New Zealand Employment Relations Authority Decisions

Chen v Southern District Health Board (Christchurch) [2018] NZERA 1020; [2018] NZERA Christchurch 20 (22 February 2018)

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Last Updated: 28 February 2018

Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY

CHRISTCHURCH

[2018] NZERA Christchurch 20

3014251

BETWEEN VICTOR CHEN Applicant

A N D SOUTHERN DISTRICT HEALTH BOARD

Respondent

Member of Authority: Peter van Keulen

Representatives: Victor Chen, in person

Cassandra Kenworthy, Counsel for Respondent

Investigation Meeting: 9 and 10 November 2017 at Dunedin

Submissions Received: 10 November 2017 and 4 December 2017 for Applicant

10 November 2017 for Respondent

Date of Determination: 22 February 2018

DETERMINATION OF THE AUTHORITY

A. The Southern District Health Board has not breached the record of settlement between it and Victor Chen and there is no basis to award penalties or grant compliance orders as sought.

B. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] Victor Chen worked for the Southern District Health Board as an Interventional Cardiologist from July 2006. Dr Chen resigned on 22 April 2013. Dr Chen and the Health Board agreed terms relating to the resignation that were recorded in a Record of Settlement also dated 22 April 2013.

[2] Dr Chen says the Health Board has breached two of the terms of the Record of

Settlement and he seeks compliance orders and a penalty as a result.

Preliminary matter

[3] This matter concerns the enforcement of a record of settlement, which contains a confidentiality clause. Other than discussing the clauses that are subject to this employment relationship problem, it is appropriate that the confidentiality is preserved.

[4] Further, this matter involves evidence about processes at the Dunedin Hospital, which includes reference to patients, staff and specialists engaged by the Health Board. Some of the individuals referred to in evidence were not directly involved in my investigation and it is not necessary to identify them in my determination.

[5] So, on these two matters, I am satisfied that an order for non-publication pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 is appropriate.

[6] The terms of the order are that I prohibit from publication:

(a) Any of the terms of the Record of Settlement except for those referred to in this determination.

(b) The names of, or any information that may identify, patients of the Dunedin Hospital and any staff or specialists of the Health Board who did not give evidence in this matter.

Determination

[7] The Record of Settlement contained the following two clauses1:

10. Neither party will speak ill of each other.

11. The applicant will co-operate with the SAC-1 investigation. The respondent records that the purpose of the investigation is to look into systemic issues .... The respondent confirms that it will expedite the SAC-1 investigation and report it (sic) at all possible, and acknowledges that the investigator is required to report within the 70 working days of notification (internal notification date of 10 February

2013 is the start date). ....

[8] Clause 11 relates to a mandatory investigation and reporting obligation that follows the death of a patient, in this case the death of patient IPN. Dr Chen's concern was that he had been one of the medical professionals involved with patient IPN's treatment and he wanted to ensure there was an objective review of all possible causes of death.

[9] Dr Chen says that the Health Board has breached both of these clauses because:

(a) A charge nurse employed by the Health Board spoke to David Millen, a nurse unit manager at the Gold Coast Private Hospital, at a conference in Australia. That nurse spoke of Dr Chen in disparaging terms and Dr Chen says this is a breach of clause 10.

(b) The SAC-1 investigation and subsequent report are insufficient in that the Health Board did not investigate all possible causes of patient IPN's death and the investigation and report were not progressed by the Health Board in a timely way. Dr Chen says this is a breach of clause 11.

[10] In order to resolve this employment relationship problem, consisting of these two complaints, I must determine the following issues:

(a) Has the Health Board breached or failed to comply with clause 10 or 11 of the

Record of Settlement?

(b) If the Health Board has not complied with clause 10 or 11 is a compliance order appropriate?

(c) If a compliance order is appropriate, can I order compliance in the terms sought (or some other terms)?

(d) If the Health Board has breached clause 10 or 11 should a penalty be imposed and, if so, what quantum should any penalty be?

[11] In order to decide if the Health Board has failed to comply with clauses 10 and/or 11, I must consider what the obligations are that the clauses impose upon the Health Board, i.e. establish the meaning of clauses 10 and clause 11.

[12] The meaning to be attributed to these clauses of the Record of Settlement is to be taken from the natural and ordinary meaning of the language used2.

[13] In *Firm PI 1 Limited v Zurich Australian Insurance Limited3* the Supreme Court summarised the approach to contractual interpretation as:

[60] ...It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all of the background and knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

2 *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149 applying *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444

3 [2014] NZSC 147; [2015] 1 NZLR 432

[14] In *Vector Gas Ltd v Bay of Plenty Energy Ltd4*, Justice Tipping stated:

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. ... The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[15] So, my role is to interpret clauses 10 and 11 to establish the meaning the parties intended the words to bear. This involves:

(a) Considering those words on an objective basis – having no regard for what the parties say the words were intended to mean or what they believe the words mean;

(b) Taking the natural and ordinary meaning of the word used;

(c) Assessing that against the background, context of the contract and knowledge

(facts and circumstances) available to the parties.

[16] Turning first to clause 10 it is, on the face of it, a straightforward clause to interpret. It is a non-disparagement clause. It imposes an obligation on Dr Chen not to speak badly about the Health Board and likewise for the Health Board not to speak badly about Dr Chen.

[17] There is however, an aspect of the clause that I must consider further that arises from the words "speak" and "parties", that is the scope or extent of the obligation. By way of example, does clause 10 mean a cleaner employed by the Health Board

could not tell his or her partner that Dr Chen was rude to him? In my view this cannot be the scope of this clause

– it would simply be unworkable if the clause means that every person engaged in some capacity by the Health Board is prevented from expressing a negative view, perhaps just in passing, to anyone at all about anything to do with Dr Chen.

[18] So, I must identify the scope of the obligation imposed by clause 10. Once I have done that then it will be apparent if there has been a breach. Specifically, in this case the question is, is the scope of clause 10 wide enough to prevent a nurse employed by the Health Board expressing her personal view about an aspect of Dr Chen's actions in an operating theatre to another medical professional?

[19] The context and knowledge that assist in resolving this aspect of interpretation includes that Dr Chen was seeking to protect his reputation following his resignation after many years working at the Dunedin Hospital.

[20] It follows that clause 10 is most likely intended to operate in respect of enquiries about Dr Chen's work at the Dunedin Hospital or any communications or publications about the Dunedin Hospital and its work that relate to or discuss Dr Chen.

[21] Clause 10 cannot be limited to verbal communications, I believe it must include any written references, articles or reports that refer to Dr Chen's work.

[22] This is only part of the scope of the obligation - the next question is, who does the obligation of not speaking ill of Dr Chen extend to? Effectively, who is the "Health Board" for the purposes of clause 10?

[23] The Health Board is one of several district health boards established by the New Zealand Public Health and Disability Act 2000 (NZPHD Act). It is an organisation that is governed by a board5. The board of the Health Board has the authority to exercise powers

and perform the functions of the organisation6. The board must also delegate power to make decisions on management of the Health Board to the chief executive7.

[24] As with a company, the day-to-day operation of the Health Board then flows by way of delegated authority from the chief executive down to management and then down to other employees or contractors engaged by the Health Board.

[25] So effectively, the Health Board for any particular purpose is its board, the chief executive and employees/contractors who have delegated authority to act in respect of that particular purpose.

[26] Applying this to the context of the Record of Settlement, the Health Board is its board members, its chief executive and any personnel authorised by the board or the chief executive, to speak on behalf of the Health Board about Dr Chen.

[27] Clause 10 therefore obliges:

(a) The board of the Health Board,

(b) the Chief Executive of the Health Board; and

(c) any employees or contractors of the Health Board with delegated authority to provide comment on Dr Chen either directly or in connection with Dunedin Hospital's services,

not to speak, write or otherwise convey any derogatory comments about Dr Chen.

[28] Considering Dr Chen's complaint about clause 10, I am satisfied that a nurse approached Mr Millen at a medical conference in Australia and spoke about Dr Chen in disparaging terms as she had concerns about Dr Chen's actions in an operating theatre, albeit

in my view minor concerns and therefore minimal disparagement.

6 Section 25 of the Crown Entities Act 2004.

7 Section 26 of the NZPHD Act.

[29] The problem is Mr Millen's evidence was not conclusive on who the nurse was other than he believed her to be a charge nurse from the Dunedin Hospital. The evidence from the Health Board is that the only charge nurse who worked with Dr Chen, and therefore might be able to comment on his practice in an operating theatre, did not attend a conference in Australia and specifically that charge nurse denies ever speaking to Mr Millen. Given the nature of the comment made by the nurse to Mr Millen it follows that she must have been a nurse employed by the Health Board. However, I cannot say, and am not satisfied, that the nurse had authority to speak about Dr Chen, i.e. despite being at the conference as an employee of the Health Board she was not acting in a capacity that makes her the Health Board for the purposes of clause 10.

[30] If the parties had intended clause 10 to capture this type of scenario then I think they should have used language obliging the Health Board to procure that its employees or contractors do not speak ill of Dr Chen. Clearly, this wording is not in clause 10. In any event, I think the Health Board would be unlikely to have accepted such wording, as it would be too onerous.

[31] For these reasons I am not satisfied that the Health Board has breached clause 10 of the record of settlement.

[32] Turning to clause 11, this clause deals with the investigation into and subsequent report on the death of patient IPN. The relevant part of the clause for my investigation states that the Health Board records that the purpose of the SAC-1 investigation is to look into systemic issues arising out of the death of patient IPN and that the Health Board will expedite the SAC-1 investigation.

[33] Dr Chen's complaint is that first, the SAC-1 investigation was not undertaken in the required time frame and therefore the Health Board did not expedite it as required. And second, that the SAC-1 investigation did not canvass all possible causes of death therefore the SAC-1 report was not accurate or complete, leading to imbalanced conclusions, which might reflect badly on him.

[34] I must interpret clause 11 to determine if it requires the Health Board to expedite the SAC-1 investigation and if it requires the Health Board to ensure the SAC-1 Investigation was comprehensive covering all aspects of concern about patient IPN's death.

[35] The background, context and knowledge relevant to the interpretation of this clause includes:

(a) The circumstances of patient IPN's death.

(b) Dr Chen and the Health Board wanted an objective and timely review of the patient IPN's death.

(c) Patient IPN's death was a SAC-1 incident. SAC-1 a severity assessment code, which is a numerical rating defining the severity of an adverse incident. This rating dictates the level of investigation and reporting required.

(d) Dr Chen and the Health Board both appear to accept that there was no investigation necessary into any possible negligence by Dr Chen or any medical professional over the death of patient IPN.

(e) As there was no issue of negligence to investigate but the incident was a SAC-

1 event, the Health Board only had an obligation to undertake a Root Cause Analysis of the clinical incident (patient IPN's death) 8 pursuant to guidelines produced by the National District Health Board Quality and Risk Managers Group9.

(f) A Root Cause Analysis is an investigation into the systems used in the patient's care to ascertain the underlying cause of the incident. The process is

focused on systems rather than individual behaviour.

8 New Zealand Health and Disability – National Reportable Events Policy 2012

9 The guidelines align with the New Zealand Health and Disability – National Reportable Events Policy 2012.

[36] Clause 11 refers to a "SAC-1 investigation". This is not a defined term nor is it a recognised investigation in any of the policies or guidelines. The context of the record of settlement, use of the words "SAC-1 investigation", and because clause 11 identifies that the purpose is to investigate "systemic issues", mean that the investigation referenced in clause 11 is the required Root Cause Analysis and the report produced. Clause 11 requires the Health Board to ensure that a Root Cause Analysis was undertaken.

[37] Clause 11 clearly requires the Health Board to expedite the Root Cause Analysis, if possible.

[38] It is not necessary for me to outline the detail of the Root Cause Analysis process, what happened with this particular analysis or the outcome set out in the report. I am satisfied that the Health Board did ensure that a Root Cause Analysis was undertaken in respect of the death of patient IPN and in fact one was undertaken and reported on as required. Whether the report met the guidelines and any requisite standards for reporting purposes is not an issue for me to resolve, as it was not an obligation imposed by the record of settlement.

[39] I am also satisfied that the Health Board did not fail to expedite the Root Cause Analysis where it was possible for it to do so. It instructed the specialist to conduct the Root Cause Analysis in a timely fashion and after that much of the analysis or investigation was out of its control except to assist with arrangements for the investigation such as making staff available or organising interview times. On the evidence I heard at the investigation meeting I do not see what the Health Board could have been expected to have done differently to expedite the process with the specialist instructed to undertake the investigation.

[40] In conclusion, I do not find that the Health Board breached clause 11 of the record of settlement.

Determination

[41] The Health Board has not breached the record of settlement and there is no basis to award penalties against it or grant compliance orders as sought.

Costs

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[43] If they are not able to do so and a determination on costs is needed, the party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen

Member of the Employment Relations Authority
