Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

TUV v CHIEF OF NEW ZEALAND DEFENCE FORCE

(SC 14/2020) [2022] NZSC 69

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

The Employment Court order prohibiting publication of the name and identifying particulars of the appellant remains in force.

The order prohibiting publication of the terms of the settlement agreement remains in force on the basis set out in this judgment.

Background

The appellant claimed she was bullied and harassed whilst employed by the New Zealand Defence Force and wanted to pursue a claim for unjustified dismissal. She accepted she agreed to settle those claims with the Defence Force but argued that the settlement agreement should be set aside because she lacked mental capacity to enter into it.

The settlement agreement was signed by a mediator, at the request of the parties, as provided for by s 149(1) of the Employment Relations Act 2000 (the ERA). Before signing such an agreement, the mediator must explain to the parties that the terms are "final and binding" and be satisfied the parties know the effect of this. The mediator is not required to provide advice about the content of the agreement itself. Section 149(3) provides that once the agreement is signed by the mediator, the terms are "final and binding".

Therefore, the issue between the parties was whether the appellant could set aside the settlement agreement on the basis of her claim that she was incapacitated at the time of signing it.

History of the Dispute

The Employment Relations Authority (the Authority) accepted that s 149(3) of the ERA was not a bar to setting aside the agreement where a party lacked capacity. However, the appellant's claim failed because the Authority found that she did not lack capacity. Moreover, even if she had, the Defence Force did not know about this.

On appeal, the Employment Court agreed that s 149 agreements could be set aside on the basis of incapacity. While finding that the appellant did lack capacity, the agreement was not set aside because the Defence Force did not know and was not put on notice as to her incapacity. The Court of Appeal took the same approach.

In reaching their conclusion, both the Employment Court and Court of Appeal applied the test in *O'Connor v Hart*. This holds that a contract is not voidable for mental incapacity unless the other contracting party knows or ought to know of the incapacity or equitable fraud is established.

Leave to Appeal

The Supreme Court granted leave to appeal on the question of whether the test in *O'Connor v Hart* applies in the employment jurisdiction (in particular to agreements certified under s 149) and, if not, what was the relevant test and whether the appellant's agreement should have been set aside.

Further Hearing

After hearing the appeal, the Court considered it was necessary to address whether s 108B of the Protection of Personal and Property Rights Act 1988 (the PPPRA) in fact governed the position. Section 108B had not been referred to by the parties but it requires a court to approve a settlement of claims for money or damages where one of the parties is not capable of managing his or her own affairs. The Court sought and obtained further submissions on this aspect and held a further hearing.

Decision

By a majority comprising Glazebrook, Ellen France and Arnold JJ, the Supreme Court has dismissed the appeal, with the effect that the settlement agreement stands.

The majority held that s 108B of the PPPRA did not apply in this context where the settlement agreement has been certified under s 149. To apply s 108B in the present case would undercut the ERA's central concepts, institutional structures and dispute resolution processes. In particular, it would be inconsistent with the principle of good faith and the protection provided for the integrity of individual choice. It would also not fit at all well with the ERA's focus on promoting mediation as the primary problem solving mechanism and promoting the speedy and inexpensive resolution of employment disputes. Nor would it fit well with the emphasis in the Act on reducing the need for judicial intervention and the roles of the institutions, such as mediation services and the Authority. Finally, there was a strong argument that the approach under s 149 of the ERA is consistent with the supported decision-making model found in the Convention on the Rights of Persons with Disabilities (the Convention).

The majority accordingly agreed with the lower Courts that *O'Connor v Hart* applied. As the Defence Force did not know of the appellant's incapacity, the majority considered the Court of Appeal was correct not to set aside the agreement.

The minority, comprising Winkelmann CJ and O'Regan J, would have allowed the appeal. They did not agree that the ERA's scheme, provisions or purpose required the exclusion of s 108B of the PPPRA. Further, the minority held that s 108B applies even where the incapacity was not known at the time of the settlement. The text, policy and purpose of s108B, comparable English caselaw in a similar context, and New Zealand's obligations under the Convention were said to support this approach. Therefore, on these facts, even though the Defence Force did not know of the appellant's incapacity, the minority considered that the settlement agreement was not enforceable unless and until it is approved by a court.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613