IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 154
EMPC 6/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TUV Plaintiff
AND	WXY Defendant

Hearing:	31 July and 1 August 2018 and further submissions dated 8 August and 26 and 27 November 2018 (Heard at Nelson)
Appearances:	A Douglass and C McCarthy, counsel for plaintiff J Boyle, counsel for defendant
Judgment:	18 December 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] This case centres on a narrow but important preliminary issue – can a settlement agreement signed by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act) be set aside by the Court on the ground of mental incapacity?

[2] The issue arises against the backdrop of a written settlement agreement entered into by the parties on the basis that, amongst other things, the plaintiff's employment would come to an end; she agreed to forego any right to pursue any claim against the defendant arising out of the employment relationship; the defendant would pay the plaintiff a sum of money; and the fact and terms of settlement would remain confidential to the parties.

[3] The parties did not reach settlement during the course of a mediation. Rather, the settlement arose out of long-distance discussions and communications between counsel for the plaintiff and the defendant's then Director of Human Resources. The agreement was signed by the parties on 1 December 2015. A mediator (employed by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE)) was later contacted and requested to sign the agreement. The mediator spoke to the plaintiff over the telephone. The mediator signed the agreement on 15 December 2015.

[4] The plaintiff subsequently obtained a medical opinion that, more likely than not, she had been mentally incapacitated at the time she signed the settlement agreement and that, more likely than not, she had been mentally incapacitated when the mediator telephoned her. The medical opinion also concluded that, more likely than not, the plaintiff lacked capacity to instruct her lawyer.

[5] The plaintiff says that the agreement should be set aside on the basis that she was mentally incapacitated at the time she signed it, that she signed it under duress and that it constitutes an unconscionable bargain. She says that this would be sufficient to trigger the Court's inquiry in the absence of mediator sign-off. The question is whether mediator sign-off under s 149 ousts the Court's ability to intervene. If so, mediator-signed settlement agreements between employers and employees (including those signed without the benefit of independent legal advice and following a process involving no mediation at all) would appear to be one of the few, if not the only, agreements known to the law which are beyond the supervisory reach of a court.

[6] The defendant adopted a cascading approach to the plaintiff's claim:

(a) First, it was said that s 149 agreements are unassailable, even where it is established that an employee lacked mental capacity to enter into the agreement. That, it was said, meant that the inquiry in this case need go no further.

(b) Second, even if the Court could set aside a s 149 agreement on the basis of mental incapacity, it had not been shown to the requisite standard

that the plaintiff was incapacitated at the time she signed the settlement agreement. Accordingly, the inquiry need go no further.

(c) Third, even if the plaintiff could show that she was mentally incapacitated at the time she signed the settlement agreement, she would also need to satisfy the Court that the defendant knew or ought to have known that she was mentally incapacitated. This threshold was not met on the facts and the Court could not intervene.

(d) Finally, even if the knowledge threshold was met, something more than a hard bargain was required. It had not been shown that the agreement was signed under duress and/or was unconscionable. It followed that the plaintiff's claim must fail.

The sequence of events

[7] The plaintiff had been employed as a clerk by the defendant for many years. Issues arose which led to an employment dispute. The plaintiff believed that she was being subjected to an unjustified performance management process. She sought medical attention and received a string of medical certificates advising that she was assessed as unfit for work. A certificate issued on 17 April 2015 referred to the plaintiff suffering from:

> … moderate to severe depression and anxiety. I feel that she needs a long period of stress leave, at present 3-6 months, however this may be longer.

[8] A certificate issued five months later noted that the plaintiff was "…still experiencing significant disability resulting from stress." A further six months off work was advised. The plaintiff also attended counselling, which the defendant approved.

[9] The plaintiff underwent a neuropsychological assessment in June 2015 (the Galvin report). This assessment arose out of the counselling process. Doctor Galvin concluded that the plaintiff's overall intellectual function was intact, but that she exhibited mildly impaired attention and some difficulties with verbal memory. Doctor

Galvin strongly recommended that the plaintiff and her employer meet to negotiate a way forward "that is appropriate for all parties, as soon as practicable."

[10] The plaintiff gave evidence, which I accept, that she had a breakdown in August 2015. She could not remember much of what occurred during this period and up to the time her employment came to an end in December 2015, when the settlement agreement was entered into. The agreement followed a number of long-distance negotiations, which took place between the plaintiff's (then) lawyer on her behalf and the defendant's representative, either over the telephone or by way of written communication. The plaintiff's lawyer had a number of interactions with the plaintiff's son, who took an active role in communicating advice and instructions as between the lawyer and the plaintiff. He did this because he was concerned about his mother's ability to comprehend what was going on and to process information. Oral communications between the plaintiff's lawyer and the plaintiff herself were very limited. Some email exchanges between the two occurred during this time.

[11] While there were no direct communications between the plaintiff and the defendant, there were some communications between the plaintiff's son and the defendant about concerns he had about various matters concerning the way in which his mother had been dealt with, and its response to the situation. The defendant sought to re-channel the communications through the plaintiff's lawyer, as the appropriate conduit for discussions about the case.

[12] As I have said, a number of medical reports pre-dated the settlement agreement. The defendant was privy to medical certificates dated 13 February, 17 April and 9 September 2015, and the Galvin report, by the time settlement occurred.

[13] About eight months after the agreement had been signed, the plaintiff was examined by a psychiatrist, Dr Levien. This was for the purposes of an insurance claim. He wrote a report on 25 August 2016 (the first report), setting out a diagnosis of anxiety disorder, and recommending targeted psychotherapy. Dr Levien concluded that the plaintiff was "currently totally incapacitated with regards to her previous work."

[14] The plaintiff subsequently filed a claim in the Employment Relations Authority, alleging (amongst other things) that she had been unjustifiably constructively dismissed. The defendant argued that the claim was precluded by the settlement agreement, which the Authority dealt with as a preliminary issue.

[15] Dr Levien prepared a further report on 19 May 2017 (the second report) for the Authority's preliminary issues investigation, setting out his opinion as to the plaintiff's capacity to sign a full and final settlement agreement with the defendant. He concluded:

> It is my opinion that [the plaintiff] was likely to have been suffering from a significant depressive episode with ongoing anxiety symptoms at the time of signing the document in question.
>
> It is also my opinion that [the plaintiff's] ability to understand all the relevant information within this document is likely to have been impaired secondary to difficulties with her attention and concentration as a consequence of her mental illness.
>
> [The plaintiff] does not have a memory of signing this document and this in itself would indicate that her mental state was impaired at the time. In order to have full capacity to sign this legal document, [the plaintiff] *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 [the plaintiff's] case, secondary to her ongoing anxiety and depression. …
>
> *It is my opinion that [the plaintiff'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, [the plaintiff] 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 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.
>
> (emphasis added)

[16] The Authority determined that the plaintiff's claim could not proceed, on the basis that it was barred by s 149. The plaintiff challenged the Authority's determination on a de novo basis.

[17] Dr Levien prepared a further report (the third report) for the purpose of this hearing. He set out the information he had available to him, including updated information, and concluded that:

> It is my opinion that [the plaintiff] was likely suffering from a significant depressive episode with ongoing anxiety symptoms at the time of signing the document in question. *This in turn would likely have led to significant cognitive impairment.*
>
> It is my opinion that *[the plaintiff'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*.
>
> My findings regarding capacity from my 17 May 2017 report have been confirmed through this current assessment. *[The plaintiff] would have likely had impaired capacity in making a decision to sign this legal document* in the following areas: [as set out above].
>
> (emphasis added)

[18] He went on to state that:

(a) the plaintiff's mental state at the relevant time would have "likely impacted on her ability to, in the first instance, understand the details of the two different options that she had available to her";

(b) "she would have been incapacitated with respect to weighing up the different options available to her and the ramifications of those options", noting that the advice concerning the options was "detailed and technical"; and

(c) it would have been "very difficult for [the plaintiff's lawyer] to grasp the extent of [the plaintiff's] cognitive impairment and functional inability to actively participate in her claim against her employer",

particularly given the absence of a face-to-face meeting between the plaintiff and her lawyer.

[19] Dr Levien also expressed the view that:

> It is my opinion, that it is quite probable that during the months in the build-up to signing the agreement [the plaintiff] lacked capacity to instruct [her lawyer].

Analysis

[20] In any given year a significant number of employment disputes are settled by way of agreement. Many such agreements are reached following a mediation convened (including at the direction of the Authority or Court) under the Act and with the assistance of an approved mediator. Often such agreements are signed by the mediator who assisted the parties in reaching a concluded settlement. There is, however, another group of cases involving settlements between parties to employment relationships who have not attended mediation, and who have had no assistance whatsoever from a mediator prior to reaching an agreement. In such circumstances it is not uncommon for an MBIE approved mediator to be requested to countersign the agreement some time after it has been entered into, and it is not unusual for the requirement for mediator sign-off to be a term of the settlement itself.

[21] The extent to which such a process may, or may not, align with the original intention of the legislation and concept of mediator involvement in resolving employment disputes is not the issue before the Court. The issue before the Court is the legal implications of a mediator signing the agreement in this case following settlement.

[22] Settlement agreements in employment matters often have significant consequences for one or other or both parties. They frequently involve the termination of employment on agreed terms, including payments comprising lost remuneration and benefits, and compensation. And it is not uncommon for settlement negotiations to occur at a time of great stress, when the employment relationship has deteriorated and working relationships have fractured.

[23] The Act confers no role on an approved mediator to provide legal advice, or to explain the substantive legal effect of any term that a party (however vulnerable) may have agreed to. Nor is there any requirement that a party (however vulnerable) obtain independent advice prior to entering into an agreement. Under the Act there are two mandatory steps that must be taken before a mediator can sign an employment settlement agreement – the mediator must explain the effect of s 149(3) (that the terms of the agreement are final and binding and enforceable) and the mediator must be satisfied that, knowing the effect of s 149(3), the parties affirm their agreement.

[24] I start with the defendant's primary argument, namely that s 149 prevents the Court from inquiring into the agreement on any ground, including mental incapacity.

Is a s 149 settlement agreement unassailable?

[25] On the defendant's analysis, it would make no difference whether the plaintiff was mentally incapable at the time she signed the agreement. That is because, it says, no settlement agreement signed by an approved mediator may be called into question and/or set aside by any court. The airtight wording of s 149 makes it unassailable. The argument appears to me to be based on a misconception about when s 149(3) is triggered.

[26] The issue of whether the employment institutions can disturb a record of settlement entered into under s 149 has been touched on in a number of cases but has not been conclusively determined.[1] In each of the previous cases the point did not need to be decided because the grounds on which the agreement was sought to be set aside were found not to be made out on the particular facts.

[27] Mr Boyle, counsel for the defendant, submitted that the wording of s 149(3) was clear and that a settlement agreement could only be brought before the Court in very limited circumstances. I agree with Mr Boyle that the wording of the provision is central to the analysis, but those words must be read in context and having regard

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1 *Lumsden v SkyCity Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389 at [42]. See too *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30 at [21]-[22]; *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 71 at [21]-[37]; *AFT v BCM* [2015] NZEmpC 234 at [58].

to the scheme and purpose of the Act. They must also be read consistently with the generally applicable principles relating to the way in which privative provisions in a statute are to be interpreted and applied by the courts.

[28] Section 149 of the Act provides:

> **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.

[29] Section 149(3) reflects a clear Parliamentary intention to limit the Court's reach in cases involving a particular class of settlement agreements, namely those which have been signed off by a mediator. However, it is well established that privative provisions are to be given a narrow, rather than expansive, interpretation. As McGrath J has previously observed, such provisions tend to be effective provided there

is some other type of avenue for appeal or challenge.[2] No such avenue exists in relation to s 149 agreements.

[30] It is notable that s 149(3) is expressly qualified by s 149(3A), which deals with capacity. It provides that a minor aged 16 years or over may be a party to agreed terms of settlement and bound by the settlement as if they were a person of full age and capacity. Implicit in this provision is that a minor aged *under* 16 years may *not* be a party to agreed terms of settlement and is *not* bound by the settlement. The notable feature of the inclusion of subs (3) is that it lowers what would otherwise have been the applicable age of majority. In other words it is a statutory acknowledgement of the position that would, but for the insertion of the subsection, have applied – namely that a person in the lower age bracket would not otherwise have been able to enter into a s 149 agreement and such an agreement would not be binding.[3] While s 149(3) does not include express reference to mental incapacity generally, that is likely because the same imperative for including reference (namely to impose a lower age limit) does not apply.

[31] The defendant's unassailability argument is said to be supported by the intention of Parliament ascertained from various Parliamentary materials. In particular, it is said to be significant that following the second reading of the Employment Relations Bill, the Opposition recommended the insertion of s 149(4), which would have provided that "any such settlement may however be challenged on grounds that it is unconscionable."[4] The proposed new wording was voted down. In my view it does not follow that Parliament intended that no conceivable injustice would ever be able to be brought before the Court, inquired into and, if necessary, addressed. It may equally have been rejected (although there is no Parliamentary

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2 See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 (SC) at [73]. See too the recent discussion of ouster clauses in *Samuels v Employment Relations Authority* [2018] NZEmpC 138 and *8i Corp v Marino* [2017] NZEmpC 69 at [24]-[25].

3 Note the provisions for minors under Part 6 of the Contract and Commercial Law Act 2017. The Act allows the Court to enquire into the fairness and reasonableness of a contract at the time it was entered into and provides for a range of possible responses, including cancelling or declaring the contract unenforceable. However, the Act makes it clear that none of those powers relates to a compromise or settlement of any claim, including on the ground of unconscionability. That is because no settlement agreement may be made without a court approving it: ss 104-105. Thus, a minor under 16 years of age is fully supported and protected by the law. A minor aged 16 to 18 is not so protected if the Court cannot look into the contract.

4 (9 August 2000) 586 NZPD 4513.

material which assists either way) as redundant because the law as it stands adequately addresses such concerns.

[32] Further, the explanatory note refers to the wide discretion given to mediators, "including the ability, by the consent of the parties, to conclude mediated settlements with no right of appeal."[5] The point that can be made is that this expression highlights that *consent* is crucial to a binding settlement. That, of course, reflects nothing more than rudimentary principles of contractual formation – that in order to have a valid contract the key ingredients must first be in place. And, as the wording of s 149 makes plain, the provision is premised on "*agreed* terms of settlement" and "those [*agreed*] terms". Section 149(3)(b) provides that "no party may bring those [*agreed*] terms before the Authority or the court …"

[33] All of this suggests that the exclusory focus of the provision is on the terms of the settlement, not the validity of the precursor act of entering into the settlement agreement itself. Such an approach may explain what might otherwise be regarded as the illogicality of a privative provision precluding actions based on duress, unconscionability or mental incapacity. On this analysis, the statute is silent on such issues because it is focussed on the content of the *agreed* terms, not the way in which the agreement itself was entered. Such an approach might also explain why the only statutory requirements on the mediator are to explain to the parties the effect of subs (3) and be satisfied that, knowing the effect of the subsection, the parties affirm their request. There is no requirement on the mediator to ascertain that the parties understand the particular terms or have sought legal advice (this can, for example, be compared to the statutory requirement for independent legal advice prior to entering into a relationship property agreement).[6]

[34] The key point is that, on the defendant's analysis, the mediator's signature is to be taken as certification that the contract was validly entered into. While such an interpretation is open on a literal reading of s 149, it is doubtful when the provision is read in context and in light of the limited role conferred on the mediator under s 149(2).

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5 Employment Relations Bill (8-1) (explanatory note) at 8.

6 Property (Relationships) Act 1976, s 21F(3). See also the contracting out requirements under UK employment law, in the Employment Rights Act 1996 (c 18), s 203(3)(c).

Very clear statutory language might be expected if Parliament was intending the result contended for by the defendant.

[35] The scheme and purpose of the Act supports a less restrictive interpretation. One of the Act's objectives is to redress the inherent power imbalance between employer and employee and to recognise the good faith obligations on both parties in their dealings with one another.[7] The narrow interpretation of s 149(3) advanced on behalf of the defendant has the potential to seriously undermine these pivotal aspects of the statutory scheme.

[36] A hypothetical example demonstrates the issues that arise from the defendant's interpretation of s 149(3). Employee A has the mental age of an eight-year-old. The employer knows that Employee A has a limited intellectual capacity. The employer arranges for Employee A to attend a meeting at which they are the only people present. During the course of the meeting, which lasts several hours, the employer does most of the talking, explaining why Employee A is not likely to succeed in his job, and cajoles him into agreeing to immediate termination of the employment, in exchange for some minor benefits, on full and final terms. Employee A is not sure what will happen if he does not do as the employer says, signs the agreement and agrees with the employer's insistence that a mediator be requested to sign off the agreement. A duly approved mediator is contacted and asked to sign the agreement. The mediator rings each of the parties and explains the effect of subs (3) of the Act. The mediator does not know what was discussed during the course of the meeting, having not been present, and does not know how it unfolded. Nor does the mediator know that Employee A has limited intellectual capacity. Employee A is too unsure of his own understanding of what has occurred to raise any queries or concerns with the mediator. The mediator is satisfied that each of the parties affirms their request and signs off the agreement.

[37] If the defendant's analysis of s 149 is correct, no court could set aside the agreement on the basis of Employee A's capacity to enter into the agreement. The position would differ in relation to a settlement agreement which had *not* been signed

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7 Employment Relations Act 2000, s 3(a)(ii), s 4.

by a mediator. Is this a result that Parliament could ever have intended, in pursuit of the broad public policy interest in promoting the finality of settlements in employment matters? It seems to me that if Parliament had intended such a result it would have made it clear that incapacity was *not* a basis for setting aside an agreement. Rather, and as I have said, the inclusion of subs (3) suggests otherwise.

[38] Counsel for the defendant referred to the mediator's twin statutory tasks as the "protective mechanism" provided for in s 149(2); that is, the tasks of explaining the effect of subs (3) and, being satisfied that the parties understand the effect of subs (3), that they affirm their request for the mediator to sign the agreement. But the protective mechanism might provide no protection whatsoever (as the above example illustrates), acting as a restrictive mechanism, cutting off the legal avenues of redress which would otherwise be available to Employee A, despite his vulnerabilities.

[39] The defendant submitted that interpreting s 149 in a way that allows settlement agreements to be brought before the Court, including on the grounds of mental incapacity, would "open the floodgates", encouraging a swathe of applications where signatories have (for whatever reason) had second thoughts about the wisdom of settlement.

[40] The first point is that the primary focus must be on the correct interpretation of the provision, rather than the potential impact of the correct interpretation.[8] The second point is that any application advanced via the so-called open floodgates would need to be adequately supported in court. In the present case, the plaintiff has obtained the opinion of a medical expert who has, following three examinations, concluded that she was likely mentally incapacitated at the time she entered into the agreement which was subsequently signed off by a mediator, and that she lacked capacity to instruct a lawyer. Those conclusions were open to challenge by the defendant in the Court by calling its own expert, which the defendant chose not to do. The hurdles to an application such as the one advanced by the plaintiff are far from insignificant.

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8 "[T]ext and purpose [are] the key drivers of statutory interpretation…" RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis NZ Ltd, Wellington, 2015) at 220, citing *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (SC) at [22].

[41] Following the hearing I drew counsel's attention to two judgments which appeared to be relevant to the defendant's primary argument. The judgments are of the Employment Appeals Tribunal (UK), dealing with the extent to which the restrictive statutory scheme for "challenging" employment settlement agreements prevented the Court from intervening. The first, *Glasgow City Council v Dahhan*, dealt with whether the employment tribunal has jurisdiction to set aside an agreement said to have been entered into where one party to the agreement lacked mental capacity (it was held that the tribunal did have jurisdiction to do so).[9] In the second, *Industrious Ltd v Horizon Recruitment Ltd*, the employment tribunal considered whether it could set aside an agreement on the basis of misrepresentation (it was similarly held that the tribunal had jurisdiction to do so).[10] In both cases the agreement met all of the statutory criteria for contracting out.

[42] While the applicable statutory scheme differs, the underlying analysis and principles enunciated by the Employment Appeals Tribunal inform the important threshold issue identified by the defendant. In this regard the judgments draw a clear distinction between assessing validity of the contract itself (including whether there was the necessary capacity to contract) as a preliminary step and assessing whether a settlement agreement can be relied on having regard to the "challenge" restrictions to employment settlements provided for by the statutory scheme. As Silber J observed in *Horizon*:[11]

> … s. 203(2) of the ERA permits the parties to make valid compromise agreements but the word *"agreement"* must mean a valid agreement and the Employment Tribunal has to ensure that any purported compromise agreement is valid.

[43] Subsequently in *Dahhan* Lady Wise said:[12]

> [17] What is immediately apparent is that the scheme of the provisions in both pieces of legislation is to impose a rule that a contract is either void or simply unenforceable unless certain specified conditions are satisfied. Only if those conditions are satisfied will the Employment Tribunal be released from the responsibility to determine a claim before it. The significance of that, in my view, is that, absent a qualifying settlement

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9 *Glasgow City Council v Dahhan* UKEATS/0024/15/JW.

10 *Industrious Ltd v Horizon Recruitment Ltd (in liq)* [2009] UKEAT 0478_09_1112, [2010] IRLR 204.

11 At [27].

12 *Glasgow City Council v Dahhan*, above n 9.

> agreement being valid in both form and substance, the Employment Tribunal cannot dismiss the claim on the basis that it has settled.

[44] And:[13]

> … Where a claim is made that one party to an otherwise *ex facie* valid agreement had no capacity to contract, the duty of the Employment Tribunal to examine that issue and refuse to acknowledge as enforceable the agreement, if on the evidence led a lack of capacity is proved, is all part of the exercise laid down [by the Act].

[45] As Mr Boyle pointed out, the applicable statutory scheme in these cases did not contain an equivalent to s 149(3), and *Horizon* might be decided differently under the Employment Relations Act 2000 because of the express exclusion, in s 149(3)(ab), of recourse to the relevant provisions of the Contract and Commercial Law Act 2017. However, I read the judgments as emphasising a broader point in relation to settlement agreements between employer and employee – namely the Court's role in assessing whether the fundamentals of contract formation exist in a particular case (stage one of the process), as opposed to inquiring into the terms of settlement. This seems to me to be the point of distinction to be made. Section s 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 validity of the agreement itself.

[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.[14]

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13 At [21].

14 *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [6].

Mental incapacity?

[47] The defendant relied on the Privy Council's decision in *O'Connor v Hart* to support the proposition that, in order to establish a lack of mental capacity, a party needs to show that:[15]

(a) s/he was unable to understand the general nature of any agreement entered into; and

(b) the other party knew of her/his unsound mind at the time.

[48] The principles to be applied in ascertaining whether a person lacks capacity in relation to the decision at issue in proceedings[16] were set out by the Court of Appeal in *Corbett v Patterson.*[17] Those principles include:[18]

> …
> (c) The inquiry is not concerned with the sanity of the subject party. Nor is it concerned with the capacity of the subject party to make other legally effective decisions such as the making of a contract or will. The general approach is that capacity is to be judged in relation to the decision or activity in question and not globally. Evidence of the capacity to make decisions which have legal consequences and to conduct ordinary day to day affairs will be relevant but must be weighed with such other evidence as is adduced.
>
> (d) Something more is required than the mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise the proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes, and its risks, including the prospect of an adverse costs award.
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> …
> (f) When assessing the capacity to give instructions to counsel, the test is whether the subject party is capable of understanding the issues on which his or her consent or decision is likely to be necessary, with the

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15 *O'Connor v Hart* [1985] AC 1000, [1985] 1 NZLR 159 (PC); also cited as *Hart v O'Connor* [1985] 2 All ER 880 (PC).

16 The High Court Rules (HCR 2016, r 4.29) define an incapacitated person as a person who, by reason of physical, intellectual or mental impairment, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or unable to give sufficient instructions to issue, defend or compromise proceedings. For the purposes of the Rules, an incapacitated person is given the same status as a minor and a litigation guardian must be appointed to represent their interests (HCR 2016, r 4.30).

17 *Corbett v Patterson* [2014] NZCA 274, [2014] 3 NZLR 318.

18 At [43] (footnotes omitted).

> assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require.

[49] As I have said, Dr Levien concluded that, in his professional opinion, the plaintiff was more likely than not mentally incapacitated at the time she signed the settlement agreement and subsequently, when the mediator telephoned her and later signed the agreement. He also concluded that it was more likely than not that she lacked capacity to instruct the lawyer who undertook the negotiations on her behalf.

[50] I did not understand the defendant to take issue with Dr Levien's expertise or to be suggesting that Dr Levien was ill-placed to express an expert opinion on mental capacity. The defendant did, however, submit that the plaintiff was not suffering from mental incapacity at the relevant time, although no expert evidence was called on its behalf. Doctor Levien's opinion was challenged in cross-examination but he was unshaken.

[51] The fact that the defendant did not call an expert and that little headway was made in cross-examination does not, of course, mean that I am obliged to accept Dr Levien's opinion. It is true that Dr Levien's assessments of the plaintiff's mental state were retrospective and, by necessity, involved elements of speculation. However, his opinion was informed by one-on-one examinations of the plaintiff, reference to her medical records and relevant reports, and input from the plaintiff's son in respect of his observations of his mother's decline. Doctor Levien's opinion was also supported by his assessment of the plaintiff's ability to comprehend, assess and recall the elements of the agreement and the process of reaching it. Doctor Levien expressed the opinion that, given the lapse in time between signing the agreement and the mediator's telephone conversation, it would be unlikely that the plaintiff would have retained much information and so her comprehension of what was going on, and why, would need to be approached afresh. He also observed more generally that issues with mental capacity were more readily identifiable in face-to-face meetings rather than over the telephone or by email.

[52] Evidence given by the plaintiff's son as to his mother's ability to absorb and deal with information relating to the process, and evidence given by the plaintiff herself and her vague, and at times non-existent, recall of conversations and events

(which I accept), reinforced the other evidence given at the hearing about the plaintiff's diminished mental capacity at the relevant time.

[53] I pause to note that much was made of the role that the plaintiff's son played in the settlement process. It is clear that the plaintiff was supported by her son throughout. He was the conduit for some of the communications but he was not acting as her agent; nor did the plaintiff's lawyer perceive him to be. It was the plaintiff who made the ultimate decision about the settlement, who signed the agreement and who spoke to the mediator before the mediator countersigned it.

[54] Having regard to all of the evidence, including Dr Levien's evidence and the material underlying his conclusions, I accept that the plaintiff was more likely than not mentally incapacitated when she signed the agreement and when she subsequently spoke to the mediator over the telephone. I also accept, based on the evidence before the Court, that it was more likely than not that the plaintiff lacked capacity to instruct her lawyer (a role she exercised little active involvement in).

[55] As the law was traditionally applied, the plaintiff would succeed at this point of the inquiry. That is because all she would need to show is that she suffered from mental incapacity at the time she entered into the agreement.[19] The way in which the common law in New Zealand has developed, however, presents a significant impediment to the plaintiff's claim. As Mr Boyle points out, the current approach requires the opposing party to an agreement to have knowledge of the mental incapacity at the time.[20] I refer to this as the second limb of the mental incapacity test.

[56] Assuming the common law requires satisfaction of the second limb in respect of settlement agreements in the employment context (a point I return to below), did the defendant know, or should the defendant have known, of the plaintiff's lack of capacity?[21] The defendant says no, including because dealings in relation to the

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19 *O'Connor v Hart*, above n 15, at 167.

20 Absent some sort of fraud (which is not at issue in this case). See *O'Connor v Hart* at 168, 171; *O'Connor* has been cited with approval by the New Zealand Supreme Court in *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31; *Westpac New Zealand Ltd v Map & Assocs Ltd* [2011] NZSC 89, [2011] 3 NZLR 751; and *Gustav & Co Ltd v Macfield Ltd*, above n 14.

21 J Finn, S Todd and M Barber "Burrows, Finn and Todd on the Law of Contract in New Zealand" (6th ed, LexisNexis NZ Ltd, Wellington, 2018) at 552-555.

settlement were through the plaintiff's then lawyer and because of the limited contents of the medical reports that it had available to it at the relevant time.

[57] As the Director of Human Resources accepted in evidence, the defendant knew that the plaintiff was suffering from a degree of stress, depression and anxiety in the period leading up to settlement. However, I accept that the defendant did not subjectively know that the plaintiff lacked the mental capacity to enter into the settlement agreement at the time she did so. Should it have known that this was the case? As Ms Douglass acknowledged, the burden falls on the plaintiff.[22]

[58] There were flags along the way which the defendant was aware of, including:

(a) Difficulties the plaintiff was having with tasks which, as the Human Resources Director confirmed in evidence, management was struggling to understand. Correspondence from the plaintiff's then representative (dated 10 August 2015) recorded that a human resources advisor believed that the plaintiff was suffering from a "medical condition that was making her incapable of doing simple basic tasks." It was this that resulted in counselling and the subsequent referral to Dr Galvin. It also underlay the defendant's preparedness to consider medical retirement as an option.

(b) The medical certificates advising that the plaintiff was unwell and unfit for work for an extended period of time totalling around 12 months (including a medical certificate dated 9 September 2015, which the plaintiff particularly relied on, which stated: "[the plaintiff] is still experiencing significant disability resulting from stress in the workplace and will not be fit to return to work for the next six months.").

(c) Dr Galvin's report which, as the Director of Human Resources accepted in cross-examination, recorded concerns about the plaintiff's mental health.

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22 See *Imperial Loan Co v Stone* [1892] 1 QB 599 at 603 per Lopes LJ.

(d) The disability insurance claims, which the defendant supported and which were advanced on the basis of the plaintiff's "disablement", citing severe anxiety and depression. As was confirmed in evidence, the defendant made the supporting information available to the plaintiff's lawyer to enable the claims to be advanced. And, as the plaintiff's son explained in evidence, but for the defendant organisation's support, a psychiatric assessment would have been required.

(e) A workplace assessment report prepared two weeks before the settlement was entered into (namely 18 November 2015), noting that the plaintiff had said that she had "hid in the closet" for the two winter months since stopping work (but went on to note that she was, at the time of the assessment, now feeling "a little better").

(f) A telephone call from the plaintiff's lawyer to the Human Resources Director on 1 October 2015, the notes of which refer to the plaintiff as "very ill", and having had a "mental breakdown." In cross-examination the Human Resources Director confirmed that during the course of this conversation she had been told that the plaintiff was suffering from severe stress and anxiety.

[59] For completeness, while the plaintiff's son gave evidence that he advised the defendant on a number of occasions that his mother was mentally incapacitated, the people who were said to have been spoken to by him were not called to give evidence. In the circumstances I am not prepared to place weight on this aspect of the evidence.

[60] As against the flags, the plaintiff was represented by an experienced lawyer. The defendant itself had no dealings with the plaintiff during the settlement process. All communications (other than the direct communications by the plaintiff's son, which I have already referred to) were between the lawyer and the Director of Human Resources. The negotiations took place over an extended period of time and involved a degree of toing and froing, including a counter-offer put forward by the plaintiff. While, as I have said, the Galvin report raised concerns about the plaintiff's mental

health, it also noted that the plaintiff was able to understand the terms of the assessment and give informed consent, and had "an overall intact neuropsychological profile". It was suggested her cognition be monitored.

[61] The relevant point in time for assessing whether the defendant ought to have been aware of the plaintiff's lack of mental capacity was at the time the agreement was signed. A number of the flags pre-dated this event by a considerable period of time. It is conceivable, but ultimately unlikely in my view, that another employer would have made further inquiries about the plaintiff's mental capacity or requested a medical report directed to this issue prior to entering into the agreement, even assuming an obligation/ability to do so.[23] It is notable too that the plaintiff's lawyer, who was experienced, had access to all of the information the defendant did, and was required to act in the plaintiff's best interests, did not consider (and nor do I think ought reasonably to have known) that the plaintiff lacked capacity at the relevant time. It would be odd for an employer to be saddled with a heavier burden than an employee's legal representative.

[62] As Lady Hale observed in *Dunhill*:[24]

> As a general proposition, the other party is unlikely to be in a position to know the details of his opponent's mental faculties unless these are fully explored in medical reports to which he has access.

[63] Finally, it is true that the plaintiff took an extended period of time off work on sick leave prior to the settlement agreement being entered into. I understood Ms Douglass to suggest that this, of itself, should have been a red flag as to the plaintiff's capacity. I do not disagree that the plaintiff's absence on leave, supported by medical advice, is relevant to an assessment of what the defendant ought reasonably to have known. However, it is necessary to approach the point with a degree of realism. Absence on sick leave during the course of an employment process, including where the relationship has deteriorated to the point that termination on terms is being mooted,

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23 Note that whereas the Court of Appeal had criticised a defendant for not making inquiries where the plaintiff had terminal liver cancer, *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30], the Supreme Court disagreed and did not accept this aspect of the Court of Appeal's reasoning, considering that such a duty would be "highly problematic": *Gustav & Co Ltd v Macfield Ltd*, above n 14, at [14]-[15].

24 *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933 at [21].

is not uncommon. The reality is that such processes are inherently stressful and can prompt an employee to distance themselves from the workplace, often with the support of a medical certificate.

[64] I am not satisfied that the defendant ought reasonably to have known that the plaintiff lacked the mental capacity to enter into the settlement agreement in the particular circumstances.

[65] I have considered whether the second limb of the *O'Connor* approach is a necessary step in this Court's inquiry, and is fatal to the plaintiff's claim. The two-limb approach, requiring a plaintiff to establish mental incapacity and provide evidence that the defendant had knowledge (actual or imputed), appears to have developed in the commercial context, emphasising the desirability of contractual certainty.[25] While contractual certainty is desirable, in the employment sphere it might be said to apply with less force, including having regard to the underlying objectives of the Act. I see a potential danger, given the special nature of employment relationships and the unequal bargaining power implicit in them (as expressly acknowledged in s 3 of the Act), in simply assuming that employment settlement agreements reached via mediation ought to be treated in precisely the same way as other (including purely commercial) contracts. Indeed, the fact that Parliament legislated to preclude cancellation in certain circumstances may be said to reinforce the fact that s 149 settlement agreements stand apart from regular contractual arrangements.[26] And, as has been confirmed in many Court of Appeal cases, employment law is a specialist jurisdiction which is focussed on resolving problems between parties to an employment relationship, rather than on strict contractual principles.[27]

[66] Under s 189 the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to

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25 See, for example, *Archer v Cutler* [1980] 1 NZLR 386 (SC) at 396.

26 Contracts and Commercial Law Act 2017, ss 36-40; compare Employment Relations Act 2000, s 149(3)(ab) and s 162.

27 Recognised in the Employment Relations Act 2000, s 216. See also, for example, statements of the Court of Appeal on the specialist jurisdiction of the Employment Court in *New Zealand Van Lines v Gray* [1999] 2 NZLR 397, [1999] 1 ERNZ 85 (CA) at 91-94; *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176, [2002] 1 ERNZ 255 (CA) at [1]-[2].

determine all matters in such manner and to make such decisions and orders, not inconsistent with the Act or any other Act, as "in equity and good conscience it thinks fit." It might be argued that setting aside an agreement entered into with a party lacking the requisite capacity, whether or not the employer knew or ought to have known of it, would lead to a result *consistent* with equity and good conscience, even weighing the countervailing policy consideration of certainty of contract. The point might be even more strongly made where the mental incapacity was actually caused or triggered by the employer's unjustified actions or inactions during the course of the employment relationship. To put it another way, it may be relevant that one party (in breach of their employment obligations, including to act in good faith) has driven the other party to the point of mental incapacity.

[67] The outcome in this case, of limiting the inquiry to limb one, would be that the defendant, a large government sector organisation, would face the prospect of an employment claim that it acted unlawfully in the way in which it dealt with performance issues involving the plaintiff that it thought it would not have to confront. There is no other evident prejudice involved, other than that generally associated with the passage of time. The flip side is that a person assessed as lacking sufficient mental capacity at the time they signed away their legal rights to access the employment institutions, would be able to pursue those rights in circumstances where no other right of challenge, appeal or judicial review is available.

[68] The Court of Appeal has not yet had the opportunity to consider the extent to which s 149 acts as an impenetrable shield to the pursuit of claims and (if not) whether the generally applied approach to mental incapacity applies to employment settlement agreements. However, given the clear approach currently adopted by the courts, including the Court of Appeal, to the second limb test for mental incapacity, I feel constrained to approach this case in the same way.

[69] While the plaintiff was mentally incapacitated, the defendant did not know, and could not reasonably have known, about the lack of capacity. Limb one is satisfied; limb two is not.

[70] For completeness, I understood Ms Douglass to submit that the plaintiff's lack of capacity to instruct a lawyer was sufficient, of itself, to enable the agreement to be set aside. The judgment of the UK Supreme Court in *Dunhill v Burgin* was cited in support of this proposition.[28] *Dunhill* involved the application of what is known as the "compromise rule", which requires the Court to approve any compromise agreement made by a person lacking capacity. That person must have had the prior assistance of a litigation friend. The Court held that instructions to a lawyer to enter into an agreement did not suffice. I do not consider that the judgment is authority for the broad submission contended for on behalf of the plaintiff.

Unconscionability

[71] Was the agreement unconscionable? The plaintiff says yes; the defendant says no, referring to numerous judgments in support, notably *P v Bridgecorp Ltd (in rec and in liq)*;[29] *Blackwell v Chick*;[30] *O'Connor v Hart*,[31] and *Gustav and Co Ltd v Macfield*.[32]

[72] The principles were conveniently summarised by the Court of Appeal in *Gustav & Co Ltd v Macfield Ltd*.[33] Equity will intervene to relieve a party of an unconscionable bargain where one party (the weaker party – in this case the plaintiff) is under a qualifying disability or disadvantage. Once a qualifying disability or disadvantage has been established, the focus shifts to the conduct of the other party (the stronger party – in this case the defendant). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain. Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability (actual or constructive) and must "take advantage of" that disability or disadvantage. Constructive knowledge may arise where, for example, there is a marked imbalance in consideration or having

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28 *Dunhill v Burgin*, above n 24.
29 *P v Bridgecorp (in rec and in liq)* [2012] NZCA 530.
30 *Blackwell v Chick* was reversed by *Blackwell v Edmonds Judd* [2016] NZSC 40, [2016] 1 NZLR 1001, but not on this point.
31 *O'Connor v Hart*, above n 15, at 170.
32 *Gustav & Co Ltd v Macfield Ltd*, above n 14.
33 *Gustav & Co Ltd v Macfield Ltd*, above n 23, at [30]-[31]. The summary of principles was acknowledged by the Supreme Court in *Gustav & Co Ltd v Macfield Ltd*, above n 14.

regard to the way in which the agreement was reached, including where the weaker party failed to receive independent legal advice in relation to a significant transaction. The stronger party may be found to have taken advantage of the weaker party in circumstances involving active extraction of a benefit or passive acceptance. Once 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.

[73] Even accepting that the plaintiff had established that each of the above pre-conditions was met, the last is insurmountable. The reality is that the plaintiff was represented by an experienced employment lawyer who negotiated an unremarkable settlement agreement based on conventional terms that were reasonably evenly weighted.[34] The agreement was fair and reasonable, and falls well short of representing an unconscionable bargain.

Duress

[74] Nor do I consider that the plaintiff signed the agreement under duress. As the Court of Appeal observed in *McIntyre v Nemesis DBK Ltd*, contractual duress is the imposition of improper pressure by threats that coerce a party to enter a contract.[35] Illegitimate pressure must be exerted and that pressure must have compelled the victim to enter the contract. Compulsion will arise where the victim intentionally submits, realising that there is no other practicable alternative.

[75] I accept that there was a degree of pressure on the plaintiff to conclude matters. For example, on 6 October 2015 the defendant wrote to the plaintiff's lawyer noting that:

> Given the strain on both her, and on our business in terms of covering her workload the situation really does need to be addressed from our end, and soon. Can you please update me on progress and or likely next steps so that I can report back to the business in regards to resourcing or backfilling the role in the interim, or commencing a more formal investigation into our actions to date.

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34 See *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC) at 460-461; where there is adequate independent advice it would be hard to find an unconscionable bargain.

35 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [19], [20] and [66]; see also the discussion in *Sawyer v The Vice-Chancellor of Victoria University of Wellington*, above n 1, at [31]-[37].

[76] Being under pressure to conclude terms of settlement is not unusual and does not amount to duress.[36] While the defendant was making it clear that matters needed to be progressed and that, absent resolution, it would be obliged to proceed with its investigation, there is nothing improper about that. Further, the plaintiff was effectively buffered by her lawyer who was the go-between for the negotiations which took place over a relatively extended period of time. She did not consider that the defendant applied undue pressure on the plaintiff in terms of the settlement proposal, and the documentation reflects the extensive opportunities given to the plaintiff for reflection. The applicable timelines indicate that the plaintiff took these opportunities, progressing the negotiations in a relatively slow-paced manner. All of this is reflected in the contemporaneous documentation sent to the plaintiff by her lawyer, which was crafted in a moderate and measured way. It made it clear that there were a range of options available to her; that she should take the time to consider what she wished to do; and that she should contact her lawyer if she wanted to discuss any aspect of the advice that had been given.

[77] What the documentation also reflects is that there were other pressures being brought to bear on the plaintiff. In this regard it is evident that the plaintiff's son had strong views about the need to hold the defendant to account for the way in which it had allegedly dealt with his mother. This was reflected, for example, in a telephone conversation between the plaintiff's son and the plaintiff's lawyer on 7 October 2015 during which the plaintiff's son confirmed that he had spoken to his mother and that she "wants out" but that he was unhappy with the defendant effectively being let off the hook. The plaintiff's lawyer followed this discussion up with an email to the plaintiff the next day, seeking formal instructions "if you want to go down the route of an exit agreement". The plaintiff responded two days later by email, confirming her instructions and thanking the lawyer for her "clear options" and her assistance. On 31 October 2015 the plaintiff emailed the lawyer confirming authority to finalise the settlement. A counter-offer was subsequently advanced on her behalf and with her input. The reality is that all of the communications between the lawyer and the plaintiff appeared, on their face, to be clear and considered.

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[36] *McIntyre v Nemesis DBK Ltd*, above n 35, at [26].

[78] As an aside, Dr Levien was cross-examined on the plaintiff's emails and their apparent lucidity. He confirmed that this did not change his opinion as to the plaintiff's capacity; rather, he saw them as indicative of her feelings of helplessness. Further, the plaintiff's son gave evidence that he drafted the second email on his mother's behalf. The plaintiff gave evidence that she could not recall either email (a point that Dr Levien was unsurprised by in light of his assessment of her mental state at the time). The main points to be drawn from the email traffic are that it reinforces the timeframes that were available to the plaintiff to consider, reflect on, and confirm her instructions, having regard to the available options; and what the defendant could reasonably take from the plaintiff's communications.

[79] Following settlement the plaintiff appears to have affirmed the agreement. It was not until around 16 months later, on 10 April 2017, that the plaintiff filed proceedings in the Authority seeking to challenge the agreement. This was after her mental health improved.

[80] I am satisfied that the settlement agreement was not obtained under duress.

Conclusion

[81] For the foregoing reasons the plaintiff's challenge is dismissed.

Non-publication

[82] Both parties apply for permanent non-publication orders, but the scope differs. The plaintiff seeks an order that her name and any identifying details be protected from publication. The defendant supports the plaintiff's application but seeks an extension of the order to include its name and identifying details. The plaintiff opposes the defendant's application for non-publication orders in respect of itself.

[83] The defendant's primary submission was that non-publication is necessary to protect the confidentiality of the s 149 settlement agreement. The argument is circular. Ultimately it is for the Court, not the parties, to decide whether non-publication is

warranted in law, having regard to the particular circumstances including, but not limited to, any agreement they might have reached touching on the issue.

[84] There is a public interest in knowing the identity of parties to litigation before the courts.[37] That interest may be displaced, including where a party would suffer adverse consequences of publication. I accept that serious consequences would likely flow from identifying the plaintiff based on the material before the Court and the plaintiff's apparently fragile state. I understood this to be accepted by the defendant and it was reinforced by the evidence before the Court.

[85] I do not see that non-publication orders are necessary to protect the identified interests of the defendant. It is well established that orders should only be made to the extent necessary. The defendant is a large public sector organisation and there is a public interest in knowing that it is involved in litigation, and the litigation in this case. Naming the defendant would not result in a naming of the plaintiff, and non-publication cannot be justified on that basis. The fact that a settlement agreement has been entered into which contains, as a term, that the fact and terms of the agreement will remain confidential, is relevant but not determinative. The Court has a range of options available to it to deal with concerns relating to confidentiality as and when they arise in individual cases. The making of wide-sweeping orders suppressing details of the parties themselves is not the default position to address such concerns.

[86] In the particular circumstances of this case, including having regard to the broader public interest and the interests of justice, I do not consider it appropriate to exercise my discretion to make permanent non-publication orders in respect of the defendant organisation and I decline to do so. A permanent non-publication order in respect of the name and identifying details of the plaintiff is however made, for the reasons set out above.

[87] The decision declining the defendant's application for an order prohibiting publication of its name and identifying details will not take effect until 10 working days after the date of this judgment, to provide the defendant with a reasonable

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[37] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [14], [17], citing *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA).

opportunity to seek leave to appeal if that is what it chooses to do. The interim orders currently in force protecting the defendant's name and identifying details from publication, remain in place, and must be observed, pending the expiration of the 10 working day time period.

Costs

[88] The parties are encouraged to agree costs. If that does not prove possible the defendant may file and serve a memorandum and any supporting material within 20 working days of the date of this judgment; the plaintiff within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 18 December 2018