

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 359
3267961

BETWEEN INY
 Applicant

 HYI
 Respondent

Member of Authority: Marija Urlich

Representatives: INY, in person
 Danny Gelb, advocate for the respondent

Investigation Meeting: On the papers

 15 April and 23 May 2024, from the Applicant
 30 April 2024, from the Respondent

Determination: 19 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] INY seeks to have set aside a settlement agreement entered with HYI on 19 October 2023 so that the Authority may investigate their employment relationship problem. In the alternative, they seek to enforce the settlement agreement on the grounds HYI has breached the non-disparagement clause contained therein. HYI says the settlement agreement the parties entered into is binding and enforceable and resolves all matters between them. It denies any breach of the settlement agreement.

[2] The enforceability of the settlement agreement is the first matter to be investigated and determined. By consent, this occurs on the papers. The parties have

filed information and evidence in affidavit form in compliance with the Authority timetable. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the information received.

Non-publication order

[3] INY seeks a non-publication order of their name and any information likely to identify them.

[4] Given this determination deals with only part of the employment relationship problem concerning the parties' settlement agreement, the terms of which they have agreed should remain confidential, it is appropriate to make an interim non-publication order of the parties' names and any identifying personal information. If the matter proceeds further, then whether the order should be made permanent will be further considered.

[5] An interim non-publication order over the parties' identities and is made under clause 10(1) of the second schedule of the Employment Relations Act 2000.¹

Issues

[6] The issue for investigation and determination is whether the settlement agreement should be set aside.

The relevant law

[7] Section 149 of the Act provides parties who settle an employment relationship problem may request an authorised mediator to sign the agreed terms of settlement. Before signing the settlement, the mediator must explain to the parties the terms of the settlement are final and binding and that the settlement cannot be challenged. They must also be satisfied the parties understand and affirm their request before signing.

¹ The letters used were selected using a random online selection tool. The letters bear no relation to the parties' names.

[8] In limited circumstances an agreed settlement agreement signed under s 149 of the Act may be set aside. Those circumstances are lack of capacity where the respondent has actual or constructive knowledge of the applicant's incapacity at the time of entering into the settlement agreement.²

The settlement agreement

[9] For the purposes of this determination the settlement agreement includes:

- (i) the parties had settled all matters relating to INY's employment and its termination and the terms of settlement were final and binding;³
- (ii) the parties had at all times had a proper opportunity to seek independent advice;⁴ and
- (iii) INY would withdraw their application to the Authority within two days of the date of the record of settlement and that there was no issue as to costs.⁵

Background

[10] In September 2021 INY suffered a serious workplace accident and was off work for some time on ACC. In early February 2022 HYI terminated INY's employment for reason of medical incapacity arising from the workplace injury. In June 2022 INY received a full medical clearance.

[11] On 21 July 2023 INY lodged an application in the Authority for unjustified dismissal. In September 2023 INY received information about raising a personal grievance and seeking leave to raise a personal grievance out of time.

[12] The parties agreed to attend mediation for which a date was scheduled for 18 October 2023. The email communication between the parties in the days immediately prior to that scheduled date has been provided to the Authority. Two days before the scheduled mediation INY emailed HYI managers beginning "This email is an offer to try and finish off this matter before this Wednesday and not spend money on

² TUV v Chief of New Zealand Defence Force [2022] 1 NZLR 78 at [69].

³ Settlement agreement clause E.

⁴ Above, clause 1.

⁵ Above, clause 8

Employment Advocates”. The email then sets out a proposed resolution, outlines INY’s response to a factual matter between the parties and ends “If you agree, please email me and we can put this behind us and move on”. One of the managers addressed in the email telephoned INY. They negotiated a settlement and subsequently corresponded by email to finalise the settlement agreement. In the affidavit filed by that manager in relation to this matter they depose that during the telephone conversation INY did not give any indication of being unwell and gave no indication during that communication or subsequent written communications that they may not have the mental capacity to sign the settlement agreement.

[13] HYI then had a settlement agreement drafted based on the discussion INY had had with the manager. A proposed settlement agreement was emailed to INY at 3.15pm on 16 October 2023 with a covering email:

As discussed on phone we are happy to settle this matter and move forward.

I have attached the settlement agreement to this email for your review and signing. Please review, sign and send it back to me at your earliest convenience.

I will be our (*sic*) for meetings tomorrow and [another manager] is away whole week, it would be beneficial for both parties if it is possible for us to close this matter today.

[14] At 3.40pm INY emailed back the signed record of settlement, asked HYI to sign and return it to them and they would then forward it to the mediation service. INY’s reference to mediation is consistent with the mediator certification process for records of settlement under the Employment Relations Act 2000. INY’s email included:

I am glad that this is behind us.

Just a small request, I would still need reference as the skills I have learnt at [HYI] would help me gain future employment in the [...] industry.

Please let me know if you have any questions.

[15] At 5.45pm HYI sent the counter signed record of settlement to INY and confirmed that HYI would send it to mediation services for certification. HYI did not respond to INY’s reference request and INY took the matter no further. INY’s concerns about disparagement appear to have occurred subsequently in about November 2023.

[16] At 5.59pm INY sent the signed and dated record of settlement to the mediation service, advised the matter was settled, requested the settlement agreement be authorised and to contact them if there were any questions.

[17] Consistent with the record of settlement on 17 October 2023 INY confirmed in writing to the Authority that the application could be closed because the parties had reached settlement.

[18] On 19 October the mediation service provided the parties with the certified record of settlement. The mediator's certification included in the record of settlement and signed and dated by the mediator, reads:

Before I signed the agreed terms of settlement I explained to the parties the effect of section 148A, 149(1) & (3). I am satisfied that the parties understand the effect of sections 148A, 149(1) & (3), they have advised me that no minimum entitlements have been forgone in the reaching of this settlement and have affirmed their request that I should sign the agreed terms of settlement.

[19] In December 2023 INY applied to the Authority to have the settlement agreement set aside and/or enforced due to breach of the non-disparagement clause.

Discussion

[20] The settlement agreement was entered into by the parties and certified under s 149 of the Act. As set out above, the grounds on which a settlement agreement certified under s 149 may be set aside are very limited. Those limited grounds are not met in this case for the following reasons.

[21] The information before the Authority does not establish INY was suffering a lack of capacity at the time the settlement agreement was entered by the parties. It is wholly accepted INY suffered a serious workplace accident in September 2021 which required medical treatment and considerable time off work to recover and rehabilitate from the injury. It is also accepted effects of such an injury may be ongoing. However, the information before the Authority suggests INY received a full medical clearance in June 2022 and there is insufficient information before the Authority that INY was

suffering further incapacitation in the subsequent period up to and including October 2023 when they entered the settlement agreement.⁶

[22] This was not an unconscionable bargain – INY initiated and actively participated in the settlement discussions and led the finalisation of that settlement agreement within the statutory framework. In addition, the information before the Authority does not establish HYI was aware of or ought reasonably to be aware of any incapacity suffered by INY in October 2023 and continued with the process of and settlement agreement in the face of such knowledge.

[23] INY has raised concerns that they were unable to access legal advice and this is grounds to set aside the settlement agreement. The information INY has provided of attempts to seek legal advice is in the period when their employment ended. The parties have included and agreed in the settlement agreement that they have had the opportunity to seek legal advice. Given the above finding as to capacity, it is more likely than not INY entered the settlement agreement aware they had acknowledged they had a proper opportunity to seek legal advice and forgoing that opportunity is not grounds for setting aside the settlement agreement.

[24] While it is clear to the Authority INY is deeply upset by the circumstances of their workplace injury and their employment ending, they entered a settlement agreement with HYI in which they agreed to resolve all employment matters and which is binding and enforceable. The application to set aside the settlement agreement does not succeed.

Next steps

[25] INY should advise the Authority if they wish to proceed with a claim of breach of the settlement agreement.

⁶ Statement of problem 10 December 2023.

Costs

[26] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority