IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 427
5423557

	BETWEEN	A Applicant
	A N D	B Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Ian Davidson, Advocate for Respondent
Investigation Meeting:	18 September 2013 at Auckland
Date of Determination:	20 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr A) alleges that the respondent (B) has breached the terms of a record of settlement reached between the two parties on 17 April 2013 in that the parties agreed that they would not *speak ill of the other.*

[2] B resist Mr A's claim by denying that they spoke ill of him.

[3] The facts are not disputed. Mr A was employed by B, there was an employment relationship problem, that employment relationship problem was resolved by way of the mediated settlement the Authority has just referred to and that settlement included the term that *neither party will speak ill of the other*: clause 4.

[4] Moreover, by clause 3 of the record of settlement, B provided a positive reference for Mr A the terms of which were agreed between the parties.

[5] Subsequent to the execution of the record of settlement, Mr A applied for positions and relied in part on the reference he had received from B. It is common ground that in respect to two such applications for employment, the prospective employer on each occasion contacted Mr C a director of B. The prospective employer in one case asked Mr C if he would re-employ Mr A and in another asked Mr C if there were any legal proceedings brought against B by Mr A. In responding to each of those questions, asked by two separate prospective employers, Mr C answered each question truthfully saying on the one hand that he would not re-employ Mr A and in the other case that Mr A had brought legal proceedings against B.

[6] Mr A says that those answers by Mr C to questions asked of him constitute a breach of s.4, particularly because they appear to contradict the positive reference given to Mr A as part of the settlement process pursuant to clause 4. Conversely, B say that Mr C did nothing more than honestly answer questions he was asked and that those answers of themselves cannot be a breach of clause 4.

[7] B indicated in their statement in reply that had Mr A contacted them first before filing his proceedings in the Authority, they would have readily agreed with him on the approach that they should take in future when confronted with requests for information from prospective employers.

[8] Moreover, B indicated to the Authority their willingness to adopt a different approach in future to try to protect Mr A from any negative consequences of their involvement. They proposed that if asked in future for information pertaining to Mr A they simply indicated to the inquirer that their company policy was to stand by the reference already given (which is in positive terms) and for privacy reasons, to make no other comment. Mr A accepted that stance as appropriate and both parties agreed with the Authority's suggestion that such a stance from B could be recorded in this determination as being the approach it would take should there be future requests of it from prospective employers of Mr A.

Determination

[9] The simple question for the Authority to decide in the present case is whether B have breached their obligations to Mr A by truthfully responding to two questions asked of them by prospective employers of Mr A.

[10] The Authority has the greatest sympathy for Mr A (as does B for that matter). The Authority made the observation during the investigation meeting that Mr A's position was not an unusual one where there had been an employment relationship problem in a small close-knit industry where everybody knew everyone else. That said, the question for the Authority remains whether B have breached their legal obligations or not.

[11] The Authority's considered view is that there has been no breach of the obligations that B have to Mr A pursuant to the executed record of settlement and in particular no breach of clause 4 of that agreement.

[12] The Authority is satisfied that the words in clause 4 of the record of settlement must be given their ordinary usual meaning and that an honest answer to two questions asked of a B director can neither of them be construed as *speaking ill* of Mr A. The fact that Mr C indicated that B would not employ Mr A again does not in the Authority's opinion equate to B speaking ill of Mr A; the fact that B choose not to re-employ Mr A may be judged by the recipient of that message to be a negative factor that such a person would want to take into account in making a decision about whether Mr A ought to be employed or not, but it cannot in the Authority's view be regarded as speaking ill of Mr A.

[13] In that regard, the Authority accepts the submission made on behalf of B that the proper construction of the phrase *speaking ill* requires some active voice and making a statement about re-employment does not in the Authority's view convey that active voice. To the contrary, the statement is itself free of any negative connotation which can only be attached to it by implication.

[14] Similarly, the confirmation B gave of legal proceedings being brought against it by Mr A is in the Authority's judgment in the same category. There is no active intention to damage Mr A's reputation or character. Indeed there is no intention at all beyond simply honestly answering a question that was asked.

[15] So in the Authority's judgment, in order for there to be a breach of a provision requiring a party not to speak ill of the other, there must be an active intention to damage the reputation of the person commented on. In the present circumstances, there is a complete absence of such a intention; indeed, B made it absolutely clear that they would willingly have agreed with Mr A on exactly what they were to say to

prospective employers, either during the mediation or indeed subsequent to it. It seems to the Authority that B have gone out of their way to try to assist Mr A as far as that is possible.

[16] In that context, the Authority records formally that B have now indicated that if they are asked any further questions about Mr A by prospective employers, their response will be to say that they stand by the terms of the positive reference they have given and for privacy reasons their company's policy is to offer no further observation or comment. Mr A accepts that form of words as appropriate and the Authority, as a witness to that exchange between the parties during the investigation meeting, undertook to record it in this determination.

[17] It follows from the foregoing analysis that the Authority is not persuaded that B has breached its obligations under the record of settlement it reached with Mr A and on that footing Mr A's claim before the Authority fails.

Costs

[18] Strictly speaking, as Mr A has been unsuccessful in his claim, on normal principles B could look to him to make a contribution to its costs in successfully defending his claim. Without expressing a definitive view on the matter, the Authority would urge B to let costs lie where they fall, given Mr A's difficulty in obtaining work, and therefore the imbalance in the relative financial positions of the parties.

James Crichton
Member of the Employment Relations Authority