

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 295
5554775**

BETWEEN WARREN SPANHAKE
 Applicant

AND WHENUAPAI PRIMARY
 SCHOOL BOARD OF
 TRUSTEES
 Respondent

Member of Authority: Eleanor Robinson

Representatives: David Towle, Counsel for Applicant
 Paul Robertson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 27 August 2015 from Applicant
 10 September 2015 from Respondent

Determination: 25 September 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr Warren Spanhake, claims that he was unjustifiably dismissed as Principal of Whenuapai Primary School by the Whenuapai Primary School Board of Trustees (the Board) on or about 23 May 2014. As a result, Mr Spanhake also claims that the Board breached its duty of good faith to him.

[2] The Board claims that the parties signed a settlement agreement pursuant to s. 149 of the Employment Relations Act 2000 (the Act) on 6 June 2014. On 19 June 2014 the settlement agreement signed by the parties was signed by a MBIE mediator (the Settlement Agreement).

[3] Mr Spanhake claims that the Settlement Agreement is void, on the basis that his agreement to it was made as a result of duress.

[4] The Board claims that the Authority does not have jurisdiction to order that a settlement agreement signed under s 149 of the Act is voidable on the grounds of duress. Consequently Mr Spanhake is precluded from raising a personal grievance as a result of the Settlement Agreement

Issues

[5] The issue for determination is whether or not the Authority has the jurisdiction to order that a settlement agreement signed by a mediator pursuant to s 149 of the Act is voidable on grounds of duress.

Note

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

Brief Background Facts:

[7] Mr Spanhake had been Principal of Whenuapai Primary School for approximately 27 years when the Board commenced raising concerns regarding aspects of his ability to perform certain aspects of his role satisfactorily and also his relationship with the Board.

[8] Meetings took place between the parties, and during the course of the meeting held on 23 May 2014 Mr Spanhake offered to resign.

[9] The Board agreed to accept Mr Spanhake’s resignation, and the parties both signed the Settlement Agreement on 6 June 2014.

[10] The Settlement Agreement was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 22 May 2014. In signing the Settlement Agreement the mediator stated that:

c) I have been asked by the parties to sign the attached agreed terms of settlement; and

d) Before I signed the agreed terms of settlement I explained to them the effect of sections 148A, 149(1) & (3);

f) I am satisfied that the parties understood the effect of sections 148A, 149(1) & (3), and have affirmed their request that I should sign the agreed terms of settlement.

[11] Sections 149(1) & (3) of the Act referred to at clause d) of the Settlement Agreement state:

149 Settlements

(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—

(a) who is employed or engaged by the chief executive to provide the services; and

(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,— may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

(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.

(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 section 7 of the Contractual Remedies Act 1979; 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.

Determination

[12] In the event that parties resolve an employment relationship problem, mediators employed by MBIE are empowered pursuant to s 149 of the Act to sign agreed terms of settlement between the parties: “*at the request of the parties*”.

[13] Prior to signing such a s.149 settlement agreement, the mediator is required pursuant to s.149(2)(a) of the Act to explain to the parties the effect of signing the agreement, and in accordance with s 149(2)(b), to be satisfied that the parties understand the effect of s.149(3), i.e. that the terms of the settlement agreement are final and binding, may not be cancelled, and except for enforcement purposes, may not be brought before the Authority or a court.

[14] It is important that parties can have confidence in the finality of mediated settlements.

[15] In support of this proposition I observe that s.149 of the Act was amended in 2004 and s.149(3)(ab) inserted¹. Section 149(3)(ab) states: “*the terms cannot be cancelled under section 7 of the Contractual Remedies Act 1979.*” i.e. for misrepresentation, repudiation or breach. The Explanatory Note to the Employment Relations Law Reform Bill stated that the amendment was intended to provide:

Greater certainty of outcome in mediated settlements ... [ensuring] ... that settlements that are agreed to be final and binding by the parties cannot later be cancelled by 1 party.

[16] Section 149 of the Act provides that following the amendment in 2004, there is only one exception by which the terms of a s149 settlement can come before the Authority or the court. That is for enforcement in circumstances in which a party has not complied with the agreed terms of settlement. Such non-compliance may be result in an order for compliance by the party in breach, and/or a penalty pursuant to s 137 of the Act. I find no other circumstance in s149 of the Act which would give rise to a mediated settlement being brought before the Authority or a court.

¹ Section 51(1) of the Employment Relations Amendment Act (No 2) 2004 (2004 No 86)

[17] The issue for determination requires me to consider whether or not I have the jurisdiction to order that a settlement agreement signed by a mediator pursuant to s 149 of the Act is voidable on grounds of duress i.e. that there is an exception on the basis of duress to s 149 of the Act.

[18] I am not aware of any case law which addresses this issue directly, although in the case of *Tinkler v Fugro PMS Pty Ltd*², a case in which there was a mediated settlement agreement between the parties, Judge Inglis stated:

[27] *There is authority for the proposition that settlements of employment disputes reached under duress are unenforceable. However in each case the settlement agreements did not have the imprimatur of a mediator, and none were decided within the statutory framework of s.149.*

[19] In the later case of *Young v Board of Trustees of Aorere College*³ Judge Inglis addressed the issue of duress again stating in that case:

[20] *The combined effect of these provisions is that a settlement agreement which has passed through the s. 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds.*

[20] Judge Inglis refers to a s.149 settlement agreement possibly being set aside in circumstances of duress: “*on public policy grounds*”. Her Honour does not elaborate on what might constitute the public policy grounds and therefore I turn to examine the definition of duress and the object of s 149 of the Act.

[21] In *Pharmacy Care Systems Ltd v Attorney-General*⁴ (*Pharmacy Care*) the Court of Appeal listed what were referred to as seven “elements” of duress recognised in New Zealand Law:⁵

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

² [2012] NZEmpC 102

³ [2013] NZEmpC 111

⁴ Court of Appeal, CA 198/03, 16 August 2004

⁵ Ibid at para [98]

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.

[22] In accordance with the definition in *Pharmacy Care*, to constitute duress the will of the party claiming duress must have been overborne by improper pressure which induces a manifestation of assent.

[23] I consider that improper pressure is envisaged in s.7 of the Contractual Remedies Act 1979, particularly in the instance of misrepresentation by which a party is improperly induced to enter into a contract. However as a result of the amendment which resulted in s.149(3)(ab) being inserted into the Act, the terms of a mediated settlement cannot be cancelled under section 7 of the Contractual Remedies Act 1979

[24] I conclude that the cancellation of this avenue of redress arises from the inclusion in s.149 of significant safeguards to ensure against improper pressure being imposed on a party to ensure their assent to a settlement agreement. I find that these safeguards are intended to ensure that parties not only understand the ramifications of the agreement into which they are entering, but are protected from improper pressure being brought to bear upon them.

[25] The safeguards in s.149 of the Act impose certain requirements upon the mediator before he or she signs a settlement agreement pursuant to s.149 of the Act, being that the mediator:

- i. signs [the settlement agreement] at the request of the parties: s.149(1);
- ii. explains to the parties the effect of subsection (3): s.149(2)(a); and
- iii. is satisfied that, knowing the effect of subsection (3), that the parties affirm their request s.149(2)(b)

[26] I conclude that it is because of the legislature's confidence in the robust nature of such requirements on the part of an impartial third party that the amendment providing that the terms cannot be cancelled under s 7 of the Contractual Remedies Act 1979 was introduced by the amendment in 2004 inserting s.149 (3)(ab) into the Act.

[27] I find that the statutory safeguards which act to preclude challenges to mediated settlements on the basis of s.7 of the Contractual Remedies Act 1979 also act in a similar fashion in the case of duress to ensure a party's agreement to a settlement agreement is not improperly obtained.

[28] On that basis, I determine that the Authority does not have the jurisdiction to order that a settlement agreement signed by a mediator pursuant to s 149 of the Act is voidable on grounds of duress.

[29] Given the determination set out above, I find that I am unable to assist Mr Spanhake further in this matter.

Costs

[30] I consider that this is in the nature of a genuine dispute and I am not persuaded that this is a matter in which costs should be awarded. However in the event that the parties seek costs, they are in the first instance encouraged to agree costs between themselves.

[31] If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority