IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 287
3078092

	BETWEEN	VIRGINIA FAY Applicant
	AND	COMMERCIAL HELICOPTERS LIMITED T/A FLY MY SKY Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Keith McKenzie, director of the Respondent
Investigation Meeting:	On the papers
Determination:	24 July 2020

DETERMINATION OF THE AUTHORITY

A. Section 149(3) of the Employment Relations Act 2000 bars Virginia Fay from pursuing a claim for wage arrears against Commercial Helicopters Limited.

Employment Relationship Problem

[1] A preliminary jurisdictional issue arose in an application Virginia Fay made regarding wages and holiday pay she said her former employer Commercial Helicopters Limited (CHL) still owed her.

[2] A settlement agreement reached between the parties on 28 June 2019 included a term stating that agreement was "a full and final settlement of all matters between the parties arising out of their employment relationship". However Ms Fay said she was entitled to pursue payment of wages and holiday she claimed was still due to her because another term of that agreement said "the parties confirm that neither has agreed to forego minimum entitlements".

[3] Their agreement was reached in mediation. A Ministry of Business employment mediator then certified the written record of their agreed terms through the process set out in s 149 of the Employment Relations Act 2000 (the Act).

[4] The relevant parts of those terms were:

> 4. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, the Holidays Act 2003 …) as specified in s 148(3) of the Employment Relations Act 2000.
>
> 5. This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[5] The question raised by Ms Fay's claim probed the interrelationship between the "full and final" term in her agreement with CHL, the finality conferred on such agreements under s 149(3) of the Act, and the provisions in s 148A(2) and (3) of the Act that prohibit Ministry mediators certifying any terms of settlement "in which a party agrees to forgo" all or part of their minimum wage and holiday entitlements.

[6] Ms Fay's argument, in short, was that the agreement's fourth term, confirming neither party agreed to forgo minimum entitlements, had carved out an exception to the agreement's fifth term on full and final settlement of "all matters" between the parties. Conversely CHL's position was that those terms, read together, confirmed no minimum entitlements had been forgone, rather than preserving any possible future claim for further payments, and had declared all matters were fully and finally settled.

The Authority's investigation

[7] The parties agreed this question regarding the interpretation of their settlement agreement and the relevant sections of the Act could be resolved 'on the papers'. They lodged submissions setting out their arguments. Those submissions have been considered along with Ms Fay's statement of problem, CHL's statement in reply and background documents provided by both parties.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. It

has been provided outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.[1]

[9] CHL's submissions included an argument about the supposed application of the concept of promissory estoppel to the circumstances but, given the conclusion reached in this determination on the basis of statutory interpretation, it was not necessary to address or reach any conclusions on that argument.

The statutory context

[10] The Act contains the following provisions for certification of settlement agreements that meet certain criteria:

> **149 Settlements**
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> (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 sections 36 to 40 of the Contract and Commercial Law Act 2017; 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.

[11] In conducting this certification process the mediator is subject to the following instructions:

> **148A Certain entitlements may be subject to mediation and agreed terms of settlement**
>
> (1) The entitlements specified in subsection (3) may be the subject of—

[1] Employment Relations Act 2000, s 174C(4).

(a) mediation under this Part; and
(b) agreed terms of settlement under section 149(1).

(2) Despite subsection (1), a person who is employed or engaged by the chief executive to provide mediation services and who holds a general authority to sign agreed terms of settlement under section 149(1) must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party's entitlements specified in subsection (3).

(3) This section applies to wages or holiday pay or other money payable by the employer to the employee under the Minimum Wage Act 1983, the Holidays Act 2003, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, or the Care and Support Workers (Pay Equity) Settlement Act 2017.

[12] The mediator's obligation not to certify agreed terms of settlement in which a party agrees to forgo wages or holiday pay payable under the Minimum Wages Act 1983 (the MWA) and the Holidays Act 2003 (the HA) is specifically addressed by two clauses in the standard form of agreement and certificate used by the mediators. The first of these two clauses is an agreed term of the settlement agreement. This term states the parties "confirm that neither has agreed to forego minimum entitlements". The term refers to those entitlements being as specified in s 148A(3) of the Act and including "monies payable" under the MWA and the HA.

[13] The second of those clauses is found in the certificate signed by the mediator. The certificate confirms the mediator explained the effect of the agreement to the parties and those parties had "advised" the mediator "that no minimum entitlements … have been foregone in the reaching of this settlement".

[14] The Act includes a prohibition on challenging or calling into question how mediators carry out their statutory services, such as by certifying terms of settlement under s 149.[2] However this prohibition includes one express exception relating to s 149 agreements.[3] This concerns the mediator's obligation to explain to the parties that the certification process has three specific effects – that it make the terms final, that it limits rights under the Contract and Commercial Law Act 2017 to cancel an agreement and that it prevents further action except for enforcement. If the mediator did not comply with that part of the process, relating to knowledge of the effect of certifying a settlement agreement, the agreed terms of settlement can be challenged or called into question on the ground of that failure.

[2] Employment Relations Act 2000, s 152(2)
[3] Section 152(2)(a).

The factual context

[15] Ms Fay worked as a pilot for CHL from 30 October 2017 to 21 September 2018. She raised a personal grievance after her employment was terminated but subsequently did not pursue that grievance. In February 2019 CHL applied to the Authority for an order requiring Ms Fay to pay CHL a certain sum of money under a term of her employment agreement. Ms Fay disputed the validity of the term and the amount said to be due. The Authority referred the parties to mediation. The agreement they reached there was signed by parties and certified by the mediator.

[16] The first agreed term was for the parties' terms of settlement and all matters discussed in mediation to remain, as far as the law allowed, confidential to the parties. Apart from the fourth term, regarding the minimum entitlements confirmation, and the fifth term, regarding full and final settlement, it was not necessary for this determination to fully disclose the content of their second and third agreed terms. However, as a matter of context, it was relevant to note that one of those terms required Ms Fay to pay some money to CHL.

[17] Just over three months after signing the settlement agreement Ms Fay made her own application to the Authority. In December 2019 she amended her application to better specify her claim, which sought orders requiring CHL to pay her $4,204.85. Ms Fay claimed this sum was due to her for occasions where she had worked overtime, which was said to have the effect that salary paid to her during that time amounted to less than the minimum wage; for shortfalls of payments for public holidays, alternative holiday pay entitlements and annual leave; and for a $49.94 deduction made from her pay on one occasion without her written agreement.

[18] CHL disputed the factual basis of the alleged shortfalls but, in any event, said any such claims were all resolved by the full and final settlement reached in mediation.

Analysis

[19] There are some recognised categories or circumstances where the law accepts a party to terms of settlement agreed and certified under s 149 of the Act may not be held to those terms or is not otherwise prevented by the statutory bar from bringing those terms before the Authority for further consideration.

[20] One such category concerns the mental capacity of a party to have made such an agreement in the first place. If circumstances of mental incapacity were established, the fundamentals of contractual formation would not have been made out, so no agreed terms could have been reached of the type to which the s 149(3) statutory bar against further action then applied.[4] This was not a matter in issue in Ms Fay's claim.

[21] Another exception concerns situations where the terms were agreed under duress. Duress in this context does not refer to the ordinary business or financial pressures that may come to bear on both parties to conclude terms of settlement during or after the end of an employment relationship. For a claim of duress to succeed, evidence must establish illegitimate pressure was exerted and such pressures compelled the subject of it to enter the agreement.[5] While Ms Fay may not have liked or preferred the outcome of the terms she agreed in June 2019, duress was not alleged in relation to the terms agreed in the mediation conducted by the Ministry employment mediator.

[22] A further exception concern unconscionability of outcome or how the outcome was reached. This was not in issue here. The terms agreed were an unremarkable outcome arising from terms of Ms Fay's employment agreement.

[23] Neither was there any suggestion that the mediator had failed to carry out the required process of explaining to Ms Fay and the CHL representatives at the mediation what effect certifying the terms of their agreement under s 149 of the Act would have. This meant there were no grounds to challenge or call into question the agreed terms under the exception allowed under s 152(2) of the Act.

[24] Section 149(3)(a) prohibits cancellation of the terms in circumstances of repudiation, misrepresentation, or affirmation under the relevant provisions of the Contract and Commercial Law Act 2017. Although, as noted recently by the Court of Appeal, there may be other avenues of challenge under that legislation for relief for mistake or in relation to illegal contracts, those were not the basis on which Ms Fay argued she should be allowed to pursue CHL for further pay.[6]

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[4] *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12 at [39] and *8i Corporation v Marino* [2017] NZEmpC 69 at [45].
[5] *TUV v WXY* [2018] NZEmpC 154 at [74].
[6] *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12 at [41].

[25] Rather Ms Fay submitted she was entitled to pursue those claims because they could "never be invalidated by a mediation settlement". And in an earlier message to the Authority she described the settlement agreement as specifically excluding her forgoing any minimum entitlements.

[26] Her argument was, however, based on an interpretation of the relevant sections of the Act, and particularly of the phrase "agrees to forgo", that was not sustained on a plain reading of the text and purpose of the statute. Section 148A(2) prohibits the mediator from certifying an agreement where a party has agreed to forgo certain minimum entitlements. The section refers to entitlements, which are rights that are known and capable of being quantified. It does not require the mediator to investigate and determine whether such entitlements may or may not exist. Rather the inquiry concerns the content of "agreed terms of settlement". The mediator's assessment is of what is apparent from the wording of the terms of the agreement and what is known to the mediator from her or his involvement in the discussions that led to the agreement.

[27] In practice the form of certification used by the mediators authorised to certify these agreements under s 149 of the Act has two steps confirming those statutory obligations regarding minimum entitlements have been complied with. Firstly, the parties have agreed a term to that effect. Secondly, the mediator's certificate states the parties have confirmed to that mediator that neither party has agreed to forgo such entitlements. A third party – such as the Authority – subsequently reading the agreement and certificate is entitled to rely on both the terms of the parties' agreement, as evidenced by their signatures, and the mediator's declaration as to what the parties have advised her or him.

[28] Ms Fay's subsequent assertion that she had, either in fact or as a matter of law, reserved some right to pursue minimum entitlements cannot stand in the absence of any evidence that the term agreed was not as it was written in the agreement she had signed or that the mediator had failed to carry out the certification process described in his certificate.

[29] To conclude otherwise would sit uncomfortably with the certainty and finality of the certification process, and its effects, as provided for in s 149 of the Act. It would be contrary to the other agreed term that the agreement was full and final settlement of all matters between the parties arising out of their employment relationship.

[30] There is an argument that such full and final settlement applies only to matters which were known, or ought reasonably to have been known, at the time that the agreement was made. There may be instances where a subsequent change in the law, making the situation different from what was known at the time of agreement, may be sufficient reason to set aside the declared term of finality. In one example a later decision of the Employment Court had opened the possibility of a wage arrears claim for duties carried out by a certain category of worker because those duties were not recognised as requiring payment at the time that an earlier settlement agreement had been made in mediation.[7] Simply put, the law changed. In that particular case the finality of the agreement in respect of any further claims did not apply because payment to such workers for carrying out those duties had not reasonably been in the contemplation of the parties at the time.

[31] This potential exception did not apply to Ms Fay's circumstances. Whether or not she may have had outstanding statutory minimum entitlements could not have been unknown to her or to her former employer at the time that they met in mediation in June 2019, some nine months after her employment had ended. Before her employment ended in September 2018 Ms Fay was represented by a lawyer from her union and the parties had corresponded over her annual leave and sick leave entitlements. In that context the term on full and final settlement of all matters agreed in June 2019 had, reasonably, to be taken as referring to any possible outstanding minimum entitlements.

[32] As a matter of common sense it was also unlikely CHL would have agreed to an agreement with a term providing for settlement what was said to be a full and final basis at the same time as agreeing to another term allowing for future claims of an unknown or indeterminate nature.

Conclusion

[33] There was a clear and principled distinction between the particular scenario in Ms Fay's circumstance and the scenarios discussed by the Court of Appeal in *TUV v Chief of New Zealand Defence Force* where a settlement agreement made and certified under s 149 of the Act could be held void or voidable at its inception. While the objectives of finality and certainty in the settlement of employment disputes do not trump other policy objectives and basic legal values, there was no evidence in this

[7] *Cleverley v Selwyn House School Trust Board* [2016] NZERA Christchurch 43.

particular case of any real concerns regarding mental capacity, knowledge, unconscionable conduct by a party or a representative, criminal behaviour or duress at the time that Ms Fay and CHL reached their agreement.[8] Rather it was a situation where all matters were, as apparent from the agreed terms, validly settled and should remain settled. The agreed term on finality could not be set aside so one party who might wish they had gone about things differently and been more careful or insistent, got "a second bite of the cherry".[9]

[34] Ms Fay is barred by the terms she agreed with CHL and by the effect of s 149(3) of the Act from proceeding with her application to the Authority.

Costs

[35] Both parties represented themselves in participating in the Authority's process in dealing with this matter. There is no order for costs.

Robin Arthur
Member of the Employment Relations Authority

[8] *TUV*, above n 4 , at [42] and [45].
[9] *Hildred v Strong* [2007] NZCA 475 at [46] cited in *Roy v Board of Trustees of Tamaki College* [2016] NZEmpC 20 at [173].