NOTE: EMPLOYMENT COURT ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT REMAINS IN FORCE.

NOTE: ORDER PROHIBITING PUBLICATION OF THE TERMS OF THE SETTLEMENT AGREEMENT REMAINS IN FORCE ON THE BASIS SET OUT IN THIS JUDGMENT AT [75].

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 14/2020
[2022] NZSC 69

BETWEEN	TUV Appellant
AND	CHIEF OF NEW ZEALAND DEFENCE FORCE Respondent

Hearing:	8 September 2020 and 27 September 2021
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Arnold JJ
Counsel:	A J Douglass and A S Butler for Appellant A L Martin, J P A Boyle and E G R Dowse for Respondent J S Hancock for Human Rights Commission as Intervener
Judgment:	3 June 2022

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The Courts below were correct not to set aside the settlement agreement in this case on the grounds of mental incapacity.**

C **There is no order as to costs.**

REASONS

GLAZEBROOK, ELLEN FRANCE AND ARNOLD JJ
(Given by Ellen France J)

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Introduction

[1] The appellant claims she was bullied and harassed whilst employed by the New Zealand Defence Force, and wants to pursue a claim for unjustified dismissal against the respondent. She accepts she entered into a settlement agreement with the respondent in respect of those claims but argues that the settlement agreement should be set aside because she lacked capacity to enter into that agreement at the relevant time. The settlement agreement was signed by a mediator as provided for by s 149(1) of the Employment Relations Act 2000 (the ERA). In signing such an agreement, the mediator does not provide advice to the parties about the content of the agreement but, rather, must explain to the parties the "final and binding" nature of the settlement as provided for in s 149(3). Under s 149(2) the mediator must "be satisfied that, knowing the effect of" s 149(3), "the parties affirm their request" that the mediator sign the agreement.

[2] In considering the appellant's claim, the Employment Relations Authority (the Authority) accepted that s 149(3) was not a bar to setting aside the agreement where a party lacked capacity.[1] The appellant's claim nonetheless foundered because the Authority found that she did not lack the capacity to enter into the settlement and, in any case, there was nothing to put the respondent on notice of her incapacity.

[3] On appeal to the Employment Court[2] and then to the Court of Appeal,[3] both Courts agreed that a s 149 agreement could be set aside on the basis of lack of capacity. The Employment Court found the appellant did not have capacity at the time she entered into the agreement but the agreement was not set aside because the Court concluded that the respondent did not know and was not put on notice as to her incapacity. The Court of Appeal took the same approach.

[4] In concluding the agreement should not be set aside, both Courts applied the test in *O'Connor v Hart* that a contract is not voidable for mental incapacity unless the other contracting party has actual or constructive knowledge of the incapacity, or equitable fraud is established.[4] The application of *O'Connor v Hart* in the employment context gave rise to the issues on which leave was granted in this Court, namely:[5]

(a) Does the test in *O'Connor v Hart* apply in the employment jurisdiction, in particular, to a settlement agreement that has been certified under s 149 of the ERA?

(b) If not, what is the relevant test and should the settlement agreement have been set aside in this case on the grounds of mental incapacity?

[5] However, after hearing the appeal, the Court considered it was necessary to address whether s 108B of the Protection of Personal and Property Rights Act 1988

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1 *TUV v WXY* [2017] NZERA Christchurch 222 (David Appleton) [Authority decision].
2 *TUV v WXY* [2018] NZEmpC 154, (2018) 16 NZELR 326 (Chief Judge Inglis) [EmpC judgment].
3 *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] 2 NZLR 446 (French, Courtney and Goddard JJ) [CA judgment].
4 *O'Connor v Hart* [1985] 1 NZLR 159 (PC).
5 *TUV v Chief of New Zealand Defence Force* [2020] NZSC 47. The Human Rights Commission sought and was granted leave to intervene on the ground the proceedings raise human rights issue of general principle: *TUV v Chief of New Zealand Defence Force* SC 14/2020, 3 August 2020.

(the PPPRA) in fact governed the position. Section 108B had not been referred to by the parties but it requires a court to approve a settlement of claims for money or damages where one of the parties is not capable of managing his or her own affairs. The Court sought and obtained further submissions on this aspect and held a further hearing.

[6] The initial question for the Court now is whether s 108B is dispositive of the case. As we see it, that question turns on whether s 108B applies at all given the scheme of the ERA, including in particular s 149. We turn to that question first after setting out the background.

Factual background

[7] The appellant began working for the respondent in 2002. She gave evidence before the Employment Court that in 2014 she began to feel the effects of what she believed was bullying conduct toward her. This included performance management processes which she alleges were unjustified and part of a campaign by her managers to force her to leave as she neared the age of 65.

[8] From February 2015 the appellant was on sick leave, an absence supported by medical certificates which attributed her unwellness to stress resulting in "moderate to severe depression and anxiety" and "significant disability". At the respondent's instigation, the appellant underwent a neuropsychological assessment in June 2015. The resulting report expressed the view that the appellant's overall intellectual function was intact but that she exhibited mildly impaired attention and some difficulties with verbal memory. The report observed a return to work for the respondent was unlikely to be successful and recommended that the parties negotiate an appropriate way forward as soon as practicable.

[9] The appellant's employment came to an end in December 2015, when a settlement agreement was entered into between the appellant and the respondent. The settlement process was initially handled for the appellant by her union representative, but in September 2015 the appellant engaged her own lawyer.

[10] We adopt the Chief Judge of the Employment Court's summary of the process that followed in relation to the settlement agreement:[6]

> The agreement followed a number of long-distance negotiations, which took place between the [appellant's] (then) lawyer on her behalf and the [respondent's] representative, either over the telephone or by way of written communication. The [appellant's] lawyer had a number of interactions with the [appellant's] son, who took an active role in communicating advice and instructions as between the lawyer and the [appellant]. 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 [appellant's] lawyer and the [appellant] herself were very limited. Some email exchanges between the two occurred during this time.

[11] Once the terms of settlement had been agreed, the appellant's lawyer sent an email to the appellant advising of this and explaining that it meant that neither the appellant nor the respondent would be able to raise any employment-related claims against each other in the future. The lawyer also said that once the agreement had been signed, it would be sent to the Mediation Service and a mediator would contact the appellant to ask her to confirm that she fully understood and agreed to the terms of settlement.

[12] The appellant and respondent signed the settlement agreement in early December 2015. As provided for by s 149 and foreshadowed by the appellant's lawyer, a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment was contacted by the solicitor acting for the respondent and asked to sign the agreement.

[13] As we have explained, when asked to sign the agreement, the mediator does not advise the parties about the terms of settlement. Rather, under s 149(2), the mediator must explain to the parties the final and binding nature of the agreement and be satisfied that, knowing the final and binding nature of the settlement, the parties affirm their request to have the settlement signed. Section 149(3)(a) provides that, where the parties affirm their request that the mediator sign the settlement agreement and the mediator signs the settlement, the terms of settlement "are final and binding on, and enforceable by, the parties".

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6 EmpC judgment, above n 2, at [10].

[14] Section 149 encourages performance of the terms of the settlement by creating a jurisdiction to impose penalties for breach of the terms of the settlement, and limits the circumstances in which the settlement can be challenged.

[15] At the foot of the agreement, the appellant signed her confirmation that she fully understood the effect of s 149, namely, that once the mediator signed the terms of settlement:

> 1. the settlement is final and binding on and enforceable by us; and
>
> 2. except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, and application for review, or otherwise; and
>
> 3. the terms of the settlement cannot be cancelled under section 7 of the Contractual Remedies Act 1979; and
>
> 4. that section 149(4) provides that a person who breaches an agreed term of settlement to which subsection(3) applies is liable to a penalty imposed by the Authority.

[16] The mediator did not meet the appellant in person, instead speaking to her over the phone. The mediator signed the agreement pursuant to s 149(1) and (3) on 15 December 2015.

[17] The appellant's evidence in the Employment Court was that she experienced a breakdown in August 2015. She could not remember much of what occurred from around August 2015 until her employment came to an end in December 2015, when the settlement agreement was entered into.

[18] About eight months after the agreement had been signed, the appellant was examined by a psychiatrist, Dr Tom Levien, for the purposes of an insurance claim. By way of background, the respondent took out workplace income insurance to cover its employees. The appellant made a claim under this policy on the basis that she was unable to work through disability, which was accepted following an assessment by an occupational therapist in mid-November 2015. The insurance policy provided for updated medical assessments and, following a reassessment, in his updated report of 25 August 2016, Dr Levien diagnosed the appellant with an anxiety disorder, and

recommended targeted psychotherapy. The doctor concluded that the appellant was "currently totally incapacitated with regards to her previous work".

Employment Relations Authority

[19] The appellant filed her statement of problem in the Authority in April 2017. The respondent met the claim with the argument that it was precluded by the settlement agreement and the operation of s 149(3). The issue of the appellant's capacity and the implications of that for the enforceability of the agreement were therefore squarely before the Authority, and addressed by it as a preliminary issue.

[20] At the appellant's request, Dr Levien provided a further report, dated 19 May 2017, which was placed before the Authority, addressing the appellant's capacity at the relevant time. Dr Levien concluded:

> It is my opinion that [the appellant] 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 appellant'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 appellant] 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 appellant] 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 appellant's] case, secondary to her ongoing anxiety and depression. …
>
> It is my opinion that [the appellant'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 appellant] 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.

[21] The Authority found that s 149(3) did not override common law principles protecting those suffering from disability or who were unconscionably taken advantage of.[7] But the Authority declined to set aside the settlement agreement.[8] It found that the appellant did not lack the capacity to enter into the agreement,[9] and that in any case, there was no material indication to the respondent which would have reasonably led it to conclude that the appellant lacked capacity to enter into the agreement.[10] The Authority also held that the bargain reflected in the settlement agreement was not unconscionable, and that the appellant did not enter into the agreement as a result of duress.[11]

Employment Court

[22] The appellant appealed to the Employment Court. The Chief Judge accepted Dr Levien's opinion, confirmed in a further updating report, dated 30 June 2018, that the appellant was incapacitated at the time she entered into the agreement.[12] In reaching this view of the evidence the Chief Judge noted that the doctor did not resile from that opinion during cross-examination and noted also the lack of evidence contradicting that opinion. The Judge also considered that other evidence as to the appellant's condition, both at the time of the agreement and the later discussion with the mediator, was supportive of Dr Levien's opinion. The Chief Judge was therefore satisfied the appellant was mentally incapacitated when she signed the agreement and when she subsequently spoke to the mediator over the telephone. She also found that

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7 Authority decision, above n 1, at [15], applying *8i Corp v Marino* [2017] NZEmpC 69, (2017) 14 NZELR 606 at [37] and [45].
8 At [81].
9 At [69].
10 At [70].
11 At [73]–[74] and [80].
12 EmpC judgment, above n 2, at [54].

the appellant lacked the capacity to instruct her lawyer, a role that she had little involvement in.[13]

[23] The Chief Judge agreed with the Authority that, despite s 149(3), the agreement could be set aside on the basis of lack of capacity.[14] In determining whether to set aside the agreement, the Chief Judge said that the New Zealand position is that the opposing party to an agreement must have knowledge of the mental incapacity at the time that the agreement is entered into, if an application to set that agreement aside on the grounds of incapacity is to be successful.[15] In this the Court was referring to the two limbs of the test in *O'Connor v Hart*, discussed above.[16]

[24] Although expressing doubts as to whether such an approach was appropriate to settlement agreements in the employment jurisdiction, the Chief Judge considered existing authority required the Court to apply the approach in *O'Connor v Hart*. The Chief Judge concluded that whilst the appellant was mentally incapacitated, the respondent did not know and could not reasonably have known about the lack of capacity.[17] The Chief Judge also addressed whether equitable fraud was made out so that the agreement was otherwise voidable. She found that the agreement was not unconscionable, given that the appellant was represented by an experienced employment lawyer who negotiated an unremarkable settlement agreement based on conventional terms that were reasonably evenly weighted. She said the agreement was fair and reasonable, and fell far short of representing an unconscionable bargain.[18] Finally, the Chief Judge found that the appellant had not signed the agreement under any duress.[19]

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13 At [54].
14 At [45]–[46].
15 At [55].
16 *O'Connor v Hart*, above n 4, at 174, following the leading English authority on this issue, *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 (CA). For a discussion of this line of authority, see Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 556–559.
17 At [57] and [64].
18 At [73].
19 At [80].

Court of Appeal

[25] The Court of Appeal granted leave to appeal on two questions of law. The first was whether s 149(3) prevented the Court from setting aside the agreement on the basis of incapacity and the second, whether the *O'Connor v Hart* test applied in the employment jurisdiction.[20] On the first question, the Court upheld the conclusion of the Employment Court, namely that s 149(3) was not a bar to setting aside the agreement where a party lacked capacity.[21]

[26] On the second question, the Court referred to what it described as the "orthodox" approach to capacity — if a party lacks capacity and the other party knows that, there can be no justification for enforcing a contract between the parties where the incapacitated party (or their representative) wishes to set it aside.[22] "Similarly", the Court said:[23]

> … if the other party is on notice that an individual may lack capacity, they should not be permitted to turn a blind eye to those circumstances and take the benefit of a contract that exploits that incapacity. Rather, if they refrain from making inquiries, they take the risk that the contract will be set aside because the other party lacked capacity to enter into it.

[27] "But on the orthodox approach", the Court observed, "a contracting party dealing with an individual who is not a minor" can go ahead on the basis that the individual has contractual capacity unless they know the individual lacks capacity, "or are aware of circumstances that would put a reasonable person on inquiry about the individual's capacity".[24]

[28] Such an approach, the Court said, is consistent with the objective approach to contract formation that underpins the law of contract. It creates certainty and reduces barriers to contracting, because dealings can occur against a background of assumed capacity without the need for inquiries or other active steps to ascertain that capacity.[25] In that way it reduces transaction costs which would otherwise be borne by the parties,

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20 CA judgment, above n 3, at [23].
21 At [45], and [48]–[49].
22 At [58].
23 At [58].
24 At [59].
25 At [59].

including by the individuals who are required to take steps to establish their capacity to enter into the contract.[26]

[29] The Court did not consider the employment context was so different as to require a different approach. Indeed, the Court saw the broader statutory framework regulating employment relationships as supporting such an approach.[27]

Does s 108B apply to settlements approved under s 149?

[30] It is useful at this point to set out the terms of both s 108B of the PPPRA and s 149 of the ERA.

The relevant provisions

[31] Section 108B is a type of provision commonly known as a "compromise rule". It protects incapacitated parties from being bound by agreements to settle certain claims unless the agreement has been approved by the court. Section 108B provides as follows:

> **108B Approval of court required to settle claims of specified persons**
>
> (1) This section applies where money or damages are claimed by or on behalf of a specified person, whether alone or in conjunction with another person.
>
> (2) If the claim is not the subject of proceedings before a court, an agreement for the compromise or settlement of the claim entered into by the specified person, or on his or her behalf by a person who, in the opinion of a court, is a fit and proper person to do so, is binding on the specified person if the agreement, or a release of the claim, is in writing and is approved by the court under section 108C.
>
> (3) If the claim has not been compromised or settled in accordance with subsection (2), and has become the subject of proceedings before a court, a settlement, compromise, or payment, or acceptance of money paid into court, whenever entered into or made, is valid so far as it relates to the specified person's claim only with the approval of the court under section 108C.

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26 At [60].
27 At [62]–[66].

[32] The PPPRA defines "specified person" as "a person who is incapable of managing his or her own affairs" and "court" as "a court in which proceedings could be taken to enforce the claim".[28]

[33] The companion provision to s 108B is s 108C, which provides for the making of applications for approval and sets out the powers of the court on such an application. In its discretion, the court may do the following:

> (a) refuse the application; or
>
> (b) grant its approval unconditionally; or
>
> (c) grant its approval subject to any conditions and directions that it thinks fit, including conditions and directions as to—
>
> (i) the terms of the agreement, compromise, or settlement; or
>
> (ii) the amount, payment, security, application, or protection of the money paid, or to be paid; or
>
> (iii) any other relevant matter.

[34] Section 149 of the ERA provides that where an employment problem is resolved, a person employed or engaged by the Chief Executive to provide mediation services and who is authorised by the Chief Executive to sign, for the purposes of s 149, agreed terms of settlement, may sign the agreed terms at the request of the parties to the problem. The section is a safeguard provision for those who resolve their claims through settlement.

[35] Section 149(2) sets out what the mediator must do before signing the agreed terms with emphasis on ensuring the parties understand the settlement will be final. Subsection (2) provides accordingly that the mediator must:

> (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.

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[28] Protection of Personal and Property Rights Act 1988 [PPPRA], s 108A.

[36] Subsection (3) is in the following terms:

> (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.

[37] Sections 36 to 40 of the Contract and Commercial Law Act referred to in s 149(3)(ab) are those sections allowing cancellation for repudiation, misrepresentation or breach.

[38] Section 149(3A) deals with the position of settlement agreements entered into by minors aged 16 years or over, providing that they may be bound by the settlement as if they were of full age and capacity.

The parties' submissions

[39] The Court raised with the parties whether s 108B was displaced by the ERA for present purposes. Neither party nor the Human Rights Commission adopted that position. Both parties say that s 108B and the ERA can operate together and the latter does not displace the former. Rather, the difference between the parties is primarily as to the relevance of knowledge (actual or constructive) of lack of capacity.

[40] The appellant says that the respondent's knowledge of the appellant's incapacity is irrelevant to the applicability of s 108B in this case. And, she says, because she was denied the protection of s 108B, the agreement should be set aside as unenforceable and her claim ought to be allowed to proceed in the Employment Court.

[41] The Human Rights Commission supports the appellant's arguments as to the applicability of s 108B. It considers that the purpose of s 108B is to provide a

procedural safeguard through which a settlement agreement entered into by an incapacitated person must pass.

[42] The respondent argues that s 108B does not apply here — where incapacity was not a known issue at the time of the agreement. The respondent says that, viewed in its statutory context, it is clear that the purpose of s 108B is to enable settlement in circumstances where it might not otherwise occur due to one party's inability to manage their own affairs. It follows that it is intended to apply where the parties know one of them is incapacitated, and therefore can prospectively engage with the court in respect of the settlement agreement.

Our approach

[43] In terms of the place of the ERA in the overall statutory arrangements, the appellant's argument is that there is no incompatibility between the sections of the ERA identified by the Court and s 108B. However, when the scheme of the ERA as a whole is considered, there is an incompatibility because the ERA covers the field, namely, settlement agreements entered into under s 149.

[44] As we now explain, to apply s 108B to the present case would undercut the central concepts underlying the ERA and the institutional structures set up by the Act, as well as undermining the efficacy of the Act's dispute resolution processes. In particular, it would be inconsistent with the thread of good faith running through the Act and the protection provided for the integrity of individual choice. It would also not fit at all well with the ERA's focus on promoting mediation as the primary problem solving mechanism and promoting the speedy and inexpensive resolution of employment disputes. Nor would it fit well with the emphasis in the Act on reducing the need for judicial intervention and the roles of the institutions established under the Act.

The statutory scheme and relevant concepts of the ERA

[45] As this Court said very recently in *FMV v TZB*, the focus of the ERA is on the

employment relationship.[29] That relationship in turn reflects "the statutory incorporation of the principle of good faith"[30] and that principle "underpins the Act's relational approach".[31] This is reflected in s 3(a) of the ERA, which relevantly provides that the object of the Act is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship".

[46] Section 3(a) goes on to provide that the object of the Act is to be achieved in a number of ways. For present purposes it is relevant that those methods are described to include:

> (iv) by protecting the integrity of individual choice; and
>
> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
>
> (vi) by reducing the need for judicial intervention; …

[47] Section 4(1)(a) imposes a duty on parties to an employment relationship, such as that in this case, to deal with each other in good faith and not do anything, whether directly or indirectly, to mislead or deceive each other.[32] Section 4(4) specifies that the duty of good faith applies to matters such as bargaining for collective or individual employment agreements.

[48] The interpretation of the ERA must be approached in light of that purpose and should accordingly avoid outcomes that would undermine or not incentivise good faith dealing between employers and employees. As the Court said in *FMV*:[33]

> Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

[49] The logical outcome of the approach advanced by the appellant is that a settlement agreement may be reopened, even well after it has been implemented,

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29 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [46].
30 At [47].
31 At [47].
32 The duty of good faith also forms the object of Part 5 of the Act dealing with collective bargaining and of Part 6 addressing individual employees' terms and conditions: Employment Relations Act 2000 [ERA], ss 31 and 60.
33 *FMV*, above n 29, at [50].

although the employer had done everything that would be expected of a reasonable employer acting in good faith to address the challenges its employee was facing. That does not sit readily with the scheme of the Act. In addition to not facilitating timely resolution of employment disputes and not rewarding good faith dealing, applying s 108B as the appellant advocates may in fact incentivise employers to take steps to protect themselves which may exacerbate, not resolve, employment relationship problems.

[50] There are two further considerations in this context. The first is that employers may not discriminate against people with mental disabilities as ss 104 and 105 make clear.[34] The second is that the context is an employment relationship which is subject to a dispute. In those situations, an employer may face difficulty in suggesting to its troubled employee that they may lack capacity, so that an assessment by a specialist is required. The present case provides a good illustration in that the appellant's union representative commented adversely on the respondent's request the appellant undergo a neuropsychological assessment. The facts of *FMV* also indicate the types of problems that may arise.

[51] Further, on the appellant's approach there is no requirement in s 108B that the parties have knowledge (actual or constructive) of the incapacity. Applying s 108B in the manner in which the appellant contends to set aside certified s 149 agreements is inconsistent with the way the ERA treats mental disability in other contexts, namely the bargaining for and entering into of an individual employment agreement as set out in s 68 of the ERA. Section 68 is not directly applicable to the appellant who was employed under a collective (not individual) agreement and whose grievance concerns the terms of a settlement (not employment) agreement. But s 68 is nonetheless of relevance to whether the ERA covers the field in cases such as the present, given the duty of good faith applies throughout the relationship.

[52] Section 68 deems bargaining for an individual employment agreement to be unfair where one party, assume for these purposes it is the employer, knows or ought

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[34] ERA, ss 104 and 105(1)(h). See also s 21(h) of the Human Rights Act 1993.

to know of certain enumerated circumstances. Those circumstances include where the other party, at the time of bargaining for or entering into the agreement:[35]

> (a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—
>
> (i) age; or
>
> (ii) sickness; or
>
> (iii) mental or educational disability; or
>
> (iv) a disability relating to communication; or
>
> (v) emotional distress; or

[53] Section 68 accordingly adopts the *O'Connor v Hart* approach because it is premised on making provision to set aside the employment agreement for unfairness where one party has actual or constructive knowledge of the incapacity of the other.[36] The legislative history indicates that s 68 reflected a deliberate move away from the approach in the ERA's predecessor, the Employment Contracts Act 1991. Under that Act, the threshold test was that the contract was "harsh and oppressive", whereas the current Act reflects the common law approach to unfair (or unconscionable) contracts as reflected in *O'Connor v Hart*.[37]

[54] The appellant maintains that it is significant that s 68 applies only to negotiation of an agreement and not to its termination. It is helpful to consider how that submission would apply in the situation where an employee satisfies the Authority that an employer has breached s 68. In that case, s 69 empowers the Authority to grant various remedies including payment of compensation, variation or cancellation of the agreement or to make any other order it sees fit in the circumstances. However, the Authority cannot vary or cancel an agreement unless the requirements of s 164 have

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35 Section 68(2).

36 The Court of Appeal saw s 68 as confirming that a knowledge requirement like that in the second limb of *O'Connor v Hart* is "consistent with the purpose of the Act and the values that underpin it.": CA judgment, above n 3, at [66].

37 Employment Relations Bill 2000 (8-1) (explanatory note) at 6; and Employment Relations Bill and Related Petitions 2000 (8-2) (select committee report) at 19. See also John Hughes and others (eds) *Mazengarb's Employment Law* (online ed, LexisNexis) at [ERA68.3]–[ERA68.5].

been met. The effect of s 164 is that a cancellation or variation order cannot be made unless:

> (a) the Authority …
>
> (i) has identified the problem in relation to the agreement; and
>
> (ii) has directed the parties to attempt in good faith to resolve that problem; and
>
> (b) the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation; and
>
> (c) despite the use of mediation, the problem has not been resolved; and
>
> (d) the Authority is satisfied that any remedy other than such an order would be inappropriate or inadequate.

[55] Let us assume then that the Authority, minded to vary or cancel the employment agreement because it has identified a problem in relation to an agreement, directs the parties to negotiate in good faith. The parties reach an apparent resolution of the problem (whether with the aid of mediation services or not) and enter into a settlement agreement which involves a variation to the contract of employment and the payment of a sum of money to the employee.[38] The employer asks that a mediator sign the agreement in terms of s 149. As we have noted, under s 149(2) and (3), the mediator is required to explain the "full and final" nature of the settlement and to be "satisfied" that, in light of that explanation, the parties wish to affirm the agreement. A mediator gives the required information and, being satisfied that the parties wish to affirm the agreement, signs off on it.

[56] We consider it is improbable that s 108B would apply in these assumed circumstances if the employee subsequently sought to challenge the validity of the settlement agreement on the basis that they did not, through mental incapacity, understand the full implications of agreeing to it. Given that the heart of the employment relationship problem is that the employee was unfairly taken advantage of in the negotiation of the individual employment contract as a result of mental disability, the assumption must be that the process leading up to the making of the settlement agreement would accommodate any necessary supports for

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[38] A settlement agreement for the purposes of s 149 refers to terms agreed as part of a resolution of a "problem": see ERA, s 149(1).

decision-making by the employee. In that sense, the ERA's processes are intended to be ameliorative and facilitative.[39]

[57] In our view, a similar analysis applies where settlement agreements are certified under s 149. As we noted at [46] above, s 3(a)(v) of the ERA refers to mediation as "the primary problem solving mechanism other than for enforcing employment standards". Under s 144, the chief executive of the relevant department "must" employ or engage people to provide mediation services to support all employment relationships. "Mediation services" includes services that assist people to resolve their employment relationship problems promptly and effectively. Where an employer and an employee utilise the ERA's mediation services to resolve a relationship problem and record the outcome in an agreement, that agreement is likely to be certified under s 149. It would run counter to the scheme of the Act if either party to the certified agreement could have it set aside under s 108B at some point in the future on the ground of mental incapacity. The mediation process would provide the forum in which the issue of any mental disability could be addressed, and would allow appropriate steps to be taken to facilitate decision-making by the relevant person.[40]

[58] In the present case, the settlement agreement that was certified did not result from a mediation process but rather from private negotiations. But we do not see how the approach to the effect of certification under s 149 can vary depending on whether the parties did or did not utilise the ERA's mediation services. The s 149 certification process is, in the scheme of the Act, a meaningful one and must be given effect.

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39 Winkelmann CJ at [109] says that s 68 deals with the enforceability of an individual employment agreement, not a settlement agreement involving a money claim so that the concerns we raise do not arise. However, under s 69, the remedies for unfair bargaining include orders for compensation. If parties to an employment agreement where the employee alleged unfair bargaining agreed during mediation to a settlement that included a money payment and had the agreement certified under s 149, it seems to us that the same problem we identify could arise.

40 As we note below at [68], there is an argument that the ERA itself provides a mechanism for relief in extreme cases. Further, there was no cross-appeal from the finding of the Courts below that s 149(3) did not prevent an agreement from being re-opened where a party lacked capacity. But, in any event, our present concern is relief under s 108B.

The institutions

[59] Part 10 of the ERA deals with institutions. The objects clause, s 143, identifies various objectives for the ERA's institutions. An important part of the institutional structure is that the parties should be encouraged to resolve problems themselves, albeit with the availability of expert assistance at short notice if necessary. As this Court said in *FMV*, the two specialist employment institutions, the Authority and the Employment Court, "are intended to give effect to the Act's overall object of building productive employment relationships through the promotion of good faith".[41] Noting the objects, the Court said "[in] short, the Act is designed to empower parties to employment relationships to resolve their own problems where possible and to avoid unnecessary adversarialism."[42]

[60] The focus of Part 10 is accordingly on providing "practical, specialised, speedy and informal dispute resolution that is accessible to all parties".[43]

[61] It is recognised, however, that judicial intervention may be required, initially by a specialist body that is not inhibited by strict procedural requirements. Overall, the scheme of the ERA contemplates that most employment disputes will be resolved between the parties, possibly with the assistance of mediation services, with the Authority being the primary forum where negotiation or mediation fails.

[62] Where there is unfair bargaining in the making of an employment agreement, the ERA provides a process which gives its two primary institutions for dispute resolution — mediation services and the Authority — important roles to play. But, on the approach of the appellant, neither has the power within the framework of the ERA to address settlement agreements with a person who lacks capacity for mental health reasons, even if the incapacity is associated with, or limited to, the employment relationship. That outcome seems to us inconsistent with the scheme of the ERA.

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41 *FMV*, above n 29, at [53].
42 At [54].
43 At [55].

Conclusions

[63] Against this statutory scheme, we consider s 108B is displaced by the scheme of the ERA. The effect of s 68 is that the *O'Connor v Hart* principle is seen as consistent with good faith obligations and fair dealing, and the Act's institutional framework indicates the ERA provides a bespoke process for resolution of employment disputes, including those involving issues of incapacity. On that approach, the scheme of the ERA is that prospects of reopening are confined to those situations where there was actual or constructive knowledge. The prospect of reopening s 149 settlements years later where there was no knowledge of the incapacity at the time, as the appellant contends for under s 108B, would provide all of the wrong incentives and could discourage resolution of employment disputes even in situations where plainly resolution is the best course for all parties. That outcome would accordingly undercut the values underlying the ERA.

[64] Such an outcome also tells against providing for an exception to *O'Connor v Hart* in the employment field, such that settlement agreements are voidable if one party lacks capacity to enter it where the counterparty had no actual or constructive knowledge of the incapacity. That approach would cause issues with reopening settlement agreements potentially, as here, years later with probable extensions of limitation periods because of incapacity.[44] And, as we have discussed, it opens up the prospect of intrusive medical examinations in what are meant to be employee-friendly dispute resolution processes. Indeed, we see the difficulties in retrospective assessment of competency as apparent in the present case where the assessment was made without the benefit of information as to the full context of the support received by the appellant or as to the full extent of the appellant's interactions with her lawyer.[45] There is the further point, as we have discussed, that an exception from *O'Connor v Hart* would not sit well with s 68.

[65] In addition, there is a strong argument that the approach reflected in s 149, which allows persons with disabilities to settle disputes, even by making a bad bargain,

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[44] Limitation Act 2010, s 45.

[45] This appeal is of course limited to questions of law: ERA, s 214. We add that the parties all accepted that the modern, functional, approach to capacity was the appropriate approach. We agree.

subject to appropriate procedural safeguards, is consistent with the supported decision-making model found in the Convention on the Rights of Persons with Disabilities.[46] Article 12 is the key provision for these purposes, requiring states parties to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".[47]

[66] The United Nations Committee on the Rights of Persons with Disabilities (the Committee) addressed the correct interpretation of art 12 in a General Comment issued in 2014 noting, amongst other matters, that "support" is a "broad term that encompasses both informal and formal support arrangements, of varying types and intensity".[48] The Committee also said there was an obligation on states parties to abolish substitute decision-making regimes and to replace these with supported decision-making alternatives.[49] Further, the "primary purpose" of the safeguards associated with supported decision-making "must be to ensure the respect of the person's rights, will and preferences".[50]

[67] Moreover, if there is to be an exception to *O'Connor v Hart* to deal with unfair agreements entered into by persons with disabilities even if the other party did not know of the disability or failed to make inquiries having been put on notice, there is merit in the proposition that this should be a generic exception, that is, not one limited to the employment field. We do not need to consider that prospect here because there

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46 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). This Convention has been ratified by New Zealand. The right to freedom from discrimination on the grounds of disability has been protected for over 50 years by the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), to which New Zealand is a party. It is also expressly affirmed in our domestic legislation. Section 19 of the New Zealand Bill of Rights Act 1990 provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, of which disability is one. The definition of disability captures intellectual disability or impairment: Human Rights Act, s 21(1)(h).

47 Articles 12(2) and (3). See also the obligation in art 12(4) to ensure there are appropriate and effective safeguards.

48 United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

49 At [26].

50 At [20].

was a finding by the Employment Court that the terms of the settlement were, in fact, fair to the appellant.[51] In any event, as adopting a generic approach would go well beyond the scope of the present case, we take the point no further.

[68] We add that s 152(2)(a) of the ERA does enable agreed terms of settlement signed under s 149 to be challenged on the ground that the provisions of s 149(2) and (3) were not complied with. This would obviously apply where the required information was not given at all. If s 152(2) was not simply procedural, as was accepted in argument, but rather applied to an employee who says they did not understand the import of the information provided because of lack of capacity that could, we suggest, allow s 149(3) to be read as ensuring finality subject to the remedial jurisdiction under s 152(2)(a).[52] That approach would fit with our view of the statutory scheme. However, we take that point no further given that there was no cross-appeal from the finding of the Courts below that s 149(3) did not prevent an agreement from being reopened where a party lacked capacity. Nor was the point addressed directly in argument before us.

Application to this case

[69] Accordingly, we consider the Courts below were correct not to set aside the settlement agreement in this case because the respondent did not have actual or constructive knowledge of the appellant's incapacity at the time of entering into the agreement. *O'Connor v Hart* applies and the question of whether or not the agreement should be set aside was governed by the ERA, not by s 108B.

Postscript

[70] Given our conclusion that s 108B has no application in relation to settlement agreements certified under s 149 of the ERA, it is not necessary for us to resolve the competing submissions between the parties as to the interpretation and scope of

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51 We see no merit in the appellant's submission that this finding should be ignored because it was made in the context of assessing whether an unconscionable bargain had been established.

52 Hughes and others, above n 37, at [ERA152.4].

various aspects of s 108B.[53] However, as an observation in support of the respondent's position, we note that the language of the provision implies the approval is prior to the settlement, not subsequent. For example, the heading to s 108B and the language of s 108B(1) address the need for approval "to" settle claims. Similarly, the reference in s 108B(2) is to settlement of a claim by a person acting on behalf of the disabled person and the opinion of the court that this person "is fit and proper" rather than, for example, referring to fitness at some earlier point in time.

[71] In addition, we make the observation that there are features of s 108B which support the view that the section does not apply to s 149 settlement agreements. First, there must be an issue whether a claim such as the present for reinstatement and restoration of mana is aptly caught by reference in s 108B(1) to a settlement of claims for "money or damages". Compromise of such claims is the focus of Part 9A of the PPPRA, in which s 108B sits.

[72] Second, there is a question as to whether the Authority, given its features, comprises a "court" for these purposes. As we have seen, a "court", is defined for the purposes of s 108B as any court in which such a claim would be brought.

[73] Finally, we do not consider it is possible to view s 108B separately from s 108D and s 108E. Those two provisions relevantly provide for money payable under a settlement approved under s 108C to be held on trust for the person who lacks capacity. This feature suggests s 108B is something of a hangover from the days when the Public Trustee would receive and hold monies from such settlements on behalf of a disabled person.[54]

Non-publication orders

[74] The Employment Court order prohibiting publication of the name and identifying particulars of the appellant remains in force. At the hearing, the appellant

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53 We agree with Winkelmann CJ (at [101] below) that, in cases where s 108B does apply, it should be interpreted to require supported decision making rather than substituted decision making by the court. Had s 108B applied in this case, the support that the appellant had received, particularly that of her son, would have been highly relevant.

54 Part 9A of the Act was a late addition to the PPPRA, inserted in 2002 by s 170(1) of the Public Trust Act 2001. The Public Trust Act repealed and replaced the Public Trust Office Act 1957, which until then contained the predecessor provision to s 108B.

sought, with consent from the respondent, a clarification of that non-publication order made by the Employment Court to include all whānau and iwi affiliations of the appellant, the town in which she resides, the location of her employer and particulars of other employees that could be identified. We consider these details would fall within the scope of the current Employment Court order suppressing publication of the appellant's identifying particulars and confirm that this is the position to the extent such clarification is necessary.

[75] Shortly after the appellant filed her application for leave in this Court, an order was made by consent preventing publication of the terms of the settlement agreement pending resolution of the application for leave to appeal or, if leave was granted, the appeal. As the appeal has now been determined, the order will lapse in the absence of a further order. Accordingly, we extend the order until 5 pm on 9 June 2022 and reserve leave for the parties to file a memorandum within that time frame, if they seek a new order to the same effect.

Result

[76] In accordance with the views of the majority, the appeal is dismissed. For the reasons we have given the Courts below were correct not to set aside the settlement agreement in this case on the grounds of mental incapacity.

[77] As the appellant is legally aided in relation to this appeal, we make no order as to costs.

WINKELMANN CJ AND O'REGAN J
(Given by Winkelmann CJ)

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Introduction

[78] The issue on this appeal is the level of procedural protection the law affords to those who are incapable of managing their own affairs at the time they enter into an agreement to settle a claim for money or damages arising out of their employment. The Protection of Personal and Property Rights Act 1988 (PPPRA) defines those who are incapable of managing their own affairs as "specified people".[55] Section 108B provides that agreements specified people enter into to settle or compromise a claim for money or damages will be valid only insofar as it has been approved by a court under s 108C of that Act. But at common law the general law of contract provides that those lacking mental capacity are nevertheless bound by contracts they enter into unless the other party knew or had notice of their incapacity or equitable fraud is established — this is known as the rule in *O'Connor v Hart*.[56]

[79] In this case, the Employment Court found that the appellant lacked capacity when she settled her employment claim.[57] Which rule should apply to her? The s 108B rule which applies to contracts settling certain categories of claims or the more general common law rule relating to the enforceability of contracts?

[80] We consider that s 108B applies to the settlement of claims for money or damages arising out of employment relationship problems where one of the parties to the settlement was a specified person at the time of contract.[58] Section 108B therefore applies in this case, with the consequence that the settlement agreement at issue in this

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55 Section 108A.
56 *O'Connor v Hart* [1985] 1 NZLR 159 (PC).
57 *TUV v WXY* [2018] NZEmpC 154, (2018) 16 NZELR 326 (Chief Judge Inglis) [EmpC judgment] at [54].
58 For ease of reference, we refer to settlements and settlement agreements generically in these reasons, but these terms should be read as referring to settlements and settlement agreements involving a money or damages claim. Sections 108B and 108C apply only to claims for money or damages.

proceeding is not enforceable unless and until it is approved by a court under s 108C of the PPPRA.[59] We therefore disagree with the majority's finding that the rule in *O'Connor v Hart* rather than s 108B applies to the settlement agreement here.

[81] We reason that s 108B performs an important function — it is protective of the rights of persons with a disability, rights which New Zealand committed to uphold and promote when it ratified the United Nations Convention on the Rights of Persons with Disabilities (the Convention).[60] By its terms, and consistent with its purposes, s 108B applies to the circumstances of the appellant. If it is not to apply we would expect to see its application expressly excluded. There is nothing in the scheme or provisions of the Employment Relations Act 2000 (ERA) which can or should be read to exclude the operation of s 108B, nor a purpose which requires that exclusion.

[82] The reasoning supporting the majority's conclusion that s 108B does not apply is, in broad brush, as follows:

(a) Section 149 of the ERA "covers the field" in respect of the settlement of employment relationship problems.

(b) Applying s 108B does not sit well with other provisions in the ERA, in particular ss 68, 69 and 164.

(c) The s 108B requirement of court approval is inconsistent with the object of the ERA — of building productive employment relationships through the promotion of good faith — and the stated means of achieving this including by protecting the integrity of individual choice,

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59 It was common ground before us that TUV was a specified person given the finding of the Employment Court that she was "more likely than not mentally incapacitated when she signed the agreement and when she subsequently spoke to the mediator over the telephone": EmpC judgment, above n 57, at [54].

60 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [the Convention]. The Convention was ratified by New Zealand on 25 September 2008. See the majority reasons above at [65], n 46 for a discussion of the relationship between the Convention and the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

promoting mediation as the primary problem solving mechanism and reducing the need for judicial intervention.[61]

(d) Applying the provisions of the ERA to the exclusion of s 108B is more consistent with New Zealand's obligations under the Convention.

[83] We will address shortly why we consider that these are not sufficient nor persuasive reasons to disapply the legislative requirements of s 108B. But first we provide necessary explanation and context in relation to s 108B, and then set out the argument the Court received as to the application of s 108B to this case, the latter not being addressed in the majority reasons.

Section 108B of the PPPRA

[84] Before the enactment of the PPPRA the rights of persons lacking decision-making capacity were dealt with through the court's parens patriae jurisdiction and a patchwork of legislative provisions.[62] The PPPRA is now the primary legislative vehicle for dealing with adults who lack decision-making capacity. It creates a protective system, giving the Family Court — the key player in the PPPRA — powers to apply and oversee this system.

[85] Section 108B sits within Part 9A and somewhat apart from the rest of the PPPRA's statutory framework in that it applies whether or not a person has been brought within the protective scheme provided by the PPPRA. Part 9A is solely concerned with the compromise of claims by[63] and the handling of money or damages awarded to,[64] a person who is incapable of managing his or her own affairs. Section 108B is a type of provision commonly known as a "compromise rule" — one that protects an incapacitated party from being bound by a settlement agreement unless the agreement has been approved by the court. As we come to, compromise rules have

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61 Employment Relations Act 2000 [ERA], s 3.
62 Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) at 10.
63 The Protection of Personal and Property Rights Act 1988, ss 108B and 108C.
64 Sections 108D and 108E.

a long history and are common in the statute books and rules of court in common law jurisdictions.[65]

[86] The text of 108B is set out in the majority judgment.[66] In order to follow the arguments made on this appeal, it is necessary to also have regard to s 108C, its companion provision, which governs applications for approval and provides:

> **108C Applications for approval of court**
>
> (1) An application for the approval of a court under this section may be made by or on behalf of a specified person, or by any other party to the agreement or proceedings.
>
> (2) On an application for its approval under this section, the court, in its discretion, may—
>
> (a) refuse the application; or
>
> (b) grant its approval unconditionally; or
>
> (c) grant its approval subject to any conditions and directions that it thinks fit, including conditions and directions as to—
>
> (i) the terms of the agreement, compromise, or settlement; or
>
> (ii) the amount, payment, security, application, or protection of the money paid, or to be paid; or
>
> (iii) any other relevant matter.

[87] Also relevant are ss 108D and 108E. These empower the court approving a settlement to direct that all or part of money or damages to which the specified person is entitled under the settlement is to be held on trust by a corporation or person designated by the court, or to be held by the manager of the estate of the specified person.

The parties' submissions as to the application of s 108B

[88] The appellant's position is that settlement of an employment relationship problem where one of the parties is a specified person is invalid, notwithstanding s 149

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65 See below at [136].
66 Above, at [31].

of the ERA, unless and until it is approved pursuant to ss 108B and 108C of the PPPRA. The appellant argues that it is irrelevant to the application of s 108B whether either party knew of the incapacity at the time of the settlement. This is also the position of the intervener, the Human Rights Commission.

[89] The respondent does not contend that s 108B is displaced where the s 149 processes have been followed (which is the finding of the majority). It accepts that a s 149 settlement agreement may be voidable under s 108B but says this is only where, in accordance with the principles in *O'Connor v Hart*,[67] the other party to the contract had actual or constructive knowledge of the lack of capacity at the time they entered into the agreement, but failed to obtain approval of the settlement under s 108C. If, however, the incapacity was not known of at the time the agreement was entered into, s 108B has no effect and the agreement remains valid and enforceable. This, says the respondent, is how s 108B should be applied in all contractual situations (whether or not the contract in question is the settlement of a claim for damages or money) — mirroring the common law principles in *O'Connor v Hart.*

Issues to be addressed

[90] We address the issues raised by the appeal as argued by the parties, and by the judgment of the majority, as follows:

(a) Does s 108B apply to the settlement of employment relationship problems where the agreement has been signed by a mediator in accordance with s 149 of the ERA?

(b) Does the rule in *O'Connor v Hart* govern the exercise of the s 108C discretion?

[91] Before we embark on consideration of these issues it is helpful to place ss 108B and 108C within the context of New Zealand's international obligations.

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[67] *O'Connor v Hart*, above n 56.

New Zealand's international obligations to persons with disabilities

[92] As was acknowledged by the parties, because these provisions directly affect the rights and interests of persons with disabilities, they fall to be interpreted against the backdrop of New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities. It is well established that legislation should be read, so far as possible, consistently with New Zealand's international obligations.[68]

[93] Although the need for protection from discrimination has long been acknowledged,[69] the implementation of that protection has been slow. Over time, recognition has grown internationally that protecting disabled persons from discrimination can be fraught, and has the potential to erode, rather than protect, their rights.[70] The United Nations General Assembly agreed to a new treaty in relation to those with disabilities in 2006 — the Convention, which came into force in 2008.[71] The overarching purpose of the Convention is set out at art 1:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
>
> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[94] New Zealand ratified the Convention in 2008, after the enactment of the PPPRA and the ERA, but the obligations New Zealand undertook are relevant to the interpretation of that legislation nevertheless.[72] New Zealand also signed the

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68 *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and at [207] per Glazebrook J; and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96].

69 See the majority reasons, above at [65], n 46.

70 Sylvia Bell *Protection of Personal and Property Rights* (2nd ed, Thomson Reuters, Wellington, 2017) at [Intro1.2].

71 The Convention, above n 60.

72 Section 11 of the Legislation Act 2019 provides that legislation applies to circumstances as they arise. It replaces s 6 of the Interpretation Act 1999. Section 6 was described in *Fairfax v Ireton* [2009] NZCA 100, [2009] 3 NZLR 289 at [179] as a "re-expression in less metaphorical terms" of the more colourful s 5(d) of the Acts Interpretation Act 1924 which expressed the principle as the "law shall be considered as always speaking". See discussion in Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 540.

Optional Protocol to the Convention in 2016, which allows those who allege to be victims of a Convention breach to take their complaint before the UN Committee.[73] The Convention relies on a social model of disability, premised on the idea that the environment around those with disabilities will often control their ability to participate equally in normal life.[74] The Convention seeks to redress the physical and social barriers confronting those with disabilities, and to promote their ability to participate in all aspects of life, including socially, economically and culturally.[75]

[95] The definition of "disability" in the Convention is based on this conceptual framework. While recognising that people can have long-term impairments, it also acknowledges that disability can result from "the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".[76] To reduce barriers and to promote the full participation of all people, the Convention imposes a duty on states parties to reasonably accommodate people's impairments.[77] It also formulates the concept of supported decision-making — the idea that those who lack capacity should not have decisions made for them (substituted decision-making) but should rather be supported and helped to make decisions for themselves.[78]

[96] As acknowledged by the majority, art 12 of the Convention is the key provision for the purposes of this appeal, addressing the issue of legal capacity for persons with disabilities. It provides :

> **Article 12: Equal recognition before the law**
>
> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

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73 Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (opened for signature 30 March 2007, entered into force 3 May 2008).

74 Bell, above n 70, at [Intro1.2].

75 Clare Barrett (ed) *Brookers Family Law — Incapacity* (looseleaf ed, Thomson Reuters) at 1–601.

76 The Convention, above n 60, preamble, recital (e).

77 Article 5(3).

78 Article 12.

> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
>
> 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

[97] The Convention does not define capacity, nor does it provide a particular capacity standard. But at its heart the Convention is directed to ensuring that disabled people have the appropriate support to enable them to fully enjoy their civil and political rights, on an equal basis with others, rights which include the exercise of legal capacity. In its General Comment on Article 12 the United Nations Committee on the Rights of Persons with Disabilities (the Committee) defines "support" for these purposes as a "broad term that encompasses both informal and formal support arrangements, of varying types and intensity".[79]

[98] Of particular relevance to this appeal is art 12(4), which outlines the safeguards that must be present for the exercise of legal capacity. In the General Comment, the Committee said that the "primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences".[80]

[99] Importantly, the Committee has said that the "best interests" principle, which is common in many legislative models, should no longer be used, because it is not a safeguard that complies with art 12 in relation to adults.[81] The "best interests" principle, where a decision is made by another person "based on what is believed to

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79 United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

80 At [20].

81 At [21].

be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences", is a form of substitute decision-making.[82] This should be replaced with an approach which uses significant effort to determine the will and preferences of an individual. If it is still not practicable to determine this, then the "best interpretation of will and preferences" must replace the "best interests" determinations.[83]

[100] The apparent purpose of the PPPRA, apparent even from its title, is the protection of those with disabilities and of their property.[84] It is clear from Part 9A that the court exercises its powers on behalf of the protected person to protect them from exploitation and abuse — as we have noted, this is a statutory expression of the High Court's parens patriae jurisdiction.[85] This protective purpose is reinforced by the power that the court is given under ss 108D and 108E to impose trust obligations in favour of the specified person in respect of any money paid.

[101] On its face, Part 9A appears to adopt an approach that provides for substitute decision-making (by the court, on behalf of the incapacitated person) which is at odds with the approach of art 12. But as both parties submitted, notwithstanding its historical derivation, Part 9A must be interpreted as having a rights-enhancing purpose, consistent with New Zealand's obligations under the Convention. That includes supporting the incapacitated person so that they have equal access to the benefit of the exercise of their legal rights, and are able to participate as fully as they can, with support, in decision-making affecting their legal interests. Part 9A achieves this purpose, in part by enabling the specified person to effectively settle proceedings, and ensuring that the settlement is for their benefit. But construed in light of the Convention, the s 108C discretion to approve a settlement is expressed broadly enough for a court to apply the social model of disability, requiring supported decision-making techniques (rather than a substituted decision-maker) where appropriate to enable the specified person to participate to the fullest extent possible in the decision to settle in accordance with their own will and preferences.

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82 At [27].
83 At [21]. See also [29(b)].
84 See also the long title to the PPPRA.
85 See above at [84].

[102] We expect that whether the agreement is fair and reasonable, and whether the specified person has had adequate support to enable their participation in the decision to settle, are matters that a court will have regard to in making a decision under s 108C.

[103] In this case, the appellant did receive support to assist her with her decision-making. She had the informal support of her son and the assistance of legal representation. But that support was not tailored in light of her incapacity — it could not have been, since the fact of that incapacity was not known at the time. Whatever support the appellant did receive, the Employment Court has found that she did not have legal capacity at the time that she signed the agreement, nor at the time that she received the explanation from the mediator.[86] It is on that basis that we proceed to consider the issues on this appeal.

Does s 108B apply to the settlement of employment relationship problems where the agreement has been signed by a mediator in accordance with s 149 of the ERA?

[104] Consistent with the requirements of s 10 of the Legislation Act 2019 we base our conclusion that Part 9A of the PPPRA applies to s 149 agreements on the text, purpose and context of the provisions of the ERA and PPPRA.

[105] We start with the critical point that s 108B provides a generic regime for the settlement of claims for money or damages by or on behalf of a specified person. If it is interpreted in light of the Convention, as we say it should be, it can assist the specified person to participate as fully as possible in decision-making affecting their interests.[87] We would expect to see s 108B expressly disapplied where not intended to apply. Yet there is nothing in the language of the ERA or the PPPRA to suggest that s 108B does not apply to the settlement of employment relationship problems in general or to s 149 agreements in particular.

[106] As we see it, there is not only an absence of any indication that s 108B is not intended to apply to employment relations problem settlements, the indications are to

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86 EmpC judgment, above n 57, at [54].
87 See above at [101]–[102].

the contrary. Section 149 expressly provides for the override of aspects of other generic contractual regimes, yet makes no mention of s 108B:

(a) Section 149(3)(ab) provides that following the s 149(2) affirmation, a s 149 agreement may not be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017 (CCLA), provisions which otherwise apply generically to contracts.

(b) Section 149(3A) addresses the relationship between s 149 and the general contractual regime for minors (contained in Part 2, Subpart 6 of the CCLA). While Subpart 6 of the CCLA regulates the enforceability of all contracts entered into by minors (defined as a person under the age of 18 years),[88] the CCLA addresses the enforceability of contracts settling claims as a particular subcategory — providing that the settlement is binding on the minor only if approved by the court.[89] However, s 149(3A) provides that minors aged over 16 are bound by the terms of a s 149 agreement as if of full age thereby disapplying part of the contractual regime for minors — for settlement agreements entered into by those aged 16 or over.

[107] On the other side of the legislative puzzle, it is also worth noting that Part 9A of the PPPRA expressly addresses where its provisions do not apply. Section 108G provides that nothing in Part 9A limits or affects the Deaths by Accidents Compensation Act 1952.[90] Yet it makes no similar provision in respect of s 149.

[108] As noted above, the majority also see inconsistency between the application of Part 9A of the PPPRA and the scheme of the ERA. They say that applying s 108B to invalidate certified s 149 agreements is inconsistent with the way the ERA treats mental disability in other contexts, namely the bargaining for and entering into of individual employment agreements as set out in s 68 of the ERA. Section 68 defines

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88 Contract and Commercial Law Act 2017, s 85.
89 Sections 103–107.
90 See also s 21 of the Deaths by Accidents Compensation Act 1952, to the same effect.

bargaining for an individual employment agreement as unfair if, amongst other things, one of the parties is unable to understand adequately the implications of the agreement by reason of diminished capacity and the other party knew or ought to have known about that. Section 69 prescribes the remedies the Employment Relations Authority (the Authority) can then provide in the case of unfair bargaining, which include cancelling or varying the agreement, or ordering compensation.

[109] While it is true therefore that s 68 adopts the *O'Connor v Hart* approach to enforceability, this is in a different context to that in which the compromise rule as set out in s 108B applies — at issue in s 68 is the enforceability of an individual employment contract, not a settlement agreement resolving a money claim. There is therefore, on the face of things, no inconsistency between the application of Part 9A of the PPPRA and the scheme of the ERA.

[110] But the majority say that the additional overlay provided by s 164 of the ERA is significant in that it is suggestive that s 108B is not intended to apply where an issue arising under s 68 is resolved through a mediated settlement signed off in accordance with s 149. Section 164 provides that the Authority can only make a s 69 order if the parties have attempted to resolve the problem in good faith negotiation by using mediation and have failed to do so. What happens, the majority asks, if the Authority, minded to cancel or vary the agreement under s 69 directs the parties to mediation, the dispute is settled and the employer asks the mediator to go through the s 149 processes? The mediator then explains to the other party the 'full and final" nature of the agreement, and being satisfied the parties wish to affirm the agreement, signs off on it. The majority says that it is improbable that s 108B could apply in these circumstances with the effect that the settlement is not enforceable until approved by a court, because given the background to the mediation it can be assumed that the making of the settlement agreement would accommodate any necessary decision-making support for the employee.

[111] Even in light of this hypothetical example of the operation of the ERA we still see no inconsistency between the s 164 processes and the application of s 108B. Rather to the contrary — the example highlights the importance of the s 108B protections. As the majority assumes, protective measures would need to be taken

should the incapacity which gave rise to the original unfairness persist at the time of settlement. At some point the adequacy of the protective measures put in place may fall to be determined if the enforceability of the settlement is challenged on the grounds of lack of capacity. On the majority's approach they would fall to be determined under the test in *O'Connor v Hart*. On our approach they would fall to be determined (and indeed could conveniently be determined in advance) under s 108C. It seems to us that on the majority's hypothetical scenario, the application of ss 108B and 108C is more supportive of certainty and finality – with the certainty that court approval would provide.

[112] As we discussed earlier, the majority also consider that the application of s 108B has effects inconsistent with the object of the ERA — of building productive employment relationships through the promotion of good faith — and the means described in s 3 for achieving this such as by protecting the integrity of individual choice, promoting mediation as the primary problem solving mechanism and reducing the need for judicial intervention. We set out again the relevant part of s 3, for ease of reference:

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
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> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
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> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice; and
>
> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
>
> (vi) by reducing the need for judicial intervention; …

[113] The first point we make in relation to the majority's schematic analysis is that made by the Human Rights Commission in argument before us. The ERA does not elevate interests of contractual certainty and the promotion of mediation above the

statutory objectives of good faith behaviour and recognition of the imbalance of power between employer and employee. These last two objects lie at the core of the statutory scheme. They are objects best served by the application of Part 9A of the PPPRA to s 149 settlements so that inherent inequality of power within employment relationships is not exacerbated in the case of a disabled employee, and so that issues of incapacity that exist are addressed fairly and in good faith.

[114] Applying s 108B to s 149 agreements, the majority says, is inconsistent with the object of protecting the integrity of individual choice — an employer may have to take steps to protect themselves such as insisting on a specialist assessment — while all the time taking care not to discriminate against its employee on the grounds of disability as is prohibited by ss 104 and 105 of the ERA. But even on the majority's approach, if the employer knows, or has notice of the incapacity, this is an issue they may have to confront. Employers should be able to deal with the issue without crossing the line into discrimination, by simply proceeding in a respectful and good faith manner.

[115] The majority say that applying s 108B to a s 149 agreement will slow down the resolution of disputes and will not reward good faith dealing in the context of resolving employment relationship problems. An employer who entered into a settlement agreement in good faith could face a settlement being reopened long after it was made.

[116] We agree that the application of s 108B may at times slow down settlements. That is the effect of ensuring that a specified person receives the support they need to assist them in making an individual choice or, where they are not able to be supported into decisional independence, to ensure that they are protected from exploitation or oppression, however that may arise. This approach is consistent with the ERA's object of protecting the integrity of individual choice. Indeed it is hard to see how binding a specified person to a "choice" made by them without decisional capacity can be said to respect the integrity of individual choice as the majority would have it.

[117] As to the undermining of settlements, it is important to stress first that this will only occur when incapacity for the purposes of Part 9A is later established to have

existed at the time of settlement — unlikely to be a frequent event. And even then, a court will only decline to approve the settlement where the court considers it should not, in the exercise of its protective jurisdiction, approve the settlement.

[118] The majority say that applying Part 9A to s 149 agreements would undermine the use of mediation as the primary problem solving mechanism. However the s 108B process need not displace the use of mediation processes for specified persons in circumstances where mediation can appropriately be used, such as where appropriate arrangements are in place to support their participation. And if mediation cannot be appropriately used because of disability, then it should not be used. We also note that s 108B does not eliminate the role of s 149(3). When the s 149 settlement is approved under s 108B, s 149(3) will have its full and usual effect.

[119] Important to our reasoning is also the fact that an interpretation which applies Part 9A to s 149 settlement agreements is supported by the purposes of the PPPRA. We also consider that, if the PPPRA is interpreted as we suggest above, it is also consistent with New Zealand's obligations under the Convention. The application of the framework created by ss 108B and 108C to agreements settling employment problems is both protective and promoting of a specified person's enjoyment of and participation in their civil rights.

[120] What of the majority's approach which has Part 9A of the Act displaced from the employment context if the s 149 process has been followed, but not otherwise? And which displaces s 108B in the case of a s 149 agreement even where the disability was known about by the employer at the time of settlement — the latter not being a position argued for by the respondent. How does that sit with the purposes of Part 9A of the PPPRA and with New Zealand's commitments under the Convention?

[121] The majority identify what they say is a strong argument that the approach reflected in s 149, which allows people with disabilities to settle employment relationship problems, even by making a bad bargain, but subject to appropriate procedural safeguards, is consistent with the Convention's supported decision-making model.

[122] In our view, the majority overstates the nature of the s 149 safeguard. There is nothing in the s 149 process to protect a disabled person from exploitation or abuse, nor to encourage or ensure support for their participation in the decision-making. There is no framework which supports decision-making by specified persons, no requirement that the mediator ensure the parties understand the true nature and effect of the terms of settlement, and no requirement that the mediator be satisfied that the terms of the settlement are fair and reasonable. The procedural safeguards are slight when viewed in the context of a compromise agreement entered into by a specified person. They amount to nothing more than the mediator explaining the full implications of the terms being final and binding and enforceable by the parties. The slight nature of that protection is exemplified in this case by the fact that the mediator conducted their entire interaction with the appellant over the phone.

[123] We conclude therefore that the application of Part 9A, and s 108B in particular, to s 149 agreements is consistent with the text, purpose and context of both the ERA and the PPPRA. We consider this approach is also more consistent with New Zealand's international obligations than that of the majority.

Does s 108B apply to compromise agreements where the incapacity was not known at the time of settlement?

[124] The respondent submits that Part 9A, and s 108B in particular, only applies where the parties knew or were on notice as to any capacity issues at the time of settlement. It says that to apply s 108B when the capacity issues were unknown at that time would create considerable difficulties for parties wishing to settle claims and is unnecessary given the other protective mechanisms provided by the common law, which are sufficient to protect vulnerable people.

[125] The respondent says that the interpretation we adopt of requiring approval of a settlement entered into without knowledge of the incapacity is inconsistent with the inherently prospective nature of the protective scheme created by Part 9A of the PPPRA. It argues that the mechanisms in Part 9A are in many ways frustrated if not applied prior to, or at the time of, settlement and are likely to work injustice. In particular:

(a) Section 108B(2) contemplates that a fit and proper person can enter into a settlement on a specified person's behalf. However, it appears that the court's approval is required before this can be done.

(b) The court's powers under s 108C(2)(c), to grant approval subject to conditions and directions in respect of matters including quantum and terms, are inherently prospective. The respondent submits that it is questionable whether such directions could be made in cases where the settlement has already been performed, especially if the terms include a positive reference from the employer and resignation from the employee.

(c) Sections 108D and 108E set out procedures and rules when the court directs under s 108C that any money be held on trust. Again, says the respondent, it is not possible for such orders to be made and for this procedure to be complied with if the agreement has already been performed and the money paid.

[126] Again we start our analysis with the text of the legislation, and with the observation that there is nothing in the text of s 108B to limit its application, as the respondent contends, to applications for approval before a claim is finally settled and to settlements where the incapacity was a known issue at the time of settlement.[91] The provision is expressed in language which, on a plain reading, encompasses compromise agreements entered into at any point in time — a settlement "whenever entered into or made, is valid so far as it relates to the specified person's claim only with the approval of the court".[92] Its language also encompasses settlements where one party lacks contractual capacity, whether or not that was known to the other contracting party at the time of contract. The latter view is supported by the fact that s 108B extends to contracts entered into by the specified person on their own behalf,

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91 The respondent's submission tends to conflate the issue of the timing of settlement (whether settlement occurred before approval or was rather conditional on it) with that of whether incapacity was known about at the time of the settlement. But, in any case, there is nothing in this argument. We note that the majority also tentatively observes at [70] that s 108B is prospective in application, undertaking a contextual analysis which does not address the critical words "whenever entered into".

92 PPPRA, s 108B(3).

not only those entered into by a person acting on their behalf.[93] This is an indication that the provision is not solely addressed to situations where formal processes have already been engaged to protect the incapacitated person, such as the involvement of a litigation guardian.

[127] As to the respondent's point (a), there is nothing to suggest that s 108B requires the court to approve the fit and proper person before the agreement is entered into.[94] At whatever point the court becomes involved, it will wish to be satisfied that a party purporting to contract on behalf of the specified person is a fit and proper person.

[128] As to (b) and (c), there is no reason why the consent processes in s 108C could not be used to ensure a just outcome even post-settlement — no reason, for example, why a refusal to approve could not have attached to it a direction for the repayment of money already paid under the agreement, or a condition that the money already paid be held on trust for the specified person.

[129] Both the respondent's and majority's approach involve reading down the plain words of a provision which, on its ordinary meaning, is of broad application and is rights enhancing.

[130] In our view, an interpretation that has s 108B applying even when the incapacity was not known of at the time of settlement is the most consistent with the Convention requirement that states parties have laws that protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and that promote respect for their inherent dignity.[95] Those freedoms include the freedom to contract.[96] It is not consistent with respecting the inherent dignity of a person subject to disability to hold them to contracts they entered into without capacity, and outside the protective mechanisms the law provides. We accept the Human Rights Commission's submission that an interpretation of Part 9A that allows retrospective approval of settlements is the reading most consistent with

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93 In *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933 the United Kingdom Supreme Court considered that these words in the equivalent United Kingdom legislation "hint at" the inclusion within the rule of cases where no litigation friend has been appointed: at [22].

94 A point also made by the majority at [70].

95 Article 1.

96 Article 12.

New Zealand's obligations under art 12 of the Convention, as it enables the court to determine whether measures taken relating to the exercise of legal capacity were proportional and tailored to the disabled person's circumstances as required by art 12(4). The court's power under ss 108B and 108C enables it to ensure that the rights and preferences of the incapacitated person are not overborne or overlooked.

[131] Whilst the principles in relation to the application of the s 108C discretion are yet to develop, there is no reason to think that other factors, such as absence of knowledge of the disability coupled with detrimental reliance by the employer, will not also be able to be taken into account. The ability to adjust the interests of the parties through the s 108C discretion seems to us to be more compatible with the rights guaranteed by the Convention, than is the application of the *O'Connor v Hart* test — a test which, if applied in this context, prioritises certainty of contract over giving effect to the disabled person's preferences or protecting their interests.[97]

[132] The respondent says that the retrospective application of Part 9A is inconsistent with the presumption of capacity in the PPPRA and in the general law. However, the PPPRA does not create a general presumption of competence. Provisions in the PPPRA creating presumptions that could be so categorised are of limited scope. Section 4 provides that people subject to property orders have the same "rights, privileges, powers, capacities, duties, and liabilities" as any other person, but that is subject to the provisions of the PPPRA or any other enactment. And ss 5, 24 and 93B describe particular presumptions of competence applying in relation to Parts 1 (personal rights), 3 (property rights) and 9 (enduring powers of attorney) of the Act, but not expressed as applying to Part 9A.

[133] There are also difficulties with the argument in relation to the general law. While the law of contract can be seen to operate on the basis of a presumption of competence, that is of course subject to statutory exceptions. And such exceptions do exist, like the statutory regime in relation to minors. As referred to above at [106], ss 104 and 105 of the CCLA provide that agreements to compromise or settle claims,

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97 See the discussion by Lady Hale in *Dunhill v Burgin*, above n 93, at [19] of the fact specific evaluation likely to be involved in the decision to retrospectively approve a compromise of rights by a person lacking capacity who had not been represented by a litigation guardian for the settlement. The court was not in that case asked to approve the settlement.

even claims not the subject of a proceeding before a court in New Zealand, are binding on a minor only if approved in court.[98] We note the absence of any stipulation to the application of that rule that the other contracting party know of the minor's age at the time of settlement.

[134] The respondent also points to provisions within the PPPRA that it says show that the PPPRA limits any adverse consequences, particularly for unknowing parties. These include s 53 (powers of persons subject to property orders to deal with their property), s 54 (testamentary powers of person subject to property order), s 94A(7) (creation of an enduring power of attorney) and s 103C(5) (effect of attorney's actions prior to receiving notice of revocation). It says that to apply Part 9A retrospectively as the appellant contends is inconsistent with a legislative scheme which limits the adverse consequences for parties who deal with a person, not knowing of their incapacity. We do not propose to go through these provisions in detail other than to say first that they deal with a different category of transaction than Part 9A — they do not address compromise agreements. Secondly, while these sections demonstrate a range of approaches to the particular categories of transactions they address, the outcomes provided for are not out of keeping with likely outcomes if Part 9A is applied retrospectively. For example, s 53 provides that dispositions of property made personally by a person subject to a PPPRA property order is avoidable by that person or by their manager appointed under the Act. But it also provides that the court has a discretion to protect parties from the adverse consequences of that invalidity where they received the disposition in good faith and have so altered their position in reliance upon the validity of the transaction that it would be inequitable to grant relief, either in part or in full.[99] As we note above, it is possible that similar principles will inform the exercise of the s 108C discretion.

[135] The respondent relies upon Australian authority in which agreements entered into with an incapacitated party have been held to be valid unless the other party knew of the incapacity. We have not found the Australian authorities that were referred to

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98 We have already noted that this rule is modified for minors over the age of 16 by s 149(3A) of the ERA: above at [106].

99 PPPRA, s 53(8).

us, or that the Court had identified for the parties,[100] helpful. The courts were not required to engage with a statutory provision similar to s 108B, and they contain little (in some cases no) discussion of compromise rules within the relevant rules of court.

[136] Of greater assistance is the decision of the United Kingdom Supreme Court in *Dunhill v Burgin*.[101] This case involved a settlement agreement entered into as a result of a claim for damages for personal injury sustained in a road traffic accident. The parties were both legally represented and agreed to a compromise at the door of the court, under which the appellant was to be paid £12,500 with costs in full and final settlement of her claim. This was a gross undervaluation of her claim — by the time of the Supreme Court decision, the appellant's advisers put the claim as being worth over £2,000,000, and the respondent's put it at around £800,000.[102]

[137] The compromise rule in the United Kingdom was set out in r 21.10(1) of the Civil Procedure Rules 1998 (UK),[103] which provided that where a claim is made by or on behalf of a protected party:

> … no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim, by, on behalf of or against the … protected party, without the approval of the court.

[138] Also relevant was r 21.2(1), which mandated that a protected party "must have a litigation friend to conduct proceedings" on his or her behalf, and r 21.3(4) which stated that any steps taken before a protected party has a litigation friend "shall be of no effect unless the court otherwise orders".

[139] The appellant sought a declaration that she had not had capacity at the time of the settlement, and an order that the settlement be set aside. The Supreme Court upheld the finding that the appellant had lacked capacity (and was therefore a protected party). It followed that under the Civil Procedure Rules, she should have had a litigation friend throughout the proceedings. In first deciding it would not

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100 *TUV v Chief of New Zealand Defence Force* SC14/2020, 16 November 2020. See, for example: *Rossi v Qantas Airways Ltd (No 2)* [2020] FCA 1080; *Macura v Sarasevic* [2019] NSWSC 1409; *Bell v de Castella* [2018] ACTSC 170; and *Affoo v Public Trustee of Queensland* [2011] QSC 309, [2012] 1 Qd R 408.

101 *Dunhill v Burgin*, above n 93.

102 At [4].

103 As amended by the Civil Procedure (Amendment) Rules 2007 (UK).

retrospectively validate the settlement (under r 21.3(4)), the Court said that "[w]hile every other step in the proceedings might be capable of cure, the settlement finally disposing of the claim is not".[104]

[140] The question was then whether this automatically meant that the settlement was of no effect, due to r 21.10(1). The respondent raised two arguments against this. First, the respondent said that the rule only applied where the protected party had a litigation friend, as only then was the other party to the settlement put on notice that the settlement requires court approval. In this case, it had never been suggested that the respondent either knew or ought to have known of the appellant's lack of capacity. The Court rejected this argument, saying that it would involve writing words into the rule which were not there: "[i]f anything, the words hint at the reverse, as they refer to a claim made '*by or on behalf of*' a patient or protected party".[105]

[141] The respondent's second argument was that without the limitation for which he first contended, the compromise rule would be ultra vires, as this would change the substantive common law rule requiring the other party's knowledge of the incapacity.[106] The argument was that the Civil Procedure Rules cannot alter the substantive law. Accordingly, if the rule's effect was to alter the common law test, it would be ultra vires.[107]

[142] The Court found that the compromise rule did carve out an exception to the common law rule, as it was not restricted to cases where the claimant had a litigation friend at the time of settlement, or where the other party knew of the incapacity. Nonetheless, it held that the compromise rule was not ultra vires.[108] Therefore, the

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104 *Dunhill v Burgin*, above n 93, at [20].

105 At [22] (emphasis added).

106 The rule originated from the case of *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 (later followed in New Zealand in *O'Connor v Hart*, above n 56).

107 The judgment therefore focused in large part on the issue of the vires of the compromise rule. That is not an issue in this case as in New Zealand the compromise rule is contained in a statutory provision.

108 Lady Hale, at [30], found that the compromise rule was intra vires for two reasons. First, she considered the Court was bound by a prior Privy Council authority to that effect, unless it found good reason to depart from it. Secondly, it was intra vires because the Civil Procedure Act 1997 (UK) expressly provides that "[a]mong the matters which Civil Procedure Rules may be made about are any matters which were governed by the former Rules of the Supreme Court or the former county court rules". This could be read as conferring an express power to make rules of court modifying the substantive law to the extent that the previous rules did so, whether or not those rules were intra vires. The compromise rule existed in the previous rules.

settlement in that case required court approval, despite incapacity not being a known issue at the point of settlement. The Court said that it had "not been invited to cure these defects nor would it be just to do so".[109] The settlement was set aside and the case allowed to go to trial.

[143] In the course of her judgment, Lady Hale addressed policy arguments advanced by the respondent to support a requirement for proof of knowledge of the incapacity as a prerequisite to the application of the compromise rule. Since these echo some of the arguments advanced in this case, we set the relevant passages out below:

> [32] Much was made in the course of argument of the competing policy arguments, some of which I touched upon at the outset of this judgment. In particular, Mr Rowley emphasised the need for finality in litigation, the stresses and strains which prolonged litigation places on both litigants and the courts, the difficulty of re-opening cases such as this so long after the event, and the alternative protection given to the parties by their legal advisers, who should bear the consequences of their own mistakes. Against this Mr Melton emphasised the disadvantages of claims for professional negligence when compared with claims for personal injuries, principally the discount for the chance that the claim might not have succeeded and the inability to make a periodical payments order. He also points out that lack of insight is a common feature in head injury cases, so that the parties should be encouraged to investigate capacity at the outset. A litigant in person would, of course, have no legal advisers against whom to make a claim, but the legal position cannot differ according to whether or not a party is, or is not, represented by lawyers.
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> [33] Policy arguments do not answer legal questions. But to the extent that they are at all relevant to the issues before us, the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. …

[144] To conclude on this issue, we consider that s 108B does apply to compromise agreements regardless of whether the incapacity was known about at the time of settlement. The text and policy of the provision supports such a reading. It is the interpretation most consistent with the provisions of the Convention, and is supported by the approach taken to a very similar provision by the United Kingdom Supreme Court in *Dunhill*.

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109 At [34].

The majority's postscript

[145] The majority identify as an issue whether a claim, such as the present, for reinstatement and restoration of mana is aptly caught by reference in s 108B(1) to a settlement of claims for "money or damages". But, in addition to claiming restoration of the mana of the appellant and her whānau and seeking recommendations to prevent further racial harassment in the workplace, the appellant also claims lost wages and compensation for humiliation, loss of dignity and injury to feelings. The claim therefore seeks money or damages. The fact it seeks other remedial orders cannot mean that s 108B does not apply.

[146] The majority also query whether the Authority can be categorised as a court for the purposes of s 108B. The appellant and the Human Rights Commission each argued that, given the central role the Authority plays in the ERA statutory scheme, the word 'court' in s 108B should be given a purposive reading so as to encompass the Authority. We think that the ERA provides the answer to this issue. Section 162 provides:

> **162 Application of law relating to contracts**
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> Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including—
>
> (a) Part 2 of the Contract and Commercial Law Act 2017:
>
> (b) the Fair Trading Act 1986.

It seems to us that this section is broad enough in scope to empower the Authority to make orders under Part 9A, relating as those provisions do to contracts settling or compromising claims, including claims arising under employment agreements.

[147] Finally, the majority say that it is not possible to view s 108B separately from ss 108D and 108E which provide for money paid under s 108C to be held on trust for the person who lacks capacity. They comment that this feature suggests s 108B is something of a hangover from the days when the Public Trustee would receive and hold monies from such settlements on behalf of disabled persons.

[148] There is no requirement that settlement funds be subject to orders under ss 108D and 108E. And while it is true that Part 9A has statutory antecedents in the Public Trust Act 2001, the purpose of these provisions has remained constant and remains relevant — the protection from exploitation or abuse of those who may be vulnerable because of incapacity. It highlights also a purpose of Part 9A that will be lost on the majority's approach — the protection of the specified person not just from the other contracting party, but also from third parties who would take advantage of the proceeds of settlement. This legislative history does not in our view support a reading down or brushing aside of the provisions, if that is what the majority suggests.

Conclusion

[149] For these reasons we consider that s 108B applies in accordance with its text, purpose and context, to the settlement at issue on this appeal, with the result that the agreement settling the appellant's claims against the respondent is not binding upon her until approved by a court. We would therefore have allowed the appeal. Given this is a minority judgment, it is not necessary to go on to address what steps would follow from the adoption of our approach, in particular, whether the respondent should be permitted to seek approval under s 108B.

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