

WHEN IS “FULL AND FINAL” ACTUALLY FINAL?

August 2019

Until recently, the finality of section 149 settlement agreements has been left largely untouched by the Employment Relations Authority and Courts have been reluctant to set aside settlement agreements unless one of the parties was considered to lack the legal capacity to enter into an agreement.

The recent case of *Bagley v Deloitte Limited* [2019] has broadened the circumstances in which the validity of these agreements can be challenged. It sets a potentially concerning precedent that employers should be wary of.

SETTLEMENT AGREEMENTS

Section 149 of the Employment Relations Act allows an employer to enter into a settlement agreement with an employee who has raised a personal grievance or employment relationship problem (for example, a bullying claim). If the parties agree terms then a mediator from MBIE's Mediation Services can certify the agreement, which becomes final, legally binding and enforceable by the parties. The Act also precludes the parties cancelling the agreement under the Contractual Remedies Act. Parties are precluded from advancing claims arising out of the employment relationship.

BAGLEY AND DELOITTE LIMITED CASE

Mr Bagley worked for Deloitte in a business development role. He got into a dispute with his employer about their sales commission scheme and the company then restructured their operations. When it became obvious that Mr Bagley's position might become surplus to requirements, Deloitte held discussions with him about whether he would prefer to come to agree a suitable exit package or go through a formal redundancy process that would likely result in his employment ending. Mr Bagley enquired about what the latter option would look like

and was told by HR that he would receive two months' notice but he was not entitled to any redundancy compensation under the terms of his employment agreement. Mr Bagley and Deloitte later entered into a section 149 settlement agreement on agreed terms.

A short while after his settlement agreement was certified, Mr Bagley learned Deloitte had a redundancy policy from October 2017 that would have entitled him to redundancy compensation of 16-18 weeks salary. He also learned his employment agreement contained a clause saying that, in the event of any inconsistency between the terms of the agreement and a policy, the policy would prevail. Mr Bagley sought to have his settlement agreement set aside on the grounds he was incorrectly informed by HR that he was not entitled to redundancy compensation and that he may not have signed the agreement at all had he been aware of this fact.

The Authority had to consider whether they had grounds to set aside the agreement given it was signed on a “full and final settlement” basis and was entered into in contemplation of redundancy situation arising. Counsel for Deloitte failed to persuade the Employment Relations Authority that the settlement agreement was valid. Instead, the Authority found that both parties were under the misapprehension that Mr Bagley would not have been entitled to redundancy compensation and Mr Bagley was induced into entering the settlement agreement on the basis of a misrepresentation, which made the whole agreement invalid. The Authority did not explain further the legal basis for the agreement being invalid, particularly as the agreement would not have been able to be cancelled under the Contractual Remedies Act.

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HOW CAN WE HELP

Employers may be concerned that these types of settlement agreements may not be as bulletproof as they thought and they may have to continue litigating with an ex-employee.

We recommend employers consider the following before entering into a settlement agreement with a current or former employee:

- Be aware of all benefits and entitlements an employee may have a claim to (including those conferred by company policies);
- Ensure all representations made and facts presented to the employee before an agreement is signed are accurate; and
- Take legal advice on both the appropriateness of, and terms of a settlement agreement before signing.

Please contact Glenn or Jeremy if you require legal advice on a settlement agreement.

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