

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 538  
5130668**

BETWEEN KEVIN PHILPOTT  
Applicant

AND ANZ NATIONAL BANK  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Applicant in person  
André Lubbe and Kylie Dunn, Counsel for Respondent  
Investigation Meeting: On the papers  
Submissions received: 19 October and 24 November 2011 from Applicant  
16 November 2011 from Respondent  
Determination: 19 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Kevin Philpott claims that there is an unresolved employment dispute with the Respondent, ANZ National Bank Limited (“ANZ”).

[2] ANZ denies that there is an unresolved employment dispute between the parties, and claims that all matters between the parties were concluded by a settlement having been reached on 29 October 2009 (“the Settlement Agreement”), and which was stated to be “in full and final settlement of all claims either party might have against the other”.

[3] ANZ further claims that Mr Philpott’s claim is frivolous and vexatious and should be dismissed pursuant to clause 12A of Schedule 2 of the Employment Relations Act. 2000

[4] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on submissions from the parties.

## Issues

[5] The issues for determination are:

- whether Mr Philpott is precluded from bringing his claim against ANZ by virtue of the Settlement Agreement
- whether Mr Philpott's claim is frivolous and vexatious

## Background Facts

[6] On 4 July 2008 Mr Philpott resigned from his employment with ANZ and raised a claim for unjustifiable dismissal.

[7] The parties subsequently attended mediation and following negotiations, settlement was reached and was recorded in the Settlement Agreement signed by Mr Shane Deegan for ANZ on 23 October 2009, and by Mr Philpott on 29 October 2009. The terms of the Settlement Agreement were:

### *Agreed Terms of Settlement to Employment Relationship Problem*

5. *The employee's employment with the employer concluded on 5 July 2008.*
6. *The employer shall, within 14 days of receipt of this signed agreement, pay to the employee, without any admission of liability, the amount of \$40,000 (without deduction) pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.*
7. *This agreement and its terms are to remain strictly confidential between the parties.*
8. *Neither party shall speak ill of the other.*
9. *This agreement is in full and final settlement of all claims that either party may have now or in the future arising from the employment relationship including the termination of that employment relationship.*
10. *The employee has had the opportunity to take independent advice as to the terms and effect of this settlement agreement.*

[8] In accordance with the terms of the Settlement Agreement, ANZ duly paid Mr Philpott the sum of \$40,000.00

### **Determination**

#### **Is Mr Philpott precluded from bringing his claim against ANZ by virtue of the Settlement Agreement?**

#### *Duress*

[9] Mr Philpott stated that he had signed the Settlement Agreement only under duress, and explained the duress as arising from the circumstances at the time of signing, which were that he was only weeks away from defaulting on his home loan to the bank, and additionally, that he needed money urgently for a medical operation.

[10] Duress has a very clear legal definition. In the recent case of *Pharmacy Care Systems Ltd v Attorney-General*<sup>1</sup> the Court of Appeal listed what were referred to as seven “elements” of duress recognised in New Zealand Law:<sup>2</sup>

*In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim’s will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim’s manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.*

[11] The reasons submitted by Mr Philpott are of economic pressure, but I find do not constitute duress, and as such would not impair consent.

#### *Consent*

[12] Both parties are in agreement that the Settlement Agreement was preceded by lengthy and protracted negotiations, during which ANZ stated that Mr Philpott was repeatedly advised to obtain legal advice.

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<sup>1</sup> Court of Appeal, CA 198/03, 16 August 2004

<sup>2</sup> Ibid at para [98]

[13] It was also a specific term of the Settlement Agreement that the employee had the opportunity: “*to take independent advice as to the terms and effect of this Settlement Agreement*”. Mr Philpott signed the Settlement Agreement on 29 October 2009, some 6 days after it was signed by ANZ.

[14] I consider that there was therefore ample opportunity for Mr Philpott to have obtained legal advice on the terms of the Settlement Agreement. I find that Mr Philpott made a valid consent to the Settlement Agreement.

#### *Mediator Signature*

[15] The Settlement Agreement was not signed by a mediator pursuant to s. 149 of the Act. However I am not thereby persuaded that the Settlement Agreement was not complete. The law is clear that where the parties themselves have executed an agreement, and especially where that agreement has been partially performed, that too is a binding and enforceable agreement.

[16] I consider that I am entitled with reference to the law to find that a settlement agreement executed by the parties, but not countersigned by a mediator pursuant to s 149 of the Act is a binding agreement between the parties, unless there is evidence of duress. As stated, I have not found evidence of duress.

#### *Nature of the Transaction*

[17] I have considered whether Mr Philpott understood the nature of the transaction he was entering into when he signed the Settlement Agreement. The law on capacity was stated by the Court of Appeal in *Scott v Wise*<sup>3</sup> in the following terms:

*A person entering into a transaction should be able to understand the nature of the transaction when it is explained to him. Therefore it follows that the capacity required is related to the transaction*

[18] I find no evidence for thinking that Mr Philpott lacked the capacity to understand the nature of the transaction into which he was entering. On the contrary, in a letter addressed to Mr Deegan which is undated, but which stated to be in response to an email dated 2 December 2010, Mr Philpott had written:

*However whilst you are correct about this being a legal and binding agreement, in reality should one of us decide to break this agreement*

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<sup>3</sup> [1986] 2 NZLR at 484

*there is not much that the other party can do, no police are going to come and arrest anybody.*

[19] In conclusion, taking into consideration all the circumstances, I do not find that Mr Philpott's contention that he signed the Settlement Agreement under duress to be valid, but determine that Mr Philpott consented to the Settlement Agreement in full understanding of the nature of the transaction.

#### *Accord and Satisfaction*

[20] It is clear that the Settlement Agreement was entered into with the aim of resolving litigation between the parties and thus it is an accord and satisfaction. In *Graham v Crestline PTY Limited*<sup>4</sup> the Chief Judge stated the constituents of accord and satisfaction as being:

*There must first be a genuine dispute between the parties. Second, whether accord and satisfaction has been made is a question of fact requiring a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.*

[21] Mr Philpott signed the Settlement Agreement and ANZ in accordance with its terms, paid, and Mr Philpott accepted, the sum specified. There had been offer, acceptance, and consideration. I find ANZ was entitled to believe that the money had been taken in satisfaction of any claim Mr Philpott may have had against it.

[22] I determine that Mr Philpott is precluded by virtue of the Settlement Agreement from taking his claim any further.

#### **Is Mr Philpott's claim is frivolous and vexatious?**

[23] The Settlement Agreement was concluded in October 2009. The Statement of Problem was lodged with the Authority on 22 June 2011. In the Statement of Problem Mr Philpott was claiming a total payment of \$294,580

[24] The Authority has the power under clause 12A of Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious.

[25] The parties have entered submissions on the issue, and these have been taken into consideration by the Authority before reaching a decision in the matter.

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<sup>4</sup> [2006] ERNZ 848

[26] The explanatory note to the Employment Relations Amendment Bill (No 2) indicates a purpose of the provision is that of allowing the Authority to dismiss claims with little or no merit without needing to fully investigate them.

[27] The Employment Court has long had a power to dismiss proceedings deemed to be frivolous or vexatious. In *STAMS v MM Metals Ltd*<sup>5</sup> the Employment Court considered whether the attempt of an employee to pursue a personal grievance where a settlement agreement existed was frivolous. Judge Finnegan stated:<sup>6</sup>

*To attempt to proceed would be frivolous, is futile. Clearly on the facts of the present case an agreement was reached to compromise the cause of action and both parties moved to implement it. That agreement was contractual. It was an agreement, on the part of Mr Rose and of STAMS to forego the right of appeal and on the part of the employer to pay in return the sum of \$5,000.00. Offer, acceptance and consideration all existed.*

*There could not in my view be a clearer case of parties being in concluded and final agreement. Once that occurred then an attempt to continue with the litigation had no foundation. The right to do so had been surrendered. The claim had become "frivolous" in terms of s 121*

[28] I have found the parties to be in final and concluded agreement. Term 5 of the signed Settlement Agreement makes this quite clear:

*5. This agreement is in full and final settlement of all claims that either party may have now or in the future arising from the employment relationship including the termination of that employment relationship.*

[29] I find that Mr Philpott's claim is frivolous.

[30] Mr Lubbe submits that Mr Philpott's claim is also vexatious. I have previously alluded to Mr Philpott's admission in the letter to Mr Deegan that he recognised that the Settlement Agreement was legally binding. In these circumstances I conclude that Mr Philpott's motivation in bringing the claim is to leverage a further payment from ANZ and this conclusion is supported by a statement made in a letter to the Authority dated 7 July 2011 in which Mr Philpott wrote:

*It simple (sic) boils down to this: money and a job or Mark Sainsbury*

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<sup>5</sup> [1993] 1 ERNZ 115

<sup>6</sup> Ibid at pages 10 and 11

[31] Accordingly, by order, pursuant to the discretion of the Authority under clause 12A of Schedule 2 of the Act, the claim by Mr Philpott is dismissed as being frivolous and vexatious.

### **Costs**

[32] In view of the fact that the Respondent has had internal representation, this might be an appropriate case for letting costs lie where they fall in consideration of Mr Philpott's acceptance of the decision of the Authority.

[33] Should that not be the position, costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**