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NOTE: EMPLOYMENT COURT ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF APPLICANT REMAINS IN FORCE.

NOTE: ORDER PROHIBITING PUBLICATION OF THE TERMS OF THE SETTLEMENT AGREEMENT PENDING RESOLUTION OF THE APPEAL REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 14/2020
[2020] NZSC Trans 21

BETWEEN **TUV**
Appellant

THE CHIEF OF NEW ZEALAND DEFENCE FORCE
Respondent

AND **HUMAN RIGHTS COMMISSION**
Intervener

Hearing: 8 September 2020

Coram: Winkelmann CJ
Glazebrook J
O'Regan J

Ellen France J
Arnold J

Appearances: A Douglass and A S Butler for the Appellant
A L Martin and J P A Boyle for the Respondent
J S Hancock for the Intervener

CIVIL APPEAL

MS DOUGLASS:
Tēnā koutou e ngā Kaiwhakawā, ko Ms Douglass toku ingoa. Ko au te rōia mō te kaipira TUV māua ko taku hoa, Mr Butler. May it please the Court, my name is Ms Douglass, I appear as counsel for the appellant with my learned friend, Mr Butler.

WINKELMANN CJ:
Tēnā kōrua.

MR MARTIN:
Ko Martin ahau, kei kōnei māua Boyle, mō te kaiwhakahē. May it please the Court, Martin and Boyle for the respondent.

WINKELMANN CJ:
Tēnā kōrua.

MR HANCOCK:
Tēnā koutou katoa, ko Hancock mō te Kāhui Tika Tangata. May it please the Court, Hancock for the Human Rights Commission.

WINKELMANN CJ:
Tēnā koe. Ms Douglass.

I'll just remind everybody here that there is a name suppression order applying in respect of the appellant, if everybody will try and remember to use "appellant" or the initials. But in case someone should slip, members of the public, you should be aware that the appellant's name is suppressed.

Ms Douglass.

MS DOUGLASS:
May it please your Honour, in relation to the non-publication order, I have spoken with the Crown and by consent if we could clarify the continuation of that non-publication order to include all whānau and iwi affiliations, the town where TUV resides, the location of her employer, the respondent, and other employees that could be identified.

WINKELMANN CJ:
Do you have that written down?

MS DOUGLASS:
No, your Honour, I just really wanted to emphasise that. In fact the Employment Court judgment and subsequent order from Justice O'Regan that sets the name and identifying details –

WINKELMANN CJ:
So that's identifying details should pick that up, you would want them extended to the iwi?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
And is there anything else that's not obviously identifying details?

MS DOUGLASS:
Yes. Her whānau and iwi, the town where she resides.

WINKELMANN CJ:
It would just help if this is written down.

MS DOUGLASS:
Thank you.

O'REGAN J:
We can get it from the transcript.

WINKELMANN CJ:
The town where she resides and…

MS DOUGLASS:
Location of her employer, the respondent, and other employees that could be identified.

WINKELMANN CJ:
Well, you're not seeking suppression of the name of the employer?

MS DOUGLASS:
No, not, it's where the workplace…

WINKELMANN CJ:
Which locale the workplace was in?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
Okay, right. I think those are included within the identified particulars so I'm sure, well, there's no difficulty with that.

MS DOUGLASS:
Yes, thank you, your Honour.

May it please the Court, how Mr Butler and I propose to address the Court in relation to our submissions and reply to the respondent's submissions is first of all I will provide an introduction to this matter and also take the Court through the chronology and some of the background facts, including of course the record of settlement and the expert medical reports that underpin the key findings of the Employment Court. Then in terms of reply to the respondent's submissions I will address the Court in relation to the respondent's proposed test of supported capacity and in reply of course to the appellant's proposed sole functional test which we have characterised as argument one in our submissions. Then Mr Butler will reply to the respondent's submissions regarding the requirement for knowledge of the other party, the so-called second limb of *O'Connor v Hart* [1985] 1 NZLR 159 (PC), and place these arguments within in reply to our arguments two and three, which are the alternative arguments that we have put forward.

WINKELMANN CJ:
Are you saying you're dealing with these matters in reply or…

MS DOUGLASS:
Yes, he'll dealing with those matters in reply and, of course, subject to any indication from the Court, but our proposal is to essentially use the table of contents in the appellant's synopsis of submissions as the roadmap, as it were, in terms of the issues before the Court and using that to benchmark our reply submissions. We haven't prepared a separate outline of oral argument as such, we've just proposed to address these matters topic-by-topic as set out in the table of contents.

So the Court should have of course the appellant's submissions, the respondent's submissions in reply, and of course the Intervener's submissions. There is also a joint chronology, so it is an agreed chronology, which I will use to refer to the facts and the important documentary evidence before the Court.

So my intention now is to address the first part of our submissions by way of introduction – these are paragraphs 1 to 15 of the appellant's submissions – and to introduce this appeal.

Is your Honour happy with that approach?

WINKELMANN CJ:
Yes, go ahead.

MS DOUGLASS:
This appeal involves for the first time consideration of what should be the applicable test for setting aside a settlement agreement by a mediator pursuant to section 149 of the Employment Relations Act 2000 on the ground of mental incapacity. Its importance lies in this Court determining the applicable legal test for setting aside such agreements and to ensure that there is procedural and substantive fairness for people who, because of a mental disability, may have impaired capacity for decision-making. At its heart this case raises policy and human rights considerations of access to justice by employees who are vulnerable by reason of their impaired capacity. The vast majority of claims in the employment jurisdiction are dealt with by way of mediation whereas in this case a private negotiation that is then certified by a mediator.

There are a wide range of mental disabilities that may impair an employee's capacity to effectively participate in decisions such as resolving a personal grievance and ending their employment relationship with their employer. These mental disabilities can include decisions such as a brain injury, dementia, a learning disability or, as in TUV's case, a mental illness that was so severe that she lacked capacity to make decisions about her employment situation.

The incapacity may be permanent or temporary. Here, TUV suffered a severe stress reaction to her employment situation and she later recovered and regained her capacity.

TUV's claim is for unjustified constructive dismissal arising from serious allegations of workplace bullying and harassment, including racial harassment, where she was employed as a [redacted] in a civilian office of the New Zealand Defence Force. From February 2015 TUV suffered severe anxiety, stress and depression arising from what she says was an unjustified performance management process by her employer. Over the following 11 months TUV was on sick leave and she never returned to her workplace. In August 2015 she suffered a breakdown, an acute stress reaction. During this time, in August of that year, her union representative raised a personal grievance on TUV and one other employee's behalf about the bullying and harassment by their managers.

In December 2015 TUV signed a settlement agreement following a private negotiation between her lawyer and the respondent's human resources manager. The agreement was then certified by an approved mediator. Neither TUV's lawyer nor the mediator had met the appellant, kanohi ki te kanohi, face-to-face, only speaking to her by telephone.

The remedies sought include both monetary relief, compensation for humiliation, loss of dignity, and injury to feelings under section 123(c)(i) of the Employment Relations Act but also non-monetary remedies, that is, restoration of TUV and her whānau's mana, including recommendations by the Court to prevent further racial harassment in the respondent's workplace. This is a specific remedy under s 123(d) of the Act. The claim for racial harassment relates to TUV being the only Māori in this office, a civilian office, whereby she alone and not her co-workers was required in an undignified manner by one of her managers to use a specific wharepaku, a toilet. These remedies are, of course, set out in the statement of claim.

These remedies and the section 149 process itself reflect the specialised nature of the employment jurisdiction, its objectives, including the duty to act in good faith and to recognise the inherent imbalance of power between the employer and employee. The terms of the section 149 agreement have been

described as unremarkable and conventional. That is not the point. For TUV they are unfair. It is the formation of the agreement, not its substance, that counts. Here, TUV was denied access to these remedies and to the dispute resolution process because of her incapacity and her inability to consent to and enter into the settlement agreement.

I will now turn to just a brief summary of the Employment Court and Court of Appeal findings.

The grievance, TUV's personal grievance, which is referred to as "a statement of problem", was commenced in the Employment Relations Authority. Subsequently there has be a de novo challenge in the Employment Court, and that's where I, as counsel, was instructed for TUV. There has been an appeal then to the Court of Appeal on this preliminary issue of whether the agreement can be set aside for incapacity. Importantly, the Employment Court made findings based on a psychiatrist's assessment that TUV lacked the mental capacity to enter into the agreement and to instruct her lawyer. A section 149 agreement may be set aside on the grounds of mental incapacity. Those findings were upheld in the Court of Appeal and the Court of Appeal at paragraph 3 of its judgment accepted that if a settlement agreement is set aside because the employee lacked capacity to enter into it there are no agreed terms of settlement to which section 149 could apply.

O'REGAN J:
The Court of Appeal had to accept the factual finding of the Employment Court, did it? It didn't have jurisdiction to question them?

MS DOUGLASS:
Yes, that's correct. And the Court of Appeal also accepted that incapacity could be a ground for setting aside a section 149 agreement.

In the Employment Court Chief Judge Inglis raised the question of whether section 149 acts as an impenetrable shield to the pursuit of claims and whether the laws as generally applied to mental incapacity applies to

employment settlement agreements. Her Honour felt, in her words, "constrained by the common law two-limb test in *O'Connor v Hart*". The second limb of this test required TUV to show that the respondent had actual or constructive knowledge of her incapacity. Her Honour held that the respondent did not have such knowledge. The Court of Appeal upheld the Employment Court judgment on that point.

If I could take you to volume 1 of the bundle, the Court of Appeal judgment is at tab 4, and her Honour Chief Judge Christina Inglis judgment is at tab 10. And the key passages from the Chief Judge commence at paragraph 65, which is at page 93 of the bundle, through to 66, 67, 68 and 69, and those are the passages that are in fact repeated in the Court of Appeal judgment. But it reflects the constraint that the Judge felt in terms of being confined to the contract law rule in *O'Connor v Hart* that not only a person must lack capacity to enter into the contract but also the other party ought to either know or ought to know that is the case.

So the question of law before this Court are set out in paragraphs 9 of our submissions and of course in tab 1 in terms of the basis upon which leave has been granted. And to summarise the appellant's response to these questions the appellant submits, firstly, the two-limb test in *O'Connor v Hart* does not apply to section 149 agreements. Secondly, the correct test is can the employee show on the balance of probabilities the existence of mental incapacity, that is, they lacked capacity to consent to and enter into the section 149 agreement. If yes, the section 149 agreement should be set aside. The Court need not look any further.

Thirdly, the absence of knowledge, actual or constructive, by the employer is not a bar to the employment institution's power to set aside a section 149 agreement and this forms the basis of what we have called argument 1 and it is the primary submission of the appellant that there should be a sole function or test as the basis upon which an agreement can be set aside for incapacity.

GLAZEBROOK J:

Can I just check, how does that fit in with supported decision-making which is obviously a total plank of the disability convention that people shouldn't be written off effectively in terms of their own affairs but should be supported in their decision-making?

MS DOUGLASS:

Yes, we have addressed this in our submissions and, of course, the intervener, Mr Hancock, will be addressing the Court. The appellant's submission in relation to supported decision-making is that, of course, what happened here was that there was no supported capacity or supported decision-making of TUV, so we already have a finding of incapacity and that the support that occurred on the facts of this case, for example, the fact that TUV had a lawyer, was of no assistance to her because the Court found she lacked capacity to instruct her lawyer. Similarly, TUV's son who was involved in helping to relay the lawyer's advice to TUV also, whilst he used his best endeavours, in the end TUV still lacked capacity and so therefore this case is an example where TUV has not been supported in the exercise of her legal capacity.

GLAZEBROOK J:

Are you saying you could never be supported in those circumstances because that doesn't seem to fit with the convention, with respect? So what you're saying is because she lacks capacity to engage with a lawyer, that can't be supported decision-making, or her son or anybody? So effectively you're denying her any of the ability to make decisions and, sensibly, not prolonging matters and coming to a sensible conclusion and without having employers effectively requiring everybody to have capacity assessments before they even enter into negotiation might actually be the best outcome, mightn't it, for a disabled person?

MS DOUGLASS:

The point here is that TUV didn't have support for the exercise of her legal capacity, that of course the CRPD and, in particular, the Convention on the

Rights of Persons with Disabilities, provides for, in Article 12, that everyone should be equal before the law and, secondly, in Article 13 that they should have access to justice. Those kinds of supports were not offered to this plaintiff, the appellant. The –

GLAZEBROOK J:
What I'm really asking you is what then should have been offered to her in this negotiation.

MS DOUGLASS:
So in this case it starts with the employer, because although TUV was referred to a neuropsychologist that report was not acted upon and in relation then to the –

GLAZEBROOK J:
Well, what do you say should have occurred after that?

MS DOUGLASS:
That what should have occurred is that as they got closer to negotiating the settlement agreement that first of all TUV's state of health and wellbeing should have been checked, and there were plenty of flags through the GP reports and her medical certificates that that was the case –

O'REGAN J:
Who should have checked it?

MS DOUGLASS:
So the, well, the employer had – this appellant was on sick leave for a period of, it was actually 11 months before the settlement agreement was signed. And of course she had medical certificates, but these medical certificates – and I'll take you to them shortly – indicated the severity of her mental distress from her employment situation, that she was in fact suffering from anxiety and depression to a very severe extent. So that in itself she have been a flag or a trigger to –

O'REGAN J:

You said that somebody should have checked on her. I just asked you who you say should have.

MS DOUGLASS:

Well, the starting point of course was, would be the –

O'REGAN J:

Well, just answer the question.

MS DOUGLASS:

Yes.

O'REGAN J:

Who should have done it?

MS DOUGLASS:

Well, the employer, and then secondly the lawyer.

WINKELMANN CJ:

Can I just say – oh, carry.

ARNOLD J:

Sorry. I was just going to say TUV had a support person, didn't she?

MS DOUGLASS:

In one sense, of course, her son –

ARNOLD J:

No, no, I'm not talking about her son, I'm talking about her support person.

MS DOUGLASS:

Oh, one of the co-employees, yes. And she was in fact criticised for taking that person to her psychological assessment. But, yes, so there was a measure of informal support. But when it comes to it, on the facts of this case

that was of no assistance to her because, as Dr Levien, the psychiatrist, found, at the material time she lacked capacity –

ARNOLD J:
But where in the –

WINKELMANN CJ:
Can I just ask, is your – A, because you're slipping between issues that go to whether or not the employer should have known she lacked capacity and also issues that go to their duty of care toward her as an employer and the critical question that Justice Glazebrook's asked you, which is what should she have had at the time, and I had understood from your submissions that she needed support from people who understood her lack of capacity, because the support you get when people don't understand your lack of capacity is different to the support you get when they do.

MS DOUGLASS:
Yes, there are – the way the system is set up at the moment, TUV should have had a litigation guardian. And in the case of *S v Attorney-General* [2012] NZHC 661 Justice Ronald Young highlights that in fact the CRPD, the Convention on the Rights of Persons with Disabilities, can be interpreted as being, the system in the High Court Rules and the appointment of a litigation guardian can be interpreted as compliant with the CRPD and making, adopting reasonable accommodation.

GLAZEBROOK J:
Well, that's taking away the decision-making of the person though, not supported decision-making, at least in the High Court Rules. So that's why I was asking you what should have happened here. Because my impression was you said if she lacked capacity to make an agreement that's the end of it. So now you say, do you, that if she had a litigation guardian who took over that decision-making without reference back to her because she couldn't instruct them, that that would have been fine? It just doesn't seem to me – I

might put it out there – that doesn't seem to me to be supported decision-making.

MS DOUGLASS:
No, no. I mean, to answer your question, your Honour, there was no supported decision-making that reaches the expectation of the CRPD –

WINKELMANN CJ:
No, what Justice Glazebrook's asking you is are you sure that there is just this dichotomy between an avoidable decision that she makes and a decision made with a litigation guardian, isn't there some sort of level of support between those situations that means that she can enter into binding contracts? Because you've just answered when I asked you that question about what level of support should she have got, you've just answered that she should have got a litigation guardian, which is taking away her decision-making power.

MS DOUGLASS:
Yes. So to answer the first point, the legal system as it stands has a binary view which is that if the person is unable, lacks mental capacity, then they are required to have effectively a substitute decision-maker. There is really no sort of halfway house in the sense that whilst the CRPD requires that support measures are put in place that to support people wherever possible to make decisions for themselves, that clearly didn't happen here, and the employer, the lawyer and the mediator in fact, operating within the regime that we have under the Employment Relations Act, did not provide the necessary support. I mean, one obvious support would be if the extent of TUV's incapacity had been picked up by either the employer or the lawyer or the mediator, then she could have been treated for her mental illness and been put back in a position to have made those decisions and to have entered into a mediation process. But what happened was, despite attempts by the son and the lawyer, unwittingly, not realising the extent of her client's disability, that those supports didn't transpire into TUV having the necessary or requisite capacity. It was only some nine months later that she went to see the psychiatrist because the

lawyer supported her obtaining disability insurance that anyone actually looked not at her capacity but the extent of her unwellness at the material time, and then it was following that a year later when TUV's son assisted TUV in actually having a capacity assessment so retrospectively we were able to say based on the medical or psychiatric evidence that at that time she lacked capacity.

So the question also of how the principles of the CRPD and how they ought to play out here, perhaps these are matters of policy for the employment institutions to look at in terms of what are support measures under Article 12(3) that a state party should provide and how should they be balanced against Article 12(4), which is that there should be necessary safeguards also to protect the interests of people who have impaired capacity? I'm not sure if that…

GLAZEBROOK J:
It doesn't really assist me, because what seems to be the submission is that you have to have a litigation guardian, which I suppose you say, I think, that there already is a court process underway, given the grievance has been filed, and therefore that would work. But then you say because there's a binary system that takes away decision-making, and that doesn't come within supported decision-making as far as I can make out, and that somebody who's in this position would actually have to wait around unwell for a long time before they're well enough in order to actually enter into a mediation process, which wouldn't seem to me to actually enhance recovery.

MS DOUGLASS:
No. The supported decision-making. So the support that TUV required in this case, in my submission, comes from the statute itself. There are positive obligations on an employer to act in good faith, to recognise the imbalance of power, to be constructive in their relationship. On the facts of this case there was very little, no in effect direct communication with TUV. So no one stopped to pause to look at the extent of her unwellness and no one stopped

to look at whether, in fact, she had capacity to enter into this negotiation process.

ELLEN FRANCE J:
So what are you saying the employer should have done then when you say they should have made these checks as to her state of health? What would that have involved?

MS DOUGLASS:
So there were a number of opportunities for the employer acting on the medical certificates and, indeed, the neuropsychological report which had earlier in the year been obtained to essentially require a further assessment from either the neuropsychologist or someone else to essentially assess her capacity and ask what supports does this person need to be able to exercise their legal capacity? Is she, in fact, in a position to enter into this negotiation with her employer? And so that would require a capacity assessment, on the facts of this case, because of the extreme nature of the illness. Employers frequently and will obtain medical reports about stress in the workplace and, indeed, bullying and harassment cases, sadly, they're not that uncommon. The point here is the flag or the trigger for this employer was to act on those medical certificates and take the further step to assess whether TUV had capacity and what supports? Part of that process is identifying what supports would be necessary.

ARNOLD J:
But the employer did get the neuropsychological assessment and that did conclude that TUV was a resilient, intelligent woman with a number of strong social supports and identified two sort of areas of difficulty in relation to cognition, but it did recommend that there be negotiations about TUV's future. So the employer had that in mid-June or late June, some time like that.

MS DOUGLASS:
That's right.

ARNOLD J:

Now that was a step the employer took. It was a positive report in the sense that I've just described. So you're saying that things happened after that, what, around the time she raised the grievance?

MS DOUGLASS:

Yes. So that was in June 2015 and it was in August 2015 that she had the acute stress reaction which has been described as a breakdown.

ARNOLD J:

So did she have capacity to raise the grievance?

MS DOUGLASS:

The grievance was raised at that time once that report was put in the hands of the union representative, Mr Drummond, and I can take you to that grievance in the papers which perhaps if I –

ARNOLD J:

No, I've looked at it, so unless you want to show us something about it…

MS DOUGLASS:

Yes. Well, I mean the point was that, of course, that was a 27-page letter with the heading "Bullying and Harassment" and it related to two employees, but leaving aside the second employee. So that union representative had said that he was representing TUV at that point and had been involved in earlier discussions around the so-called performance issues which had been identified by him as having a more disciplinary nature to them and he raised clearly that, so that is the statement of problem, that is the grievance that is raised at that time.

But to answer your first question, which was around the timing of this, so the actual agreement was signed in December, so another six months. So it was available to the employer to go back to Dr Lea Galvin, the neuropsychologist, who had in fact done a cognitive test as part of her overall assessment, and

she had identified that there was workplace stress and that there was some mild memory deficit. It was always open to the employer to go back to the neuropsychologist and ask for a capacity assessment; that didn't happen, nor – indeed the collective employment agreement makes various provisions for essentially directed medical reports. So I can take you to bundle, there is the collective agreement…

WINKELMANN CJ:
Is your submission then that even if the respondent had done all these things, it could still not have reached a binding agreement with the appellant unless it had the Court appointment someone to represent her interests or had – well, I don't know if the Employment Authority has jurisdiction to appoint someone but…

MS DOUGLASS:
So, yes, in answer, yes, because as the law stands we do have essentially a binary approach in the sense that once someone is established as lacking capacity then that does require a decision-maker to be appointed and –

O'REGAN J:
And do you say the employer had to apply to the Employment Court for the appointment of a guardian?

MS DOUGLASS:
No. The employer's duty was of course, in my submission would be, was to first of all follow through and make due enquiry about the appellant's capacity, whether she was in a position and what support she needed to enter into these negotiations. To answer your Honour Justice Winkelman's question, the Employment Court Rules specify that if there is no particular rule that applies to them then the High Court Rules are by default the rules. So we are dealing with the High Court Rules here.

WINKELMANN CJ:

So what Justice O'Regan and I are trying to get from you though is how would this proceed? Because they'd make enquiry about what she needed but whatever she said she needed it wouldn't be sufficient because she needed a litigation guardian.

MS DOUGLASS:

Well, that would only follow if there was a capacity assessment done at that time which confirmed that she lacked capacity. Then under –

GLAZEBROOK J:

What say the assessment, which I'm sure it probably would in many cases say: "Well, she's suffering from major stress, she has some issue or some difficulties in undertaking this process, she would especially have difficulties in meeting face-to-face with the employer for obvious reasons and the support that she might need is to have somebody there who's going to act as intermediary to have communication assistance because she may not understand this, that and the other," but you're saying: "No, even if they had a report like that that said she was perfectly capable, given that assistance of entering into it, because she lacked capacity she'd have to have a litigation guardian whereby in fact the decision-making would be taken away from her"? Is that – as I'm just having difficulty with the submission, that's all.

MS DOUGLASS:

Yes, under the *system*, if we can call it that, as it stands, that's the only position that a binding agreement can be entered into –

WINKELMANN CJ:

In fairness to you, I don't think that is what you're saying. I think what you're saying – because you're not dealing with a hypothetical where she could have capacity if she had support but she didn't have capacity because it's a retrospective analysis. You're saying if she's found not to have capacity she needs a litigation guardian but if the report is she would have capacity if she had the support she could proceed with the support.

MS DOUGLASS:

Yes, sorry, perhaps I…

GLAZEBROOK J:

But I'm not sure that's right because if you can't instruct a lawyer I can't see quite how you can instruct your support person.

MS DOUGLASS:

So I'm trying to clarify the distinction here between incapacity and mental illness. So in this case TUV was clearly unwell and the supports weren't available to her in terms of either correcting or treating that unwellness or along a spectrum because –

GLAZEBROOK J:

Along what, sorry? I just didn't catch what you said. A spectrum?

MS DOUGLASS:

Sorry. There is a spectrum of mental illness. One way of thinking about this is a two-step process. First of all, clearly, TUV was mentally unwell and there will be many employees in her position who will suffer mental distress, hence my comment that it's not uncommon for employers to act on that and get fuller medical certificates and understanding of the extent of the unwellness, and there is, of course, opportunity to support that person in getting better and those things didn't happen because they didn't act on the neuropsychologist's report and they didn't act on the raising of the personal grievance which clearly set out the stress that TUV was experiencing. But the second step is that if the severity of the illness is – if the illness is so severe then that should be a flag, a trigger, for obtaining a capacity assessment.

ELLEN FRANCE J:

How does the employer assess that? I mean I – are you saying here when you have a medical certificate that says she can't come back to work for another six months and there's another one, is that sufficient to trigger the obligation on the employer?

MS DOUGLASS:

In my submission, if we could actually go to that September 2015, there is a one-liner, as it were, medical certificate.

ELLEN FRANCE J:

Yes. No, I've seen that.

MS DOUGLASS:

So if I could just take – if I can just actually take you to the chronology, in fact. This is quite a full chronology and I've actually cited some of the key points out of the medical certificates, but if you go to tab number 16 on the second page at 9 September 2015, in volume 4, the light pink bundle at page 79, it states that: "TUV is still experiencing significant disability resulting from stress in the workplace and will not be fit to return to work for the next six months." If you place this certificate in context, now going back in the timeline, but if you go back to, on the chronology, 17 April 2015, that appears at page 32 of the same bundle. So this is just a few months into TUV leaving the workplace on stress leave. The GP says: "In my opinion TUV is medically unfit for work due to work-related stress," so there's a clear link there, "causing moderate to severe depression and anxiety. I feel that she needs a long period of stress leave, at present three to six months, however this may be longer." That is a very strong statement from a GP. So, to be fair, the employer did refer her to neuropsychologist and that report is set out at page 34, and that's on the 19th of June, and his Honour Justice Arnold referred to that. And the recommendations of course at the end of that, that the parties strongly recommend that they negotiate a way forward and that it wasn't appropriate for her to be returning to that work in that office, of course that doesn't preclude an employer's duty to consider what might be another appropriate work setting for this employee.

ELLEN FRANCE J:

Could I just check, Ms Douglass, if in July 2015 the negotiations had gone ahead, which was as Dr Galvin recommended, are you saying there would have been no difficulty then, in terms of capacity I mean?

MS DOUGLASS:

On the face of it, no, because Dr Galvin, she finds that her intellectual functioning is intact and there are some minor *deficits*, so-called. But of course her assessment wasn't done for that purpose, it was done in terms of a sort of a wider neuropsychological approach in terms of how the employee was coping in the workplace. But, yes, that could well have been sufficient there and then for TUV to have embarked on a negotiation. It's around that time – at page 47 – that this letter, the raising of the personal grievance made by Mr Drummond, does take a fairly strident approach in terms of making it very clear that there were so very serious issues in the workplace. He was also critical of – at paragraph 83 and following – he was very critical of the employer's interpretation that Dr Galvin's report was such that TUV could simply go back into the same office, which was rejected. So that's at paragraph 148 of his letter, page 64, saying that a comprehensive report was produced and, at the top of 65, that one of the managers had said did not appear "to be anything untoward in the report, we are looking at ceasing the paid leave and a return to employment". Well, that is not what was recommended by Dr Galvin, she was very sensitive to one of the factors being the stress that TUV was experiencing, and that's highlighted through that report. So it was a bit of an open question, I suppose, at that point.

The point is that a week later was the acute event as recorded by the GP and, of course, Dr Levien in his reports, which is that in late August 2015 TUV had this acute stress reaction and she was diagnosed with anxiety disorder and at the material time of the settlement agreement she was also, of course, in a state of severe depression. The point about all of this is that capacity is decision and time specific. So faced with the 9 September GP certificate, which is at page 79, that bald statement that she's not fit to return to work for six months and she has a significant disability, surely, in my submission, that is a trigger to take the next step which was to have her capacity assessed, and, in answer to Justice Glazebrook's question, that can form part of supported decision-making in terms of what advice can be given by the GP or the psychiatrist as to what supports could be given to put this employee in a position to properly and fairly enter into a negotiation process.

ARNOLD J:

So shortly after this the lawyer was engaged around the beginning of September?

MS DOUGLASS:

Yes, that's right.

ARNOLD J:

So what should the employer's response to that be? You've now got a lawyer who's an independent adviser and herself has professional obligations in relation to these issues. What should the employer do? Say to the lawyer: "Well, there are capacity concerns," or – in other contexts, depression contexts, this Court has taken the view that the fact that somebody is represented by an independent lawyer effectively means that the party, the equivalent of NZDF in this case, is entitled to rely on the fact that the independent lawyer will do the job appropriately. I'm just wondering how that analysis applies in this context.

MS DOUGLASS:

In this case, of course, the finding is that TUV lacked capacity to instruct her lawyer. So in common law the lawyer's retainer is at an end, and as Lady Hale has said in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933, which I was going to come to a bit later, but which is that essentially the policy behind, in the UK, the compromise rules, and we have similar but there are some differences obviously in New Zealand, is to not only protect the parties, the incapacitated parties, from themselves, but, put rather bluntly, their legal advisers. So the fact that a person has a lawyer doesn't axiomatically mean that that person is protected in terms of being unable to instruct them and/or –

ARNOLD J:

My point is slightly different. I mean the fact that the employer knows that there's an independent professional who has her own obligations, one of which goes to the competence or the ability of the client to give her instructions, it's that fact that I am raising, I guess.

MS DOUGLASS:

Yes. So this case does raise issues around the duties and obligations of lawyers in terms of the lawyer in this case was summonsed to attend the Employment Court to give the evidence to find out what actually happened and she, of course, accepted that she didn't realise that her client lacked capacity to instruct her and she also accepted the evidence, of course, of Dr Levien which was that at that time that was the case and that was the finding by the Court. But what it demonstrates in this case is that it provided no protection, no support. So many of the cases are about whether or not the person had that opportunity for independent legal advice but in this case that advice had no effect. In fact, Dr Levien said that she felt, TUV felt under pressure, in fact, because she was on one level being advised by a GP, you know, to remove herself from the workplace environment and on another being pressured into making a decision as to whether she should agree to this settlement agreement, not also being able to weigh up the option which would be, of course, she was effectively waiving her right to bring her personal grievance.

ARNOLD J:

So all I'm trying to get at is that the employer cannot rely on the fact that the employee has a lawyer? They will need to satisfy themselves that the lawyer has satisfied him or herself that the employee has the capacity to instruct the lawyer?

MS DOUGLASS:

Yes, and as Justice Priestley in *Corbett v Patterson* [2011] 3 NZLR 41 (HC) which was the High Court decision before the Court of Appeal decision, underscores that and was upheld, of course, in *Corbett v Patterson* [2014] NZCA 274 which the scheme of this process is to in fact protect both parties. So it's about – an employer has an interest in having a person with the requisite capacity entering into a binding agreement and so it's as much about protecting the employer's interests in getting finality as it is the employee's in terms of what's – and that can be interpreted, of course, as to what support they might also need to be in a position to be fairly negotiating the agreement.

So that, of course, also applies to the lawyer as well. So this lawyer was instructed not only to do the negotiations around a potential exit or settlement agreement but also to file an insurance claim and that insurance claim was through the employer. There were two, in fact, disability and income protection, and all over those applications was the fact that this appellant, TUV, was suffering from a severe disability. They are referenced here in the – that all occurred, in fact, around the time of the settlement agreement. So if you go to 22 October 2015 and at volume 4 at page 16 –

WINKELMANN CJ:
Are we going off on a tangent here because we're not considering – how is this relevant, the com – how well the lawyer performed? Are we – it just seems a little bit peripheral because the lawyer is not represented, is she?

MS DOUGLASS:
I suppose in terms of what an employer should do, I mean in this case there was another flag essentially that the fact that because of her – the significance of her disability was such that she was eligible for their disability and income protection insurance, and so the – I mean in this sense the employer, as it were, happily supported that application, didn't have to obtain any further, or didn't obtain or need to or wasn't required to provide any further psychiatric evidence in support of that, but that occurred nine months later because Dr Levien, the psychiatrist in this case, was in fact, his first report, was in fact for the insurance purposes.

WINKELMANN CJ:
So the employer supported the application for disability insurance?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
Where is that in your chronology?

MS DOUGLASS:

At 22 October 2015 the actual – so the lawyer was instructed to make those applications because in her interactions with the human resources manager she became aware that TUV was eligible for this insurance.

WINKELMANN CJ:

So she was instructed by the appellant to make the applications?

MS DOUGLASS:

Yes.

WINKELMANN CJ:

And she learnt of the insurance from the HR manager at the respondent?

MS DOUGLASS:

It was a policy that was available through the respondent, yes.

ARNOLD J:

I thought the son or TUV had raised it initially with the lawyer and the lawyer had made enquiries –

MS DOUGLASS:

It might have gone that way, yes.

ARNOLD J:

That's right.

MS DOUGLASS:

I suppose essentially the son was dealing with the lawyer in terms of getting her under way to negotiate the settlement agreement and yes, the insurance policies were raised. So the lawyer here at page 168 states that "TUV has been unable to work since 17 April 2015 due to severe anxiety and depression".

GLAZEBROOK J:

What's this 168 we – sorry…

WINKELMANN CJ:

168 of what, Ms Douglass? 168 of what? What are you at? You were at page 168 –

MS DOUGLASS:

I'm sorry. I'm still at the same volume, volume 4, and these…

GLAZEBROOK J:

You'll have to give me the actual number, please.

MS DOUGLASS:

168, 301.0168. So the chronology is hyperlinked as well.

WINKELMANN CJ:

So is that the 22nd of October on the chronology?

MS DOUGLASS:

Yes.

ELLEN FRANCE J:

And where do we see the employer's support for that?

MS DOUGLASS:

It was a policy that was available through the New Zealand Defence Force and it was brought to the attention of the lawyer who duly progressed those applications.

WINKELMANN CJ:

And she refers to the HR person in her letter. It's the second line. That's the extent of it, isn't it, I think?

MS DOUGLASS:
Yes.

ELLEN FRANCE J:
So is it clear that the employer would have known that she was claiming the insurance?

MS DOUGLASS:
Yes, yes, it is.

ELLEN FRANCE J:
So where do we see that?

MS DOUGLASS:
So I'd have to find it. It's probably in the – there's quite extensive telephone notes between the lawyer and the human rights manager.

WINKELMANN CJ:
The HR manager?

MS DOUGLASS:
Sorry, the HR manager, yes, and actually in the course of the hearing in the transcript Judge Inglis, we actually – some of those were actually sort of dictated because they are quite hard to read on this, the handwritten notes.

ELLEN FRANCE J:
Yes. No, I –

MS DOUGLASS:
But I can come back to this and –

ELLEN FRANCE J:
No, no, that's fine.

MS DOUGLASS:

Yes. But no, these were policies available. There's sort of a passive sort of acceptance sort of approach in the sense that as part of this exit arrangement the employer here had these insurance policies which on the one hand they're prepared to accept that TUV suffered such a severe disability and was eligible for them but on the other hand didn't take what the appellant says is any positive steps to act on the medical reports which, as I say, it's common to get medical certificates, it's a second step once the degree of the disability is apparent to then follow up with a capacity assessment, and so that would have to be an assessment in this case that was relevant to, at and around the time of the agreement which here was December 2015. So it was some months later than the initial neuropsychological assessment.

ELLEN FRANCE J:

If the employee refuses to undergo the capacity assessment, what's the effect of that for the employer?

MS DOUGLASS:

Well, in this case under the Collective Employment Agreement as an example, there can be an ability to require an assessment. So at volume 4, page 1, so again in the chronology 301.0001, is the actual collective agreement, and under 7.11 there is an ability for an employer – this is quite a common clause for an employer to have a medical examination – and there is an ability also of dismissal for incapacity under 10.6, and was pointed out that this would only, if those hurdles, as it were, were overcome by the employer, that would have only entitled to employee to one month's pay [redacted]. So this, and in a way is quite nicely summarised by the lawyer in her 1 October 2015 email, and that's at volume 4, 301.0145…

O'REGAN J:

It's pretty much a blank page on ours.

GLAZEBROOK J:

Yes, I haven't actually got it on here.

ARNOLD J:
Is it 0147?

MS DOUGLASS:
Oh, yes, I'm sorry, that's a typo there, 0147. Well, no, sorry, I'll have to find – so it's actually 301.0138, and that's shows in the chronology at 19, 1 October 2015.

So this letter was in fact provided to Dr Levien in terms of his final report and, in particular, whether TUV had capacity to instruct her lawyer, which he described as "technical" and "probably too much information" in terms of the kinds of decisions and the options that she needed to be considered. But at page 140 the lawyer outlines the ability of an employer to cry "halt", and this is not an uncommon situation with sick leave, and points out this clause, 7.11, and based on this: "NZDF may require you to undergo a further medical assessment and if such assessment states that you are unable to return to work in the near future it may take steps to terminate your employment on medical grounds." So that was acknowledged. In fact, over the page she says, at page 141: "Given your most recent medical certificate, I consider the NZDF will take steps to commence this process." So she outlined various options and was thinking that that would probably be the path that would be pursued, but in fact it wasn't because she got into discussions about essentially the termination agreement. And the net effect of all of that on these facts is that there was no appropriate medical assessment done at that time which confirmed whether or not TUV had capacity to enter into the agreement.

WINKELMANN CJ:
Okay, so where are we at with your submissions?

MS DOUGLASS:
Right. Well –

GLAZEBROOK J:

Had it been done one month's notice would have, it would have been grounds for termination and one month's notice, is that…

MS DOUGLASS:

Potentially it could have been. Of course that assessment wasn't done at that time.

WINKELMANN CJ:

That also doesn't answer the personal grievance, does it?

MS DOUGLASS:

Sorry?

WINKELMANN CJ:

It doesn't answer the personal grievance.

MS DOUGLASS:

No, no, well, that's the whole point about all of this is that, as I've outlined in my opening submission, that the personal grievance here seeks other remedies. Very importantly, it seeks not only compensatory remedies for –

WINKELMANN CJ:

Yes, that's not – I don't think we're going to…

MS DOUGLASS:

Yes, yes. So that is the essence of the employment jurisdiction and, also indeed, the mediation process that is available. Because there are other remedies that are often offered within this context and we have here the union representative saying: "An apology would be nice." So, I mean, these are all very powerful parts of the process.

WINKELMANN CJ:
Yes, but that not what I was saying. The contractual right to terminate doesn't mean that you'd be able to do it without recrimination, because of course the personal grievance would continue on, that was my point.

GLAZEBROOK J:
Well, and the settlement was of the personal grievance and could have included these other remedies as well, in fact.

WINKELMANN CJ:
Yes.

MS DOUGLASS:
Yes.

WINKELMANN CJ:
And there's nothing to stop anybody agreeing to include other remedies in a settlement agreement.

MS DOUGLASS:
So in this case the employer denies that the raising of the person grievance was – says that it was out of time. There's actually no written correspondence here to indicate that they in any way formally acknowledged that personal grievance letter of the 27th of August, or the 18th of August –

O'REGAN J:
Does this matter though? I mean, the question we're trying to decide is how does the *O'Connor v Hart* jurisdiction apply in employment.

MS DOUGLASS:
Yes.

O'REGAN J:
You just seem to be completely enmeshed in the detail in relation to matters that the Employment Court has already made findings on that aren't being

challenged and can't be challenged. So don't we need to get on to the point that the Court's actually given leave for?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
But I think we do, and to be fair to you, Ms Douglass, we have taken you into the details. But it is time, I think, to move on to the next, as Justice O'Regan says, move on to the…

MS DOUGLASS:
Yes. Just effectively we've moved on to the background facts. There's just a couple of other documents that I should just take you to now. The first of course is the record of settlement agreement itself. This appears in volume 5 at page 302.0251. So this is the section 149 agreement. I'm sure if you have any questions – and you'll see at page 252 that the standard statements that's put in there under section 149(3) that "the settlement is final and binding" and "except for enforcement purposes" it can't be brought back to the Court, and the other provisions. Section 149(4) of course relates to penalties and enforcement on that basis. And on the third page at 302.0253 is the mediator's certification as required under section 149(3) of the Act.

In that same bundle are the three reports from Dr Levien. The first is – and these are all cross-referenced in the chronology, but just to take you to them. So the first one, 25 August 2016, is 302.0258, this is called the "first report", this was the report for the insurance company.

WINKELMANN CJ:
Sorry, what date is it?

MS DOUGLASS:
302.0258.

WINKELMANN CJ:

Right, I'm working with the chronology, (inaudible 11:20:31). So what date is it?

MR BUTLER:

Entry number 28.

WINKELMANN CJ:

Thank you.

MS DOUGLASS:

Yes, so number 28 in the chronology, 25 August 2016, and the hyperlink is 302.0258. Importantly at page 262 or page 5 of his report, at that stage Dr Levien highlights that, about the fourth paragraph down, that, well, firstly the second paragraph down, the history "indicates that workplace stress was the major factor in the precipitation of these symptoms." And then the further paragraph down, includes "stressors associated with regards to her employment and financial contribution to the family" and also then: "I was unable to identify any major pre-existing vulnerability factors with regards to her anxiety symptoms. She has no previous psychiatric history," essentially confirming that there was no other confounding factors in terms of her state. So that was the first report that was done simply to confirm the ongoing insurance because of the significant disability.

Then at page 308.0265, which is 30 of the chronology, is the so-called "second report", and that was obtained, this is when the son, TUV's son, raised, had filed the personal grievance in the Employment Relations Authority and went back to the psychiatrist, this report, and this is the opinion reached that because of the significant episode of depression and the ongoing anxiety symptoms that at that time TUV lacked capacity to sign the agreement in question, and that's all set out in the chronology and it's as cited in fact by Judge Inglis in her judgment.

And then thirdly, at the chronology, the third report is at number 35 of the chronology, 30 June 2018, and that report appears at 302.0265, and that is dated 19 May 2017. So that was obtained for the purpose of the challenge in the Employment Court and that was when I, as counsel, was briefed and I asked Dr Levien to not only review his opinion on capacity to enter into the contract but to also instruct the lawyer, and that third report therefore is the opinion that, particularly as summarised on page 268, which is page 4 of his report, that she was unable or lacked capacity to instruct her lawyer for the purpose of compromising these proceedings. And that also was cited by Judge Inglis in the judgment.

ARNOLD J:
I think you're on the wrong pages.

O'REGAN J:
Yes, the report, the 268 is actually the second report. The third report starts at 269.

MS DOUGLASS:
Oh, sorry. I'm one report out, my apologies. So that's 30 June 2018, that makes sense. So that's when the Employment Court challenge was filed.

And the points as cited by Judge Inglis in her judgment appear at page 275 and 276 of the bundle, so at the very end of that. And in that at that penultimate paragraph on page 275 Dr Levien highlights that because the lawyer didn't meet TUV face-to-face but spoke to her and her son on the phone and also corresponded by email, in these circumstances it would have been very difficult for the lawyer to grasp the extent of TUV's cognitive impairment and functional ability to actively participate in her claim against her employer. And these points of course were reinforced in the cross-examination of Dr Levien which I could take you to there…

WINKELMANN CJ:
I think that's all right. Because I think we need to get on to the issue that's actually on, the appeal, which is the legal question.

MS DOUGLASS:
Yes. Are there any further questions in terms of the background facts and findings?

So what I propose to do now is address the respondent's proposed test of supported capacity that has been raised in the respondent's submissions in response to argument one, or the appellant's primary submission that there should be a sole functional test.

O'REGAN J:
Don't you need to make your case first before you respond to theirs?

MS DOUGLASS:
I'm happy to do that.

WINKELMANN CJ:
I thought that you were going to deal with reply to the respondent on reply, that's why I checked it. It just seems quite a confused way to do that. Is Mr Butler going to deal with your argument on the test?

MS DOUGLASS:
No, no. So if we just go to the table of contents, perhaps at the starting point here, I will deal with the appellant's proposed test in terms of what we've called the "modern approach to mental incapacity", and then as part of that I will reply to the respondent's proposed test.

WINKELMANN CJ:
Oh, for mental capacity?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
All right. So you're finishing at page 13 of your submissions. I think we'd better get a clip on then, hadn't we?

MS DOUGLASS:
Yes.

WINKELMANN CJ:
Right, you move on then.

MS DOUGLASS:
All right. Well, essentially in paragraph 16 to 36 of the appellant's submissions we have set out the appellant's proposed sole functional test that ought to apply, as it does in our submission, across the law in the civil jurisdiction. This is the appellant's primary submission and preferred approach. And at paragraph 12 of their submissions we have set out the test of mental incapacity as being one which is based on the Mental Capacity Act 2005 (UK) in the UK, section 3, and, as is pointed out further in our submissions, that this has been applied in New Zealand legislation and in case law. But it is a simple, straightforward, functional test, it was the one that was applied in *Corbett v Patterson* in terms of capacity to litigate and it essentially rests on the four abilities or inabilities, that is, if the person is unable to understand the information relevant to the decision or to retain that information or to use or weigh that information as part of the process of making the decision or to communicate the decision. As applied to the – and we've outlined in our submissions why that is the modern approach, there is a presumption of capacity, capacity as decision- and time-specific, and a functional approach is taken to the applicable legal test. Those matters are agreed by the respondent and I've set out at paragraphs 22 and following where these tests, the similar functional approach is applied across the law in New Zealand, and in particular of course I've highlighted the Protection of

Personal and Property Rights Act 1988, which is our adult guardianship law, and although the wording is different both the Mental Capacity Act 2005 in England and Wales and our Act referred to as the triple PR Act, has a similar functional approach and that generally the wording in the triple PR Act is that if the person lacks capacity, if they cannot understand the nature and perceive the consequences of decisions or are unable to communicate them.

Unless you have any particular questions around that, I next propose to go to the specific test here in relation to capacity to litigate and to conduct proceedings at paragraph 24 of my submissions.

WINKELMANN CJ:
So it's the morning tea break.

MS DOUGLASS:
Yes.

WINKELMANN CJ:
But just looking ahead, you won't be very much longer on your part, will you?

MS DOUGLASS:
No, no. I just simply propose to address the capacity to litigate and the reply to the part of the respondent's submissions around that.

WINKELMANN CJ:
All right.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MS DOUGLASS:
May it please the Court, now I wish to promptly take you through the primary submission of the appellant in regard to a sole functional test based on the capacity to litigate or to conduct proceedings. In doing so I will start at

paragraph 24 of the appellants submissions and if I could just highlight for you in these submissions we have raised this as an error as to the misdirection of the applicability of the compromise rule by the Court of Appeal and those submissions at paragraphs 45 through to 49 therefore form part of the appellant's submissions. So, just to recap, I'm at paragraph 24 through to 37 and then this encompasses paragraphs 45 to 49 specifically in relation to the Court of Appeal judgment.

And in relation to the respondent's submissions the arguments in and around the proposed test essentially sit at paragraph 66 at page 16 of their submissions and through to approximately 88. As I say, I'm not directly addressing the knowledge issue in terms of the second limb, that is something that Mr Butler will do. So in paragraph 24 of my submission, so in the appellant's submission the extra dimension here of course is that this is a case about capacity to litigate or specifically here to compromise proceedings and so settlement agreements should not be treated as ordinary contracts by the common law or the rule in *O'Connor v Hart* and that rule does not, in our submission, apply to them.

The decision specific nature of it at paragraph 27, if we go to the High Court Rules which, as I have indicated by default, are the applicable rules for the employment jurisdiction and that sets out the definition of an incapacitated person, and if I could just go to those rules, that's in volume 6(b) at tab 29, this is where excerpts of the High Court Rules appear. So the definition is set out there. It has two components to it, first of all of course the capability to understanding the issues on which the decisions are made to conduct the proceedings but, secondly, unable to give sufficient instructions to issue, defend, or compromise proceedings. Compromise here of course is very important because we're in a situation where the proceedings had not actually been issued although the personal grievance had been raised.

The respondent has suggested that this is something that should apply prospectively but in fact it is the appointment of a litigation guardian can be made by the Court both prospectively and retrospectively. The rule under

4.30 is that if a person does become an incapacitated person during a proceeding then no steps should be taken until that person has a litigation guardian and the appointment of a litigation guardian is in fact a discretion of the Court so the Court can in fact decide not to appoint one, that's under 4.30 but it also operates retrospectively under 4.34 because at any point in a proceeding the Court may pause and make a decision as to whether or not the person is incapacitated and ought to have a litigation guardian.

O'REGAN J:
But can that apply to something that happened before the proceeding was commenced?

MS DOUGLASS:
Well the answer is yes because the proceeding here includes compromising proceedings, so any decision – so the settlement agreement is in effect –

O'REGAN J:
But the Court just isn't engaged, is it? The Court just isn't engaged at that point. It isn't a step in the proceedings because there's no proceeding in existence.

MS DOUGLASS:
Well, it applies however to compromise the proceedings so that –

O'REGAN J:
Yes, but that's assuming there's a proceedings to compromise. In this case there wasn't.

MS DOUGLASS:
The decision here is to waive TUV's inability to decide whether she will waive her right to bring the proceeding.

O'REGAN J:

Yes, but the proceeding doesn't actually exist yet, does it? She never commenced the proceeding in fact.

MS DOUGLASS:

Well, in my submission the section –

O'REGAN J:

I mean, I don't think the High Court rules apply to people negotiating about whether one will sue the other.

MS DOUGLASS:

Yes, but applied in the employment jurisdiction, which has no other rules, this –

O'REGAN J:

Well, if the employment jurisdiction's been engaged, but it hadn't been in this case.

MS DOUGLASS:

Yes, well, in my submission it has been, because a personal grievance had been raised and that in itself allows for the framework under section 149 to apply. Moreover, as the respondent has pointed out, in the employment jurisdiction you can engage the mediation process for unfair disadvantage. So a person can stay in their employment and still take a matter to mediation, so it – but in this case it is engaged because the framework around that Part 9 of the Act applies because of entering into what led to a settlement agreement. And I suppose the important words around the definition and these rules also is that it's about the ability to compromise proceedings as well, and as that in *Dunhill v Burgin* in fact Lady Hale noted that that was part of the rules as applied, the compromise rules, which apply to compromising of proceedings –

O'REGAN J:

Yes, but she didn't compromise proceedings then. She entered into a settlement that meant there was never any proceeding. She agreed not to start a proceeding.

MS DOUGLASS:

Yes. So under English law the compromise rule allows the parties to go to the Court to seal the order.

O'REGAN J:

But that's the English rules.

MS DOUGLASS:

Yes. And the difference in New Zealand is that those rules are in fact very similar other than the fact is the safeguard is, as it were, not to go to the Court but embark on the section 149(3) certification process. So they do have a lot of parallels. In fact the compromise rules in the UK had very similar provisions, including for example under rule 4.35 of our rules, the basis upon which a litigation guardian is appointed under 4.35(2)(b), which is they're able to fairly and competently conduct proceedings, et cetera, they don't have interests adverse and they consent to that role.

So the submission at paragraph 28 of our submissions is that the Court of Appeal decision in *Corbett v Patterson* applies in this situation. I'd like to take you to paragraph 43 of that decision, that's at volume 6A, tab 5. And commencing at 42, which is at the time of this decision of *Corbett v Patterson*, which was an appeal from the High Court, *Dunhill v Burgin* had been a recent judgment of the United Kingdom Supreme Court, and at paragraph 42 essentially essentially the Court of Appeal took into account the principles around capacity and capacity to conduct proceedings under the Mental Capacity Act 2005 for England and Wales which is the UK and apply these and summarise the principles that should apply to capacity to litigate.

These principles of course also applied and noted the common law position on capacity in *Dunhill v Burgin* and also applied another authority which I have provided you with which is *Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell* [2002] EWCA Civ 1889; [2003] 3 All ER 162, which is the decision specific authority in the common law, particularly principles at paragraph 43, (c), (d) ad (f), and I won't go into any more detail but other than to point out that the Court of Appeal has already adopted the common law position and applied it to the New Zealand High Court Rules in terms of capacity to conduct and litigate. Those principles and laws in fact raised with Judge Inglis in the Employment Court and she canvassed these principles at paragraph 44 of her judgment and she did this as part of her own analysis of whether TUV lacked capacity to complete the agreement and also to instruct her lawyer, that is, capacity to litigate.

The appellant says this is wholly relevant and is in essence the test that ought to be applied here. Moreover, at paragraph 34 of the appellant's submissions the appellant says that in fact: "Where incapacity comes to light after the proceedings have been compromised consideration must be given to whether the compromise can be upheld." And this was the issue that was dealt with in *Dunhill v Burgin* where the court there was asked to consider the scope and potential validity of the so-called compromise rule and under the rule which again encompasses claims that are compromised before proceedings are brought and at paragraph 30 that was noted as that the compromise would not be enforceable in circumstances when one of the parties are mentally incapacitated but not represented by a guardian.

So if I could just go to that decision, so *Dunhill v Burgin* appears at tab 9 and we've also included at tab 10 is a useful summary, it spends a bit more time on the facts of *Dunhill v Burgin,* which is a short judgment, and importantly in terms of the effect of incapacity, at paragraph 20 of the judgment Lady Hale spoke about what steps could be taken under rule, their equivalent 21.2.1 and made the very important point which is relevant in this case which is at paragraph 20: "While every step in the proceedings may be capable of cure the settlement finally disposing of the claim is not."

So the point here is that there is no more fundamental decision than actually settling a claim and this is raised because in the Court of Appeal judgment the indication was that the Court of Appeal did not consider that rule 4.34 which allows the Court when it realises that a person lacks capacity to decide whether the person is incapacitated and whether they need a litigation guardian, the Court of Appeal said that rule did not engage and, as I've submitted previously, in our submission it does.

ARNOLD J:
Just stop there. I mean, the English rule specifically defined a protected party to include an intended party. In other words, going back to Justice O'Regan's point, it contemplates somebody who's going to issue proceedings but hasn't yet done it. So it's quite clear on the English rule that it applies to people who are proposing to litigate. And I'm still a little bit unclear about what it is in the New Zealand rule that makes that position plain. Is it that 4.35 that you rely on for that?

MS DOUGLASS:
Sorry, which rule?

ARNOLD J:
4.35, is that what you're relying…

MS DOUGLASS:
That's the appointment of a litigation guardian, yes.

ARNOLD J:
Is that what you're relying on as indicating that this process applies before a proceeding is issued?

MS DOUGLASS:
No, no.

ARNOLD J:
Oh, no…

MS DOUGLASS:
So 4.35 is once the Court decides that a litigation guardian is necessary.

ARNOLD J:
Right.

MS DOUGLASS:
So it's a mandatory consideration by the Court, but it doesn't have to of course appoint a litigation guardian. But, no, I'm just taking a step back. So 4.30 is first of all the incapacitated person must be appointed by the litigation guardian during a proceeding…

ARNOLD J:
Yes. So how does that – I must have misunderstood your answer to Justice O'Regan. How does that cover a proceeding not yet in existence?

MS DOUGLASS:
Because the – well, first of all, we have no specific Court rules for the employment jurisdiction, so we're dealing just with how we can apply the High Court rules in the context of the employment jurisdiction. But, secondly, it applies to compromise, and in this case, as it were, that part of the Act, Part 9 of the Employment Relations Act is engaged, because here we have an employee who has raised a personal grievance and they're seeking to use the mediator's certification process. So in the context of this the appellant says – because, as the respondent and the appellant has submitted, the majority of proceedings, claims, referred to as statement in problem, are resolved in this manner in effect. And so of course it wouldn't be a purposive interpretation of the Act to simply say: "Well, you need to have actually lodged a claim in the Employment Relations Authority." And in any event, if you do lodge a claim in the Employment Relations Authority there's a provision that the Authority mandatorily has to request that the parties, ask the parties whether they have

considered mediation. So either way the appellant says that this part of the Employment Relations Act is engaged in terms of this process.

ARNOLD J:
Okay, sorry.

O'REGAN J:
But the High Court Rules apply to the Employment Court and the Employment Relations Authority. There's nothing in the High Court Rules that can be construed as applying to something which doesn't involve the Authority or the Court, is there?

MS DOUGLASS:
If I can take you to that part of our submission where I've referenced –

O'REGAN J:
Well, your submission refers to the Employment Court Rules saying: "If our rules don't apply then the High Court Rules do." But that's only in the context of a proceeding in the Employment Court or in the ERA, isn't it?

MS DOUGLASS:
If I could just take you to footnote 38 – so I'm in page 10 of the submissions, under the definition of "Incapacitated person" at paragraph 27 you'll see footnote 39. So the Employment Regulations, rule 6(a)(ii), state: "In the absence of a particular rule of the Employment Court governing a matter, the Court is to apply the provisions of the High Court Rules –

O'REGAN J:
I know that, but that says *the Court* is to do it. The Court isn't involved in this case at the time we're talking about.

WINKELMANN CJ:
So the argument you are making I think is that what part is it of the Employment Relations Act has been engaged? Part 9? Part 9 has been

engaged by the use of the settlement processes and that one should give the purposive readings that you apply. You read this rule into the Employment Court Act and then you read it as applying to a compromise of rights.

MS DOUGLASS:
Yes.

WINKELMANN CJ:
Because the employment dispute resolution process has effectively been engaged.

MS DOUGLASS:
Yes, so either, so a claimant may have filed a personal grievance and they may have voluntarily gone to mediation. They may also have the authority request that they go to mediation. In this case as with probably the majority of cases the claim hasn't in fact been lodged but the process is engaged through, yes, through part 9 of the Act and it does – the Court Rules encompass compromise and in the case of *Dunhill v Burgin* the compromise rule was simply used just for that purpose of just for going to the Court and getting the agreement approved by the Court, there was no ongoing proceeding.

O'REGAN J:
So you're saying in this case the employer should have commenced the proceeding in the Employment Relations Authority and sought an order for the application of a litigation guardian, is that what you're saying? They had to actually start a new proceeding to invoke this power?

MS DOUGLASS:
Yes. No the submission of the appellant is that the proceeding can be interpreted to the –

O'REGAN J:
Yes, but how does a judge get the power to make an appointment if there is no proceeding?

MS DOUGLASS:
So if it is a situation where prospectively it's decided that the person needs a litigation guardian, yes, that could be a path that is as it is in the Court Rules where in fact the Court or actually the registrar in the Court Rules can make that –

O'REGAN J:
But the registrar can't do anything if there isn't a proceeding in the court, can they, they can't just make things up they have to have some basis for their jurisdiction.

WINKELMANN CJ:
I think this might come back to – I'm not sure why you're taking us to this Ms Douglass. You're not saying, are you, that this procedure applied, the litigation guardian procedure applied, that this person had to have a litigation guardian or are you? Why are you taking –

MS DOUGLASS:
On the facts of this case to have a binding agreement this TUV needed a litigation guardian.

WINKELMANN CJ:
I think you can tell that we're all finding some difficulties in accepting that because there is no proceeding issued in a court and how would it come about when she does not have capacity and she's – so Justice O'Regan said to you well does that mean for that to happen that the respondent would have to commence proceedings so as to ensure that she had a litigation guardian, how would it come about?

MS DOUGLASS:

Well that may be one answer. I suppose it is the system that we have with us. I'm not aware of any other case in the employment jurisdiction where this issue has arisen.

WINKELMANN CJ:

But it's not set out in your written submissions I don't think, this argument, is it?

MS DOUGLASS:

Well, we've said that if a person lacks capacity to litigate their settlement the issue for the Court is whether in this case a settlement agreement should be set aside. The issue isn't whether a litigation guardian should be appointed. So it is a problem, I'm not –

WINKELMANN CJ:

Because I've just seen your submissions seem to be complicating it. Is it for Mr Butler to persuade us that *Dunhill* should create this common law principle in New Zealand, is that what he's going to do?

MS DOUGLASS:

Well I can ask Mr Butler to address the Court now on that to follow on from this. Can I leave you then with the Court of Appeal in this case did not refer to *Corbett v Patterson* which in my submission is unfortunate because that, the appellant says, is the law in terms of whether this agreement should be set aside simply on the basis that TUV lacked capacity to litigate.

WINKELMANN CJ:

Well, what part of *Corbett v Patterson* do you say stands for that?

MS DOUGLASS:

Well, the principles that they've outlined in paragraph 43, which –

WINKELMANN CJ:

Well, that's to do with mental capacity but it's not to do with the binding, it's not to do with the validity of the contract, is it? Oh, so…

MS DOUGLASS:

That's the whole point. So if – I can…

WINKELMANN CJ:

All right, okay.

MS DOUGLASS:

So *Dunhill v Burgin* is essentially, the case is that Lady Hale in that decision recognised the compromise rule in the UK is essentially an established exception to the rule in *O'Connor v Hart*, which is not only that the person should –

ARNOLD J:

But it's established not because of the common law, it's established because of the rules, the UK rules of civil procedure.

WINKELMANN CJ:

I think Mr Butler's going to deal with this, is he?

MS DOUGLASS:

Yes. So if that's an opportune time then I'll perhaps hand over to Mr Butler because – and that follows through from *Corbett v Patterson* and the acknowledgement that although they are separate regimes, as it were, the principles still apply, and the appellant says that this is a case about capacity to litigate, not to contract.

Thank you.

MR BUTLER:

Thank you, your Honours. If I could just have a moment please to get myself in order? I think I've picked up a number of queries along the way which I can perhaps just touch on very quickly just because they establish a premise upon which the later parts of my submissions rely. So I'm not trying to double-dip so as to speak, but there are probably just one or two points that are worth clarify along the way, if I might? Could I just have one moment while I just grab a seat to help me array my material?

WINKELMANN CJ:

Take the time you need.

MR BUTLER:

So, your Honours, I apprehend that my job is to take the case forward from – if you're looking at our written submissions – from essentially page…

WINKELMANN CJ:

14?

MR BUTLER:

14 onwards. Thank you, your Honour. It would help if I had my own submissions, your Honour, as opposed to my learned friend's submissions. Yes, so on page 14 onwards.

There were just one or two preliminary points I think I should cover just, as I say, because they do go to the premise upon which some of my arguments are made, so if I could just very briefly touch on those? I am conscious of time and I'm in your Honours' hands as to when you want me to sit down, but I'm assuming you want me *done by lunchtime*, in the famous phrase.

WINKELMANN CJ:

Yes, and I think we'll take a shorter lunchtime.

MR BUTLER:
Thank you, your Honour.

So a first quick point I just wanted to make is there was a question that came up this morning about what did the Defence Force know about the insurance applications. So in addition to supplying the relevant forms that were required you'll see that there's a workplace assessment which is in volume 4, page 301.0210, and what you'll see there is that there was contact made by the workplace assessor with NZDF HR personnel that's recorded under "Plan details" on the page I've given you, and then further on in the document you'll see a reference to what the work assessor was told about the workplace, that's at 0212, and then towards the very end of the document, on page 0213, you'll see a little box which has further comments where there's reference to the contact details for the NZDF HR personnel and noting that in fact one of them was not available for assessment at the time because she was on leave. So I think that might be helpful in terms of giving your Honours a bit of insight as to the extent to which NZDF was aware of those insurance claims being put through.

The second point I need to come to really goes to the point that your Honour Justice Glazebrook addressed earlier on in which my friend touched on but which I just need to clarify for myself so that your Honours understand what the premise of my part of the argument is so you can come back and say, well the premise is wrong, Mr Butler, and interrogate me appropriately. And it is this very important distinction which the CRPD, it's integral to the CRPD and which I imagine you will hear a bit of from my learned friend Mr Hancock for the Human Rights Commission.

In very many instances prior to the Convention what people would do is they will confuse disability, particularly in the mental disability space with capacity. If you were mentally unwell the assumption was that you therefore lacked mental capacity. What the CRPD is about is just testing that particular assumption. What the CRPD does not do in my submission your Honours is countermand a situation where when it is established that somebody is so

mentally unwell or their illness has such an impact that they are in fact rendered incapacitated, that is assessed, that somehow you treat them like everybody else who is mentally unwell and that goes to the point that my learned friend Ms Douglass was making when she was talking about the binary nature of the choice that's been made. The progression that's being made in the mental illness space has been the acceptance that there is in fact a spectrum of mental unwellness. The modern approach to assessing incapacity is exactly as my learned friend put it, the functional one which is time and decision specific.

WINKELMANN CJ:

Yes, well, what we were having difficulty accepting from Ms Douglass was what seemed to be a very binary approach to incapacity – capacity or litigation guardian and it seemed to me at least that in fact the law has always recognised that people who would struggle to have capacity if standing on their own could be assisted to have capacity to make a decision through use of communication systems, et cetera.

MR BUTLER:

And the point is they might be able to do that but the evidence here has established in our submission and that's what was accepted in the court below, that in fact as a matter of fact TUV was incapacitated. In other words that's the starting premise that we make as a factual finding that that is the case. Now that's why we have emphasised and your Honour the Chief Justice picked it up in the earlier exchanges of my friend Ms Douglass, aren't we really, you said, aren't we really just dealing here with a situation in retrospectively rather than dealing with it prospectively? That's exactly right, that's exactly right. That's the context within which we're operating.

ARNOLD J:

Well you're right. I think one of the unfortunate things is that their doesn't seem to have been any exploration of the support around TUV.

MR BUTLER:

Correct. That's correct.

ARNOLD J:

But that is the position as you say.

MR BUTLER:

That's correct, and that's the point that I understood my learned friend Ms Douglass to be making is that had it been picked up along the way that was the submission she was making as I understood it to your Honour Justice Glazebrook, had it been picked up along the way maybe things could have been better understood, better supports put in place, a better understanding, for example, on the part of the lawyer, for example, as to what steps might need to be taken, what extra support might need to be provided. I can't say exactly what that would look like now because we're looking back retrospectively with a firm finding of the existence of incapacity. So the question there simply is what to do about it.

ELLEN FRANCE J:

Well there’s a slightly different point though which is that there’s no testing of the evidence from the doctor about the effect of the support that she did receive.

MR BUTLER:

I'm just trying to understand your Honour. I mean my understanding, where I'm coming at it from is my understanding is that they got a firm finding in the court below that in fact she lacked capacity.

ELLEN FRANCE J:

No, I understand that and that's not something we can look at. I'm just making the point that it is in a situation where there wasn't in fact a great deal of testing because presumably because it was being done on a retrospective basis of the impact of the support that was received.

MR BUTLER:

Well, I don't think that's fair. Because if you look at the notes of evidence, with great respect, your Honour, there's quite a bit of testing by my friend, Mr Boyle, in the Employment Court of the expert, Dr Levien, so you'll see, if you go back and look at the notes of evidence, there was a quite a level of testing. I don't want to get back in the weeds in terms of the evidence, but I think if you do and look there I don't think…

ELLEN FRANCE J:

Well, I have read it and, well – but anyway, you're right as to the finding that you've got.

MR BUTLER:

And the important thing, I think, that goes with the finding is what the actual practical impact of that finding was, because that's what's actually elaborated on by the expert in his report as to what that meant in the particular context for TUV: she was unable to understand, she was not able to instruct, et cetera, et cetera. I'm not getting into, I don't want to get back into the detail of –

WINKELMANN CJ:

So what you're saying is the factual finding, is that we're to proceed on the basis that whatever support she had, it wasn't adequate?

MR BUTLER:

Correct, that's the point I'm making, correct. And so that's why I say therefore, what to do about it?

So they were the two particular points I just wanted to –

WINKELMANN CJ:

But you accept that it is possible that she might, you know, if we'd been operating prospectively, it is possible that she could have had adequate support?

MR BUTLER:

I'm not going to eliminate, I can't eliminate that, I wouldn't eliminate that possibility, because it could have been, depending on when the intervention was made – let's call it that – or the realisation that this was an issue when that occurred, who knows what supports might have been put in place at the right time to mitigate the impact that that would have had on her decision-making. And if you look at the report –

WINKELMANN CJ:

So you are not urging on us that she had to have a litigation guardian appointed?

MR BUTLER:

Not straight away or anything of that particular sort, no, not at all, but I had wanted to – not straight away, and the procedural points that your Honours have raised are understood on our side that there are some challenges associated with that. So whether one would come up with an alternate solution which flushes those issues out so as to see how it is that you can make it binding as a issue, it seems to us for another day. We're just simply here looking at a scenario that has actually happened, where it's been established now what the position is, and the question is what to do about it. Does *O'Connor v Hart* apply or is there some other test that applies in respect to this agreement and circumstance if what our client wants to do is to be able to actually run the PG that she had raised and now be free to run it, that's the context we're operating within.

So, your Honours, again I am conscious of time. The written submissions do deal in some detail with many of the arguments we had wanted to make. I just wonder if I could, just to come to this issue about *Dunhill v Burgin*, if I might?

The reason for having *Dunhill v Burgin* in there is not to get lost in the – again, so I'm using the phrase again – lost in the weeds of comparing the English rule and our High Court rules but rather to stand back and see, well, what is

the context within which the rule came up for consideration in *Dunhill v Burgin*. And the context within which the rule was up for consideration in *Dunhill v Burgin* is was the rule consistent with the common law? Because if the rule was ultra vires that was the challenge that was made, then the rule –

O'REGAN J:
Well, it didn't have to be consistent with the common law, did it? It had to be consistent with the legislative power, didn't it, the rule-making power?

MR BUTLER:
And the legislative power was to give effect to the common law. You can't be innovating or making up some sort of new rule.

WINKELMANN CJ:
So if we look at the judgment perhaps…

GLAZEBROOK J:
I think we're not convinced that is the case in *Dunhill*, so you might need to show us why it needs to be consistent with the common law. Which probably means you'd have to go back to the earlier decision in respect of vires, which was the one that was being followed.

WINKELMANN CJ:
Well, perhaps if we start with *Dunhill* anyway, what you want to take us to in that.

MR BUTLER:
Yes. So *Dunhill* is summarised in our paragraphs 34 to 36, and it's submission that what the Court was asked to do in that particular case was to consider the scope and potential validity of the so-called *compromise rule*, I'd call it the so-called *compromise rule* because that's the way in which it's flagged. And it's my submission that if you look at paragraph 27 of the judgment – that's how I read the judgment – so here we're at tab 9 of volume 6A of the authorities. Paragraph 27 begins: "Neither the rules of the

Supreme Court nor the CPR can change the substantive law unless expressly permitted to do so by statute," so that's the argument that's been accepted and advanced. "Thus, it is argued, section 1 of the Civil Procedure Act gave the CPR Committee power to make rules governing the practice and procedure to be followed in civil courts," et cetera, et cetera, may modify rules of evidence, et cetera.

WINKELMANN CJ:
So the point that you're making on that is that the rules could modify the common law as to evidence but where it could not, but out that area it needed specific…

MR BUTLER:
Correct. And process, but not – and remember the way in which the rule is formulated and expressed, that ratio is expressed, is that the compromise rule is – and here I'm looking at paragraph 30 of the judgment – is a substantial but quite specific exception to the common law rule and the rule that's made reference to is *Imperial Loan Company Limited v Stone* [1892] 1 QB 599 which, as your Honours well know, was the foundational case for *O'Connor v Hart.* So *Imperial Loan* is the UK equivalent of *O'Connor v Hart.*

ARNOLD J:
It's interesting though that Lady Hale says that Lord Pearson indicts, give no reason for accepting the rule, as within the powers.

MR BUTLER:
No, that's not what's said, your Honour, with – as within the powers, that's right.

ARNOLD J:
And then goes on to say, "But we are basically bound by that unless there's a good reason to depart from it." And her final sentence makes it clear, or tends to indicate, that they thought there was an express power because of the way things developed subsequently to confirm the rule, and I took that to be saying

"even if inconsistent with the common law". And at the end of the day it seems to me you're drawing a great deal out of some quite unclear statements.

MR BUTLER:
Well, I don't accept that, you know the submission that I'm making to the Court. I say the way in which the UK Supreme Court has expressed itself, in my submission, does express this. It knows that what it's restricted to doing is recognising the rules can't change evidence, they can change the substantive law. The conclusion that's reached by the UK Supreme Court is that this is not doing that.

ARNOLD J:
Well, what about the last half of paragraph 30?

WINKELMANN CJ:
There seems to be some difficulty, Mr Butler. I was just wondering, have you looked to see if you can find any common law threads that Lord Pearson might have been picking up when he seems to say – well, it's unclear what he's saying but…

ARNOLD J:
He's just basically saying, I think: "Having heard the decision we need the power. It's been there since the early 1900s, 1909, and there it is."

MR BUTLER:
Which sounds pretty much like how the common law evolves over time, your Honour.

ARNOLD J:
But this was based on a rule that had been in existence since 1909.

WINKELMANN CJ:

So it's rule specific and it's really become part of England's common law because of that rule.

GLAZEBROOK J:

Well, I can understand that as a submission, but otherwise you would have to see – well, I suppose the question is is there authority that says compromises in the course of litigation are outside the rule, other than this rather odd, well, she says there's no authority and no reasons given, so.

MR BUTLER:

Well, I'm standing back and looking at the authority where what you've got is a specific challenge to the validity of the rule. So the validity of the rule is absolute squarely in issue, and there's no getting away from that's what actually was an issue in the case, and the firm conclusion of the Court as I read that decision is to say this compromise rule is a well-known, except it's substantial, but limited exception to *O'Connor v Hart*, in effect.

GLAZEBROOK J:

But you can't – well, maybe you can look afterwards and see if you can find authority that in the common laws this was an exception to that?

MR BUTLER:

All right, I will indeed do that. So I was just relying on what I thought was the relevant, highest authority.

GLAZEBROOK J:

Yes, no, I can understand that. It's just that I certainly read that differently.

MR BUTLER:

All right. But, your Honours, I don't need to dwell particularly, do I, on the fact that it can apply to proceedings, to claims that are compromised prior to proceedings in *Brutton.* Ms Douglass made reference to paragraph 30 of

Dunhill but I should also just note that the same point is made at paragraph 23 of the decision in *Dunhill* so I just wished to know that.

So if we look then to our submissions starting at page 14 onwards. What we've tried to do is try and identify a number of errors in the decision of the Court of Appeal. The first one we identified is the one we've just been debating, ie, the applicability or otherwise of the compromise rule.

WINKELMANN CJ:
So are we dealing with the policy at some point? Because I think that Lady Hale does talk about the policy but does she address it in this context. She certainly starts out in her judgment about the policy.

MR BUTLER:
She does, and I had wanted to come to that I suppose. So what I was going to say was if you look at page 17 of our written submissions onwards I thought I've now touched on error 1 I would come and address some of the other errors. So the first one of those starting at page 17 of the written submissions was misdirection as to the employment jurisdiction and it seems to us that there is an error here in terms of approach by the Court of Appeal.

The first point that we would make and it's a point I think that's been picked up certainly by this court, for example, in *Brown v NZ Basing Limited* [2017] NZSC 139 but also by the Court of Appeal in a number of cases and it's clear from the statute that one is in the employment jurisdiction one is not dealing with ordinary contract law as such. What we are dealing with is relationships. Relationships. It's a foundational principle of the ERA but particular legal policy considerations apply which will not necessarily apply in the general mill of commercial transactions.

Now one of the points that's made by my friends and touched on in the Court of Appeal – and here I'm now at paragraph 54.2 of the written submissions – is that the law of contract is transaction-centric. It's focused in our submission on how transactions can be facilitated. You could think about

it as encouraging efficiency and volume. By comparison employment relations is concerned with labour. It's about preventing the abuse of labour by employers but also more than abuse it's about making sure that the relationship is one that is productive. So we say that while the Court of Appeal attempted to diminish the commercial aspect of the rule in *O'Connor v Hart* how did it do that? It said: "Well look *O'Connor v Hart* is really a property transaction," so that means it wasn't a commercial context. The point we're trying to make is that it still was nonetheless a transaction.

WINKELMANN CJ:
Well, the conveying of property is the most fundamental economic unit in the commercial world.

MR BUTLER:
Correct, it's about the transfer of labour. It's not about the transfer of labour rather but about the transfer of capital and our point is that the context of *O'Connor v Hart* is still very much a transactional one.

So we go back to my 51.

GLAZEBROOK J:
So is this related just to an argument that it doesn't apply in the employment context?

MR BUTLER:
Correct, that's exactly right.

GLAZEBROOK J:
Thanks, I'd presumed that was the case.

MR BUTLER:
That's right your Honour, I should have probably just flagged that.

GLAZEBROOK J:
It's fine.

MR BUTLER:
There's two planks really to the argument, one of which is the general rule, the compromise rule let's call it and then second of all there's a more targeted employment jurisdiction argument.

GLAZEBROOK J:
That's fine, I was just double checking.

MR BUTLER:
Thank you, your Honour, that's very helpful, thank you.

So at 51.2 I make the reference to the fact that neither the authority nor the Employment Court are free to apply the law of contract as such but rather to act in accordance with equity and good conscious and again I will just simply note just by way of thought bubble. When some of the question were being put to my friend Ms Douglass about well what's the power and how would one undertake – what steps and so on. I think the equity and good conscious jurisdiction is something which is appropriately available to mould an appropriate response in a particular case but again I want to be clear. I'm not dwelling on that aspect I just simply noted –

ARNOLD J:
So how would you meet the Court of Appeal's point that it is equity and good conscious that engages the rule about knowledge or constructive knowledge?

MR BUTLER:
So that's one aspect, you might say, of equity and good conscience, but we would say it's not the full answer. Certainly where somebody has knowledge, we would say, well, then clearly they're not in a position to say that they acted with –

ARNOLD J:
And constructive knowledge.

MR BUTLER:
With good conscience.

ARNOLD J:
But where they have no knowledge at all, how does equity and good conscience work there?

MR BUTLER:
So we've got a couple of arguments in relation to that aspect. One argument is to say, to use the language actually that we'd use in our submissions but I see is used in one of the articles supplied helpfully by my learned friends, I think it's at their tab 10, the legal studies article, is to say, well, what you've got is you've got a case of two innocents. So really you're having to make a choice between the two, who's the loser, being pretty blunt. And equity in good conscience isn't necessarily something that's just driven by simply saying, well, let's look at the situation of the respondent and what the impact might be on them, but equally it can be saying, well, actually in context it's not right to hold somebody, particularly where what we're talking about is compromising a PG, it's not right to hold somebody to a settlement agreement when they lack capacity and are therefore not in a position to be able to pursue something which due to, not for the fact that there isn't good reason for it but because they were operating under in this case a temporary incapacity. So that's how the equity in good conscience can look at it, it's really a question of the Court looking and determining: "Well, what's the just and right outcome in the case here?" And one of the factors you can and will obviously take into account will be how was the conscience of one the parties to this affected? But it's not he only touchstone for determining how the matter should be resolved, that's our submission, your Honour.

ARNOLD J:
So…

GLAZEBROOK J:

And how does this – sorry. Well, I was just going to say, how does the fairness or otherwise of the compromise enter into this? Because certainly if there's been any sense of the employer taking advantage of somebody who they thought had capacity one can understand that submission. But if you have a perfectly fair compromise that's being attacked some months afterwards when everybody thinks that the matter is at an end, where does the two innocents come in on that?

MR BUTLER:

Well, in a couple of places, I suppose, and again it goes back to how one makes the assessment as to what the demands of justice are in a particular case. And again, say for example, let's take the facts of this particular case just as a way of exploring that, you might say, well, look, what's involved here is a PG of a particular, of a particular sort of PG, that you look at the reason why it is that it can't be pursued and you look, for example, and see, well, it's an inability to restore from TUV to NZDF the elements of the compromise that have been given, in other words, so that can be part of the assessment that you make and you weigh that against a sense of finality that NZDF here might have felt that it had had and appropriately weigh those elements, that's a way in which you can give effect. But what's being adopted here by the Court of Appeal, which we say in many ways just excludes the possibility of undertaking a weighing exercise, is it just says if they didn't have knowledge – and again you'll know we're going to probably come and touch on, well, what does knowledge mean in this particular context because, you know, we're not happy with the way in which the knowledge requirement was expressed, if we do need knowledge. But putting that to one side, the Court of Appeal's approach means you just simply never get to evaluate it, it's just a hard rule, in fact very, to use the word that's been used earlier today, very *binary,* isn't it?

So, Your Honours, I was at 51, so page 17 of the written submissions. your Honours have read these submissions so I'm just trying to see what are the ones I can particularly touch on that are going to be helpful in light of the

issues that your Honours have raised. I do note the difference in remedies that are available, so when we're in a contract, in an ordinary contract claim, the remedies are pretty narrow, whereas when we're in the employment jurisdiction we're dealing with a much greater range, which is another statutory indicium, I say, of the different contexts that we're in, we're not in a transaction-centric environment, we're in a relationship-specific environment. And I say, it's my submission, the Court of Appeal didn't really adequately address why the employment institutions should be constrained by a principle that was developed in respect of ordinary contractual transactions when considering whether to set aside section 149 agreements. Rather, what the Court did – and here I'm at paragraph 53 – is emphasised the importance of certainty of bargains as if, in my submission, as if we were in a transaction centric context.

When you are in the transaction space what you're often worried about is certainly of bargain, what effect it might have in title say, for example, to land or goods, those sorts of things, what impact will be had on third parties, and equally you're worried at policy level about the importance of certainty to make sure that actually transactions can just proceed. And that again, I just simply note, it is a point that's made in that legal studies article that my learned friends for the NZDF have put in, because of course they explain why is it that the common law went from a situation where if you lacked capacity, including mental capacity, the contract was not binding. That was the old common law approach and it shifted to saying you can't raise mental incapacity as a defence to the enforcement of a contract. That was in response to pressures of the market and so on and over time there's been a kind of a coming to somewhere in a very big middle. So we say you've got to have regard to the employment relationship context. I mean you look at some of the fears that derive a case like *O'Connor v Hart* the underlying policy drivers very much fall away.

One of the points in here, I'm at 20, one of the points raised by my friends and certainly picked up on by the Court of Appeal was this reference to section 68 of the Act. And section 68 is the one that deals with the ability to set aside an

employment, an individual employment agreement where it has been unfair bargaining. And so the argument that has been made by my learned friends and accepted in the Court below was that somehow section 68 tells you what Parliament's approach is to questions of the right test to be applied and why did they rely on that? They rely on that because section 68 makes reference to knowledge.

But I turn that around and say, well, actually if Parliament is specifically addressed what the requirements are to set aside an agreement in that particular context and make reference to knowledge in that case, what's of interest is the section does not apply to personal grievances. It does not apply to settlement agreements, and I say at paragraph 59 in fact section 68 provides a reconstruction to the standard that should govern capacity issues or the approach the Court should adopt when there's a challenge to a section 149 agreement.

WINKELMANN CJ:
Well, you say no instruction at all, don't you, no instruction at all?

MR BUTLER:
Yes I do, yes, I was trying to be kind I suppose. Yes, no instruction at all, and again I say the context is different at the outset of the relationship and bargaining you know very little about each other. It's a very different sort of context.

And then we come to error 5 here on page 21. This was a point that was raised by her Honour Chief Judge Inglis in the Employment Court, and it's probably worth just having a quick look at the context within which she was operating because I think it also helpfully throws some light on the thinking of the Chief Judge of that specialist jurisdiction to the broader policy issues, your Honours, so I think it's quite helpful. Could I ask you please to go to tab 10 of volume 1? So, your Honour Justice Glazebrook, my notation has 05.0072 and you will see, if you just look at paragraph 65 so that's at 05.0093. There the Chief Judge says: "I've considered whether the second limb of the

O'Connor approach is a necessary step in this Court's inquiry and is fatal to the plaintiff's claim."

GLAZEBROOK J:
Sorry, what paragraph is that again?

MR BUTLER:
65.

GLAZEBROOK J:
I'm trying to just operate electronically. It's not exactly –

MR BUTLER:
After my last visit here I'm not so brave again. Thank you, your Honour.

So what the Chief Judge said is: "I've considered whether the second limb of the *O'Connor* approach is a necessary step in the state of the plaintiff's claim," and then she explains what the two-limb approach is. But look further down where she says, having outlined it: "While commercial certainly is desirable, in the employment sphere it might be said to apply with less force including having regard to the underlying objectives of the Act. I see a potential danger, given the special nature of employment relationships and the unequal bargaining power implicit in them in simply assuming that employment settlement agreements reached via mediation ought to be treated in precisely the same way as other (including purely commercial) contracts. Indeed, the fact that parliament legislated to preclude cancellation in certain circumstances may be said to reinforce the fact that section 149 settlement agreements stand apart from regular contractual arrangements. And, as has been confirmed in many Court of Appeal cases, employment law is a specialist jurisdiction which is focussed on resolving problems between parties to an employment relationship, rather than on strict contractual principles." So I would just wish your Honours to note that in terms of the view of the Chief Judge of the specialist judications.

So then she moves from that to make the reference to section 189, which is the equity and good conscious provision, as your Honours know. And then she says – here I'm on the next page so that's 00.94, your Honour Justice Glazebrook, just at the top of the page – "It might be argued that setting aside an agreement entered into with a party lacking the requisite capacity, whether or not the employer knew or ought to have known of it, would lead to a result *consistent* with equity and good conscience, even weighing the countervailing policy consideration of certainty of contract. The point might be even more strongly made where the mental incapacity was actually caused or triggered by the employer's unjustified actions or inactions during the course of the employment relationship. To put it another way, it may be relevant that one party (in breach of their employment obligations including to act in good faith) has driven the other party to the point of mental incapacity."

And then at 67 she concludes: "The outcome in this case of limiting the inquiry to limb one would be that the defendant, a large Government sector organisation, would face the prospect of an employment claim that it acted unlawfully in the way in which it dealt with performance issues," et cetera, "There is no other evident prejudice involved," and that's relevant it seems to me to the equity and good conscious depending on how it is your Honours resolve the question of law. "The flip side is that a person assessed as lacking sufficient mental capacity," and I know I have to keep emphasising that important factual finding: "She lacking sufficient mental capacity at the time they signed away their legal rights to access the employment institutions would be able to pursue those rights in circumstances where no other right of challenge, appeal or judicial review is available." And then she goes on and says: "The Court of Appeal hasn't yet considered it however given the clear approach currently adopted by the courts, including the Court of Appeal, to the second limb I feel constrained to approach this case in the same way." So I just wanted to set the context within which the issue has arisen to then go and look at error five.

ARNOLD J:

Just on that approach it wouldn't matter what the employer did, wouldn't it? I mean even if the employer had done all that an employer could humanly do.

MR BUTLER:

Yes, that's correct, because they created and so that again goes to the point about the equity and good conscious when if you're looking between –

ARNOLD J:

Sorry, when you said “they created” they created what?

MR BUTLER:

in the context of the causation. If I look back here to –

WINKELMANN CJ:

I don't think – well, that's another point about relevance and causation. But Justice Arnold was just saying on the Chief Judge’s approach whether if you don't need to know of it and it's void then causation is irrelevant, but when she talks about causation she’s talking about the policy considerations.

MR BUTLER:

I see, sorry. Okay, so I've moved away, sorry. By my error five, with my error five I'm moving away now from the principle argument of argument one just identifying and error because the Court of Appeal rejected this suggestion that was made by her Honour the Chief Judge in the court below so we say that if we're wrong in argument one the rejection of the approach mooted by the Chief Judge is also an error. Does that make sense? So what she is saying that even if all you're in is – if you've got limb one established, mental incapacity, she’s saying requiring knowledge of the type discussed in *O’Connor v Hart* might be seen to be an unfair or an inappropriate additional hurdle to place before –

ARNOLD J:

Yes, I understand that. I'm just saying the consequence of that is that an employer at the time who thought about is this person incapacitated, did everything they could to find out but got it wrong…

MR BUTLER:

Got it wrong, yes.

ARNOLD J:

Because subsequently the psychiatrist…

MR BUTLER:

Yes, that's right. Yes, that is correct, that's inherent in this particular approach.

ARNOLD J:

Yes.

MR BUTLER:

And again, sorry, I'd leapt ahead and then – what I was saying is yes, and that might not be when you're doing, when you're weighing the interests of the two, that again may be a fair result in terms of who is to be the loser.

WINKELMANN CJ:

The Chief Judge is contemplating the possibility of two different approaches at 66, isn't she?

MR BUTLER:

Yes.

WINKELMANN CJ:

One is no requirement of knowledge…

MR BUTLER:

Correct.

WINKELMANN CJ:

Or no requirement of knowledge where the mental incapacity was caused or triggered by the employer's unjustified actions, which would be a very difficult test to administer, the second one, because she'd have to have made her claim before you could set the agreement aside, made out her claim.

MR BUTLER:

Yes, but that's what happened here, so a claim has been made and –

WINKELMANN CJ:

No, no, sorry, made out, have to have been made out.

MR BUTLER:

Oh, sorry, I beg your pardon.

WINKELMANN CJ:

So causation would have to have been established.

MR BUTLER:

Yes, absolutely. But let's stand back that, that's not a horrific prospect, let's be clear, because even if the Court of Appeal is correct on the preliminary issue you've got to have a discussion around incapacity and you've got to have a discussion, evidence, as to knowledge. So there is going to be an important issue that gets raised and it could well in that sort of instance that what the Court has got to do is to say, "Right, well, on the basis of an argument of that sort we're going to have to try and see how we marshal the issues for resolution.

GLAZEBROOK J:

It's not a particularly sensible distinction though, is it? Because you could for one reason or another have a traumatic event in your life that's caused you to lack capacity. The employer will still have an obligation to you to make sure that you have a safe workplace given that –

MR BUTLER:
Yes.

GLAZEBROOK J:
– and the employer might have had absolutely nothing to do with that but has actually breached the second one.

MR BUTLER:
Correct, I agree with you about that. But the –

GLAZEBROOK J:
But why would you have a distinction then which says it's only if you've caused it that it gets put aside?

MR BUTLER:
Because you're trying to weigh the two things. With great respect, your Honour, you wrapped a few things up in the proposition you put to me there and one of the things you wrapped up was when you put the first part of the proposition to me the question had within it an assumption that the employer was aware of the fact that something traumatic had happened in the employee's life and needed to make adaptations according. So that's…

GLAZEBROOK J:
Well, no, you'd have an obligation as an employer to make adaptations anyway, I mean, if somebody's performance is being affected by a traumatic event outside.

MR BUTLER:
Yes, that's right. But what I'm trying to say is that that event, if the employer's responding in that particular way that's probably going to put them on notice of the existence of incapacity in the first place. So you're not going to need to go there under this alternate that the Judge, the Chief Judge –

GLAZEBROOK J:
Well, I suppose we're coming down to notice of incapacity as against notice of a mental illness.

MR BUTLER:
Yes.

GLAZEBROOK J:
And, as you said right at the beginning, they are not equated together.

MR BUTLER:
They are not equated, they are not equated.

GLAZEBROOK J:
And in fact many people with mental illness would take very unkindly to suggestions that they should have capacity testing.

MR BUTLER:
To be labelled "incapacitated", absolutely. And that is why it was – sorry, with great respect – that is why I wanted to emphasise that's the premise to my starting point, that we're not into that labelling, we are just looking at what the conclusion is that has been reached here by a professional, and the conclusion was –

GLAZEBROOK J:
No, I understand that. But you answered me by saying if there was knowledge of a mental illness it would be knowledge of possible incapacity and I was just challenging that.

MR BUTLER:
Well, that's fair. But I was trying to be a bit, I intended to be more nuanced than that, I said it *might* put them on notice. If it said it *will* put them on notice then I take that back, I shouldn't have said "will", but it *might* is all I was trying to convey.

WINKELMANN CJ:
Right. Shall we take the lunch adjournment?

MR BUTLER:
Yes. And shall I just take the opportunity then just to see how I can…

WINKELMANN CJ:
Well, we're going to have to cut you down to I'd say 10 minutes.

MR BUTLER:
Absolutely, yes, that's great, thank you.

WINKELMANN CJ:
And so…

MR BUTLER:
What time do you want us back out, your Honour?

WINKELMANN CJ:
2 o'clock.

So, Mr Martin, how compressed is your time getting, because you won't have to deal with all the factual enquiries, but how long do you think you'll take?

MR MARTIN:
Difficult to know, but I mean…

WINKELMANN CJ:
Depends on how many questions we ask you.

MR MARTIN:
A little bit. I have three main propositions, which won't surprise your Honours, from the discussion this morning, and perhaps an hour and a half?

WINKELMANN CJ:
Okay, right, thank you. And, Mr Hancock, we thought we'd hear you just for no more than 15 minutes.

MR HANCOCK:
As your Honour pleases.

MR BUTLER:
Thank you, your Honours.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.01 PM

MR BUTLER:
Thank you, your Honours, and thank you for the extra couple of minutes.

WINKELMANN CJ:
So, just before you start, and not wanting to use up your extra couple of minutes, over the luncheon adjournment Justice France identified an interesting passage in *Chitty on Contracts* which I will ask Mr Registrar to pass out to all counsel and it covers the Canadian decision.

MR BUTLER:
Thank you.

WINKELMANN CJ:
Where the Courts accept that contracts centred via a mentally incapable person are voidable even where the other party has no notice of the incapacity as long as their terms are unfair, which is a similar position to *Archer v Cutler* [1980] 1 NZLR 386.

MR BUTLER:
Archer v Cutler.

WINKELMANN CJ:
And I'm not sure if you're aware of that, I assume not.

MR BUTLER:
No, I'm not, your Honour.

WINKELMANN CJ:
But it might be that counsel will wish to give some consideration to that and the various authorities that are cited there.

MR BUTLER:
Yes, and I'm just looking at the extract and I see there is reference to *Hart v O'Connor* obviously, and there is also reference to *Dunhill v Burgin* interestingly enough, at the top of 883.

WINKELMANN CJ:
And in another part of *Chitty* it is critical, I understand, of *Dunhill*, so you might just want to have a look at it.

MR BUTLER:
Sounds like a bit of homework there. Right, that's the end of 10 minutes, isn't it? Or perhaps, can I contemplate, there might be something I have to come back to the Court on perhaps after the hearing?

WINKELMANN CJ:
Yes, I think that all parties will want to take time to file some additional submissions on the point.

MR BUTLER:
Yes, I think I probably should just register that that's what we're likely to do so I did try and take the opportunity during the break while Justice France was in the library looking for certain things with Colonel Mustard perhaps, I was elsewhere in another part of the library just seeing whether we could throw some more light as was requested in terms of *Dunhill v Burgin*. So I've not

been able to bottom out those references I'm afraid for the Court so I might just flag that in light of the way in which the issue was raised with me, it might be sensible for that to be covered off in the same memorandum since there is this criticism in *Chitty on Contracts* in respect of *Dunhill v Burgin*. Does that sound like a sensible way to proceed, your Honours?

WINKELMANN CJ:
Sounds like quite a propitious way for you, isn't it?

MR BUTLER:
Thank you, your Honours. I'm never one to look a gift horse in the mouth when they really appear. Thank you, your Honours.

All right, so if I can then re-join the argument where we left off just before the luncheon adjournment. So I was just on to error, what we've identified or categorised as error 5 and her Honour Justice Glazebrook had put to me various propositions as to how it may or may not work and why one would have it. It could be non-employer related issues that might create the trauma and so on and so we were having discussion about whether I'd used the right language to describe and illness versus incapacity and I've hopefully got back onto safe ground, a ground that I'm comfortable which may well, but not necessarily will, but the second point I really wanted to come to was, you know, why – because it seemed implicit in what your Honour was putting to me was, well, why would causation be relevant or what role might it play, why focus on a causal link?

GLAZEBROOK J:
Look, I can understand why you might be focusing on a causal link. I was probably just signalling that there is real difficulties with that because you have to find the causal link in it. It might be unfair to other people so probably saying that your other submission is probably better but then this is about your third or fourth in your –

MR BUTLER:

There's a couple of fall-backs, aren't there, there are a couple of safety nets involved here. We just want to win for the client and when I was having the discussion, if I may refer to that, where the engagement with your Honour Justice Arnold when I was saying about balancing the equities, I mean that could have been argument number four in terms of how you resolve it because you can have quite a fact-specific, once you say it's appropriate to have a look at it that incapacity opens the door so to speak. Where you might end up is that the Employment Relations Authority, the authority of the Court when the matter comes back to it in the way in which it has in this particular case, may undertake an evaluative exercise where incapacity is a requirement to get in the door but what you do is you balance a range of different factors that might go to how the individual justice is to be served on the facts of the particular case.

WINKELMANN CJ:

One of which of course is the fairness of the transaction, I suppose.

MR BUTLER:

One of which may be the fairness to the transaction, your Honour. But it doesn't necessarily have to be, it could be what the transaction entails and who is losing out in terms of what they would have wanted to have done in the case of the claimant, my client here, our client here, in terms of being about to progress the PG. But anyway, I digress, because I really do want to come back to the point that I identified, the two points, I want to come back to the second point that your Honour Justice Glazebrook addressed because I think it is significant when you look at the legislation that that type of situation has already been identified in the legislation. Here I would like to refer if I may to my written submissions, paragraph 65 to 66. So if you want also, you can have the statute in front of you so that would be our volume 6(b), tab 28.

Your Honours will be familiar with the fact that the default rule is that if you want to raise a personal grievance you've got to do so within the 90 day period, I can take that as given, but of course your Honours won't be surprised

to know that Parliament hasn't laid down a rule that is an all-or-nothing rule. So section 114 which I have referenced at paragraph 65 of my written submissions but which you will also find under tab 28, page 170 of the statute book, identifies that 114 sub (3): “Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period the employee may apply to the authority for leave to raise the PG.” And then under subsection (4) on the application: “The authority may after giving the employer an opportunity,” blah, blah, blah, “subject to such conditions satisfy that the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so.”

And then I'm going to take you obviously to the exceptional circumstances. We look at those in section 115 and you will see that one of those 115(a) is where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified.

So the point I want to make really in relation to that particular ground, and there’s three points to be made in respect to that. First of all it just simply refers to effect or trauma. It's not even as high a bar as incapacity, it's the first point I want to raise. The second point I would like to raise is that because the trauma or effect is linked to the matter giving rise to the grievance there’s your causal requirement, your Honour. It's not just any effect of trauma, it's something that you're able to link to the grievance. And the third point is this is no knowledge requirement. So I just wanted to show that when you look at the statute there are indications we submit in the statute which envisaged the sort of process that's happening here.

And I deal in a bit more detail with the way in which the Court of Appeal dealt in its judgment with the way in which her Honour the Chief Judge had framed up this possible argument at paragraphs 60 of my written submissions. But your Honour had the benefit of those written submissions, and unless you've got a particular question you want to put to me on those I would propose to move then to error six. No objection to that, so I will move to error six, and the

point I'm trying to raise, your Honour, here, is that on our reading of the judgments below there seems to be an acceptance that, a statement that the knowledge requirement is one which focuses on actual knowledge or constructive knowledge, but the test of constructive knowledge is ought reasonably to have known.

Now your Honours will know that in my past life I used to teach equity and trusts and of course one of the great areas you could have a bit of fun with students on and others was *Baden's* five strands of knowledge, so we're kind of back in that territory if I can flag it, if that's a helpful indication to your Honours as to the point that I'm trying to get at. So in the traditional way of thinking about actual and constructive knowledge obviously level 1, type 1, that's actual type 2 is constructive knowledge, as in ought reasonably to have known, and the other three types of knowledge are the ones where actually –

WINKELMANN CJ:
I thought 2 was wilful blindness.

MR BUTLER:
Exactly. So ought reasonably to have known –

WINKELMANN CJ:
No, 2 is actual knowledge, wilful blindness.

MR BUTLER:
So it's wilful blindness, and then you go down, and I was then going to say some people would read 3 as being whether regardless of whether you're wilfully blind it's just ought reasonably to have known, so the language "wilful blindness" is used for level 2, and then they drop wilful blindness, not really interested in why one is, not really looking to ascribe to your wilful blindness, but then down to ought reasonably have known, and then 4 and 5 really are looking whether there was sufficient information that would have put you on inquiry. Knowing all of these things it's not so much that you ought to have

reasonably to have known, you ought reasonably to have taken steps to find out more to see what you would then know.

So all I'm trying to flag is if we use that as a sort of a way of thinking about the different sorts of flags or knowledge that can arise basically in my submission is that I say that the judgments below seem to be operating on categories 1, 2 and possibly 3 but not 4 and 5, and the thrust of my submission is to say that an appropriate approach to knowledge in this particular context is one which would embrace 4 and 5.

WINKELMANN CJ:
So 4 and 5 are…

MR BUTLER:
That's enough inquiry – I've just left my copy of equity and trust behind – but basically you've got to make that you are aware of sufficient information that will be right and proper for you to make inquiry. So you don't form your view of the situation just based on what's in front of you, there is enough to trigger further inquiries to be made to be undertaken.

GLAZEBROOK J:
So the difficulty with that again is saying that the further information is that somebody is mentally unwell and should that be something that triggers an inquiry as to capacity absent something indicating a lack of capacity to the knowledge of the person, because I'm sure that the mental health people would say absolutely not, do not make those assumptions that used to be made under the old law. Just because I'm depressed does not mean I lack capacity.

MR BUTLER:
That is so. It does not necessarily mean that but we say that in the context of an employment relationship it certainly would justify and should justify making inquiries in respect of that individual.

GLAZEBROOK J:

Well, what do you say to employers then being able to require people to provide evidence of capacity before they will even engage, and the intrusiveness of that, because it is intrusive to require somebody to undertake a capacity test especially when they are already depressed?

MR BUTLER:

Yes quite, and in some ways, your Honour, I suppose that partly informs the approach that we've adopted, which is to favour argument one, precisely because in an instance like this the knowledge requirement could be the actual or constructive, or even down where I say they ought to be, do potentially, apart from actual knowledge there's no intrusion because somehow it's surfaced, but the others do raise that issue of –

GLAZEBROOK J:

But if an employer is at risk of having something set aside wouldn't they say either you prove to me that you have got capacity – especially if it's number one, either you prove to me you have capacity or I'm not going to engage.

MR BUTLER:

No, I don't accept that, your Honour, I don't. I don't think that's an appropriate way to frame up the way in which a conversation would take place between an employer and an employee as is governed by the informing principles of the Employment Relations Act which talk about the way in which the parties are to engage is in the context of a responsive communicative positive relationship even where it looks as if the parties might be looking to discuss exit, those rules still apply.

GLAZEBROOK J:

Well they might but if you are at risk having gone down this process of finding out there wasn't any point in going down the process.

MR BUTLER:

There are a couple of things that can be said in response to that. Of course first of all there is a point and it's a point that we make in our written submissions, is in the real world how would something like this actually operate? So in the real world if an employer is making a settlement agreement with somebody who let's say they don't understand to be mentally incapacitated but the settlement is a fair and reasonable one, then the likelihood of that settlement agreement being reopened is, with respect, low, that's what would happen in the real world. So the prospect that my learned friends for the NZDF have raised regarding the opening the floodgates, which is what they tried to run as well, it has to be said, unsuccessfully in front of the Chief Judge. And I would like to take you to one or two passages of that if I may, as their primary argument as to why you shouldn't be able to attack a settlement or agreement at all at all. It just doesn't wash because in the real world the number of occasions upon which a settlement agreement of this sort is going to be reopened –

O'REGAN J:

But this is one of those cases, isn't it, because the employer –

MR BUTLER:

Yes, it is one of those cases, yes.

O'REGAN J:

But the Chief Judge did say it was a reasonable settlement and your client is trying to reopen it.

MR BUTLER:

Yes, for the reasons that she has set out. So I can't say will never happen all I'm saying is in very many cases, in very many cases it's not going to happen. Just because you see one swallow it doesn't mean its spring.

O'REGAN J:

But we're talking about incentives here, we're talking about incentives. The argument against you is that employers faced with this risk will need to get some assurance that it won't be reopened and that will involve intrusive inquiries in relation to people who exhibit some potential signs that could lead to a finding, you know, two years down the track that they were suffering incapacity at the time.

MR BUTLER:

They will make some inquiries, as my learned friend Ms Douglass indicated, so that the request for medical reports and so on in the context of the –

O'REGAN J:

But that's pretty intrusive though.

MR BUTLER:

In an employment relationship is not unusual.

WINKELMANN CJ:

I suppose if they're going to be satisfied they are suffering distress, et cetera, they need to have medical reports to that effect in any case.

MR BUTLER:

That's correct, that's what I was trying to get at is what you're looking at here is what's the marginal extra requirement that's put on the employer in a context where, for example, here there's already a lot of material, medical material, the intrusion is already taking place, your Honours.

ARNOLD J:

It seems to me there's a substantial difference between saying that somebody is suffering stress and saying that they had not got the capacity to make a decision about their own welfare even if it's a particular one.

MR BUTLER:

So effectively what we're saying is this is a catch-22 and the way in which the catch-22 gets resolved is in favour of the employer, essentially that's me putting everything out that's the proposition and I say, no, if to the extent there is a catch-22, and I use that language of two innocents, we say, no, actually it should resolve the other way because this is not a contract, this is an agreement drawn up in the context of an employment relationship and that does make a difference.

ARNOLD J:

And I guess the other thing relevant to that is that as we've seen the judgment about capacity is quite fine-grained, so that a person was capable of understanding that they're entering an agreement which will bring their relationship to an end but doesn't fully appreciate the consequence that they won't be able to pursue the grievance in the future. So the sort of inquiry that has to be done is quite a fine-grained one, is that right?

MR BUTLER:

Yes I think you can say it's a reasonably fine-grained as in it's specific, but that's entirely consistent with we would say the modern approach. You're not going to be able to establish mental incapacity if you don't do that, and that's a point that the Chief Judge made in the court when she was dealing with the flood gates argument. I'm very conscious of time, your Honours.

WINKELMANN CJ:

Yes I was going to say –

O'REGAN J:

So you should be.

MR BUTLER:

Yes, I know, I'm just trying to respond to the very legitimate questions that have been raised.

Can I just give you the reference to those passages of the Chief Judge in the Employment Court, because they haven't been alighted upon previously? And so they are paragraphs 39 and 40 of the Employment Court decision, so that's tab 10 of volume 1.

O'REGAN J:
39 and 40?

MR BUTLER:
39 and 40, yes.

So the other points I just want to touch on briefly are page 25 of the written submissions, just so that they are said and they are understood. Whether they are accepted by the Court is another thing, obviously that is for your Honours to reflect on, but I thought it was important at page 25 of paragraph 72 we just emphasise a couple of points.

72.4 so a point that will often will arise and I'm sure when I come to read the extracts in *Chitty* there will be some reference to it as, well what about third parties. Again that, we say that provides a different context or the way in which third parties as a context presents in the employment relations situation is quite different from an ordinary commercial context, and I will address that. I've addressed that at 72.4.

We say at 72.6 that the solution happened upon in *O'Connor v Hart* reflects those sorts of commercial transaction-centric matters that I have touched on earlier. Your Honours have the submissions from us at page 29 onwards as to how we would apply the three different alternate arguments on the facts of this particular case. Is there anything in relation to those that you want to hear me from or may I yield the floor to my learned friend Mr Martin? Are there any other questions, your Honours? Sorry, Justice Glazebrook?

GLAZEBROOK J:
No.

MR BUTLER:
Your Honours, if that's so I will yield to Mr Martin.

WINKELMANN CJ:
We're just wondering whether we should have the Intervener at this point. I don't know if counsel discussed it? It might be most logical because he is effectively making submissions which tend to be supportive of the appellant's position and that then gives Mr Martin an opportunity to understand everything that he might want to respond to.

MR HANCOCK:
May it please the Court. The first point I wish to address is the basic aspect of this case being a case of statutory interpretation and this case obviously involves the interpretation of section 149 of the Employment Relations Act and the compatibility of the *O'Connor v Hart* test within that provision.

It is an established position that courts will interpret legislation consistently with New Zealand's international human rights obligations wherever possible and so in that respect I just wished to first just respond to the point made by the respondent in their submissions at paragraph 65.3 that the Convention on the Rights of Persons with Disabilities does not assist in this case.

Your Honours, my submission is that it does assist and that referring to the decision, the judgment of the Court of Appeal in *Chamberlain v Minister of Health* [2018] NZCA 8; [2018] 2 NZLR 771 that the CRPD is in fact instructive when considering the application of disability rights when looking at legislation and policy.

In terms of the human rights principles at the centre of this case there are two of central relevance and those are the principles of non-discrimination and the right to justice protected under sections 19 and 27 of the New Zealand Bill of Rights Act 1991. And in this case those human rights principles are intertwined as Justice Thomas stated in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 531: "To the extent discrimination exists the ideal of

equality before and under the law is impaired and it is submitted that this principle of equality before the law has particular resonance in this proceeding given that this matter concerns the appellant's participation in a statutory dispute resolution procedure."

That principle of equality before the law is also protected by Article 14 of the International Covenant on Civil and Political Rights. That was described by her Honour Justice Glazebrook in the *Combined Beneficiaries Union Inc v Auckland COGS Committee* [2009] 2 NZLR 56 case as the principal parallel to section 27 of BORA.

So this again suggests a corollary between discrimination and natural justice when considered within the context of procedural justice and when looking at section 27 itself it's notable that the Courts have taken a broad rather than narrow approach when considering the application of the right to justice under section 27 of the New Zealand Bill of Rights Act.

And to that point I just wish again to respond to an aspect of the respondent's written submissions which states at paragraph 27 that the Commission's position that it would be open for the process under s 149 to be considered as determinative for the purposes of section 27 as overstating the role of the mediator. It wasn't the intention to focus on the mediator per se but the process itself and it is my submission that it would be open to review section 149 through the prism or through the lens of section 27 and in particular given that this is a case about procedural justice and it's a case that engages most directly Articles 12 and 13 of the Convention on the Rights of Persons with Disabilities.

Now, your Honours, I have an authority to hand up. It is the International Principles and Guidelines on access to Justice for persons with disabilities. This was produced by the special rapporteur on the Rights of Persons with Disabilities and the UN Committee on the Rights of Persons with Disabilities on the 28th of August this year, so it's very recent, and if I may seek leave to hand that up to you through the Registrar?

GLAZEBROOK J:

While that's happening, I can understand that submission. I have more trouble with the discrimination submission, and the respondents I think were suggesting that there wasn't discrimination. I just wondered if you had anything to say specifically on that?

MR HANCOCK:

I think on the principle of discrimination, I think that probably brings me right to the crux of the matter around the two different procedural safeguards that we have that have been balanced in this case through the *O'Connor v Hart* test, because in some ways the *O'Connor v Hart* test has a procedural safeguard for the incapacitated person in the form of the recognition of vulnerability, the setting aside of the agreement, but also a procedural safeguard for the other party in the form of certainty of contract. So what this case comes down to for this court when it comes to looking at this through a human rights lens is the balancing of those two safeguards and –

WINKELMANN CJ:

You're talking about interests really, aren't you, as opposed to safeguards? It's the interests of the vulnerable person not to be held to bargains that they didn't have capacity to make at the time they made them and for the other party to have the certainty of the contract they entered into.

MR HANCOCK:

That's correct, your Honour, those two interests. But there's a difference, in my submission, between the supported decision-making aspects of the procedural accommodations that are required under the Convention and which the legal frameworks in New Zealand struggle to meet, and I think this was one of the aspects that's evident in the *Corbett v Patterson* case in the sense that legal capacity is a presumption, and one of the problems with the *O'Connor v Hart* test, and one of their problems is trying to sort of adapt the *O'Connor v Hart* test as it starts with functional incapacity, is the party incapacitated, whereas a CRPD approach would look more at what supports are available to enable the person to exercise their right to legal capacity.

And then the next step would be if those supports are not available for a person to exercise their right to legal capacity what sort of safeguards are there to protect their rights, to protect the opportunity that they can actually enjoy their right to their wills and preferences or their right to be protected, their right to freedom from exploitation or from abuse. In fact the CRPD itself does touch on that issue.

So in my submission it's – well, the safeguard is the setting aside in this case. So that is the safeguard that is available once you've got to that point. Once the incapacity has been found, that's when the safeguard is triggered and the procedural safeguard for the appellant in this case would be the setting aside of the agreement because it restores her position, it restores her ability to be able to proceed with –

GLAZEBROOK J:
Well I can understand that and I can see how you might have a section 27 lens on that as well but what I can't get is the discrimination, or is it just a vulnerability and it's a discrimination if you don't give the extra supports to remove that vulnerability, is that the argument, ie, discrimination doesn't treating everybody equally, it means treating people who might need some further assistance to give them that further assistance, is that the…

MR HANCOCK:
Yes, the principle of equality being the law.

GLAZEBROOK J:
So it's an equality thing.

MR HANCOCK:
Equality before the law.

GLAZEBROOK J:
Doesn't mean equal it means…

MR HANCOCK:

That's right, so the duty is here. So there was a lot of exploration of where the duties lie at the beginning of the oral argument today and there was exploration of does it lie on the employer, does it lie on the support people, the advocates, et cetera. Well, the primary duty is on the State and that's made quite clear in these recent guidelines that principle 5 in fact provides that it's the State that must provide the necessary accommodations, and if those accommodations aren't provided then the right to non-discrimination is engaged, and in fact within the context of Articles 12 and 13 it's a positive duty. Reasonable accommodation itself can be limited. It can be limited if that reasonable accommodation would provide a disproportionate burden but the procedural accommodations upon the state can't be limited.

O'REGAN J:

And do you say the section 149 triggers that because there isn't actually a proceeding here, is there?

MR HANCOCK:

No well I think it's actually quite –

O'REGAN J:

Sorry, I mean you're effectively asking us to treat or to pretend that section 149 really creates a proceeding in a court, is that what you're asking us to do?

MR HANCOCK:

It's not a proceeding per se. I don't think it can be characterised as one. It can be characterised as the primary dispute – well dispute resolution mechanism established by the statue and it does create a series of duties and functions that are performed and I don't want to get into the role of the mediator in that respect but it does create certain functions and duties that need to be –

GLAZEBROOK J:

Well, you'd say it's really a Cropp analysis because it's under a statute that provides the duty of the state to comply with making sure that there's a reasonable accommodation for people who are under that statute, is that the – when I say a *Cropp v A Judicial Committee [2008] NZSC 46, [2008] 3 NZLR 774* or whatever it is, so the argument was because it's a statute, well, this Court held because it was a statue the Bill of Rights obligations actually engage under that statute even if it's a private body that's involved in it as it was in that case.

MR HANCOCK:

Yes the case of *T v Chief Executive of the Department of Labour* 5 NZELR 711, Chief Judge Colgan's decision where he looked at the natural justice, he took a purposive approach to section 148 of the ERA in that case and applied section 27 through section 6 of the Bill of Rights Act. That case was interesting because it involved a mediation privilege under section 148 and was again needed in order to, you know, be able to lift the protection of mediation privilege it needed a purposive interpretation rather than a literal one, and so in that case Chief Judge Colgan applied the Bill of Rights purposively to interpret that particular section.

But just getting back to that issue of these two balancing safeguards, if you like, or these two balancing and competing interests, in my submission one of the challenges or difficulties here from a CRPD perspective is that the second limb, the knowledge limb effectively supersedes or trumps the first limb which is the incapacity and in this case you have factually you've got both have been made out and aren't under – you have lack of knowledge and you have incapacity so you have these two competing interests and two competing processes. One is the setting aside, the one is keeping the settlement agreement in place. Where would a CRPD approach take you when looking at the application of that test within this particular context and my submission would be that the CRPD approach would be to recognise the setting aside as the presumption and that a knowledge requirement would have to be factored in as part of a proportionality assessment that would be taken after that, and I

think perhaps the language of human rights could be useful. Equity and good conscience does engage. I understand the *O'Connor v Hart* knowledge requirement itself but perhaps a human rights approach offers a different type of interpretative language. It talks about proportionality, about whether or not in the particular circumstances the setting aside would indeed create and injustice or be substantively unfair or disproportionate or place a disproportionate burden.

This particular case is quite resonant when it comes to disproportionality of power, if you like, too, when you compare the nature of the respondent as a large Government entity as compared to the appellant.

ARNOLD J:
Is it relevant whether the agreement which emerged was fair or not?

MR HANCOCK:
I think fairness is relevant to a calculation, to the weighing up because there could be situations of course where, and I'm not saying it's necessarily fair in this case because I understand the appellant's position is that it isn't fair because it denied her, from her perspective of her opportunities to seek particular types of remedies and that when she entered into that, even though if one stood back and looked at it you might think, well, that looks fair in terms of the quantum or that looks fair compared to other cases. Actually what's fair is quite subjective in terms of where the appellant sits but, yes, I think it can be weighed up under a proportionality type of assessment. But I tend to think that the presumption should be the setting aside, because the presumption protects the rights, it recognises vulnerability and it enables, and I guess this is looking at incapacity through a retrospective lens in this particular case, but it enables wills and preferences to be enjoyed and maintained.

So I think that was the conclusion of my submission. In the written submission it got to the equity and good conscience provision of the section 189 as a sort of second limb following the presumption of incapacity to set aside the agreement but I think that can be extrapolated through you by

applying a human rights approach and a proportionality assessment or analysis. So that would conclude my oral submissions, your Honours. If you have any questions?

WINKELMANN CJ:
Thank you, Mr Hancock. Mr Martin.

MR MARTIN:
E ngā Kaiwhakawā, au Te Kōti Mana Nui, tēnā koutou.

There are three broad reasons why there should not be a different test in the employment jurisdiction for setting aside a settlement agreement on the grounds of incapacity and all three reasons support access to justice.

The first reason I'll touch on is the presumption of capacity. It is rebuttable by knowledge of incapacity at the relevant time, ie, it applies prospectively allowing for supported capacity.

Secondly, the UN Convention on the Rights of Persons with Disabilities, that Convention requires equal recognition of people with impaired capacity before the law attaching importance to self-determination and avoiding a medical model or a substituted decision-making model.

And the third point that I will be submitting on is the statutory employment relations scheme. That scheme, it will be submitted, does not require a special rule to be carved out from the common law for incapacity.

Just before I move on and perhaps just to clarify not to take issue with, Mr Hancock, my friend, just referred to paragraph 65.3 of the respondent's submissions and suggested that it's been submitted that the Convention is in some way unhelpful. Their specific submission at paragraph 65.3 in relation to the Convention was much more specific. It was that the Convention does not directly assist in this case. The appellant has not described what additional supports or reasonable accommodations should have existed to

enable her or others in her position to exercise legal capacity and you will recall of course that in this case she was supported by her whānau, she was represented first by a union and then by an experienced employment lawyer, and so it's not clear what further assistance the law ought to require as a matter of procedural fairness in an equitable sense. That was the particular submission there so I don't want to be misunderstood as suggesting the Convention is not relevant and doesn't have a bearing.

WINKELMANN CJ:
So what paragraph was it in your submissions?

MR MARTIN:
That is of the respondent's submissions at paragraph 65.3, but really all I'm doing is explaining that in the respondent's submissions the Convention does play an important role but it is not the one contended for by the appellants because it will be submitted that it does reinforce the importance of the presumption of capacity, and I will come later to the points that have already been touched on. But, in essence, the access to justice issues that present, if the knowledge requirement is removed, are what his Honour Justice O'Regan talked about creating incentives or driving behaviours which, as Justice Glazebrook said, some of which could be quite intrusive, and that takes us in the jargon, the medical model, but really the routine obtaining of reports and arguments about what those reports mean and so forth or, in the jargon, the substituted decision-making model, which is really taking the person who may have impaired capacity to some extent out of the equation in a way that cuts completely across what you will see in the documents from the United Nations. They are coming from quite a different perspective, it is submitted.

It is submitted that the test applied by the Court of Appeal reflects the general presumption of competence and is rights-consistent and that it's, importantly for these purposes, it is a test that is context-sensitive. And by that I mean that in the employment jurisdiction constructive knowledge of incapacity will be judged by the standard of a reasonable employer and also, importantly, the confidence in mediated settlements will be preserved and mediated

settlements, as you know, have a very central place at the heart of this statutory scheme, and it's important that that remain the focus because settlements are how most employees achieve effective access to justice.

As you will see from the written submissions, the respondent proposes an updated test and that is set out at paragraph 66 of our written submissions. It is consistent with the Court of Appeal judgment in this case and with the evolution of *O'Connor v Hart* over time, but what is proposed if there is to be an updated test is essentially three steps instead of two. The first two are prospectively focused and they are focused on capacity. Firstly, functional capacity and, secondly, supported capacity. Just to be clear, on the facts and on the findings of the courts below neither of those steps are engaged, they are not in issue on this appeal, so it is accepted by the respondent for the purposes of this appeal that TUV did not have functional capacity and that she did not achieve supported capacity on the facts. It's not to say she didn't have supports, and I've touched on some of what those were, but it is accepted she did not have capacity. So what this Court is concerned with is the third step which, it is submitted, needs to be present in the test, and that is the knowledge, actual or constructive, of incapacity by the other party which, it is submitted, is not established on the facts and was not found in the courts below.

WINKELMANN CJ:
That second step really doesn't add anything though, does it, because it's really just another way of asking the first step is, did the party have capacity? Because if they had capacity because they had support then they had capacity.

MR MARTIN:
It doesn't operate well retrospectively, but what's important about it is that if an employer does have notice of capacity issues, if I can put it that way, then there is the ability to then engage with the employee in order to bring about some degree of supported capacity. Otherwise you are left with a somewhat binary problem.

WINKELMANN CJ:

Yes, but this is a test that will be applied retrospectively. I mean, I see what you're trying to achieve, you're trying to bring the focus onto the fact that you can't just say someone has, say, is unwell in some particular and therefore lacks capacity, you have to allow the possibility that with support they will have capacity.

MR MARTIN:

I take your Honour's point, but it is a helpful test nonetheless because it avoids the situation where you have capacity issues that have been raised during the course of a process, an employee still wants to access mediation, so doesn't want to go to Court, still wants to be able to engage with their employer, and their employer says: "Well, hang on, how can we engage with you to achieve that?" There needs to be, it is submitted, a way in which those parties can confidently engage around supports so that in effect it's agreed: "If we do this on a marae, if we do this with whānau engaged, if we do this…

WINKELMANN CJ:

Well, it can't bind them though, can it, because the question will ultimately still be does the person have capacity?

MR MARTIN:

But this is why knowledge is so important, your Honour, because if you apply this test – I agree that on the appellant's test it doesn't help at all, you can't do supported capacity.

WINKELMANN CJ:

No, no, my point is that it's a retrospective test and you've really included 66.2 in there to highlight the potential prospectively to take steps. But when you're assessing the matter retrospectively the one question is really whether the appellant, say, in this case, had capacity, it doesn't matter whether they had capacity with or without supports, doesn't matter whether they had incapacity with or without supports, the supports really are just relevant to assessing the capacity.

MR MARTIN:

I'm not disagreeing with your Honour, but I think I'll tease it out, I think it's useful, because it does go to, I think –

WINKELMANN CJ:

Okay, well, I'll let you come to it.

MR MARTIN:

Well, no, perhaps the heart of the disagreement between the parties, while I take your Honour's point that you will be applying this sort of test retrospectively, in a different case you may have a process where there has been a report that has pointed to capacity issues but the parties have nevertheless proceeded to negotiate a settlement, and they have done so on the basis that the employer knew there was a capacity impairment but understood that that had been address through supported capacity. So in that situation, although there may be functional, a degree of functional incapacity, the employer would be able to say: "But both parties wished to engaged and…

WINKELMANN CJ:

Yes, I mean, I see that. I just think it doesn't really help substantively, because even if you did that the ultimate question would still be whether the person had capacity and whether the employer knew that or ought to have known they didn't have capacity. So it just might be evidentially relevant but it doesn't seem to me to be relevant, a necessary step of the test, but it's a detail point so I won't hold you up on it.

MR MARTIN:

It's an aspect of how you –

GLAZEBROOK J:

Well, I would have thought it still relevant to a degree, because it draws the decision-maker's attention to the fact that it's not a binary situation, it is a

situation where support might actually create or allow a person to make decisions, so it's in fact very Convention-consistent.

MR MARTIN:
Yes, your Honour, and when we come onto the Convention documents, I mean, you see it so strongly coming through that there is this importance that there not be in effect a presumption of incapacity in order to – and I'll develop this more – but there needs to be a presumption that can be relied on by parties, if through supported capacity then that's fine.

WINKELMANN CJ:
But would you accept that if a person didn't have capacity and the employer knew or ought to have known, if we take the *O'Connor v Hart* language, that they did not have capacity, it wouldn't matter that all these steps were taken?

MR MARTIN:
I agree that if capacity in the end, if the supports have failed to achieve capacity *and* knowledge, constructive knowledge potentially, is present then you're right. The reason we've included the second step in the test is that, I suppose to pick up a point, Justice Glazebrook's just said, it did appear to usefully move away from the binary, the binary you have capacity or you don't, to explore a middle ground on that spectrum of capacity.

ELLEN FRANCE J:
Might it not be relevant though, Mr Martin, in terms of whether or not you ultimately set the agreement aside? In the situation you're talking about where the employer has some knowledge of problems and then takes steps, would that, on your test, would that be relevant at all in terms of whether ultimately the Court sets it aside, or not?

MR MARTIN:
If I'm understanding your Honour, what has been shifted is what it is that the employer has constructive knowledge about. The question's no longer did

they have constructive knowledge of a capacity issue, it becomes did they have constructive knowledge that the supported capacity was failing.

ELLEN FRANCE J:
Right.

MR MARTIN:
So despite the support that had been agreed.

ELLEN FRANCE J:
Steps taken.

MR MARTIN:
You may have a process agreement, it might be reasonably formal, but you've got supports in place. Did they then have constructive knowledge that actually, despite everyone's best intentions, that hasn't worked?

WINKELMANN CJ:
You see, that's why I'm taking issue with it, because I think it can smudge up the issues, because the issues remain capacity and knowledge, and that's a step that's relevant to both of those but it doesn't seem to me a freestanding step, and that's my point I suppose.

MR MARTIN:
I do, I take on board the point your Honour's making, and I'll move beyond it because the main point for present purposes, the main submission really –

GLAZEBROOK J:
The main one is your third point that you're going to have to really concentrate on, I think.

MR MARTIN:
The scheme, your Honour, yes. But in coming to that I'm going to come at it from a position where, it is submitted, is not simply a balancing of sort of two innocents and fairness to two innocents, there is actually something much

more fundamental about the role that the presumption of capacity plays in all of this, and it's an empowering purpose, it's not simply a protective purpose in relation to an employer, it does actually also mean that a person with some form of disability or impairment is nevertheless presumed to be capable, and so the knowledge element is important in order to make that real. So I will start there, if I may, but I take your Honour's point that in the end it has to sit within the statutory scheme.

So the overall submission – and I'll come to the presumption of capacity – the overall submission is that the presumption of capacity operates at all three levels in the updated test, and that means that the test operates prospectively, not retrospectively, actual and constructive knowledge rebuts the presumption but from the point in time when there is evidence of incapacity. So, not to be misunderstood, obviously you apply it as a court, looking backwards, but it is applied based on the knowledge that parties had, particularly the employer party had, during the course of the process, and so in that sense it operates prospectively based on knowledge through that process of the incapacity.

So presumption of capacity means apparent consent is rebuttable by knowledge, actual or constructive, of incapacity at the relevant time, which I'm describing as "prospectively". And we submit at paragraph 40 of our written submissions that the knowledge requirement arises out of the common law presumption that every person is competent and therefore has capacity to contract. So we're relying on *Corbett v Patterson* and the discussion by the Court of Appeal in that case, particularly paragraphs 36 and 43, which my friends have taken you to this morning. The party must have capacity to understand the nature of the transaction when it is explained to them. And I'll just pause there.

Self-evidently we're not talking about what's sometimes called in the literature "decisional competence". It must still be possible for a person to represent themselves in processes, even if the way they do that is not the way they would do it if they had a lawyer. It must also – and you'll see this in the cases in various places – it must also be possible for people to conduct their case in

ways that others, lawyers, doctors and others, might consider ill-judged. That is part and parcel of the autonomy. So it's not around decisional competence, it's about ability to understand the nature of the transaction, the specific decisions when explained to them.

And in the *Dunhill* case, which was also discussed this morning, paragraph 13, the general approach of the common law, it is submitted, is that capacity it to be judged in relation to the decision or activity in question and not globally. What Lady Hale said in that case at paragraph 21 is that as a general proposition the other party is unlikely to be in a position to know the details of his opponent's mental faculties unless these are fully explored in the medical reports to which he has access, which is another way of saying really that you do tend to drive a medical model if you are trying to use capacity alone as the touchstone here, and this is why I've gone so far as to say if you're not careful about it you do end up reversing the presumption and turning it into a presumption of incapacity because you can't rely on anything other than a medical report.

So the way in which this is anchored back into the common law in *Dunhill* where there's a reference to the Privy Council's decision in *O'Connor v Hart*, it is said at paragraph 25 of that case: "The rule is consistent with the objective theory of contract that a party is bound not by what he actually intended but by what objectively he was understood to intend." And I just note in passing, and there hasn't been discussion of it, but in the Protection of Personal and Property Rights Act, the PPPR Act, there is also a presumption of competence at section 5. So obviously there are different tests that apply under that legislation in relation to welfare guardians and so on and this is not a case where that Act was engaged. But I note the presumption of competence has that statutory reference as well.

The submission that is made here is that what makes the Court of Appeal's approach and the *O'Connor v Hart* test fair, if I can put it that way, is not just a balancing of interests, it is fair, the test and approach is fair because the test starts with a rebuttable presumption of capacity.

GLAZEBROOK J:

Well, yes, but you say you rebut the presumption of capacity, and if the other party doesn't have knowledge of it that's the end of it. I can understand the arguments in terms of knowledge but I can't understand saying that it actually benefits the person who doesn't have capacity. Because if you don't have capacity it means that you didn't understand the nature of the transaction involved and so you're going to be bound by something that you didn't understand. Now the presumption of capacity has been rebutted, you just didn't understand it, and I have difficulty seeing the knowledge being fair to the person who didn't understand something.

MR MARTIN:

The benefits that flow from the presumption of capacity are unlikely to appear in a particular case where an individual is trying to set aside a settlement agreement. Where they are important are when you look at the group of people who may have impairments to capacity and actually beyond that to employees generally. If you take an approach that starts with capacity sole as the question, then you don't have a presumption of capacity and so there will be these drivers that will come on towards assessments.

WINKELMANN CJ:

I guess we're just railing against the notion that it's fair. It's not fair to anybody. You're saying it serves policy purposes. It certainly serves the policy purposes of certainty of contract, doesn't it, and that's where it's sourced from. it's not sourced from some sort of rights view of the world, it originates in the certainty of contract. But in any case, it serves another policy purpose now, which is to recognise the rights of those who have disability of some sort.

MR MARTIN:

Yes. So you're right, I'm not sure the language of fairness is helpful in that sense, and it may be that some of the –

WINKELMANN CJ:

No, it's distracting, and I think it sounds ironic almost that it's fair to you to have a presumption of capacity when you don't have capacity.

MR MARTIN:

I accept that. So some of the objection, I think, to the presumption of capacity is, as your Honour has just indicated, is perhaps because of its genesis in the law and the perception that it's seen as very contractualist and very sort of driven by commercial transactions. But the point that I am trying to tease out is that if you're looking at how people with incapacity are treated and how they are able to access justice and how they are able to engage, for example, with a mediated process, it is important to that group of people and, as I'll come on to, in fact to all employees.

WINKELMANN CJ:

But do we need to spend too much time on this, because the presumption of capacity is not at issue, is it?

MR MARTIN:

Well…

WINKELMANN CJ:

No, it isn't. It's accepted by the appellants.

GLAZEBROOK J:

I just don't see where the knowledge comes into that, that's all, that was my point. Because the second point of yours does say, well, you're able to engage and every support will be given to you to engage.

MR MARTIN:

Yes.

GLAZEBROOK J:

But if every support is given and you weren't able to engage, I just can't see how the knowledge is anything other than a balancing of those wider policy considerations against the interest of an incapacitated individual.

MR MARTIN:

I don't want to push the point too much further, but it is submitted that knowledge is actually integral to the presumption of capacity. Because if what you're really saying is there is simply a question of capacity, there is no presumption there. It's a medical question essentially, satisfied by a report, and –

GLAZEBROOK J:

It's a factual question, isn't it? Was the person, despite the presumption of capacity, was the person able to operate? If the answer's no then it's not a medical question it's just an actual answer to a factual question, no, they weren't.

MR MARTIN:

And it is likely that in order to have certainty around that decision if there's nothing more in the test there will be recourse to assessments.

GLAZEBROOK J:

No, no, I can understand those policy issues, but I don't understand it when it's said it's integral to the, the test is, the particular person.

WINKELMANN CJ:

Unless you're saying it's an irrebuttable presumption.

MR MARTIN:

I'm certainly not saying that. But where it gets you to is to have a presumption the starting point has to be that you can rely on apparent capacity, and in this case we're talking about employers being able to rely on that. If you don't have a knowledge element then it becomes, it is submitted, a bit meaningless

to talk about a presumption of capacity, because really someone is only presumed to have capacity as long as there's, you know, there's nothing to say they don't, and that is not really a presumption at all. It doesn't assist people to engage with an employee presuming them to be capable, because there could be things they don't know about that mean that they're not. So the concern that's being expressed through this knowledge, this knowledge point in this submission, is that you do effectively create almost a presumption of incapacity. You start from the point of view that for all you know someone may not be capable, and that drives the behaviours that, for example, mean routine assessments, certainly concern if, as is common in the employment jurisdiction, you have stress issues, you have issues being raised around bullying, around anxiety, depression, these are sadly issues that that jurisdiction does see a lot. I have to say it's not only that jurisdiction that sees those issues, they are part of other jurisdictions which engage with personal concerns to people. But in the employment jurisdiction many, a large proportion of the cases that do go to mediation, will concern those kinds of issue. The presumption in order to be effective, a presumption of capacity, with all of the dignity and autonomy that goes with that and which we'll talk about shortly in the Convention, for that to be effective the employer needs to be able to take at face value that this person may be experiencing issues around stress and anxiety quite possibly because they are in a dispute with their employer and are going through a stressful process, and the employer nevertheless has to be able to presume them to be capable unless, it is submitted, they have knowledge to the opposite effect. So that –

GLAZEBROOK J:

Well, it might be the employer actually in that circumstance knowing that that's case might actually more have a duty to make sure the supports are available, which seems to be left out of the – because you say, well, you have your second step but then say that if there's knowledge that that's actually irrelevant, but I think especially in a duty of good faith. So would the employer be able to engage directly with a bullied employee without a lawyer, for instance, and say: "Well, that's fine, this has been signed off"? I'd suggest probably not.

MR MARTIN:
And so that –

GLAZEBROOK J:
But not with any knowledge of incapacity at that stage, because if, as we say here, there's not enough here despite knowing that there was a major depressive episode, for knowledge, that's your submission?

MR MARTIN:
That's right. But the, so the –

GLAZEBROOK J:
So knowing that, would your client have been able to engage with her directly with no supports whatsoever and rely on lack of knowledge? I would suggest not, as a responsible employer.

MR MARTIN:
And that, it is submitted, takes us more into what constructive knowledge should look like from a policy perspective perhaps.

WINKELMANN CJ:
Perhaps that is where we should go.

MR MARTIN:
And so perhaps I will –

GLAZEBROOK J:
Well, you say there's not constructive knowledge here, as I understand it.

MR MARTIN:
There's not here. But on these facts neither were we dealing with an unrepresented person who was unsupported. So these facts are quite different to the case your Honour –

GLAZEBROOK J:

Well, they might be different but I don't see how constructive knowledge can be different. Just assume this is exactly the same person but without any support around.

MR MARTIN:

But it may be that when you come to apply a constructive knowledge test, if you are in circumstances where, if the circumstances are that an employer, and I think the example may have been given, but the example's given in the Employment Court's judgment actually of a situation where someone takes advantage of an employee, I think it's a young employee in that example, with impaired capacity, and sort of deals with them directly in a way that's quite oppressive, so quite a different circumstance to here, and I mean that may well engage other equitable doctrines. But the facts around a particular case, not this case but another case where there is that kind of oppression or taking advantage –

GLAZEBROOK J:

I wasn't suggesting that they're dealing with her oppressively, I was just suggesting they were dealing with her, in my hypothetical. But I think maybe we've taken it as far as it can go.

WINKELMANN CJ:

I'm not sure where you are in your submissions, Mr Martin. Can you re-locate us in your submissions?

MR MARTIN:

I will do, Ma'am.

WINKELMANN CJ:

We were dealing with the fairness of the presumption of capacity, and I think we've still not gone past that?

MR MARTIN:

I'll just, if I can – just before, I'll move shortly onto the Convention rights, because that then does locate us quite back squarely with what would be submitted are strong policy reasons for the knowledge component of this test. But just before I go there, what's happened with the threshold for incapacity is that it's becomes more specific and context-sensitive over time, not higher, it is submitted, and that's contrary to what I understand the appellant has been saying, but the *O'Connor v Hart* test used the language of "unsound mind" as a threshold, and what has evolved over time is a more specific test for incapacity, a more functional test. So the threshold is certainly not a higher one, and what you see is, I guess, an engagement where this is, on these facts for example, this is not a case where the appellant's general right to exercise her legal capacity is in question, as I've noted there'd no orders under the PPPR Act for example being applied to her, it's not being suggested that at any stage she wholly lacked capacity to make or communicate decisions relating to particular aspects of her personal care and welfare, so we're not in that space as far as we can see from the evidence. So you are in a situation where the circumstances that are causing the incapacity may be related quite specifically to particular interactions with the employer that may be what's causing the stress, the unresolved issue may be causing the stress. Supported capacity is in that test, in our submission, in order to be consistent in terms of dignity and self-determination with allowing people who have diminished capacity but are nevertheless able to engage and continue to engage through a process in order to access mediation, that is a benefit to that individual – to come back to Justice Glazebrook's question – but it's also of a benefit to all employees who want to access, as the vast majority of them do, 76% of employment cases resolve through mediation. The ability to have a starting point of capacity, even where people may be demonstrating the "stress of the process", if I can put it that way –

WINKELMANN CJ:

Yes, but I mean it's not going to drive massive changes in behaviour should there be a change in the test, even as model one, suggested by the appellant, because it's such an improbable situation that someone's going to want to set

aside in a fair settlement agreement on condition that they disgorge the benefits of it and start again, it's just not going to happen all the time and employers aren't going to alter their entire way of behaving because of it, are they?

MR MARTIN:
It's two different things there. I mean, I'm not, I don't believe I am making a sort of a floodgates argument as my friend, Mr Butler, put it. But there's two different things there. Would there be, if you removed the knowledge component, would there be a sudden flurry of people trying to sort of court out settlements? I'm not pitching it that high and it's frankly not possible to know. I mean, I will, just before leaving that point, I mean, mediators often say that, you know, perhaps tongue in cheek, but they do say that a mediation out of which both parties are a bit unhappy is a successful mediation…

WINKELMANN CJ:
Yes, that doesn't really help us.

MR MARTIN:
But putting that to one side, would you expect that people will queue up to set aside their settlements when they've just managed to draw a line under something? No, perhaps not. The actual point of concern in terms of access to justice is different, and that is that if you remove the knowledge component and there is a vulnerability there around whether or not the settlement can actually be relied on, then you will start to see either through HR practice with large employers or through nervous small employers who aren't always enthusiastic about going to mediation anyway, so different kinds of employers engaged here, but in either scenario you do have the real prospect, it is submitted, of employers becoming more nervous around the mediation process and a routine seeking of assessment wherever there's an indication, if you like, that capacity might be diminished or compromised in some way and, as I've said, that will often occur in the employment jurisdiction.

WINKELMANN CJ:

Well, mind you, wouldn't that be a good thing, if there's an indication that capacity is diminished?

MR MARTIN:

And this is what takes us squarely into the Convention. Because what you then do, to take your Honour's point, what you then do is you have really quite intrusive routine procedures that medicalise what is a stressful perhaps but normal way of resolving relationships in a way that is not litigation, in a way that is quicker and cheaper and less confrontational, and what you do, if you're not careful and you remove this knowledge element, is you do start to medicalise it by having these reports that are quite intrusive, and to move beyond the word "intrusive", I mean, it's obviously intrusive in terms of the personal information in there, but to position that in terms of the, I guess, the "real world", as my friend put it, of mediations, where an employee's going to mediation, they don't normally want to bring along a report that details their self-reported description of their situation and the various factors that are impacting on them, they wouldn't normally go along into a mediation and provide that, because it could play in different ways. It could say that they have capacity issues, have no intention of not being advised to return to their employment, and that may not be what they wish to, that may not be the starting point they wish to take into mediation, so that's one possibility. Or it may be that the report actually says: "No, this person is actually doing okay and there are these particular issues but they're not impacting significantly on them." That won't necessarily be something that a person wants to take into mediation either, particularly if they are perhaps looking to move on and negatiate an exit from this employment relationship.

So what can happen through this is, with a quite rational response from an employer, is to say: "Concerned about capacity in these circumstances, we need to see an assessment," you drive behaviours which in fact put a question mark over everyone's capacity.

WINKELMANN CJ:

Yes, I mean, well, I understand your point. But the response from Mr Butler is that the cases in which it will arise are cases where were already in the medical world, we've already got reports about the person's stress, et cetera, that's the reality.

MR MARTIN:

Well, there may be reports along those lines. I'm not sure –

WINKELMANN CJ:

Well, I mean, I suppose we can't deal with every hypothetical situation, you're quite right, Mr Martin, so.

MR MARTIN:

Well, I mean, in the – and I'll come to the figures but, I mean, they are worth pausing on – you know, for the financial year 2017/18 the mediation services dealt with just over 7,000 applications for mediation, 76%, as I said, resulted in a settlement, and mediators certified 8,967 agreements outside of mediation, so there's something like 15, 16,000 applications going through, which we've contrasted with this 750 determinations in the authority and the 180 judgments in the court. So, I mean, the scale is much bigger.

GLAZEBROOK J:

Well, you're not suggesting that every employer in every case when somebody says: "I've got a personal grievance because you haven't been paying me for three months," or "you sacked me without reason," is going to say: "I need a capacity assessment," and that would fit within the good faith requirements of the…

MR MARTIN:

I'm pausing –

GLAZEBROOK J:

Well, there'd be no way that you'd say "I'm not entering into mediation or any settlement agreements *and* meet your good faith requirement," if there was absolutely no reason to ask for that. So to say all 8,000 people would have to go under capacity assessments is really not the case, is it?

MR MARTIN:

No, I'm not saying that, but what I am saying is a substantial proportion of that volume is likely to engage – and I don't have the numbers – but is likely to engage questions around stress, questions around –

GLAZEBROOK J:

And then they will be providing, if they ever got to that stage, reports from medical practitioners or whoever about that stress, won't they?

MR MARTIN:

But not –

GLAZEBROOK J:

That was what the submission contrary to you was.

MR MARTIN:

But not for mediation and not routinely, it is submitted. And it may, as I was indicating, that may not be something that an employee wishes to do or what is actually in their interest to do.

WINKELMANN CJ:

Well, if they're pursuing a claim for stress and humiliation then they're going to be presenting evidence that they've been harmed by it. So, I mean, yes – I mean, we can go on forever about this, Mr Martin, and I just wonder if…

MR MARTIN:

Well, it depends – no, I will take your Honour's signal on that – but it does, just finally, it does depend though on what the relationship dynamic is and what is

trying to be achieved through the relationship problem. Your Honour may be right, where you're dealing with a particular kind of claim that is premised on an allegation of a severe incapacity caused by an employer, but by no means the majority of claims would be in that category. But they will nevertheless still indicate elements often of anxiety, depression and certainly stress-related impact. So those are the concerns and just finally, in Justice Glazebrook's question, because of the impact of HR practice it is not inconceivable that a decision to remove knowledge could drive those sorts of incentives, and it wouldn't necessarily be inconsistent with good faith to be seeking assessments where there is any suggestion of stress or –

GLAZEBROOK J:
No, no, I was just suggesting that if you say all those 8,000 people would have reports asked of them, that could not possibly be in accordance with good faith.

MR MARTIN:
And I didn't mean to say that, I didn't mean to suggest that.

WINKELMANN CJ:
So where are we in your submissions Mr Martin?

MR MARTIN:
I'll move to the Convention, which is my second point. The Convention requires equal recognition before the law.

WINKELMANN CJ:
I'm just trying to follow where you are in your written submissions, I don't know if you're anywhere in your written submissions.

MR MARTIN:
I've made one or two references as we go your Honour but the material I'm covering is in the written submissions but I am really endeavouring to summarise it for your Honours.

WINKELMANN CJ:
So can you give me the general location?

MR MARTIN:
So the Convention that I'm going to be discussing now is covered around page 15 and what I was proposing to do with this point, your Honour, was just particularly draw the Court's attention to Article 12 and I'll be guided by your Honours on how much time to spend here but it's in the appellant's bundle of documents, volume 6B at tab 34, page 10. That's the Convention itself but perhaps I don't even necessarily need to take you to it. Article 12(1): "Persons with disabilities have the right to recognition everywhere as persons before the law." And Article 12(2): "Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life", and you'll see that Articles 12(3) and 12(4) expand on those ideas.

What I did want to spend just a little bit of time on was the United Nations Committee on Rights of Persons with Disabilities and their commentary, and there is, helpfully, in the Human Rights Commission's bundle two general comments which I did just want to draw your attention to. So that's in their bundles, their authorities I should say, and it's tab 9 is the first one, and I won't take you through line by line but it is submitted that Part 1, the introduction.

GLAZEBROOK J:
Can you just wait a moment?

MR MARTIN:
So this is the intervenor's authorities.

WINKELMANN CJ:
Is this the 19 May 2014 one? Eleventh session, yes.

MR MARTIN:
Yes it is, yes. And so it's headed, "General Comment No 1 (2014), Article 12: Equal Recognition Before the Law." The first part is Part I, Introduction. I

wasn't going to take you through it paragraph by paragraph by any means but much of that introduction is certainly worth touching on because it amplifies what is in the Convention right and discusses that and it is submitted is directly on point in terms of what it is saying about inherent dignity, individual autonomy, freedom of choice. And then you come to Part II of that comment and, in particular, what I did want to just pause on, for emphasis, is paragraph 15, and there is actually in that paragraph some criticism of the functional approach that was applied by the Courts below and is contended for by all parties in this Court but that is because of the importance that is attached by the Committee to self-determination and to avoiding stigmatisation, medicalisation and disempowerment of people with impaired capacity. So, what they're seeking, and you'll see this coming through in this comment, is supported capacity and reasonable accommodation, and it is submitted that in order to be able to talk sensibly about that you actually do need to have constructive knowledge, at least knowledge or constructive knowledge, of a particular issue. The sort of engagement that this comment is wanting to have is prospective engagement and so it does, it is submitted, while it is critical of even the idea of having an incapacity test, I think, I think that’s a fair take on it, putting that aside, what it does make clear is that you should start from the premise that people have capacity and, again, it is submitted that it is important that not – knowledge, constructive or actual, is important in order to make that real.

GLAZEBROOK J:

Well, does it say that, because I would have thought it might be saying that you actually have a duty as the state to make sure that anybody who is disabled has supported decision-making or necessary accommodation to make sure they can act equally. So the state can't say sorry, I didn't have any knowledge of this therefore they sink or swim. The state, in terms of the state responsibility, has to make sure the reasonable accommodation is provided so that there is equality before the law otherwise they breach their duty.

MR MARTIN:

There's no question that the supported capacity and the reasonable accommodation are all directed at the sorts of things that you're –

GLAZEBROOK J:

And you can't say: “I didn't know about the disability therefore I didn't have to provide that.” It's your duty, as the state, to find out about it and to provide that support and decision-making and reasonable accommodation. I’m not sure it has anything to do with *O’Connor v Hart* but I do, I’m just suggesting that that does not say that the knowledge requirement is important.

MR MARTIN:

Well, it is submitted that what this does, from at least a policy perspective, is it points to the importance of parties being able to talk about these issues, which implies knowledge, so it’s not –

WINKELMANN CJ:

So it starts with the presumption of capacity, but it also recognises it's important support is provided for those who don’t have capacity, but if people are free to sit around on the basis of their “you ought to know” quite high level of knowledge, that’s actually not going to see people with capacity issues provided support often, is it, because they can just say: “Well, I don’t need to know, it's best if I don’t know,” and therefore the person with a disability which has an impact upon their capacity is not going to get the support they need in that situation?

MR MARTIN:

It's submitted though that the way your Honour’s pitching that test is a wilful blindness construct and so it would be accommodated by the constructive knowledge test. The problem is we’re moving away from the facts that we have in this case.

GLAZEBROOK J:

Well, they're looking at the state responsibility anyway and I'm just saying the state responsibility cannot possibly have knowledge involved with it, whatever type of knowledge.

MR MARTIN:

And I accept what your Honour's saying and I accept that this is about the state's responsibilities, and I would go further and say then what they're also concerned about is particularly pernicious situations where people are being stripped of human rights through –

WINKELMANN CJ:

My point is that you can excavate quite a lot out of it, which supports either argument I suppose, as to how the law should develop.

MR MARTIN:

The reason I've taken your Honours to it though is, as I say, to just reinforce, and there are similar statements in the second comment, which I'll take you to more briefly in a moment, to reinforce that your starting point is capacity and it does take us back to that premise I began with, which is that the presumption, to be meaningful, the presumption of capacity must be that someone is capable until there is evidence, until the point in time when there is evidence that they are not. Otherwise you're not in a position to rely on it. There is no presumption. It is a simple question of capacity or not.

WINKELMANN CJ:

Yes but I mean, honestly, I don't see how that helps you with your argument or not because the appellant's – this is why I don't know why we don't move, has this presumption – the appellant's model assumes presumption and they agree that the contract's binding until such time as they prove that they didn't have capacity, and you say there's a presumption of capacity and – but what you're saying is you're really worried about what the people in HR are going to be doing and really that's your argument, isn't it? That's going to cause all

sorts of behaviours, but I don't know that it's going to help us to spend too much more time…

MR MARTIN:
I think the difference there is about the timing. I think it's the timing question. The difference – what the appellant is saying is that the presumption of capacity, if you put it that way, can be set aside at any stage, in this case 17 months after the settlement, by a report that says that at that time they didn't have capacity, TUV didn't have capacity, and that knowledge, on the part of the employer, should be irrelevant. That's quite a different thing to what, it is submitted, the presumption of capacity requires, which is that someone is presumed to be capable until a point in time when there is evidence from which constructive knowledge can be inferred.

WINKELMANN CJ:
But that's someone else's interests you're bringing into that. We're talking about the interests of the person with the disability. This is what this is concerned with, isn't it? This Convention is concerned with the rights of the disabled. It's not concerned with the employer's rights?

MR MARTIN:
No, but it is concerned with the idea that people who have impairments are not therefore taken to be incapacitated. So it is starting from a premise that people should be taken to be capable until a point in time where something different is shown, but not – that has to be at a time when you can gauge in a prospective way. So, what I mean is up until the settlement, not after the settlement, unless it can be shown that at some stage before the settlement the employer had knowledge, actual or constructive. At that point then they should have engaged prospectively and provided the supports and had the engagement around supports.

So, the difference between the parties is at what point in time, if you like, it is permissible to set aside the presumption of capacity.

WINKELMANN CJ:

Well, it's not really, because you agreed you can set aside presumption of capacity at a later point if you can show that the employer had constructive knowledge.

MR MARTIN:

Yes, but the constructive knowledge will be from a point before the settlement. I mean, it doesn't make sense to say that you've got constructive knowledge now because we've given you the report 17 months later. The constructive knowledge must be up to or before the settlement. So that's why I say that it's prospective. Even though you're judging it with hindsight it's still a prospective test because constructive knowledge says "at what point in time did your employer ought to have realised that this person was suffering from a relevant incapacity"? Now, once their settlement is done, then that enquiry comes to an end because otherwise – so this is why I say that otherwise you don't have a presumption of capacity at all. The employer must be able to rely on capacity, up until the point that they either knew or should have known, that the person didn't have capacity.

WINKELMANN CJ:

And the employer's rights are protected under the code, are they?

MR MARTIN:

I'm sorry?

WINKELMANN CJ:

I just see you mixing up the employer's interests with the disabled person's interests in this analysis.

MR MARTIN:

But I think they are actually inter-dependent.

WINKELMANN CJ:

Well, I know that's your submission.

GLAZEBROOK J:

Well, it certainly doesn't come within the Convention, does it, because what the Convention would say, if there was, say, a medical procedure that somebody had to consent to and the person didn't realise somebody was disabled and wasn't able to understand what was happening, the state's responsibility in those circumstances – it would be a breach of the Convention not having put into place, say, a communication assistant or supported decision-making, whether anybody involved realised, including the disabled person, that they were disabled or not. So, calling the Convention an aid for this argument, in terms of the employer, just does not seem to work to me, which is probably the same point, I think, the Chief Justice is making.

WINKELMANN CJ:

Yes.

MR MARTIN:

I take on board, I'm conscious that it's after 3.30 so that's a convenient place for me to – and then I'll come onto my third point.

WINKELMANN CJ:

Oh no, we don't have – do we want to take a short break? I think we'll just carry on I think. We don't normally have an afternoon tea break. We normally finish at four you see, but we're going to continue. I haven't asked my fellow judges but I'm sure they intend to continue until we finish.

MR MARTIN:

I'll press on, Ma'am, and come to the third point. Just to close that one off, I was not suggesting that this Article was concerned with employers, or anything like that. The point on which it was relied is that point around the importance of the, what I'm calling the presumption of capacity, the starting point being that people who may have disabilities are nevertheless to be taken to be capable, which is the critical point that you will see in that comment, and also in comment number 6, which is also in the same bundle at the next tab,

at tab 10, and which I won't take you through but which, at paragraph 8, reinforces, in my submission, the same point or a similar point.

So we come to the statutory scheme, which it is submitted, does not require a special rule or a carve-out from the common law and I start by saying that across many areas of the law a wide range of agreements, including settlements, occur in circumstances where there could be a power imbalance and vulnerability of one party. The Court of Appeal, in this case, recognised that, where it said, at paragraph 61, that all cases about mental capacity, by definition, concern dealings by individuals and the employment jurisdiction is by no means unique in this regard, it is submitted.

As your Honours know, there are some key points that have been touched on in this statutory scheme as indicia, one way or another, for why there should be, perhaps, a special carve-out in this jurisdiction. The starting point for the respondent is, of course, the objects of the Act, section 3, which will be known to your Honours and which have the clear focus on mediation as a primary remedy and in the statistics that I've touched on already you see, it is submitted, that being very effective as providing access to justice for the vast majority of employees in this jurisdiction.

Then section 68, I will take you to, and I know my friend, Mr Butler, has touched on it. It's in the bundle of authorities for the respondent under tab 1, and I anticipate the point that it may be said that you don't see this sort of scheme in section 149 in terms of the "ought to know of the circumstances", but it is nevertheless, I think worth pausing on for what it does say about the scheme here. This is a provision that is not concerned with personal grievances or settlements, as my friend said, it is about unfair bargaining for an individual employment agreement. But it does, in subsection (1), have the "ought to know" requirement, in terms of knowledge, and that is explored further, in terms of the circumstances in subsection (2), which includes diminished capacity and it deals also with, in (2)(c) oppressive means and undue influence and duress. And so in subsection (4), this is the way in which a party to an individual employment agreement must challenge or question

that agreement if they are to do so on the basis that it's unfair or unconscionable.

So what it does – and what is something that's quite a central element to this entire legislation, the entering into of an individual employment agreement, it is submitted that it signals an attempt, sorry, it signals an intent to have knowledge as part of the basis on which you would set aside an agreement, and it is submitted that viewed in the context of legislation that has within it the concepts of good faith and the equitable jurisdiction more broadly, this provision signals that Parliament did not see the knowledge requirement as inimical to that.

I don't take it further than that. I don't say that it's a conclusive answer, but it is a – when you're looking at the legislation overall and you're trying to reconcile, as you're being asked to do, the good faith and equitable dimensions of this statute with the section 149 test, this –

WINKELMANN CJ:
So what you're saying is it signals that you would consider knowledge as part of the reason to step outside the normal application of the statutory scheme's rules really. That's what you're saying, isn't it? Obviously it's applying a different situation but…

MR MARTIN:
Applying in a different situation but Parliament has turned its mind to the knowledge requirement and included it here for what is something that's really quite fundamental in the statutory scheme and has incorporated it, and now, of course, my friends will say, "But section 149 doesn't incorporate that," but what you do see if you go over to section 149…

ARNOLD J:
Just before you do that, to understand section 68, perhaps need to put it against the context of section 4 which requires the parties to an employment relationship to deal with each other in good faith, and then at subsection (4) it

says the duty of good faith in subsection (1) applies to bargaining for an individual employment agreement or for a variation of it.

MR MARTIN:
Yes.

ARNOLD J:
So I assume that what that's referring to is people who end up in an employment relationship having bargained an individual employment agreement. They have an obligation in that bargaining to establish the relationship, an obligation of dealing with each other in good faith, and then when you look at section 68 what it does is specifically spell out a situation of unfairness that occurs within that good faith bargaining relationship. The outcome is unfair if these circumstances apply.

MR MARTIN:
Yes.

ARNOLD J:
Now the interesting thing, of course, the obligation under section 4 applies throughout the entire employment relationship from the point of view of commencing bargaining that leads you into the employment relationship, through the course and through the end of it, so it's a continuous flow, and all 68 does is say, well, in this particular circumstance the bargaining will be unfair. So in that sense it doesn't necessarily – it seems to me it's sort of equivocal as to what it tells you.

MR MARTIN:
As I say, your Honour, there's a limit to how far I would seek to take it except that, and I think it's the point your Honour is making, is that if you take good faith and you lay it alongside section 68 and what is a very central provision in this legislation, those two things are aligned by Parliament here.

ARNOLD J:
Yes.

MR MARTIN:
I can't put it much further than that because it isn't present in section 149, but I would – it becomes a stretch then to say that in some way having the "ought to know" test, the knowledge test, is in some way inimical to this legislation because the legislation has used it itself.

So section 149 is intended to apply before or after a proceeding has commenced and it's an additional layer of protection, it is submitted. Parliament's intent was that certified agreements be watertight and what you're seeing in the provision section 149 is a degree of utilitarian balancing between the interests and certainty in concluding settlements and the benefits that flow from those and attempts to provide fairness and to ensure that process has been objectively overseen by the mediator. So it's responding to an acute, what has been described in the Varney article that's in our bundle, as an acute conflict of policy, protecting but not patronising, or in the Convention terms it's picking up, it is submitted, on the sort of themes of autonomy, or rather perhaps I'm picking up on the themes of autonomy and equality.

So the other provision, just before I move off section 149, to note, of course, is section 152 which is that mediation services are not to be questioned as inappropriate. So that in effect is the partner provision that flows or that is brought into effect by the mediated certification.

Where this takes the respondent in its submission is that the parties achieve resolution through informal, accessible and effective process and that is intended to address the inequality of power by using alternative dispute resolution. So it's reducing, and I'm talking in the language of the objects here, it's reducing the need for litigation and judicial intervention and you see that, obviously, in the statutory language and also in the explanatory note to the Bill which is at, I won't take you to the provisions, but the explanatory note

to the Bill is at tab 2 of the bundle, the respondent's bundle, and you'll see at, for example, pages 2, 8 and 9 the emphasis on mediation and alternative dispute resolution.

It is submitted that the statutory scheme does not envisage a difference between settlement agreements that are certified following mediation and those certified by a mediator when no mediation has occurred, and that is because at the beginning of section 149 it says: "Where a problem is resolved, whether through the provision of mediation services or otherwise," and it continues. So there's an indication there that this provision is applying wherever the settlement occurs. Picks up on the discussion that your Honours had with my friends earlier around this provision not being one that's arising in the course of a proceeding, or at least not necessarily so, not in the vast majority of cases on the numbers, actually, and in fact the majority of agreements under this section are certified without a mediation actually having occurred, and this is consistent with the Act allowing for mediation to be provided in a range of ways, and that's section 145.

That was all I was proposing to say around the statutory scheme, which brings me really to the updated test that was proposed and perhaps just some concluding remarks on the access to justice point. But much of this we've touched on through, I think, the submissions that I have made. You have the test that's proposed. It's proposed by way of perhaps assistance to the Court around the policy questions. The *O'Connor v Hart* test is still within it and the Court of Appeal judgment or the Court of Appeal's approach is also consistent with this updated test, and, significantly, because of the facts and the findings that were made in the Courts below on this test the appeal would not succeed. That is a function of the way in which the incapacity here unfolded and I have endeavoured to sort of explain how the constructive knowledge aspect, in particular the knowledge aspect, supports the test and particularly the presumption of capacity that sits, it is submitted, in that test and on the facts in this case the constructive knowledge threshold is not met and, importantly, the Employment Court also considered the other equitable doctrines that might in other cases be engaged and found that they were not.

WINKELMANN CJ:
Well, that's because the transaction agreement was fair.

MR MARTIN:
I'm sorry, Ma'am?

WINKELMANN CJ:
Fair. The agreement was fair in the Chief Judge's assessment.

MR MARTIN:
And in her specialist's assessment an unremarkable agreement. But she looked specifically at unconscionable bargain and duress and it – I mention it because –

WINKELMANN CJ:
Perhaps she didn't use the word "fair" but "unremarkable" and – yes.

MR MARTIN:
That's right, yes.

ARNOLD J:
On your approach to constructive knowledge, if the agreement had been one-sided in favour of the employer, would that be sufficient to put the employer on inquiry as to the employee's capacity?

MR MARTIN:
I'm sorry, I just want to be sure I heard what you said, would have been sufficient to –

ARNOLD J:
Right, sorry. If the agreement had been unfair towards the employee and favourable to the employer, so it was obviously unfair, not consistent with the normal range as the Employment Court Judge found, would that circumstance on your approach to constructive knowledge have been sufficient to put the employer on inquiry about the capacity of the employee?

MR MARTIN:

No, not if it's just substantive unfairness because that's effectively the *Archer* formulation that was rejected by the Privy Council in *O'Connor v Hart*. So it would be a shift from the threshold for constructive knowledge if all we're talking about is substantive unfairness. It might open the gates to the equitable doctrines depending on the surrounding circumstances.

ARNOLD J:

So there you're thinking of unconscionability, are you?

MR MARTIN:

Yes, and so you're getting into a situation where there is a combination of procedural and substantive unfairness, more than substantive unfairness simpliciter which was –

WINKELMANN CJ:

So I have it in mind that there are a number of cases in the area of testamentary capacity where the unusualness of the disposition has been held to put the part – to necessitate inquiry about the person's testamentary capacity.

MR MARTIN:

The approach the Courts take to gifts though does seem to – is different and testamentary capacity is a different – it's –

WINKELMANN CJ:

Well, it's not that different. It's part of the same flow of – it's moving in the same direction, isn't it?

MR MARTIN:

There is a spectrum of engagement. But we were talking about testamentary capacity. You're not talking about a bargain, essentially. So you're not engaging in quite the same way.

WINKELMANN CJ:

In reality again unusual settlement of an employment dispute which was so one-sided to put someone on inquiry as to capacity in any case, wouldn't it?

MR MARTIN:

Well, it also takes the Court into really quite a difficult – well, it takes the Authority in reality into quite a difficult situation where it is needing to evaluate what the parties negotiated on in their own terms and how that maps onto facts that haven't yet been found.

GLAZEBROOK J:

If you find incapacity then it's not a bargain the person made. It's a bargain they didn't make, isn't it? So how can it, so if there is incapacity, so number 1 of your test is met, two, there was no support provided to that person and, three, the terms of the so-called bargain which hasn't been made by that person are one-sided.

MR MARTIN:

So there's the problem of determining what a one-sided bargain looked like but it might be the sort of example where it's, the Employment Court has in mind, and that particular example where it's a particularly vulnerable employee who has essentially given up their job. But those are facts which really do open the door to other equitable remedies.

WINKELMANN CJ:

I was wondering, asking you that question, I think Justice Arnold is asking it too also for this reason, in *Archer v Cutler* and the Canadian approach they treat the unfairness of the bargain or the badness of the bargain as a relevant criteria for intervention and I'm just testing with you whether it's relevant because it shows, puts you in inquiry or it's relevant because it's a free-standing consideration that – so no capacity and the bargain is unfair. So those two things on their own are enough to ground relief.

MR MARTIN:

It does take you into what is a much more nebulous, it is submitted, test in terms of what that unfairness looks like and how you determine that from outside of that process and it carries with it, and again I don't wish to be heard to be saying, to be sort of catastrophising in this submission, but it does, however, carry with it an element of uncertainty, introducing uncertainty into what is intended to be a process that is quick and easy and is used by a large number of people. So there is value, from an access to justice point of view, in that certainty operating without the opportunity to then have an argument about how fair the settlement was in the Authority.

WINKELMANN CJ:

All right, so that question, of course, is relevant to the material that we handed out just after lunchtime and we're proposing to give you time to file submissions on that.

MR MARTIN:

Would it be – I'm conscious, and I don't know how far it will assist the Court, but there is an Australian law reform paper that I'm aware of which I don't think has been implemented but which actually recommended that there not be a capacity test, that – and it took the approach essentially that the equitable doctrines would suffice and that it's not necessary. If we're responding, would it be all right if we just drew the Court's attention to that information really for completeness? It's not the respondent's submission that the test should be abolished completely but it's –

WINKELMANN CJ:

So it scans the Australian authorities, one assumes, then?

MR MARTIN:

It's only a page but it talks about – sorry, the report obviously is significant but the bit I'm thinking of is a page and –

WINKELMANN CJ:
Yes, include that.

MR MARTIN:
But it does talk about these principles perhaps in quite I think a broadly useful way if the Court is, as I anticipate, looking across a range of policy responses to these issues.

WINKELMANN CJ:
Yes, that'd be useful.

GLAZEBROOK J:
If you've finished on – sorry.

ELLEN FRANCE J:
No, sorry. I was just going to say in terms of your response, Mr Martin, to the notion of looking at fairness, I think it would be useful to know what you see as the sort of policy problems with that approach.

MR MARTIN:
So the incapacity plus fairness or unfairness.

ELLEN FRANCE J:
Yes, yes.

MR MARTIN:
Yes. All right, if we can address that, that would be useful and we'll do so succinctly. In answering the Chief Justice's question about the language that the Court used, I think it did use the language "fair" and "reasonable". Just to correct myself, I think I accepted she – but I think her Honour did use the word "fair". Fair and reasonable, unremarkable, falling well short of an unconscionable bargain, were her findings there.

GLAZEBROOK J:

If you've finished with that point, can I just ask what you would see as raising constructive knowledge, because your friends have said in this case there was certainly enough to raise at least the concern. What do you say, and you say: "No," and I understand that, but what do you say is necessary for constructive knowledge because you say the one-sided bargain doesn't have anything to say about that? So what would have to have arisen for there to be constructive knowledge?

MR MARTIN:

So stepping away perhaps from what occurs in the facts of this case, and you then do have a fact-dependent spectrum, so you may have, it is submitted, a complete absence of procedural safeguards against the background of someone who is appearing to be struggling with at least some degree of impairment. You might have something like that. It is submitted that, as I already –

GLAZEBROOK J:

I'd just like to see where does the constructive knowledge come? So an employer is dealing with somebody in a settlement case. I mean, they've obviously had some knowledge of them throughout their employment processes, but what would amount to constructive knowledge and what does it have to be constructive knowledge of?

MR MARTIN:

It needs to be constructive knowledge of the incapacity as opposed to states of mind or emotion that are, for example, stress, anxiety, things that will be relatively common in not only the employment jurisdiction but in any form of interpersonal litigation or dealings. So it has to go to the capacity.

GLAZEBROOK J:

And how would you decide that? Is that someone who just comes along and jibbers or something, or doesn't appear to understand anything that's said to him? What's the test for that?

MR MARTIN:

It might be procedural. It might be apparent, which I think is what your Honour is talking about in terms of how someone has presented from their knowledge of that person.

WINKELMANN CJ:

And coherence, for instance, and coherence in their written material.

MR MARTIN:

Yes. And the reason I'm being careful around this is because you've also got to there, as I don't need to tell this Court, but around decision or competence in the context, for example, of people who wish to represent themselves in any process, there needs to be latitude for people to conduct that in their own way. It may not be the way that others think is effective or appropriate but decisional competence is different to incapacity, and so…

GLAZEBROOK J:

I guess I just have some difficulty in seeing that you'd ever have on your test an "ought to have known" unless you have wilful blindness but that is knowledge.

MR MARTIN:

So there's the apparent, there's the procedural, and I've indicated in written submission that those are two areas where the constructive knowledge could arise. I mean it is difficult to use this case as a basis for the conversation about what future cases might look like because it is submitted that here you really do from a procedural point of view have the lawyer, the whānau support, the independent mediator, and you have the attempts to engage with the assessment, albeit some months beforehand. You have time, as you might think, to some extent a protective mechanism in terms of cooling-off period and so on. So on the facts of this case it is submitted, and as the Employment Court found, you're some distant from it, from constructive knowledge, so it is difficult to then shift to a variation. It would be quite different. But the appearance of the person in the engagement or the lack of

procedural safeguards or perhaps information that does not come in the form of a medical assessment but nevertheless, as her Honour, the Chief Justice, put it, discloses some behaviour that really does raise a question around someone's capacity as opposed to simply decisional competence and that could come from a number of sources –

ARNOLD J:
Sorry. You've cited *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205, *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735, in your submissions, both in the Court of Appeal and in this Court. Now in the Court of Appeal an attempt was made to summarise unconscionability and constructive knowledge in that context and this Court approved that statement. But it seems to me that what is said there is rather different from what you're now saying. "Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must 'take advantage of' that disability or disadvantage."

6 – this is on paragraph 30 under tab 4 of your authorities.

MR MARTIN:
Yes.

ARNOLD J:
"The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage." Now I must say I had assumed in my own mind that the same sort of analysis would apply here to constructive knowledge, that you wouldn't have to have constructive knowledge of the actual incapacity but you

would, if you had knowledge of circumstances which raised, should have raised, an alarm in your mind and you didn't make enquiry then you will be treated as if you – if you didn't make an enquiry you should have made, you will be treated as if you had the knowledge.

MR MARTIN:
I think we're saying the same thing, Sir. I didn't mean to say – so the constructive knowledge needs to be of the incapacity is my point.

ARNOLD J:
That's right.

MR MARTIN:
But because of its constructive nature, it isn't, obviously, actual knowledge of the incapacity.

ARNOLD J:
That's right.

MR MARTIN:
But what you're inferring is not that the person is experiencing stress or anxiety or depression. You're inferring from those facts that the person has become incapacitated to an extent.

ARNOLD J:
Well, no, it seems to me that what this is saying is if there is some set of indications that puts you on enquiry, reasonably, and if you don't make those enquiries you're treated as having the knowledge.

WINKELMANN CJ:
Which is the levels 4, possibly 5, of knowledge that Mr Butler referred to earlier which goes beyond "ought to have known" and what you had in front of you. It encompasses "ought to have known" because you should have made enquiries.

MR MARTIN:

And I think it is clear in our discussion. As long as what we're talking about is around the incapacity as opposed to – because, without labouring the point, it will be often the case in an employment dispute that people are finding that stressful, they are finding that an anxious situation, they may be experiencing a number of those sorts of signs. It is submitted those would not in themselves point to an incapacity. So what's required is something that is more than that. So I mean I think when we're talking about the circumstances that would put the stronger party on enquiry, they can't be the sorts of things, it is submitted, that would routinely arise otherwise what you end up with is a constructive knowledge test that almost negates the test.

ARNOLD J:

Yes, I –

WINKELMANN CJ:

But then it wouldn't be, that wouldn't be the test, would it, because it couldn't be the sort of things that ordinarily arise because they wouldn't –

MR MARTIN:

No.

WINKELMANN CJ:

Because the fifth level is knowledge of circumstances which would put an honest and reasonable person on enquiry. I had rather remembered the number 3 as number 4 which is wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make.

MR MARTIN:

Yes.

WINKELMANN CJ:

But that's actually level 3 in any case.

MR MARTIN:

And I think the key in that, as I've said, is around the incapacity being the focus because if it's not, if care isn't taken what occurs is that you start to look for things that are simply flags of people being under pressure, unhappy, which you're dealing with a dispute.

WINKELMANN CJ:

So it's knowledge of circumstances which would put an honest and reasonable person on enquiry that the individual lacked capacity to enter into this agreement?

MR MARTIN:

Yes.

WINKELMANN CJ:

Compromising their rights. So you would accept that that would be – because that's the third model, I think. That is actually the third model for the appellants.

MR MARTIN:

And the thing about it is that you are keeping not only incapacity in the centre of that enquiry but you are also maintaining the presumption, and I know I won't go back into that again because we've been through it, but you are maintaining a presumption of capacity if you take that approach. You start from capacity at the relevant time rather than coming along later and saying: "Now we'll find out whether the person had capacity or not," because in my submission that's not a presumption at all. So in order – this is where the constructive knowledge, however that test is framed, needs to be focused on the capacity and it does need to be prospective in terms of looking for evidence from the relevant time, the time when capacity mattered, that would have put the employer on notice that there was a capacity issue. It is submitted that that is necessary in order to uphold the presumption of capacity.

WINKELMANN CJ:

Sorry, can you just repeat that? It would have been something that put them on notice at the time?

MR MARTIN:

I'm using that which his Honour has raised with me from *Gustav* here, that whatever your test is around constructive knowledge that the important point is that it needs to be from the time that is salient. It is the time that the negotiations and the settlement is being agreed that matters. That is what you want evidence from, that puts the other party on constructive notice that there is a diminished capacity.

WINKELMANN CJ:

So I now recall why *Baden v Société Générale* is organised in that way. It's because the first three levels have always been analysed as consistent with dishonesty in the cases that it's used and levels 4 and 5 are simply negligence, and it was used in the law of trusts for knowing, received knowing assistance, so that's where it comes from. *Baden*, if you wanted to look it up, Mr Martin, *Baden* – I'm trying to find the full citation and I can't. Anyway, if you look under *Baden* you will find it. *Société Générale*.

MR MARTIN:

Yes, a point actually that did occur to me and my friend has just reminded me. There is a discussion at – so picking up on what Justice Arnold raised with me around *Gustav*, important to just note that the Court, this Court, does discuss the knowledge, the constructive knowledge of this at paragraphs 14 and 15 and does note that it could be problematic, essentially, to impose, I'm at 15 here: "To impose a duty to make inquiries would also be highly problematic from a practical point of view."

ARNOLD J:

But that was – you have to look at the context of that remark because the issue there was at what point you made the assessment, the time the contract

was entered into or at the time it was confirmed and that's what the Court is talking about, making an enquiry at the time of confirmation. I don't think…

MR MARTIN:
Yes, accept that context point. I suppose what it does do is link to my, and I have, as I say, come back to it several times, but it does link to my submission that knowledge is integral to the presumption of capacity and that the prospective way that operates is important if you're to have a presumption at all, and so depending on how constructive knowledge is framed, if that bar is set so low that just about every, you know, every – the routine matters of a dispute qualify, then you have effectively abolished the requirement for knowledge, and that does bring with it problems.

I have touched on some of those problems on my way through and won't spend more time on them unless it's of assistance. They really do come to the importance of access to justice and the need for parties to be able to engage with each other without overly medicalising or, worse still, involving substituted decision-makers except in cases that are genuinely requiring those. You don't want to have an approach that simply causes reluctance to engage in these effective dispute resolution processes which are so central to the statutory scheme.

GLAZEBROOK J:
It might be the answer to this is that unconscionability actually deals with this, but just looking at what was said at least in the Court of Appeal and seems to have been accepted in *Gustav*, all you need is a disadvantage and knowledge of a disadvantage, an inequality of bargaining power, and that can be constructive knowledge and that's unconscionable. So it seems odd in this case that you have knowledge of the disadvantage and disability because it's quite difficult to say that you didn't think that she was at some sort of disability, having been six months and then another six months off work with major stress issues when there was certainly going to be some kind of disadvantage in that circumstance. I mean you might say that it was sorted out by her having a lawyer acting for her. Just to say, well, the scheme says you don't

look at it in terms of total incapacity when in fact it says you can look at it in other terms, but your answer may be, well, then you look at it in other terms, but the answer can't be, well, you know, this 149 procedure actually trumps everything, can it? Or is that the submission?

MR MARTIN:
Well, subject to the test that would allow it to be opened where there is the constructive knowledge, but you are –

GLAZEBROOK J:
But you say they have to be of the incapacity, not of a disadvantage that might be in terms of unconscionability?

MR MARTIN:
Well, that is an alternative remedy, of course, and it is worth bearing in mind that the equitable doctrines do still – you still have the ability, I suppose, to access those but my – I guess the point I'm really making there is your constructive knowledge must go to the incapacity because otherwise you're not in a position to engage constructively with the person if they want to proceed. You know, they have a lawyer, they have whānau support. It must be possible and actually is in the interests of access to justice that you can proceed with them unless you actually have knowledge of an incapacity that they can't actually consent to the agreement that you're negotiating. I mean it's – you want to be able to facilitate resolution because often that will be in the best interests of the employee as well as the employer. Delay won't be. Additional costs won't be. I haven't really spent any time on the idea of the costs because I think the access to justice and the incentives that it may drive are more important but there are costs involved in the sort of – in recourse to reports which may not be needed. All of those things get in the way. They're barriers to access to justice, and in any individual case will they be sort of overwhelming? Perhaps not, but across the 15,000 mediations on a system it is submitted that those are really significant policy considerations.

WINKELMANN CJ:
Is there anything else, Mr Martin?

MR MARTIN:
Unless there are questions, that was all I was going to submit, your Honour.

WINKELMANN CJ:
In terms of the timing I imagine that Mr Butler would wish to file his submissions first? Additional submissions? Sorry, Ms Douglass would.

MS DOUGLASS:
Yes, your Honour. Do you wish to hear any brief reply today?

WINKELMANN CJ:
Yes. No, I was just – well, while Mr Martin was on his feet I was just covering off the point about filing additional submissions, then it occurred to me I didn't know when you wanted to file yours. So how long do you need to file your submissions, Ms Douglass?

MS DOUGLASS:
Two weeks, Ma'am.

WINKELMANN CJ:
Two weeks, all right. And then Mr Martin, a week afterwards?

MR MARTIN:
Thank you, Ma'am.

WINKELMANN CJ:
Ms Douglass? You're splitting your reply, aren't you? Is that right or not?

MS DOUGLASS:
Yes. It's my intention to reply to you with a brief reply. I'm conscious of the time but –

WINKELMANN CJ:
No, go ahead.

MS DOUGLASS:
Yes, may it please the Court, throughout the argument this afternoon from my learned friend, Mr Martin, there was this dichotomy that's been played out in the Court in terms of prospective and retrospective analysis of the situation and how the Convention might apply. This a case, as your Honour, the Chief Justice, has pointed out, where this is a retrospective analysis of what occurred at the material time. So it is no different from, for example, a testamentary capacity case where the facts play out and then further down the track a claim is filed in relation to, in this case, this section 149 agreement. So on that basis it is a case of here the appellant carrying the burden of proof to overturn the presumption of capacity and no one, of course, disputes that, and that has been overcome in terms of the capacity, in terms of her incapacity at the material time.

So the proceeding here, your Honour, Justice O'Regan, you asked the question about it to my learned friend, Mr Hancock, is what was the proceeding that was engaged here that brings the state into play in terms of the Convention and the answer to that question is that the proceeding in which the section 149 agreement has been set up as a defence is this claim which has been commenced in the Authority and now the Employment Court. So it is the statement of claim that's set out at volume 2, tab 1, in terms of – and that is the reference, that is what the state is implicated in because it failed to set aside the agreement when it, in terms of when it had the chance, so that is the proceeding that we're dealing with here and it is a retrospective analysis of capacity. So, by contrast, a lot of the discussion this afternoon has been in and around the prospectivity and how supported decision-making could have occurred or should occur, but on the facts of this case it's irrelevant to this analysis to the extent that the supports failed this appellant. So, there was a legal advisor but that failed this appellant because she lacked capacity to instruct her lawyer.

And that's the point that Lady Hale made in *Dunhill v Burgin* at paragraph 33 of that decision, where she says the policy consideration is in fact not only to protect, well, in their case, the protected person, but also to protect them from their legal advisers. And in my submission it's not a suitable policy response, for example, to say: "Oh well, you can sue your lawyer if there's negligence or they should have known of your capacity." That, again, would fail the system in terms of what the Employment Court and its institutions, the jurisdiction, is all about, which is employment relationships and, as much as possible, having people to be supported in their ability to bring their claim.

So the CRPD, the Convention, has of course, does in fact reflect the tension that's operating here and that is as promoting the autonomy of the individual, and I particularly draw your attention to Article 12(3) because that requires states to put in support measures and that's the prospectivity we're talking about, perhaps for another day and not for this case, but in terms of how are the employment institutions going to put in those supports and what might be required in the context of the employment jurisdiction. And they need to be balanced against Article 12(4), which talks about ensuring that the rights and preferences of the individual are brought into play and are a part of that. And, importantly, that those safeguards, that there are safeguards, and that might mean protection.

So, there has also, my learned friend, Mr Martin, has raised the issue of the debate around how the Convention ought to be interpreted. I have read all of the international literature on this, it is very topical internationally about how countries might apply the Convention. Of course, New Zealand ratified it in 2008, but that's yet, the policy and how the New Zealand Government is yet to apply this, and within the context of the employment jurisdictions, is yet to play out. Again, that's not about this case. What we can say is that the supports that were offered in this case were not sufficient to provide those protections. So that the UN comment 2014 is controversial in the sense that, for example, it recommends that the – this is the UN committee's own interpretation of the Convention, and it recommends that state parties abolish substitute decision-making laws. Such, for example, would be our PPPR Act would be

one example. So the debate centres around whether that's realistic because, of course, for some people they need 100% support. So if you are sitting in a coma in a hospital or, indeed, you are so severely impaired through your mental illness, as is the case with TUV, that is a situation where you might need a decision-maker. That's not to say that what's being asked is that there are front-end support measures put into play in the law. So we're yet to revise our domestic laws and look at how that should play out in terms of implementing the principles and the articles of the Convention.

In terms of the Convention's applicability to litigation guardians, I draw your Honours' attention to the case of *S v Attorney-General*. This is in the authorities, tab 23 of the appellant's bundle. This is where Justice Ronald Young essentially said, although there was a challenge, this was a decision of Justice Ronald Young, where there was a challenge as to whether, in the case involving a group of people with impaired capacity who had learning or intellectual disabilities, whether it was compliant with the Convention to in fact be appointing a litigation guardian and essentially his Honour found that it was consistent with the Convention. If I can draw your attention, there is reference to Article 13 which has been raised in this case about access to justice and, indeed, that litigation guardians were a reasonable accommodation in terms of Article 13(1) and it wasn't discriminatory. In fact, this is an example where under Article 12(4), which I referred you to, where a person – this is an example where support can be for the exercise of the person's legal capacity, and I'll just draw you to paragraphs 45, 46 and in particular 47 at the end where his Honour says: "The litigation guardian procedure therefore facilitates disabled persons' rights as reasonable accommodation rather," as in Mr Ellis who brought this claim, rather than to compromise them.

So that decision, of course, it is there and then Parliament is asking you to address *Corbett v Patterson* which does import the sole functional test as applied in our law in terms of the High Court Rules, and –

WINKELMANN CJ:
That's for the purposes of a settlement?

MS DOUGLASS:
Yes, yes. So that's the compromise and as Lady Hale says in *Dunhill v Burgin*, of course, compromise, there's no need for a proceeding to be issued.

The rules, the compromise rules, of course, run very similar provisions to the High Court Rules but I don't wish to traverse that all over again. We will provide you a written submission on the question that was raised.

O'REGAN J:
I just think you're going over old ground. I think we're just concentrating now on how do we deal with this case, not what could have happened if everyone had noticed this earlier.

MS DOUGLASS:
Yes, yes. So the respondent's proposed test of supported capacity essentially sets a very high threshold, so it accepts the functional test that's proposed and making the point that, of course, limb 1 of *O'Connor v Hart* is not a functional test. It has a very low requirement, that is, that is the person of unsound mind and that's why the appellant says that is discriminatory because it is based on medical status, not on the person's functional abilities. And, secondly, of course, so however you want to phrase "supported decision-making" or perhaps the preferred reference to the Convention is "support for the exercise of legal capacity", the respondent has got that added layer of constructive knowledge which the appellant says is an unacceptable hurdle and burden.

WINKELMANN CJ:
Although the appellant's model 3 has it. All you're arguing about is what level of – and I don't think you are arguing now, actually, because I think Mr Martin has accepted that all levels of *Baden* are in, that is constructive knowledge being put on enquiry, that's a form of constructive knowledge?

MS DOUGLASS:

Yes. So it takes it up a step.

WINKELMANN CJ:

Yes.

MS DOUGLASS:

So, of course, the appellant's primary submission is for a sole functional test rather than a functional test and these additional requirements, and that is supported, of course, by the intervener and Mr Hancock has clearly set that out and also he has raised the point that this is a case of procedural justice, and procedural accommodations as referred to in Article 13 are not hamstrung by the requirement in reasonable accommodations on the requirement of undue burden or something that is disproportionate. Because the appellant says here in any event that these requirements, the Court needs to look no further than the principles and objectives of the employment jurisdiction itself, and that these duties – and they've been referred to extensively, particularly around good faith and recognising the unequal bargaining power – place a positive obligation on employers to take steps and, going back to this morning's submissions, we spent some time on the facts and the chronology sent out ample points in time –

WINKELMANN CJ:

Are we just repeating submissions from this morning or are we actually replying, Ms Douglass? Because it seems to me, I'm not sure about how much this is reply.

MS DOUGLASS:

Yes, I don't need to go any further. Really just to reiterate that there were plenty of opportunities to take what I had submitted as the second step, not the common step around a medical certificate, but the second step, which would be for an employer to ask for an assessment of the employee's capacity.

WINKELMANN CJ:

Okay, well, I think we are repeating.

MS DOUGLASS:

Yes. So, then just turning to fairness has been raised, and we will be providing a written submission in terms of that requirement under the Canadian legislation. Suffice to say that in relation to section 189 of course, the Court being one of equity and good conscience, that goes to these issues. And there has been raised in relation to *Gustav*, and at paragraph 30 of the Court of Appeal's submission. Those submissions were in fact made in any around unconscionability in the Employment Court of course, but then her Honour –

WINKELMANN CJ:

You mean, is that – sorry, do you mean submissions or…

MS DOUGLASS:

About constructive knowledge, and at paragraph 30 of *Gustav* his Honour Justice Arnold highlighted that they speak of constructive knowledge. And so this is a case where there has been a qualifying disability, and of course the appellant has argued that constructive knowledge, or perhaps if it's at the level of putting a reasonable employer on inquiry –

WINKELMANN CJ:

Which is a form of constructive knowledge?

MS DOUGLASS:

Yes.

WINKELMANN CJ:

Inquiry form of knowledge.

MS DOUGLASS:

Yes, yes. That all goes to the unconscionability here. So the unconscionability lies in the fact that this appellant lacked capacity to consent to the, is a about the formation of the agreement, not the substance per se.

The equitable fraud cases in *Gustav* set a very high standard for unconscionability, but it's open to this Court in terms of being a court of equity and good conscience to take these factors into account, and it is – if your Honour Justice Arnold, you got to point seven on the *Gustav* case, if I can just take you back there, at paragraph 30, tab 4 –

O'REGAN J:

I'm just not quite sure why you're arguing this. The leave is about whether *O'Connor v Hart* applies in the employment jurisdiction, it's not about unconscionability. Are you asking us to make a finding of unconscionability? Because that's clearly not with the leave.

MS DOUGLASS:

No, that's right. In terms of these alternative tests. I just wanted to – because the principles that are applied do seem to have some applicability here in terms of broadly what might be considered constructive knowledge, taking into account arguments two and three. But the point is that at point seven of that paragraph the Court talks about "passive acceptance" and really this, in terms of, this is a case where the appellant says that there was passive acceptance by the employer because they didn't take the constructive steps as they're required –

WINKELMANN CJ:

Right, I mean, I think we are going round in circles now.

MS DOUGLASS:

Yes. So that goes to –

WINKELMANN CJ:
Only significant points of reply.

MS DOUGLASS:
Yes, yes. And of course, well, the unfairness here goes to –

WINKELMANN CJ:
We've got it, formation of the contract.

MS DOUGLASS:
Yes. And, finally, my learned friend referred to the Australian law reform legal principles, a commission's report. That report provides high-level legal principles that are to apply to State parties in Australia and has been part of this discussion I referred to earlier about the "debate", for want of a better word, in terms of how the Convention ought to be applied. I just make the point that Australia has had some confused laws that have resulted, one in Victoria where there was the idea of supported attorney, so again it's kind of a merging of –

WINKELMANN CJ:
Okay, we don't need to go into this.

MS DOUGLASS:
Right. So in terms of – I've highlighted for you that there is some debate about how the Convention ought to be interpreted and also, however, it's application here, in our submission, really provides another layer in terms of the policy and legal considerations that ought to apply in the employment jurisdiction to disregard or carve out the exception to *O'Connor v Hart*, to *O'Connor v Hart* applying in this jurisdiction and that these principles all do go in fact to support access to justice for this appellant.

Unless the Court has any further questions, those are our submissions.

WINKELMANN CJ:
So Mr Butler has no reply? No, right, thank you.

And so we're agreed, are we, two weeks for your additional submissions for the appellant, one week after that, Mr Martin?

MR MARTIN:
Thank you.

WINKELMANN CJ:
Right, well, we'll take some time to consider our decision. Thank you, counsel, all counsel, for your very helpful submissions.

MS DOUGLASS:
As the Court pleases.

WINKELMANN CJ:
We will now retire.

COURT ADJOURNS: 4.42 PM