

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 314
5457428

BETWEEN

WIEMU TANEKAHA
ROSIEUR
Applicant

AND

WAITEMATA DISTRICT
HEALTH BOARD
Respondent

Member of Authority: R A Monaghan

Representatives: K Andersen, advocate for applicant
A Russell, counsel for respondent

Investigation meeting: 4 June 2014

Determination: 18 July 2014

DETERMINATION OF THE AUTHORITY

- A. There was an accord and satisfaction between Wiremu Rosieur and the Waitemata District Health Board which has the effect of preventing him from pursuing his personal grievances.**
- B. The associated settlement agreement between the parties was not entered into under duress.**

Employment relationship problem

[1] Wiremu Tanekaha Rosieur is a former employee of the Waitemata District Health Board (WDHB). He was employed as a Maori Cultural Adviser in the Maori Services Unit.

[2] In early 2013 the WDHB received complaints from colleagues of Mr Rosieur's. The complaints concerned incidents involving Mr Rosieur, and which the complainants said amounted to sexual harassment. Mr Rosieur was advised of the complaints, an investigator was appointed, and an investigation began.

[3] In July 2013 the investigator forwarded a report which included findings that several of the incidents complained of occurred, and that some of them amounted to sexual harassment. Mr Rosieur provided a reply.

[4] On 23 July 2013 the parties met to discuss whether the findings constituted serious misconduct. The WDHB advised Mr Rosieur that a finding of serious misconduct was likely, and sought a further meeting. The meeting went ahead on 11 September 2013.

[5] During the meeting the parties reached an agreement - reduced to writing and later signed - under which Mr Rosieur resigned and other arrangements were made. One of the terms was that the agreement was in full and final settlement of *'any claim, complaint, or any issue whatsoever ... which is in any way connected with [Mr Rosieur's] employment or its termination.'*¹

[6] In his statement of problem Mr Rosieur asked the Authority to review what he says was the WDHB's decision to dismiss him, and to consider the findings of what he also says was an independent investigation into both the complaints about his conduct and the decision to dismiss. The investigation was conducted at the end of 2013 by Timoti George, who had been Mr Rosieur's service manager. Mr Rosieur believes Mr George's investigation exonerates him of the conduct leading to the dismissal. He seeks orders for reinstatement, the reimbursement of lost remuneration, and compensation for injury to his feelings.

[7] Although he did not frame his employment relationship problem in these terms, from the Authority's perspective the problem raises the prospect of a personal grievance on the ground of unjustified dismissal.

[8] Mr Rosieur has also made other complaints, including one of bullying. There may be a prospect of personal grievances in respect of those complaints.

[9] Preliminary matters arise before the Authority can proceed to address any personal grievance. The first is whether the September 2013 settlement embodies an accord and satisfaction between the parties, so preventing any pursuit of any grievance now. Another matter concerns whether any grievance - whether in respect

¹ Cl 9

of an unjustified dismissal or in respect of the other complaints - was raised within the 90-day period in s 114 of the Employment Relations Act 2000.

[10] This determination addresses the first preliminary matter. The following issues arise:

- (i) was there an accord and satisfaction; and
- (ii) was the September 2013 agreement void in that it was entered into under duress.

Was there an accord and satisfaction

[11] Subject to Mr Rosieur's allegation of duress, if the September 2013 agreement amounted to a settlement of the actual and potential employment issues between the parties (or there was an accord and satisfaction), then Mr Rosieur cannot proceed to litigate those matters. In other words, the Authority cannot take them any further.

[12] Broadly speaking an accord and satisfaction involves: an agreement between parties involving a mutual exchange of promises regarding the exercise of their obligations; and the presence of consideration for that agreement. This occurs in the context of a dispute between the parties, and with the parties intending their agreement to resolve the dispute.

[13] Applying that here, it was clear during the 11 September meeting that there was a dispute between the parties in the form of:

- Mr Rosieur's disagreement with, -
 - the investigator's findings about the incidents in question,
 - whether he was guilty of serious misconduct, and
 - whether dismissal was appropriate; and
- Mr Rosieur's concern that he had not been treated fairly; and
- Mr Rosieur's other complaints including that he was the victim of bullying.

[14] The possibility of resolving these matters by Mr Rosieur's resignation was raised by Mr Rosieur's whanau, to the extent that they had prepared a letter of resignation before the meeting. The resignation was proposed and discussed during

the meeting, and agreement was reached. The written and signed settlement agreement had the effect of obtaining for Mr Rosieur the release from any prospect of dismissal by the acceptance of his resignation, coupled with certain other benefits. In return, by the inclusion of the provisions for full and final settlement, the WDHB obtained a release from the prospect of litigation.

[15] There was no uncertainty about the meaning or application of the terms of settlement. The terms were wide enough to encompass the matters Mr Rosieur now seeks to pursue. I have no difficulty in finding there was an exchange of promises which was supported by consideration, and that there was a meeting of the minds between the parties to the effect that the settlement agreement would resolve the dispute between them. The parties acted on the agreement.

Was the agreement entered into under duress

[16] An agreement can be found not to have effect if it was entered into under duress. In deciding whether the agreement here should be avoided by reason of duress, the Authority must apply relevant legal tests. They are:

- was there a threat or pressure;
- was the threat or pressure improper;
- was Mr Rosieur's will so overcome by the threat or pressure that he could not exercise free will or judgment;
- did the threat or pressure induce his assent to an agreement; and
- was the threat or pressure so grave that it left Mr Rosieur with no reasonable alternative but to agree.²

[17] Even if the above tests are met, if Mr Rosieur affirmed the agreement the affirmation may mean the agreement remains in effect.

[18] The nature of the duress relied on was that Mr Rosieur did not want the indignity of a dismissal, and his children were ashamed for him and he was ashamed for himself. Mr Rosieur elaborated in the Authority's investigation meeting by

² *Pharmacy Care Systems Limited v Attorney-General* (2004) 2 NZCCLR 187 (CA)

explaining that his position as kaumatua in his community would be undermined if he were dismissed from his employment. That prospect was intolerable to him.

[19] I accept in a general way that Mr Rosieur felt threatened and under pressure during the September meeting. Few employees would not feel that way when in a meeting with the employer, convened to address allegations of misconduct together with the possibility of dismissal. Employees in those circumstances can and do choose to resign, and to accept such additional enhancements as may be offered in return for the resignation, rather than be dismissed.

[20] The question here is whether Mr Rosieur was subjected to a threat or pressure which was improper. There is nothing inherently improper in any threat or pressure inherent in the general circumstances he faced, as the employer was following a process it was obliged to follow in the interests of ensuring a fair procedure. There was no allegation of any additional threat or pressure. Instead the threat or pressure arose from the matters set out above.

[21] I do not accept that threat or pressure arose from any impropriety by the WDHB. The threshold is high, and requires conduct which is wrongful or contrary to public policy.³

[22] Mr Rosieur and his whanau were arguing at the time that the WDHB had not followed a culturally appropriate process in respect of the disciplinary investigation and its aftermath, but I would not accept their view of that matter meant the WDHB placed any improper pressure on Mr Rosieur. Efforts were made to conduct the process in a culturally sensitive way, while also observing the requirements of s 103A of the Employment Relations Act. Mr Rosieur and his whanau did not agree with the approach taken. In particular they sought a reinvestigation by a different investigator. Otherwise Mr Rosieur and his whanau had a full opportunity to consider their position before raising the possibility of resignation, there was nothing inappropriate in the way the matter was discussed and negotiated, and Mr Rosieur had several days to consider and seek advice on the text of the written agreement before he signed it. He chose to act as he did for the reason he has expressed.

³ *Pharmacy Care Systems Limited*

[23] I find, too, that Mr Rosieur affirmed the agreement not only by signing it later as he did, but also by accepting benefits under it and otherwise acting on its terms. His decision to pursue the present claims came several months later, after Mr George had completed his investigation and report.

[24] Finally, I do not accept the submission that the WDHB's failure to place the settlement agreement before a mediator for sign off under s 149 of the Act was curious or should be viewed with suspicion. The WDHB had no obligation to proceed in that way.

[25] For these reasons I conclude the September 2013 agreement was not entered into under duress. It is final and binding.

Conclusion

[26] There was an accord and satisfaction. Mr Rosieur's claims in the Authority cannot proceed.

Costs

[27] Costs are reserved.

[28] The parties are invited to resolve the matter. If either party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file and serve a written account of what is sought and why. The other party shall have a further 14 days from the date of receipt of that account in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority