IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 171
EMPC 130/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	DELOITTE (NO. 3) LIMITED (formerly known as ASPARONA LIMITED) First Defendant
AND	DELOITTE LIMITED Second Defendant
AND	DELOITTE (NO. 1) LIMITED (formerly known as DELOITTEASPARONA LIMITED) Third Defendant

Hearing:	9–13 August 2021
Appearances:	Plaintiff in person J Hardacre and D Findlay, counsel for defendants
Judgment:	15 September 2022

JUDGMENT OF JUDGE KATHRYN BECK

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[1] Mr AlKazaz has brought a de novo challenges to two determinations of the Employment Relations Authority. The first determination found that a record of settlement was binding and enforceable, defeating a number of claims and grievances brought by Mr AlKazaz.[1] The second awarded costs in favour of the defendants.[2]

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1 *AlKazaz v Asparona Ltd* [2019] NZERA 215 (Member Campbell).
2 *AlKazaz v DeloitteAsparona Ltd* [2019] NZERA 456 (Member Campbell).

[2] Mr AlKazaz was employed by Asparona Ltd as an Oracle Education Consultant in September 2013. He moved to New Zealand from Dubai to take up the role.

[3] Asparona was acquired by the Deloitte group of companies not long after Mr AlKazaz started, and in November 2014, all employees were transferred to DeloitteAsparona Ltd.[3] Mr AlKazaz disputes that he agreed to this transfer but agrees that he was paid by DeloitteAsparona from that point.

[4] In 2016 there was a reduction in the amount of classroom-based Oracle training being undertaken.

[5] Alternative roles were investigated for Mr AlKazaz but they did not work out.

[6] On 7 July 2016, a Record of Settlement was entered into by Mr AlKazaz and DeloitteAsparona, purporting to be a full and final settlement of all matters arising out of the employment relationship between them. Mr AlKazaz now says the agreement was obtained under duress and should be set aside so that he can pursue a grievance for unjustified dismissal.

[7] If the agreement is not set aside, he says that DeloitteAsparona has breached it and should be penalised. He says he should be compensated for damage caused by those breaches.

[8] Mr AlKazaz also now claims that he was discriminated against or harassed by racist comments directed at him during his employment and that he is owed arrears of wages. He says those claims were not settled by the settlement agreement.

[9] The defendants deny all of these claims and say that the settlement agreement resolved all matters arising out of the employment relationship and should stand.

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[3] Now known as Deloitte (No. 1) Ltd (the third defendant) but referred to as DeloitteAsparona.

Issues

[10] The issues for determination depend on the finding as to the enforceability of the settlement agreement and are set out below:

(a) Who was Mr AlKazaz's employer at the time of termination?

(b) Should the settlement agreement be set aside on the basis that the plaintiff was under duress when he signed it?

(c) If not, are the claims of racial harassment and wage arrears precluded by the settlement agreement?

(d) If the settlement agreement is set aside:

Unjustified dismissal

(i) Was Mr AlKazaz unjustifiably dismissed?

(ii) If so, what dismissal remedies are available?

Racial or religious harassment

(i) Should Mr AlKazaz be granted leave to bring his grievance for racial or religious harassment out of time?

(ii) If so, was Mr AlKazaz racially harassed in his employment?

(iii) If so, what remedies are available?

Wage arrears

(i) Was Mr AlKazaz underpaid by $5,000 per annum?

(e) If the settlement agreement is binding and enforceable:

(i) Did the defendant breach cl 5 of the agreement?

(ii) If so, what remedies are available?

(iii) Did the defendant breach cl 9 of the agreement?

(iv) If so, what remedies are available?

Who was Mr AlKazaz's employer in July 2016?

[11] While not articulated as an issue by either party, it is apparent from Mr AlKazaz's case that he is of the view that at the time of his termination, the second defendant, Deloitte Ltd, was his employer, not the third defendant, DeloitteAsparona.

The facts

[12] Mr AlKazaz was employed by Asparona Ltd as an Oracle Education Consultant in September 2013.

[13] He was sent an employment agreement on 7 August 2013, which he signed on 9 August 2013. He started in the job on 4 October 2013.

[14] Mr AlKazaz reported to Mr Mark Rosser, the Education Manager, on a day-to-day basis. He was good at his job; that was confirmed by many of his colleagues from DeloitteAsparona.

[15] About the same time as Mr AlKazaz came on board, Asparona Ltd was purchased by the Deloitte group. The businesses continued to operate separately for some time after purchase, although some contractual terms such as confidentiality requirements were changed by agreement in October 2013 to ensure consistency between the organisations.

[16] While Mr AlKazaz at times suggested that the employer may have changed at that point, it is apparent from the documentation that all that changed were particular terms of employment, not the parties to the employment itself.

[17] By way of a letter dated 6 November 2014, employees of Asparona Ltd were asked to agree to transfer their employment to a new company, DeloitteAsparona, on the same terms and conditions as their current employment agreement with Asparona Ltd. Employees were to signal their acceptance by signing a declaration. The defendants have produced a document that they say is Mr AlKazaz's consent to the transfer. Mr AlKazaz says it is not his signature and that he does not recall being asked to sign such a document. He appears to accept that his employment did transfer at around about this time but says it was to Deloitte Ltd, not DeloitteAsparona.

[18] I agree with Mr AlKazaz that the signature on the transfer document looks different from his signature on other documents. However, neither party called any expert evidence on the point, and I do not consider I have the necessary evidence to make a finding on its legitimacy or otherwise. Further, I do not consider I need to do so.

[19] Given Mr AlKazaz's acceptance that his employment moved from Asparona Ltd to another entity at that time and that he agreed to that transfer, for the purposes of this case I consider that the key issue is to identify which entity that was. The question is who, in all the circumstances at the time, was Mr AlKazaz's employer leading up to and at the time of termination of his employment?

[20] In assessing who his employer was, the question to be asked is: who would an "independent but knowledgeable observer" have said was Mr AlKazaz's employer?[4] A useful starting point is the documentation evidencing any written agreement between the parties.[5] If it is alleged that the employer changed during the course of the employment, there must be evidence of mutual agreement to that change.[6] However, the absence of written documentation is not determinative.[7] If there had been any communications or actions or documentation from which the intention of the parties can be derived, then the real nature of the relationship may be determined as something different to that disclosed in the contractual documents.[8]

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4 *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 (EmpC) at [22].
5 *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223.
6 *Mehta v Elliott (Labour Inspector),* above n 4, at [22].
7 *Hutton v Provencocadmus Ltd (in rec)* [2012] NZEmpC 207, [2012] ERNZ 566 at [82].
8 *McDonald v Ontrack Infrastructure Ltd,* above n 5, at [41].

Analysis

[21] While I appreciate that the line between the two organisations would have been difficult to see on occasions (as is often the way when a company is being transitioned into another organisation), the evidence supports Mr AlKazaz's employer as being DeloitteAsparona, as recorded by the parties in the settlement agreement.

[22] Mr AlKazaz continued to work out of the Asparona Ltd offices in Newmarket until 2016. Even after Asparona Ltd shifted out of its separate offices in Newmarket to the Deloitte building in Auckland CBD, it had separate signage. Mr AlKazaz's CV, prepared by him in March 2016, describes him as based in the DeloitteAsparona Auckland practice. The CV is headed with the Asparona brand and is noted at the foot as being a "Deloitte Asparona Biography". The email address in the contact details is ahmed.alkazaz@asparona.com. I accept employees also had a Deloitte email address, but Asparona is the one that was advertised. On page 3 of that CV Mr AlKazaz refers to himself as:

> Oracle Senior Consultant – Oct. 2013 – Present
> DeloitteAsparona …

[23] The Deloitte group took over responsibility for payroll from November 2014, and the payslips are consistent with that, but that does not render Deloitte Ltd the employer.[9] Such arrangements are not uncommon.

[24] The plaintiff was managed on a day-to-day basis by Mr Rosser, who directed Mr AlKazaz's work up until the end of his employment. Mr Rosser's evidence was that he was employed by DeloitteAsparona and undertook duties for that entity until transferring to Deloitte Ltd in 2017, which was after Mr AlKazaz had left. He reported to Mr Gareth Glover, a partner in Deloitte Ltd. Mr Glover had responsibility for the Oracle practice, including employees at DeloitteAsparona, and was a director of Asparona Ltd.

[25] I accept the defendants' evidence that employees of DeloitteAsparona did not transfer to Deloitte Ltd until 1 June 2017, a year after Mr AlKazaz left.

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[9] Although this would not have been determinative, neither party produced Inland Revenue Department documents recording who the employer was.

[26] That DeloitteAsparona was the employer is further supported[10] by the parties themselves recording DeloitteAsparona as the employer, and the employment relationship as being between DeloitteAsparona and Mr AlKazaz, in the settlement agreement dated 7 July 2016.[11]

[27] Accordingly, on the evidence before me, I find on the balance of probabilities that Mr AlKazaz agreed to the transfer of his employment to DeloitteAsparona and that DeloitteAsparona was his employer in July 2016.

Should the settlement agreement be set aside?

The facts

[28] As noted above, Mr AlKazaz was employed as an Oracle Education Consultant by Asparona and DeloitteAsparona. This role required him to manage and plan training courses, prepare training materials, co-ordinate resources, and utilise presentation skills to deliver high quality classroom-based training to customers on Oracle systems. Although based in Auckland, Mr AlKazaz delivered training around New Zealand, including in Wellington. As noted above, he reported to Mr Rosser.

[29] Over 2015 and the first quarter of 2016, demand for classroom-based training significantly reduced.

[30] Mr AlKazaz disputed that the downturn was as significant as the defendants claimed. He accepts that there was less work but says it picked up again in the second quarter of 2016. He also says he could have undertaken training work in Wellington and elsewhere had that option not been removed by DeloitteAsparona hiring a Wellington-based trainer. Mr AlKazaz cites this as a factor in what he claims was his unjustified (constructive) dismissal.

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10 Although the parties' description is not determinative, it is relevant given that the agreement was negotiated over a period of more than two weeks with both parties, including Mr AlKazaz, being legally represented.

11 The background to the record of settlement states: "Following discussions regarding the employment relationship between Ahmed AlKazaz and DeloitteAsparona, the parties have agreed …".

[31] I am not required to make a finding on that issue at this stage. It is sufficient to say that the downturn was the context for Mr Glover having without prejudice discussions with Mr AlKazaz about redeployment or a possible exit from the business. Mr AlKazaz's preference was to remain with the organisation. From April to mid-June 2016, Mr Glover explored other options for him.

[32] Mr AlKazaz says the alternative work he was given was executed well. The defendants say that while Mr AlKazaz was willing to carry out other work and they tried to find other work for him (on the service desk and undertaking database administration projects), his skillset did not match what was required for the work available. Mr AlKazaz says the National Support Services Manager, who did not give evidence, was unfairly prejudiced against him, deliberately withheld work from him, and misled the other managers as to his ability. I am not required to make a finding on that.

[33] The short point is that DeloitteAsparona says that there was insufficient work for Mr AlKazaz and that it was unable to find viable redeployment opportunities.[12]

[34] Mr Glover says that in June 2016 he advised Mr AlKazaz that he did not think there was an alternative position for him. This prompted a continuation of the parties' without prejudice discussions about a possible exit. Mr Glover then sent proposed terms of settlement to Mr AlKazaz for discussion.

[35] The parties disagree as to the extent to which this was a unilateral act by Mr Glover or a continuation of discussions. Mr AlKazaz says that the draft record of settlement was a distressing surprise.

[36] Whatever the circumstances, Mr AlKazaz had the good sense to obtain legal advice before responding. On 14 June 2016, his lawyer wrote to Mr Glover registering concern at the way in which the matter had been handled and advising that Mr AlKazaz would not be signing the document or waiving his rights to a personal grievance.

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[12] Mr AlKazaz says this view was either not justified or not genuinely held. Again, this is not an issue I need to resolve.

[37] Discussions then took place between the parties' respective legal advisers. Mr Glover and Mr Jacobus Scholtz (a director of DeloitteAsparona and managing partner of the consulting business with Deloitte Ltd) were only indirectly involved towards the end (29 June 2016) in relation to the quantum of compensation, and to finalise and approve the terms of the settlement.

[38] DeloitteAsparona recognised that due to Mr AlKazaz's visa status, it was preferable for him to remain 'on the books' for long enough to obtain alternative employment. Ultimately, an agreement was reached, and the record of settlement was signed by Mr Scholtz on 4 July 2016, and Mr AlKazaz on 5 July 2016. It was certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act) on 7 July 2016.

[39] Mr AlKazaz says that agreement was obtained under duress.

The law

[40] The issue of duress was considered by this Court in *Sawyer v Vice-Chancellor of Victoria University of Wellington.*[13] The Court applied principles set out by the Court of Appeal in *McIntyre v Nemesis DBK Ltd*.[14] The Court of Appeal's approach can be summarised as follows:

(a) Was there a threat or the exertion of illegitimate pressure?

(b) If so, did that threat result in being coerced into entering into the agreement?

(c) If the result of that analysis is a finding that there was duress, was the agreement affirmed?

[41] The Employment Court noted that some relevant factors when considering if a party was coerced are whether the person:[15]

(a) did or did not protest;

(b) was independently advised; and

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13 *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 71, (2018) 16 NZELR 76 at [33].

14 At [33]; *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [25].

15 *Sawyer v Vice-Chancellor of Victoria University of Wellington,* above n 13, at [37].

(c) after entering into the contract took steps to avoid it.

Analysis

Was there a threat or the exertion of illegitimate pressure?

[42] Mr AlKazaz says DeloitteAsparona was aware of his dire financial circumstances, his need to support his family, and his vulnerable visa status. He says the defendants orchestrated a situation that put his employment at risk and then used his financial and immigration vulnerabilities to apply pressure on him to settle. His evidence was that he was told it would cost over $10,000 to run a personal grievance and that he was left with no choice but to settle. He regards this as amounting to a situation of duress.

[43] Mr AlKazaz relies on the fact that he had applied for a $2,000 advance on his salary on 12 April 2016 (which was declined by Mr Glover) as evidence of DeloitteAsparona knowing about his financial situation. He says he had commitments in relation to medical treatment for his father and an upcoming wedding (which he says was ruined). Mr AlKazaz says he spoke to Mr Rosser about his need for the funds and assumed he passed that information on to Mr Glover.

[44] Mr Glover says that all he knew about Mr AlKazaz's circumstances and the reason for seeking an advance was what he read in the email, which was that it was for a personal commitment that he had planned to cover with his first quarter bonus (which he had now learnt he was not getting). I accept this; it is consistent with Mr AlKazaz's acknowledgment in cross-examination that he had not discussed his financial circumstances with Mr Glover.

[45] There is no evidence that Messrs Glover, Sholtz or Rosser were aware of Mr AlKazaz's personal situation or what he says were his dire financial circumstances. The managers acknowledge that he had sought an advance in the past and that Mr Glover had spoken to him about budgeting, but that is as far as their knowledge went. I accept Mr Rosser's and Mr Glover's evidence that they only knew Mr AlKazaz wanted the advance for personal reasons and that they did not know what those reasons were.

[46] While I am prepared to accept that Mr AlKazaz's financial circumstances were difficult, there was no evidence before the Court that would render him particularly vulnerable. He did not provide any evidence of his financial circumstances at the time.

[47] Even if he was vulnerable, there is no evidence that the defendants were aware of such vulnerability. In the absence of such knowledge, they could not be said to have used that vulnerability to put illegitimate pressure on him.

[48] The cost of pursuing a grievance is a factor that any potential litigant would need to consider when weighing up the costs or benefits of whether to settle or contest their employer's decision. This is not a factor that evidences any illegitimate pressure by DeloitteAsparona on Mr AlKazaz.

[49] In relation to his visa status, from the email evidence before me, it is apparent that DeloitteAsparona was aware of potential issues arising from Mr AlKazaz's immigration status and took steps, such as retaining him in employment during his notice period while not requiring him to work, to give him time for his resident status to come through and to find alternative employment, all of which he was able to do. Mr AlKazaz obtained resident status during his notice period.

[50] There is no evidence that DeloitteAsparona exploited his immigration status.

[51] While I accept that this would have been a very stressful time for Mr AlKazaz, there is no evidence of DeloitteAsparona exerting any threat or illegitimate pressure on him at the time.

Was Mr AlKazaz coerced?

[52] I have already found that DeloitteAsparona did not exert illegitimate pressure on Mr AlKazaz, but even if it had, I do not consider that Mr AlKazaz was coerced in any way. He was independently advised throughout. The alternative to reaching an agreement was to go through a redundancy process. Whether that process would have been justified or not is moot. He chose an agreed exit.

[53] I have had the benefit of seeing the internal email exchanges between Mr Glover and the human resources department which were generated as a result of Mr AlKazaz's lawyer's discussions with them and/or DeloitteAsparona's lawyer. It was apparent that Mr AlKazaz's lawyer raised a number of the concerns that Mr AlKazaz now raises before the Court as to the alleged procedural failings and lack of genuineness of any restructuring in order to increase the amount of compensation to be paid.

[54] While I do not have the various iterations of the settlement agreement, it is apparent that Mr AlKazaz achieved significantly more than the first offer, which his lawyer described as containing no consideration. Ultimately, the agreement allowed him to remain in employment during the period of notice (although he was not required to work), and he received compensation under s 123(1)(c)(i) of the Act. I can see from the internal correspondence that the amount of compensation was an issue in the negotiations and the quantum was nearly doubled as a result of the efforts of Mr AlKazaz's lawyer who, the human resources department noted, was prepared to play "hardball".[16]

[55] Further, the negotiations took place over more than a two-week period.[17] This was not a situation where Mr AlKazaz was forced to make a decision under any particular time pressure.

[56] These factors directly contradict any allegation of coercion.

No duress

[57] While I appreciate that this was a situation that Mr AlKazaz did not welcome and his preference was to stay with DeloitteAsparona, the agreement was not obtained by duress.

[58] The agreement was affirmed by the parties. DeloitteAsparona paid all amounts owing at the times they were due.

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16 When Mr AlKazaz's lawyer first become involved, Mr AlKazaz was not being offered any compensation. Then $6,500 was offered. The final agreement included $12,000 compensation.

17 The period was from 14 June 2016 to 4 July 2016.

[59] Mr AlKazaz raised no issues or protest about the agreement until alleging a breach in March 2018 (two years later).

[60] There are no grounds to set aside the agreement. Whether DeloitteAsparona then breached the agreement is a separate issue.

[61] Accordingly, I find the record of settlement, dated 7 July 2016, stands. It prevents Mr AlKazaz from bringing a claim of unjustified dismissal.

Section 149

[62] Mr AlKazaz also submitted that the agreement is invalid because the requirements of s 149 of the Act were not complied with. He alleged that the mediator had never called or met with him and that his failure to do so was a breach of s 149(2). He also stated that the mediator's signature was "obviously fabricated".

[63] He provided no evidence to substantiate these claims beyond his bare assertions. There is no evidence indicating that the mediator's signature was fabricated, and I find on the balance of probabilities that the signature is genuine. Further, the mediator's certificate states that he explained to the parties the effect of s 149(3) and that they affirmed their decision to sign. The credibility of the certificate is supported by the fact that the mediator called Mr Scholtz, who signed the agreement on behalf of the third defendant, to explain the effect of s 149(3). Overall, on the balance of probabilities, I find that the mediator did contact Mr AlKazaz to explain the effect of s 149(3) and that Mr AlKazaz affirmed his decision to sign the agreement.

[64] Accordingly, as the certificate is genuine, the terms of the agreement are final and binding pursuant to s 149(3).

[65] The full and final settlement means that further claims, including claims about good faith, cannot be brought. This is the case particularly in relation to issues that were clearly being disputed at the time Mr AlKazaz left DeloitteAsparona, such as the availability of alternative work.

Can the claims of racial harassment and wage arrears be pursued?

[66] Mr AlKazaz claims that during his employment with DeloitteAsparona he was racially harassed by Mr Rosser. He also claims that he is owed an amount in wage arrears arising from an initial letter of offer dated 6 August 2013.

[67] The defendants deny these claims but also say that they have been fully and finally settled and Mr AlKazaz is barred from bringing them.

The law

[68] Mr AlKazaz and DeloitteAsparona entered into a Record of Settlement dated 7 July 2016, which was certified under s149 of the Act.

[69] Section 149(3)(a) states that the terms of settlement are final and binding on the parties. Section 149(3)(b) states that the parties may not subsequently ask the Authority or the Court to review a settlement agreement. Therefore, when determining whether Mr AlKazaz can bring a claim against DeloitteAsparona after signing such a settlement agreement, it is necessary to review the terms of that agreement.[18]

[70] Settlement agreements often include terms which prevent further litigation between the parties. A number of cases have considered these terms. In *Bank of Credit and Commerce International SA v Ali* Lord Bingham held:[19]

> [9] A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. ...
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> [10] But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.

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18 *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 (EmpC) at 213.

19 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [9] and [10].

[71] Lord Bingham went on to find that a new claim was not prevented by a term in a settlement agreement which stated:[20]

> … the terms [are] in full and final settlement of all or any claims ... that exist or may exist and, in particular, all or any claims or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal.

[72] In *Rickards v Ruapehu District Council* Judge Travis discussed a similar settlement agreement where one of the terms stated: "This agreement is in full and final settlement of any and all claims arising between the parties."[21] He followed Lord Bingham's decision and held the term in the settlement agreement did not apply to the applicant's new claim because neither party was aware of their potential claim.[22]

[73] However, in *Kaipara District Council v McKerchar* Chief Judge Colgan considered a term in a settlement agreement which described the agreement as being "in full satisfaction of any actual or potential disputes".[23] He considered that the word "potential" indicated that the agreement "was not intended to be limited to claims of which either party was aware".[24]

Analysis

[74] In the current case, Mr AlKazaz signed a settlement agreement. Clause 8 of that agreement states:

> The agreement is reached in full and final settlement on all matters between the parties arising out of the employment relationship between them. Except for enforcing this agreement, neither party may take any further proceedings against the other arising from the relationship. The Employee agrees that the terms of this agreement are reached in full and final settlement of all claims he may have against the Employer, associated and related companies or any partners, officers, employees or personnel of the company, whether arising by way of contract, statute or otherwise.

[75] Mr AlKazaz says that the settlement agreement did not apply to any claims he may have about racial harassment and wage arrears/breach of contract.

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20 At [3], [18] and [19].
21 *Rickards v Ruapehu District Council* [2003] 1 ERNZ 400 (EmpC) at [8].
22 At [41] and [47].
23 *Kaipara District Council v McKerchar* [2017] NZEmpC 55, [2017] ERNZ 243 at [31].
24 At [269].

[76] The defendants submit that cl 8 of the settlement agreement is clear on three points: first, the agreement was in full and final settlement on all matters arising from the employment relationship; second, neither party could take further proceedings against the other (except for enforcement); and third, the plaintiff agreed that the terms were reached in full and final settlement of all claims he may have against the defendants. They say this must include the claims now raised by Mr AlKazaz.

[77] Applying the approach set out in the cases above, the wording of cl 8 may not be sufficiently clear to rule out claims between the parties which neither of them was aware of before the settlement agreement was signed. However, the emphasis in those decisions was on the knowledge of the parties.

[78] This is not a situation where a party only became aware of the grounds for a claim after a settlement had been reached. The circumstances of his remuneration and the conduct of Mr Rosser towards him were all matters that Mr AlKazaz was aware of before he entered the settlement agreement.

[79] Mr AlKazaz's evidence is that from day one of his employment, Mr Rosser made inappropriate remarks about his race, religion and country.[25]

[80] Likewise, he was aware of the issue in relation to his remuneration from the start of his employment. He says that the initial letter of offer dated 6 August 2013, sent to him via email, stated that his salary would be increased by $5,000 to $83,000 per annum after successful completion of the first 90 days of employment. While his salary was eventually increased to $83,000 per annum, that did not take place until June 2015.

[81] The final sentence of cl 8 deals with this situation. It states:

> The Employee agrees that the terms of this agreement are reached in full and final settlement of all claims he *may* have against the Employer ... whether arising by way of contract, statute or otherwise. (emphasis added)

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[25] Mr Rosser denies these allegations and other witnesses say they did not observe any such behaviour in the workplace.

[82] Clearly these were matters that Mr AlKazaz may have had a claim for at the time of the agreement. He acknowledges that he was aware of them at the time of the negotiations. His evidence was that he raised the issue of his salary "amongst many things" with his lawyer at the time but did not raise them with DeloitteAsparona.

[83] It is material that in addition to the general statement about full and final settlement, the clause contains a specific acknowledgement from Mr AlKazaz himself that the terms are reached in full and final settlement.

[84] Given his knowledge at the time and his specific acknowledgement in the agreement, Mr AlKazaz must be considered to have settled the claims he now attempts to raise.

[85] Accordingly, Mr AlKazaz is barred by cl 8 of the Record of Settlement from bringing these new claims.

[86] Given the findings above, I am not required to make findings on these claims.

Was there a breach of cl 5?

[87] Mr AlKazaz makes two claims in relation to alleged breaches of cl 5 of the Record of Settlement.

[88] Clause 5 states:

> Neither party to this agreement will make any derogatory comments about the other and will not engage in any intentional behaviour connected to the other which is likely to impact negatively or cause embarrassment or distress to the other.

[89] Mr AlKazaz says that Mr Rosser and Ms Andrea Kenrick, National Support Services Manager with DeloitteAsparona, had discussions with Enterprise IT Ltd (his former employer).[26] While he is unaware of the details of these discussions, he says they were false and derogatory. He considers they prompted the issues with Enterprise

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[26] Mr AlKazaz has had a series of legal proceedings with Enterprise IT; he was found to have been unjustifiably dismissed by it; see *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

IT that resulted in his unjustified dismissal. Secondly, Mr AlKazaz says Mr Michael Enderby (now Associate Director at Deloitte Ltd, previously employed by DeloitteAsparona) told Mr Carey Wong, Talent Acquisition Manager at Deloitte Ltd, that Mr AlKazaz's CV was not accurate. Mr Wong then passed this view on to Halcyon Knights (a recruitment agency) together with a copy of a Stuff article about Mr AlKazaz and his dispute with Enterprise IT.[27]

[90] Mr AlKazaz says these comments and actions caused him damage and amount to a breach of cl 5. He says DeloitteAsparona should be penalised.

[91] The defendants deny that Mr Rosser spoke to Enterprise IT about Mr AlKazaz. Ms Kenrick left employment with DeloitteAsparona some time ago, so they are unable to comment on her actions. They accept that the comments were made by Mr Enderby and Mr Wong. They say, however, that the comments are not derogatory because they are true and even if they were derogatory, DeloitteAsparona cannot be held to be responsible for them because the individuals were not aware of the terms of the Record of Settlement and were not employed by DeloitteAsparona.

[92] Two issues arise:

(a) Were there any comments or behaviour that would amount to a breach of cl 5?

(b) If so, can any of the defendants be held responsible for such comments or behaviour?

Were the comments or behaviour a breach?

Ms Kenrick

[93] Mr AlKazaz says that Ms Kenrick and/or Mr Rosser made disparaging comments about him to Enterprise IT and Spectrum Consulting Ltd. He says he learned of this in various discussions with those companies. Mr AlKazaz has provided

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[27] Anuja Nadkarni "IT worker sacked under 90-day rule wins $36k for unjustified dismissal" (27 December 2017) Stuff <www.stuff.co.nz>.

no evidence as to when the alleged comments were made or what was said. In any case, I am unable to give any weight to what is clearly hearsay evidence. While Mr AlKazaz holds a genuine and strong belief that the comments were made, that is not sufficient for this Court.

[94] Neither party called Ms Kenrick to give evidence. Mr AlKazaz says he did not call her because she would be hostile to him. He suggested that the company's failure to call her imputed concern on their part that she would hurt their case. There was no basis for that submission.

[95] The defendants were not obliged to call Ms Kenrick in order to defend Mr AlKazaz's claims. The burden of proof in these claims lies with him. Mr AlKazaz knew they were not calling her. If he thought her evidence was necessary for his case, he could have summoned her.[28] He chose not to do so. There is no direct evidence before the Court to support the claim that Ms Kenrick made derogatory comments to third parties about Mr AlKazaz.

Mr Rosser

[96] Mr Rosser denies he had conversations about Mr AlKazaz with third parties. He says that in mid-2017 he received a call from Mr Speers asking about Mr AlKazaz's duties while he was employed by DeloitteAsparona. The conversation was followed up with an email from Mr Speers to Mr Rosser reiterating the request for comment and attaching a series of CVs received by Enterprise IT from Mr AlKazaz leading up to his employment. Mr Rosser says he told Mr Speers that he did not think he could help him. He says that on both occasions he spoke to Mr Glover, who told him it was not appropriate to comment. Mr Glover confirmed that he said this to Mr Rosser. Mr Rosser says he told Mr Speers that he could not comment and did not do so.

[97] There was no evidence before the Court that would rebut Mr Rosser's version of events.

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[28] Mr AlKazaz has utilised witness summons in the past, so he was familiar with the process.

[98] Accordingly, I find that there is no evidence to support the claim that Mr Rosser or Ms Kenrick made derogatory comments about Mr AlKazaz to third parties.

Mr Enderby and Mr Wong

[99] Mr Enderby was initially employed at Asparona Ltd. He was then employed at DeloitteAsparona until transferring to Deloitte Ltd in mid-2017. He is responsible for managing all technical resources in the Oracle practice, including Database Administration (DBA) support, infrastructure resources, developers and integration resources. He also worked on projects as the technical lead/architect.

[100] While at Asparona Ltd, Mr Enderby had very little to do with Mr AlKazaz on a day-to-day basis. However, once the practice moved into the Queen St office, his desk was opposite Mr AlKazaz's desk for a period of time.

[101] While he never observed Mr AlKazaz undertaking any training work, he acknowledges that Mr AlKazaz was understood to be a good trainer.

[102] In late 2015 and early 2016, Mr Enderby was involved in discussions with other members of the management team around increasing Mr AlKazaz's utilisation within the Oracle practice. He says he was aware that DeloitteAsparona explored whether Mr AlKazaz could perform some DBA/technical support work but it was found not to be sustainable. Mr Enderby acknowledged that he was only aware of this because of his involvement in resourcing meetings – he was not directly involved in the allocation or performance of the work itself. He notes that the skills required for teaching an Oracle training course are quite different from the skills necessary for troubleshooting and working on technical issues.

[103] In April 2018, at Mr AlKazaz's request, Halcyon Knights emailed Mr Wong, putting forward Mr AlKazaz as a possible candidate for a Technical Consultant role at Deloitte Ltd.

[104] Mr Wong forwarded the email to Mr Enderby, advising that Mr AlKazaz had applied for the position, and asking for his thoughts. Mr Wong supplied Mr Enderby with Mr AlKazaz's CV and discussed the application with him. As part of that discussion, Mr Enderby told Mr Wong that the information in the CV did not accurately reflect the work that Mr AlKazaz performed while he worked at DeloitteAsparona. Based on what he considered he knew of Mr AlKazaz from the resource meeting discussions in 2016 and the various news articles that he had read about him in December 2017, Mr Enderby did not consider he was suitable for the role.[29] He emailed Mr Wong advising that there was no interest in progressing with Mr AlKazaz and not to proceed further.

[105] On that basis, Mr Wong advised Halcyon Knights that the team had declined to proceed with Mr AlKazaz's application.

[106] Halcyon Knights requested some "intel" about what Deloitte Ltd thought was lacking, so as to assist both Mr AlKazaz and Halcyon Knights to "get it right on the next profile".

[107] Mr Wong responded in an email, dated 20 April 2018, by attaching a Stuff article reporting on the outcome of personal grievance proceedings between Mr AlKazaz and Enterprise IT,[30] with the message: "Not with us, but the information on CV is inaccurate."

[108] Mr AlKazaz says that after this email, he noticed a dramatic change in behaviour from Halcyon Knights. He says that the company had found him a job in the past and that his relationship with it was "brilliant". However, that changed after applying for the job with Deloitte Ltd –it stopped replying to his emails and other job applications. He considers that the email from Mr Wong jeopardised his prospects of finding employment in New Zealand. Mr AlKazaz says he became aware of the email when it was sent to him some time in May 2018 in response to a request under the Privacy Act 1993 made to Mr Scholtz in March 2018.

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29 Mr Enderby had read media coverage (three articles) of Mr AlKazaz's success in the Employment Relations Authority against Enterprise IT, including interviews with Mr AlKazaz.

30 Nadkarni, above n 27.

[109] Mr AlKazaz takes serious issue with the statement that his CV was inaccurate. He says that is incorrect and Mr Enderby did not have sufficient knowledge of the work he performed while at DeloitteAsparona to enable him to make such a statement. He considers it breaches cl 5 of the Record of Settlement.

[110] The statement by Mr Enderby to Mr Wong and by Mr Wong in turn to Halcyon Knights is, on any interpretation, derogatory.

[111] Mr Enderby says it is true, but cl 5 does not require that the comment be false, just that it be derogatory.[31] Further, the comment was being made to a recruitment company. Given the nature of the comment, it was also behaviour that was likely to impact negatively or cause embarrassment or distress to Mr AlKazaz.

[112] The comments were in breach of cl 5 of the Record of Settlement.

Is DeloitteAsparona responsible for the breach?

[113] DeloitteAsparona argued that it cannot be held responsible for its employees breaching a non-disparagement clause in a settlement agreement where the employees in question are not aware of the settlement agreement or its terms, and that the employees in question were not employees of DeloitteAsparona at the time the comments were made.

[114] The Record of Settlement is between Mr AlKazaz and DeloitteAsparona.

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[31] Mr AlKazaz cross-examined Mr Enderby extensively on the elements of his CV. It was apparent, and accepted by Mr Enderby, that he did not have direct knowledge of the work undertaken by Mr AlKazaz. While genuine, his view that the CV was "inaccurate" was not fair especially when the CV was very similar to the CV on the DeloitteAsparona website at the time of Mr AlKazaz's employment. Mr Enderby considered that the CV gave an "impression" that Mr AlKazaz had significant experience in areas that Mr Enderby considered his performance to be "not at an appropriate level". That is a different issue from being "inaccurate". Mr AlKazaz was able to establish that he had done the work he had listed albeit that it was only a small element of his work. His CV makes it clear that he was "largely an Education Consultant" who had "variant levels of exposure", and when Halcyon Knights sent the CV through, they noted that he had "moved into Oracle Administration, Implementation and support from his earlier role as an Education Consultant". CVs will often focus on elements of a person's work history that evidence the skills or experience required for the next role.

[115] The obligations under the agreement do not extend to or bind related parties.[32] The only mention of related companies is in cl 8 and that is limited to stating that the terms were in full and final settlement of any claims Mr AlKazaz may have against a related company.

[116] Mr Wong was never an employee of DeloitteAsparona. Accordingly, I agree that DeloitteAsparona cannot be liable for any actions by him.

[117] Mr Enderby was previously an employee of DeloitteAsparona, but in April 2018, when he made the comments, he was no longer employed there. He had transferred to Deloitte Ltd the previous year in mid-2017. Accordingly, DeloitteAsparona cannot be liable for his actions. Deloitte Ltd owed no obligations to Mr AlKazaz under the Record of Settlement.

[118] Given my findings above, I am not required to consider the issue of whether DeloitteAsparona could be liable when the employees in question were unaware of the terms of the settlement. However, the defendants' reliance on *Musa v Whanganui District Health Board* was misplaced.[33] That case dealt with a situation where the individual was named as a party and the question was whether they could be liable. That is not the case here.

[119] This case does not involve whether Mr Wong and Mr Enderby can be personally liable for making derogatory comments about Mr AlKazaz; rather, it involves whether DeloitteAsparona can be held liable for derogatory comments or intentional behaviour of its employees.[34]

[120] In *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* Judge Holden held that that a company can be responsible for the actions of its employees under s 149(4).[35] I agree.

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32 Which Deloitte Ltd could arguably be.

33 *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236.

34 I have already found (at [26] above) that DeloitteAsparona was Mr AlKazaz's employer at the time. It is the other party to the Record of Settlement.

35 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165, [2020] ERNZ 398 at [53].

[121] Even though an employer's workers are not liable for an employer's obligations if they are not aware of them, this does not mean that the employer is equally protected, particularly if it fails to inform its workers of its obligations to former employees.[36] The *Musa* case defines the parameters of when third parties to an employment dispute can be liable, but it does not define the parameters of when an employer, and party to a settlement agreement, will be liable for breaching that agreement.

[122] The question is whether the actions of DeloitteAsparona's employees should be imputed to it. Under the Act, the acts of an employee can be attributed to a company when the employee is acting within the scope of their actual or apparent authority.[37]

[123] It is a question of fact for the Court to determine whether, considered subjectively in terms of actual employment arrangements or objectively in terms of the reasonable perceptions of observers, an employee's actions were an aspect of what they were employed to do.[38]

[124] In relation to both Mr Enderby and Mr Wong, given the nature of their roles, I would have found that they were acting within the parameters of their role and accordingly within their actual or apparent authority. However, those roles were not with DeloitteAsparona.

[125] Accordingly, Mr AlKazaz's claim for a penalty for breach of cl 5 must fail.

Was there a breach of cl 9?

[126] Clause 9 of the Record of Settlement states:

> The Employer will make an announcement regarding the Employee's departure to staff by agreement with the Employee.

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36 That was the case here. The evidence showed that there had been little if any training in relation to what could be said about former employees. The witnesses were also not aware of any policies that may have covered the issue.

37 Employment Relations Act 2000, s 142ZA

38 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA); and *Kuehne + Nagel International AG v Commerce Commission* [2012] NZCA 221, [2012] 3 NZLR 187.

[127] `Mr AlKazaz says that DeloitteAsparona never discussed an announcement with him and that if one was made, it must have been in breach. On the other hand, if one was not made at all, that would also be in breach.

[128] This was a late claim by Mr AlKazaz. He sought leave to amend his claim to include it on day three of the hearing (11 August 2021) although he says he became aware of the alleged breach after reading the evidence of Mr Dmitry Lozitskiy, specialist lead for Deloitte Ltd, on 22 October 2020. Mr Lozitskiy's evidence said that he "saw an email telling the team that he [Mr AlKazaz] was leaving."

[129] Mr AlKazaz is self-represented and said he did not know he had to apply for leave to amend his pleadings once proceedings had been set down for hearing. The Court allowed the amendment but noted that the defendants did not have notice of the new claim and that it was up to Mr AlKazaz to pursue the issue through his questioning of witnesses.

[130] Disclosure has been a fraught process for the parties. No email announcement has ever been provided to Mr AlKazaz as part of the disclosure exercise. I consider it would fall into the category of documents ordered or agreed to be disclosed. A further search of the defendants' electronic records during the hearing itself could not locate such an email. Mr AlKazaz was able to ask all witnesses about it, but none, with the exception of Mr Lozitskiy, recalled the alleged email.

[131] In the absence of an email or clear evidence as to its existence and content, there is insufficient evidence to find that DeloitteAsparona breached cl 9 of the agreement by issuing an announcement without Mr AlKazaz's agreement.

[132] Mr AlKazaz's alternative claim was that if DeloitteAsparona did not issue an announcement, that failure was also a breach.

[133] The operation of cl 9 requires the parties to agree to an announcement. This would require involvement by Mr AlKazaz. This is a situation that Mr AlKazaz must have been aware of from the outset. Either DeloitteAsparona contacted him to agree an announcement, or they did not. If they did not (and so did not make any

announcement), he had ample opportunity to raise that with them at the time. On the evidence before the Court, he did not do so.

[134] This is not a breach Mr AlKazaz can say he was unaware of until reading the defendants' evidence. He must have had this knowledge since he signed the Record of Settlement on 5 July 2016, or at least shortly thereafter.[39] On any measure of time, Mr AlKazaz is well outside the limitation period of 12 months from when the breach either became known or should reasonably have become known to him.[40]

[135] Mr AlKazaz's claim for a penalty for breach of cl 9 must fail.

Costs in the Authority

[136] Given the above findings, it follows that the determination of the Authority in relation to costs remains appropriate.[41] The order of costs of $4,500 against Mr AlKazaz in the Authority stands.

Conclusion

[137] The Authority's determination is set aside, and this judgment stands in its place.

[138] Mr AlKazaz's employment transferred from Asparona Ltd to DeloitteAsparona by agreement. DeloitteAsparona was his employer at the time his employment ended in July 2016.

[139] The Record of Settlement, signed by DeloitteAsparona on 4 July 2016, Mr AlKazaz on 5 July 2016, and the mediator under s 149 on 7 July 2016, stands and is binding on the parties. Mr AlKazaz was not under duress when he entered into it. That agreement settled all issues in relation to the termination of Mr AlKazaz's employment, including any claim of constructive dismissal.

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39 All monies owing under the agreement were to be paid by 1 September 2016 (cl 2) and Mr AlKazaz's notice expired on 29 August 2016.

40 Employment Relations Act, s 135(5).

41 *AlKazaz v DeloitteAsparona Ltd*, above n 2.

[140] Mr AlKazaz is barred from bringing his claims of racial harassment and wage arrears by cl 8 of the Record of Settlement.

[141] Mr AlKazaz's claims of breach of cls 5 and 9 of the Record of Settlement are unsuccessful.

[142] Costs of $4,500 in relation to the Authority hearing remain payable by Mr AlKazaz.

[143] Costs in this proceeding are reserved. The parties are encouraged to agree costs. If these cannot be resolved by agreement, any relevant application should be filed and served within 21 days, with a response given within a further 21 days.

Kathryn Beck
Judge

Judgment signed at 12.45 pm on 15 September 2022