

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 514
5408347

BETWEEN CHRISTOPHER SCOTT ROY
Applicant

A N D BOARD OF TRUSTEES OF
TAMAKI COLLEGE
Respondent

Member of Authority: T G Tetitaha

Representatives: N R Williams/T C Tran, Counsel for Applicant
R Harrison/E McWatt, Counsel for Respondent

Investigation Meeting: 2-3 September 2013

Submissions Received: 2 September 2013 from Applicant
2 September 2013 from Respondent

Date of Determination: 04 December 2013

DETERMINATION OF THE AUTHORITY

Determination/Orders

- A. There was accord and satisfaction giving rise to a binding settlement agreement between the parties.**
- B. There was insufficient evidence of duress or undue influence to set aside the record of settlement dated 5 November 2010.**
- C. The record of settlement dated 5 November 2010 prevents the Authority from inquiring into Mr Roy's personal grievance.**
- D. Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.**

Employment relationship problem

[1] Mr Christopher Scott Roy was employed by Tamaki College Board of Trustees (Tamaki College) as a teacher until he resigned on 11 October 2010. He alleges he was constructively and unjustifiably dismissed because of his atheist beliefs.

[2] A record of settlement dated 5 November 2010 was signed between the parties recording a full and final settlement and the payment of \$6,500 to Mr Roy. Mr Roy asserts the agreement was induced by duress and/or undue influence. Tamaki College disagrees.

Issues

[3] There are three preliminary issues regarding the Authority's jurisdiction to inquire into this personal grievance. These are:

- (a) Does the record of settlement dated 5 November 2010 prevent the Authority from inquiring into this matter?
 - i) Was there accord and satisfaction?
 - ii) Was there duress or undue influence at the time the compromise was entered into?
- (b) As a consequence of the personal grievance being raised out of the 90 day period, should leave be granted to allow the Applicant to file out of time?
 - i) Was the delay occasioned by Mr Roy being so affected or traumatised by the matter giving rise to the grievance (s.115(a))?
- (c) Does the resolution of the Human Rights Commission complaint prevent the Authority from inquiring into this matter?

[4] If Mr Roy's application survives the preliminary issues, a single issue for substantive determination arises. This is:

- (a) Was Mr Roy constructively dismissed by Tamaki College due to discrimination about his Atheist beliefs?

Legal Framework

[5] The record of settlement has not been signed off by a mediator attesting to compliance with the formalities required under s149. This does not prevent a private settlement agreement being enforced by the Authority where there is accord and satisfaction.

[6] Accord and satisfaction is the purchase of a release from an obligation.¹ There must first be a genuine dispute between the parties. Secondly, 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 to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.² This requires an examination of the document itself and the circumstances of its execution.

[7] A settlement agreement can be set aside if there was duress or undue influence at the time the compromise is entered into. It is a question of fact as to whether or not duress or undue influence existed.³ The test for duress is high. The law recognises that in all but the most extreme cases of duress there has been consent.⁴

[8] There are seven elements necessary to establish duress. These are:⁵

- (a) There must be a threat or pressure.
- (b) That threat or pressure must be improper.
- (c) The victim's will must have been overborne by the improper pressure so that his or her free will and judgment are displaced.
- (d) The threat or pressure must actually induce the victim's manifestation of assent.
- (e) 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.

¹ *Cable Talk Astute Network Services Limited v Cunningham* [2004] 1 ERNZ 506

² *Graham v Crestline Pty Limited* [2006] ERNZ 848 at para [49]

³ *Cable Talk Astute Network Services v. Cunningham* [2004] 1 ERNZ 506, 513 at [44]

⁴ *Attorney-General for England and Wales v. R* [2002] 2 NZLR 91 (CA) at p.111

⁵ *Tinkler v Fugro PMS Pty Ltd & Pavement Management Services Ltd* [2012] NZEmpC 102 at [29] referring to the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [89]

- (f) 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 to a Court for the avoidance of the agreement.
- (g) The victim may be precluded from avoiding the agreement by affirmation.

[9] The basic principles of undue influence are well settled. Undue influence consists in the gaining of a unfair advance by an unconscientious use of power by a stronger party against a weaker in the form of some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally though, not always, some personal advantage obtained by the stronger party. It is directed at conduct within a relationship which justifies the conclusion that the disposition or agreement was not the result of a free exercise of the disponent's will. The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another, from victimisation.⁶

[10] The test for undue influence is very high. The law relieves only in extreme loss of autonomy.⁷

[11] There is a substantial conflict of evidence between the parties. This requires express findings of credibility⁸ upon evidence given by brief (signed and unsigned) and orally at hearing.

[12] Credibility can be assessed on two bases – the witness personally⁹ and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour¹⁰;
- (b) Inconsistencies and contradictions of all kinds¹¹;

⁶ *Contractors Bonding Ltd v. Snee* [1992] 2 NZLR 157; (1991) 3 NZBLC 102, 418 (CA) at p.165; p.102,425

⁷ *ASB Bank Limited v. Harlick* [1996] 1 NZLR 655; (1996) 5 NZBLC 103, 988 (CA) at p.659; p.103, 992

⁸ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

⁹ *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

¹⁰ *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

- (c) Prevarication¹²;
- (d) Reasons to lie¹³
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence¹⁴.

[13] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?¹⁵

[14] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.¹⁶

Does the record of settlement dated 5 November 2010 prevent the Authority from inquiring into this matter?

[15] Mr Roy concedes there was accord and satisfaction, but submits the agreement was induced by duress and/or undue influence. He gave examples of intimidation including an alleged assault in August 2009, verbal abuse from staff about his concerns about a powhiri and the requirement he attend, and alleged bullying and aggressive behaviour by trustees on the Board of Trustees and the STA representative, Gary Reading.

[16] Tamaki College denies there was any duress, alleged assault in August 2009 or bullying behaviour by the trustees or others.

Was there accord and satisfaction?

[17] There is no question that there was a genuine dispute between the parties. An agreement was settled as evidenced by the settlement agreement. There was valuable consideration and each party gave up valuable rights. There was a meeting of minds

¹¹ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

¹² *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

¹³ See above at [109]

¹⁴ See above at [110]

¹⁵ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

¹⁶ *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

or at least actions by Mr Roy which would have induced Tamaki College to believe the claims were satisfied by his receipt and retention of their money.

[18] The Authority determines there was accord and satisfaction giving rise to a binding settlement agreement between the parties.

Was there duress or undue influence at the time the agreement was entered into?

[19] Mr Roy gave evidence at hearing of previous behaviour between himself, trustees and staff which created an unsafe environment prompting settlement. He alleged he was assaulted in August 2009 by Mr Alfred Ngaro and Ms Soana Pamaka (Principal of Tamaki College), abused by staff regarding his Athiest beliefs and refusal to attend a powhiri, and bullying and aggressive behaviour by trustees on the Board of Trustees and the STA representative, Gary Reading.

Assault

[20] Mr Roy alleges he was assaulted by Mr Ngaro and Ms Pamaka following an after match function for the Tamaki and Kings College rugby teams at Kings College. He alleges Mr Ngaro *got in his face about not bowing his head during prayer* at the after match function. Mr Ngaro is Christian and a pastor for his church. When he left Mr Ngaro and Ms Pamaka followed him down the stairs punching him in the head. The fight was broken up by a Deputy principal and the Tamaki College rugby team. The Deputy Principal asked if he was okay and knew he'd been *roughed up*. He had a bleeding wound but required no medical attention. He believes there were approximately 80 witnesses.

[21] Tamaki College denies any assault occurred.

[22] Mr Roy initially stated the assault occurred on 21 June 2008. At hearing he changed the date to 1 August 2009. He explained he changed dates after recent discussions of his evidence with others.

[23] At hearing both Mr Ngaro and Ms Pamaka confirmed they were present at Kings College on 1 August 2009. Mr Ngaro was supporting his sons playing in the Tamaki College rugby team. However Ms Pamaka left during the rugby game to accompany an injured player (her nephew) to Middlemore Hospital. She did not attend the after match function or return to Kings College afterwards. She believed

there would be corroborating evidence from the Hospital and other witnesses. Mr Ngaro denied any aggressive behaviour or the assault. Both Mr Ngaro and Ms Pamaka say Mr Roy is lying.

[24] Despite initially identifying Ms Pamaka, Mr Roy changed his evidence at hearing, stating he did not see Ms Pamaka strike him at all. He accepted Ms Pamaka may not have assaulted him because he did not see her.

[25] The location of the injuries changed during examination by the Authority. Initially the injury was to the top of the head. It then moved to the side of his head when the Authority questioned how a single punch to the top of his head could have resulted in a bleeding wound. Despite the bleeding, Mr Roy required no medical attention and was able to drive the van of Tamaki College rugby players home.

[26] There was no corroborating evidence of the assault or injury from witnesses or otherwise. When asked about the lack of witnesses, Mr Roy said the Deputy Principal *wanted to stay out of it*. He gave no explanation for not summoning the Deputy Principal, or producing any other witnesses.

[27] The alleged motivation for the assault was Mr Ngaro's displeasure at Mr Roy's refusal to bow his head during grace at the after-match function. This does not ring true. Mr Ngaro's religious affiliation and position within his Church does not evidence a motivation to assault someone who does not follow his faith. Mr Ngaro denies speaking to Mr Roy about his participation or not in grace or the blessing of food. Mr Ngaro and Ms Pamaka stated the saying of grace was not compulsory. It was left to the host school to determine. They would have no motivation to speak to Mr Roy about his participation in grace, when the host school may not follow this practice either.

[28] Mr Roy laid a complaint in 2012 with the Police against Mr Ngaro and Ms Pamaka, three years later. The Police declined to take the matter any further. They interviewed the alleged witnesses including Mr Roy, Mr Ngaro and Ms Pamaka. The Police were unable to conclude there was sufficient evidence to lay charges.

[29] Mr Roy's explanation at hearing for the delay was his adoption of *an appeasement policy* meaning he wished to try to work it out with his employer adopting *a submissive role*. This explanation must be considered alongside Mr Roy's extensive correspondence complaining about Tamaki College, sent to various Ministry's and bodies during his employment.¹⁷ This does not give a picture of appeasement or adoption of a submissive role.

Powhiri, Staff Abuse and bullying behaviour by trustees

[30] After he raised concerns about his attendance at a powhiri due to his Athiest beliefs, Mr Roy alleges Ms Pamaka acted unprofessionally towards him by swearing and allowing other staff to swear at him. Ms Pamaka denies swearing at him. She accepts one staff member did swear at him. However she asserts Mr Roy was equally abusive. Mr Roy accepted he swore at staff but says this was the school culture.

[31] Mr Roy's behaviour swearing at other staff does not indicate appeasement or adoption of a submissive role. The impression is he stands up for his beliefs irrespective of others views. As Ms Pamaka stated at hearing, Mr Roy is prepared to *give as good as he gets*.

[32] The alleged confrontations with the trustees and the STA representative, Gary Reading, arise from a Board of Trustees meeting on 4 August 2010 and 27 September 2010. The Board of Trustees were investigating the complaints about Mr Roy. Mr Reading and Mr Ngaro refused to *back down* when Mr Roy informed them of the inconsistency of treatment. He alleged the complainants were guilty of similar misconduct. He believed this demonstrated bias and prejudice. He further submits Mr Ngaro made comments about his lack of understanding of Maori and Pacific culture, Mr Reading made a statement about teachers being *amenable to the Christian faith or to the dominant faith of the community*, and despite his explanations about his behaviour stated he *had personally attack[ed] the principal*.¹⁸ He alleges he was told at the 4 August Board meeting not to get legal advice but to speak to Mr Ngaro.¹⁹

¹⁷ Correspondence regarding compulsory attendance at assemblies containing religious activity in schools including letters dated 18 June 2008, 11 August and 15 October 2010 from Minister of Education, Letter of complaint to Human Rights Commission dated 16 February 2010 and emails 5 September 2010 to Ministry of Justice; Letter dated 2 August 2010 to Tamaki College Board of Trustees

¹⁸ Statement of Problem, Letter to R Newport New Zealand School Trustees Association 11 December 2012 p 2 ff

¹⁹ Statement of Problem, Opening Statement pp 2 - 11

Mr Ngaro says he advised Mr Roy to bring concerns to him directly before lawyers became involved.

[33] The matters before the Board of Trustees for discussion on 4 August and 27 September 2010 were set out in correspondence to Mr Roy.²⁰ The August complaints were about Mr Roys views on any requirement he attend school functions with religious overtones such as powhiri and subsequent unprofessional conduct towards the Principal, publication of confidential matters from mediation about this and insensitive comments on Christianity. Mr Roy provided a lengthy reply on 2 August 2010 and had legal representation at the 4 August 2010 Board meeting. This conduct does not indicate appeasement or adoption of a submissive role by Mr Roy. Mr Roy defended his behaviour. He did not accept the complaints at all.

[34] The second Board of Trustees meeting on 27 September 2010 was due to a complaint from the Principal, Ms Pamaka. The September complaints were about Mr Roys continued assertion he was able to absent himself from school functions with religious overtones, her lack of apology and therefore support and his alleged statement she was *the most hated person at Tamaki College*.²¹

[35] Mr Roy did not have legal representation at the 27 September meeting. Mr Roy says this was because of Mr Ngaro's advice following the 4 August meeting. This does not logically fit with Mr Roys use of legal advice and representation in the past and the advice in the letters dated 30 July and 22 September 2010 for him to obtain legal advice and representation. Mr Roys previous complaint involved the Principal who would normally be the first point of contact for complaints. Mr Ngaro's advice for Mr Roy to bring his concerns to him directly before lawyers became involved, seems logical in the circumstances. There was evidence Mr Roy had financial problems and an inference he could not afford legal advice. It seems more probable than not Mr Roy made a decision to dispense with legal representation for reasons other than Mr Ngaro's comments at the end of the 4 August 2010 meeting.

[36] The parties have a differing view of the 27 September meeting. Mr Roy alleges he was intimidated, humiliated and accused of being a liar by Mr Ngaro and another Board member, Mr Ball. Mr Ngaro denies this occurred, stating the meeting

²⁰ Letter dated 30 July and 22 September 2010

²¹ Letter dated 16 September 2010 S Pamaka to C Roy and Letter dated 22 September 2010 A Ngaro to C Roy.

was calm and proceeded rationally. The meeting ended with an offer to settle being made by Tamaki College by Mr Reading. Mr Roy, the trustees and Mr Reading would have made forceful submissions and replies at both Board meetings. However this does not evidence undue influence or duress.

[37] At the end of the hearing Mr Roy raised for the first time an allegation Mr Ngaro said to him on 29 September 2010 he *had to do it and sign it [the agreement]*. When this allegation was made, Mr Ngaro had finished his evidence and left for Wellington. He was no longer available to be recalled to answer this allegation. There was no basis for Mr Roy to make this allegation at the end of a hearing when Mr Ngaro's evidence had been completed. It did not enhance his credibility.

[38] Mr Roy received a copy of the settlement agreement between 27 and 30 September 2010. He did not sign the agreement until 5 October 2010. Even if such a statement had been made, there is no evidence other than bare allegation Mr Ngaro's alleged statement had any influence at all upon his signing the agreement 6 days later.

[39] The evidence shows Mr Roy was forthright defending and complaining about his treatment by Tamaki College. He was aware of and did access legal advice and representation. He signed the agreement on 5 October 2010, several days after the alleged meetings and several years after the alleged assault. The evidence does not indicate threats or loss of autonomy at the material time.

[40] The Authority determines there was insufficient evidence of duress or undue influence to set aside the record of settlement dated 5 November 2010. Accordingly the record of settlement dated 5 November 2010 prevents the Authority from inquiring into this matter. As a consequence of this determination the remaining issues are not required to be determined.

[41] Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

T G Tetitaha
Member of the Employment Relations Authority