ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPH [4 -5]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 158
5637953

	BETWEEN	CAROLINE SAWYER Applicant
	AND	THE VICE-CHANCELLOR OF VICTORIA UNIVERSITY OF WELLINGTON Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in person Mary Scholtens Q.C., Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	30 October and 30 November 2016 from Applicant 23 November 2016 from Respondent
Determination:	21 December 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Dr Caroline Sawyer, claims that she was bullied during her employment with the Respondent, the Vice-Chancellor of Victoria University of Wellington (VUW) as a result of which she resigned and claims that she was constructively dismissed.

[2] Dr Sawyer further claims that the Record of Settlement between her and VUW which she signed on 24 July 2014 (the ROS) should be declared a nullity and set aside.

[3] VUW denies that Dr Sawyer's claims, including bullying by VUW, have any substance, and claims that there is no basis for setting aside the ROS which is final and binding on the parties pursuant to s.149 of the Employment Relations Act 2000 (the Act).

Prohibition on publication

[4] **I order that the confidential details of the Record of Settlement entered into by the parties on 24 July 2014 be subject to a permanent non-publication order.**

[5] **This order is made under Schedule 2 clause 10(1) of the Act.**

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.

Issues

[7] The issues for determination are whether or not:

a. The Record of Settlement (ROS) entered into by the parties is a nullity and therefore void.

If the ROS is deemed to be a nullity:

b. whether or not Dr Sawyer was bullied by VUW resulting in constructive dismissal.

Background Facts

[8] Dr Sawyer commenced employment with VUW in 2010 as a Senior Lecturer in the Law Faculty.

[9] VUW was sent a letter of complaint on 1 March 2014 from Dr Sawyer's then lawyers, Dyhrberg Drayton, alleging that Dr Sawyer had been subjected to various forms of bullying during the period of her employment with VUW.

[10] VUW's approach was to initiate a fact finding investigation in accordance with VUW's Disciplinary Guidelines to determine whether or not the allegations made on behalf of Dr Sawyer had a factual basis.

[11] An investigation was subsequently carried out by two experienced members of VUW's staff with no connection to the Law Faculty, the Pro-Chancellor and the Dean of Humanities and Social Sciences, and the Pro Vice-Chancellor, Education.

[12] Dr Sawyer was informed by VUW via her then solicitors, specifically Ms Johanna Drayton, that an investigation had been commenced. The investigation proceeded over a number of weeks with the assistance of a VUW HR Advisor.

[13] A lengthy draft report of the investigation undertaken by VUW dated 9 July 2014 was emailed to Dr Sawyer and her lawyer on that date. The draft report noted in the Executive Summary that:

> *The conclusions reached by the Investigation were that the facts did not support the allegations made by Dr Sawyer against ….*
> *…*
> *Trust and confidence of the parties in the employment relationship has been eroded to such an extent that it is hard to see how it could be re-established.*

[14] Following the release of the draft report Dr Sawyer advised the Pro Vice-Chancellor Education that she had terminated her engagement of Ms Drayton and would be engaging a new solicitor.

[15] Following receipt of this advice, VUW's external solicitors contacted Ms Drayton on 14 July 2014 and asked for clarification and suggested that the parties attend mediation. Ms Drayton responded that she would take instructions both on her engagement by Dr Sawyer and about mediation.

[16] The following day, 15 July 2014, Ms Drayton advised VUW's solicitors that her engagement by Dr Sawyer had been terminated and she understood that Ms Penelope Ryder-Lewis had been engaged by Dr Sawyer.

[17] VUW's solicitors contacted Ms Ryder-Lewis and raised the possibility of the parties attending mediation with her. VUW states that Ms Ryder-Lewis's response was that she could see the value of mediation, and she would seek Dr Sawyer's instructions.

[18] Ms Ryder-Lewis notified VUW's solicitors on 16 July 2014 that Dr Sawyer had confirmed her agreement to attend mediation.

[19] The parties attended mediation with a Mediator of the Ministry of Business Innovation and Employment (MBIE) on 24 July 2014. In attendance at the mediation were Dr Sawyer and Ms Ryder-Lewis and VUW's external solicitor, Mr Geoff Davenport, Mr Rob Miller, Acting Director HR, and another VUW employee.

[20] During the mediation process, the parties reached an agreement which was recorded in the ROS and at clause 15 stated that it resolved all matters between the parties:

> *This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship, including the termination thereof. This includes any claims against any officer or employee of the University in any jurisdiction, which relates in any way to any matter leading up to and including this mediation.*

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[21] Subsequently, Dr Sawyer filed a Statement of Problem with the Authority on 11 August 2016 seeking to raise an employment relationship problem and claiming that the ROS should be set aside on the basis that it is a nullity in order to allow an investigation into the bullying claims to proceed.

Determination

Is the ROS a nullity and therefore void?

[22] Parties who have an employment relationship problem can resolve the matter in a number of ways. One of these may result in a record of settlement pursuant to s 149 of the Act.

[23] Section 149 of the Act states:

> ***149 Settlements***
>
> *(1) Where, a problem is resolved, whether through the provision of mediation services or otherwise, any person-*
>
> *(a) Who is employed and 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 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 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 Contracts 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.

(4) ...

(5) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[24] The parties to the ROS were Dr Sawyer and Victoria University of Wellington. The ROS was signed by Dr Sawyer and by Mr Miller on behalf of VUW.

[25] There are a number of grounds on which Dr Sawyer submits that the ROS is a nullity and should be set aside, and I shall examine each of these individually.

(i) Dr Sawyer's Employer did not authorise the ROS

[26] Dr Sawyer submits that the ROS should be set aside on the basis that the ROS was made on behalf of the Vice-Chancellor, who did not authorise the ROS to be made and it is therefore a nullity.

[27] The ROS is between Dr Sawyer and VUW. VUW submits that the party named in the ROS, Victoria University of Wellington, includes the Vice-Chancellor. It submits that 'Victoria University of Wellington' is defined in s 3 of the Victoria University of Wellington Act 1961 which states:

> *The University shall consist of the Council, the professors emeriti, the professors, lecturers, Registrar, and librarian of the University for the time being in office, the graduates and undergraduates of the university, the graduates of the university of New Zealand whose names are for the time being on the register of the Court of Convocation, and such other persons and classes of persons as the Council may from time to time determine.*

[28] The Vice-Chancellor of the University is effectively the 'Chief Executive' of the organisation, VUW. He has responsibility for the management of academic and administrative matters within VUW. In addition, I note that he is a member of the Council and a professor. He is also an employee of VUW.

[29] I find that the Vice-Chancellor is included within the definition of VUW.

[30] Clause 15 of the ROS is relevant to this issue. It states that the ROS is in full and final settlement of all matters between the Applicant and Respondent and specifically states that: "*This includes any claims against any officer or employee of the University* …". I find this provision includes the Vice-Chancellor.

[31] Dr Sawyer claims that VUW was not her employer. Dr Sawyer was a lecturer at VUW and as such is included within the definition of VUW. Her employment was covered by the Academic Staff Collective Agreement between VUW and the academic staff employees, of which she was one. I find that she was employed by VUW.

[32] I find that VUW was a body corporate pursuant to s 3(3) of the Victoria University of Wellington Act 1961 which states:

> *The University shall be a body corporate with perpetual succession and a common seal, and may hold real and personal property, and sue and be sued, and do and suffer all that bodies corporate may do and suffer.*

VUW could therefore enter into a settlement to resolve an employment relationship problem, and be sued as a legal entity, a body corporate.

[33] Accordingly I find that VUW was Dr Sawyer's employer. The ROS was signed by Dr Sawyer and by Mr Rob Miller, Deputy Director HR on behalf of VUW.

(ii) Was Mr Miller authorised to sign the ROS on behalf of VUW?

[34] Dr Sawyer claims that Mr Miller was not authorised to sign the ROS on behalf of VUW, and I therefore proceed to examine this issue.

[35] VUW is a large organisation, comprising professors, lecturers, graduates and undergraduates and: *"other persons as the Council may from time to time determine*." Given its size, as chief executive of VUW, it is to be expected that the Vice Chancellor would delegate many functions and decisions to be undertaken on his behalf and/or that of VUW.

[36] The Education Act 1989 makes recognition of this necessity in s 197, stating:

> ***197 Delegation by chief executive***
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> *(1) The chief executive of an institution may from time to time, either generally or particularly, by writing delegate to the academic board or to any member of the staff of the institution any of the functions or powers of the chief executive under this Act or any other Act including functions or powers delegated to the chief executive under an Act other than this Act.*
>
> *…*
>
> *(7) A delegation under this section to a member of the staff may be made to a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or specified class of offices.*

[37] Mr Miller is the Deputy Director, HR at VUW. At the date of the mediation, 24 July 2014, he was appointed to the role of Acting Director, HR in the absence of the HR Director.

[38] VUW has a HR delegations framework: '*The Human Resources Delegations Framework'* dated March 2014. The Introduction states:

> *The Vice-Chancellor has delegated the authority vested in him by legislation and the Victoria University of Wellington (Victoria) Council, to the manager and senior academics in the University who carry a formal delegation level.*
> *....*
> *Managers and senior academics are expected to exercise their delegations responsibly and to take ownership of the outcome.*

[39] As the Acting Director HR Mr Miller had a delegation level of 2 which permitted him to: "*Settle a negotiated or mediated grievance where payment is involved (more than $5,000) ... In consultation with VC ..."*

[40] Dr Sawyer claims that the Vice Chancellor: "*trusted his advisors, who did not tell him what they were actually doing. Accordingly he did not authorise or allow the purported settlement to be made"* .

[41] Mr Miller stated in his untested affidavit evidence that he discussed the matter directly with the Vice-Chancellor prior to the mediation with Dr Sawyer taking place, and the settlement negotiated during the mediation on 24 July 2014 and recorded in the ROS was consistent with his instructions.

[42] Moreover the Education Act 1989 states at s.197 (7)

> (7) *A person purporting to act pursuant to a delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.*

[43] I find that Mr Miller had the authority to enter into the ROS on behalf of VUW Dr Sawyer's employer in accordance with his delegated authority, and there is no evidence that he did not act responsibly and in accordance with the terms of that delegation.

(iii) There was no consideration for the ROS

[44] Dr Sawyer claims that the ROS is not enforceable because there was no consideration.

[45] I note that a record of settlement made pursuant to s 149 of the Act is a statutory instrument, and as such does not require consideration.

[46] However I observe that consideration may take a number of forms. Parties enter mediation with a view to resolving their employment relationship problem. That resolution may take many forms, not necessarily financial.

[47] Consideration has been described as consisting:[1]

> *... either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other".*

[48] It was set out in *Chappell v Nestle*[2] that: "*To be valid, consideration need not be fair and reasonable, but must have some value".*

[49] The mediator signs a settlement agreement at the request of the parties[3] Provided the mediator ensures that the parties have been advised that no minimum entitlements payable under the Minimum Wages Act 1983 or the Holidays Act 2003 have been foregone, the terms of settlement are subject only to negotiation and agreement between the parties.

[50] The ROS records (i) the nature of the agreement reached between the parties, both parties have signed it, and (ii) the Mediator signed the ROS at their request.

[51] In addition I note that the ROS contains terms of settlement that appear to have a value to Dr Sawyer, and it is submitted by VUW that the terms of settlement have been adhered to as required under the ROS.

[52] I determine that the ROS is not a nullity on the basis that there was no consideration.

(iv) Was the ROS reached as the result of improper pressure on Dr Sawyer?

[53] Dr Sawyer claims that the ROS was obtained as a result of 'fraud and duress', or improper pressure on her by VUW.

[54] In regard to the claim of fraud Dr Sawyer claimed that various documents relating to her employment with VUW were 'fraudulent'. None of these documents have been provided to the Authority despite a significant amount of time for filing having been scheduled during the case management conference call held by the Authority with the parties on 6 September 2016.

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[1] *Currie v Misa* (1875) LR 10 Ex 153 at 162
[2] [1960] AC 87 (HL)
[3] Section 149(1) of the Act

[55] Furthermore despite this claim of fraud, I observe that Dr Sawyer has since availed herself of the benefit of the terms of the ROS.

[56] I am not persuaded that there is evidence of fraud as alleged by Dr Sawyer.

[57] I turn therefore to consider whether or not Dr Sawyer had been subjected to duress, improper pressure, which induced her to enter into the ROS.

[58] The Employment Court commented in *Lumsden v Sky City Management Ltd* on the ability to revisit a s 149 settlement agreement:[4]

> *While it is true that s 149 restricts a party's ability to revisit a settlement agreement, it may not provide an impermeable barrier. There may be circumstances, which have not been fully explored by the Court, where it is permissible to go behind a settlement agreement. One such example may be in cases of duress: Young v Borad of Trustees of Aorere College [2013] NZEmpC 111 and Tinkler v Fugro Pty Ltd and Pavement Management Services Ltd [2012] NZEmpC 102.*

[59] Duress was defined in *Pao On v Lau You Long* by Lord Scarman as:[5]

> ***Duress,*** *whatever form it takes, is a coercion of the will so as to vitiate consent. … [In] determining whether there was a coercion of the will such as there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are … relevant in determining whether he acted voluntarily or not.*

[26] In a later case *Pharmacy Care Systems Ltd v Attorney-General*[6] the Court of Appeal set out what were referred to as seven "elements" of duress recognised in New Zealand Law:[7]

> *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*

[4] [2015] NZEmpC 225 at [42]
[5] [1980] AC 614 at pg
[6] Court of Appeal, CA 198/03. 16 August 2004
[7] Ibid at para [98]

> *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.*

[60] In New Zealand, mediated settlements are the means by which a substantial number of employment relationship problems are resolved. Accordingly, it is important that parties can have confidence in the finality of mediated settlements.

[61] To strengthen public confidence I observe that s 149 of the Act was amended in 2004 and s.149 (3)(ab) inserted which reads: "*the terms cannot be cancelled under section 7 of the Contractual Remedies Act 1979".* Section 7 of the Contractual Remedies Act 1979 refers to misrepresentation, repudiation and/or breach, all indices of improper pressure.

[62] I have previously considered the issue of improper pressure in the context of a mediated settlement[8] . In that determination I observed:

> [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.*

[63] The safeguards referred to 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, namely 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).

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[8] *Spanhake v Whenuapai Primary School Board of TrusteesI [2015] NZERA Auckland 295*

[64] The MBIE Mediator who signed the ROS is a highly experienced Mediator and she signed the ROS after the clauses that confirmed she had performed the requirements set out in s 149 of the Act.

[65] In addition to the safeguards set out in s 149 of the Act, I also note that Dr Sawyer had legal representation from the commencement of the investigation into her complaints by VUW. More significantly I note that she was represented throughout the mediation process by Ms Ryder-Lewis, an experienced employment lawyer with many years' experience and a partner in her own firm, whom Dr Sawyer had instructed to advise her in this matter.

[66] Dr Sawyer, as confirmed by Ms Ryder-Lewis on 16 July 2014 had agreed to attend mediation. Ms Ryder-Lewis attended the mediation with Dr Sawyer on 24 July 2014, just over a week later. There is no indication that Dr Sawyer had changed her mind regarding attending mediation in that time, although there was sufficient opportunity for her to have done so.

[67] There was subsequent communication between the solicitors acting for the parties on the day following mediation, 25 July 2014; however the email from Ms Ryder-Lewis makes no reference to Dr Sawyer having any concern about entering into the ROS as a result of improper pressure.

[68] I find in having considered all the circumstances of the mediation process, and most significantly the statutory safeguards in s 149 of the Act, there was no improper pressure, or duress, used to persuade Dr Sawyer to enter into the ROS.

[69] I determine that the ROS was not the result of fraud or improper pressure on Dr Sawyer.

(v) *Are the terms of the ROS final and binding on the parties?*

[70] I observe that the ROS was certified under s 149 of the Act by the Mediator.

[71] Section 149 as set out in paragraph [23] above, lays certain requirements on a mediator prior to him or her signing a record of settlement between parties. In this case the Mediator signed below clauses in the ROS which stated:

> *a) I am employed by the Chief Executive of the Ministry of Business, Innovation and Employment to provide mediation services under the employment Relations Act 2000; and*

b) I hold a current general authority from the Chief Executive to sign, for the purposes of section 149 of the Employment relations Act 2000, agreed terms of settlement; and

c) \I have been requested 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);and

e) I confirm that the parties have advised me that no minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined by the Employment Relations Act 2000) have been foregone in the reaching of this settlement; and

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; and

I sign the agreed terms of settlement pursuant to section 149

[72] The Mediator was an experienced and impartial mediator, I have no grounds for believing that she did not understand, or regard with due respect, the requirements set out in s 149. I therefore accept that the mediator performed her role in accordance with the requirements of s 149 of the Act.

[73] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[74] As stated above, it is important that parties can have confidence in the finality of mediated settlements, and confidence in the enforceability of the terms of agreed settlements. Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity.

[75] Having had due consideration to all the circumstances, I determine that the ROS is not a nullity and that it is full and binding on the parties.

Was Ms Sawyer bullied by VUW?

[76] Having determined that the ROS was not a nullity, it follows that clause 15 is valid. I find accordingly that there is no basis for setting aside the ROS, but it is final and binding on the parties pursuant to s 149 of the Act.

Costs

[77] Costs are reserved. The parties are encouraged to agree costs between themselves. 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.

[78] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority