction with the terms of the 2009 settlement agreement. Her claims are posed as questions and she asks whether Housing NZ acted in good faith specifically in relation to 2 aspects of the settlement. Firstly, in proposing the settlement to her in

2009 while she was too emotionally and psychologically vulnerable to make reasonable and sound decisions. Secondly, in negotiating settlement terms that did not address the short term and long term psychological harm caused by its negligent actions.

[3] Ms Thompson also asks whether her employer had an ongoing duty to protect her, alleging a breach of duty occurred in February 2011 when she received an email relating to her possible involvement in litigation before the Human Rights Commission. She says the receipt of that email caused a resurfacing of the insecurities and health issues she had suffered as a result of the incident.

[4] Ms Thompson seeks the payment of \$50,000 from Housing NZ in resolution of these matters.

[5] Housing NZ says Ms Thompson is estopped from raising any claims against it in relation to these matters by virtue of the full and final settlement she entered into in 2009. It says she has not raised any actionable claims in law against it and notes that she is outside the statutory timeframes to pursue claims for penalties for breaches of good faith or personal grievances. Housing NZ does not consent to such claims being raised out of time.

[6] This matter first came to the Authority by way of an Application for Removal of Matter to Employment Court. Counsel for Ms Thompson signalled, in the course of a telephone conference in March 2013, that this application would not be pursued. She confirmed in a further telephone conference in May 2013 that the issue of removal was no longer live.

[7] The parties agreed that the Authority should consider as a preliminary issue whether Ms Thompson is barred, by virtue of the settlement agreement she entered into with Housing NZ in April 2009, from pursuing her current claims.

Background

[8] The April 2009 settlement arose out of an incident in which Housing NZ inadvertently disclosed Ms Thompson's identity to a number of its tenants. The tenants had been served an eviction order to which they took exception. The disclosure of her name to them, and her involvement in the matter leading to the

eviction order, resulted in Ms Thompson being fearful for her personal security and that of her family.

[9] Housing NZ's Chief Executive Officer wrote to Ms Thompson apologising for its error. Discussions between Ms Thompson and the Corporation began within 2 to 3 weeks of the disclosure, over measures that could be agreed to help alleviate the stress and anxiety the employer's action had caused her.

[10] On 15 April 2009 the parties entered into a settlement agreement that contained a number of elements, each one of which was duly honoured by Housing NZ. There was also provision in the agreement for Ms Thompson to come back to the employer over the ten months following the settlement agreement if she had further claims relating to the incident.

[11] Once that period was up, the terms of the settlement agreement would become full and final settlement of any and all claims which either party had, or may have in the future, arising out of Ms Thompson's employment with Housing NZ with respect to the incident, or related incidents.

Issue

[12] The issue for the Authority to determine is whether Ms Thompson is precluded, by virtue of the 15 April 2009 settlement agreement she entered into with Housing NZ, from bringing her current claims to the Authority.

[13] As part of determining that issue, it is necessary to consider the circumstances in which the settlement agreement was made and, in general terms, the nature of the agreement.

The Settlement Agreement

[14] The settlement agreement was signed by Shane Chisholm, Acting Director of Operations Southern for Housing NZ and by Ms Thompson. The agreement, which was essentially a private document and was not signed by a mediator under s. 149 of the Employment Relations Act, was headed *Confidential – Full & Final Settlement*.

[15] It consisted of 8 separate elements under different headings, each of which was expressed to be a *Full & Final Offer*. The final page of the letter set out a number of bullet points which listed the conditions applicable to the offer. I do not

find it necessary to set out all elements of the settlement agreement in this determination.

Evidence

[16] Ms Thompson said that Housing NZ rushed her into a settlement following the inadvertent leaking of her identity to tenants who were to be evicted from Housing NZ properties. She says the incident was devastating for her and resulted in victimisation, harassment and threats directed at her children, in both their schools and the community. She says she fell into a serious depressive episode and that her employer demanded she set aside her mental and health breakdown to focus on coming up with a settlement.

[17] Ms Thompson says she would not have entered into the settlement agreement if she had not been under such pressure. She would have focused more on the welfare of her family. She claims the settlement was for Housing NZ's benefit in order to limit its liability to her. In answer to the Authority's questions, Ms Thompson said what Housing NZ did for her in the settlement was *brilliant*, but she maintains she was not in a fit state to enter into a settlement agreement at the time.

[18] Housing NZ says that it saw no evidence of that at the time. Discussions with Ms Thompson had started in late March 2009. Mr Chisholm, who signed the settlement agreement for the employer, became involved in early April 2009. He referred to meetings and discussions held with Ms Thompson, who was supported by her partner and an Organiser from her union, the New Zealand Public Service Association Inc. (the PSA). Housing NZ had encouraged Ms Thompson to be supported and advised through the process.

[19] Mr Chisholm says the paramount focus of the discussions at all times was the safety, security and wellbeing of Ms Thompson and her family and the process of settlement was not driven by Housing NZ. *It was largely driven by what Teresa herself said she wanted or needed at the time.* It had been arrived at over the period of discussion and Mr Chisholm could not recall turning down any terms requested by Ms Thompson. Ms Thompson did not disagree with that.

[20] He said he was acutely aware of how unsettling the incident must have been for Ms Thompson and he actively looked for signs of its effect on her. From his observation, she was strong and capable and continued to perform well in her role

during this period. He said he could see that she was affected by the incident but no more than he would have expected anyone to have been in that situation. Other than some tearfulness, he detected no signs in her demeanour that gave him cause for concern.

[21] The evidence from both Ms Thompson and Housing NZ was that part of the discussions involved a period of leave Ms Thompson and her partner, who also worked for Housing NZ, had already planned. At Ms Thompson's request, some of the arrangements for the holiday she was planning formed part of the settlement. The imminence of that leave, and Ms Thompson's requests around it, created some urgency in finalising details of the settlement agreement.

Discussion

Duress

[22] In the course of oral submissions, counsel for Ms Thompson cited *Tinkler v Fugro PMS Pty Ltd & Pavement Management Services Ltd*¹ where, at [27], Inglis J noted there was authority for the proposition that settlements of employment disputes reached under duress were unenforceable.

[23] The Judge listed the 7 elements of duress in New Zealand law as summarised by the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney-General*.² These are:

- 1) *There must be a threat or pressure;*
- 2) *That threat or pressure must be improper;*
- 3) *The victim's will must have been overborne by the improper pressure so that his or her free will and judgment are displaced;*
- 4) *The threat or pressure must actually induce the victim's manifestation of assent;*
- 5) *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;*
- 6) *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 to a Court for the avoidance of the agreement;*

¹ [2012] NZEmpC 102

² (2004) 2 NZCCLR 187 CA at [98]

7) *The victim may be precluded from avoiding the agreement by affirmation.*

[24] Having raised the issue of duress, Ms Maea did not go so far as to assert that Ms Thompson had signed the settlement agreement under duress. However, as it was clearly something she had concerns about, it is appropriate to consider Ms Thompson's situation in relation to the elements of duress.

[25] The settlement agreement letter of 15 April 2009 from Mr Chisholm required Ms Thompson's signature by 4 p.m. the same day. That was a short timeframe which in many circumstances would give cause for disquiet. I find it does not do so when considered in the context of some weeks of discussion and negotiation that preceded it, and particularly in light of one of the terms of settlement that related to the family holiday about to be embarked on by Ms Thompson.

[26] It was reasonable for the employer to want certainty around those arrangements, to which it proposed contributing financially, before Ms Thompson took her leave. It was clear from her evidence that the holiday was important to Ms Thompson and her partner. I find that any pressure around the settlement agreement arose from Ms Thompson's pre-arranged annual leave which was due to commence on, or around, 16 April 2009.

[27] There was no evidence that Ms Thompson protested about the timeframe for acceptance, or that she had baulked at signing the agreement. She made no suggestion that the discussions be prolonged to give her more time for consideration. Had she been unhappy with the short timeframe, she could have asked to postpone her leave to allow further time for that to occur.

[28] It is relevant that Ms Thompson was represented or supported by her PSA Organiser, and her partner throughout the settlement negotiation process. As some of the terms of the settlement agreement directly affected Ms Thompson's partner and family, it is very likely that her partner played an active role in the process. Ms Thompson confirmed as much in her evidence. In these circumstances I am satisfied there was no improper threat or pressure from Housing NZ for Ms Thompson to agree to a settlement. Therefore find she was not under duress at the time she entered into the settlement agreement.

Ms Thompson's capability

[29] Ms Thompson wishes to pursue, as part of her substantive claim, the issue of the propriety demonstrated by Housing NZ in proposing a settlement agreement to her at a time when she was distressed and fragile. As this concerns issues of Ms Thompson's capability to enter into discussions about the settlement agreement, it is relevant for me to deal with this as part of my consideration of the preliminary issue.

[30] As already noted, Housing NZ's evidence, through Mr Chisholm, is that Ms Thompson continued to work competently and professionally in her role throughout the time the discussions for a settlement agreement were taking place. While clearly affected by the incident, she remained strong and capable.

[31] Neither Ms Thompson's partner, nor her PSA representative, gave Mr Chisholm any indication that she was not comfortable with the timing or tenor of the discussions that were held. Nor was there any indication that Ms Thompson was unable to take part in discussions or make rational decisions about a settlement agreement. Ms Thompson did not disagree with Mr Chisholm's evidence on this, but noted that she was very *closed* about aspects of her personal health as she did not wish to be perceived pejoratively by her employer or colleagues.

[32] There is no evidence that Ms Thompson or anyone acting for, or supporting, her raised an issue with Housing NZ as to her mental or emotional competence to enter into discussions for a settlement agreement. Ms Thompson gave oral evidence that the PSA Organiser expressed a concern to her that it was too early for her to enter into a settlement agreement. Ms Thompson said that she and her partner *didn't listen to her* because they wanted to get away on their holiday.

[33] Housing NZ was not privy to that conversation and had no reason to query Ms Thompson's decision-making ability. Neither her demeanour nor her actions suggested otherwise. During the discussion period she submitted at least one written counter-offer to her employer which would have reinforced the Corporation's view of her capability and competence. I find Housing NZ had no reason to doubt Ms Thompson's mental or emotional capability at the time it discussed, and entered into, a settlement agreement with her.

The terms of the settlement agreement

[34] Ms Thomson queries her employer's good faith in negotiating settlement terms which, she says, did not address the short or long term psychological harm she

suffered from the incident. While this forms part of Ms Thompson's substantive claim, I find for the same reason as I have given above, that it is necessary to consider this in determining the preliminary issue.

[35] In *F v Attorney-General*³ Goddard CJ, as he was then, said (with acknowledgement to Sir John Salmond's explanation of the applicable law in *Jurisprudence*⁴):

..there is in general no better evidence of the justice of an arrangement than that the parties to it have freely and with full knowledge consented to it. They have already decided what is just in their particular relationship. That being so, the parties are not allowed to go back on their word.Another strong reason for enforcing contracts is that it is a leading principle of justice to guarantee to people the fulfilment of their reasonable expectations which others have caused to arise. None of that applies where the conditions of "freely and with full knowledge" are not met for then the consent is only a consent in form and not a true consent. However, business certainty would be impossible if one party to a contract could escape obligations in reliance on pressures for which the other party was not responsible and of which that other party knew nothing.

[36] That case involved a contractual arrangement made between a departing employee and her employer, under *no small pressure*, when the employee's health was under stress. The Chief Judge categorised the settlement as *ungenerous but not unfair*. After considering the circumstances of Ms F entering the settlement; her state of mind; the bargain she had struck with her employer; and the time taken after reaching the bargain to repudiate it (approximately 1 year), he concluded that she was bound by it.

[37] Ms Thompson's settlement agreement with Housing NZ was not overtly ungenerous or unfair. It incorporated most, if not all, of the elements she proposed during the period of negotiation and discussion with her employer. She had a ten month period following signing of the agreement in which she could raise further claims relating to the incident. This ensured she had a reasonable opportunity to reflect on the terms of settlement and request additional terms if necessary.

³ [1994] 2 ERNZ 62, at 79 & 80

⁴(7th ed), 1924, p364

[38] The evidence suggested that Housing NZ extended the original timeframes within which some of the terms of the settlement agreement were to operate. Where that was done it was to Ms Thompson's advantage. Ms Thompson expressed her appreciation for the benefit she and her family derived from the terms of settlement. She did not query, or object to, the agreement during her employment or for nearly 4 years afterwards.

[39] It seems to me Ms Thompson's real concern is that the settlement agreement she described as *brilliant* did not go far enough, with the benefit of hindsight, to meet her needs. That is not a sufficient reason to allow her to circumvent the full and final settlement agreement she entered into of her own volition in April 2009.

[40] I find there to be no reason for regarding the settlement agreement as selling Ms Thompson short. She was satisfied with the terms of the bargain at the time and was not under duress at that time she negotiated and signed it. The terms of the agreement were considered by both parties to meet Ms Thompson's reasonable and foreseeable needs.

Summary

[41] Ms Thompson did not enter the 2009 settlement agreement under duress. She entered it of her own volition and with access to advice and assistance from her partner and a PSA organiser. Housing NZ had no reason to doubt her mental or emotional capacity to discuss and enter into the settlement agreement at the time.

[42] The terms of the agreement were not unfair to her, and the full and final basis on which the settlement was made encompassed future claims relating to, or arising from, the incident.

Determination

[43] Ms Thompson is bound by the terms of the April 2009 full and final settlement she agreed with Housing NZ. She is precluded from pursuing any claims in the Authority related to, or arising from, the incident that led to that settlement agreement.

Costs

[44] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority