

ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF
CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 238
3048833

BETWEEN STEPHEN DUGGAN
Applicant

AND ARMAAN DEV ENTERPRISES LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Marty Braithwaite and Michelle Hua, advocate and counsel for
Applicant
Amit Gulati advocate for Respondent

Investigation Meeting: 12 April 2019

Determination: 18 April 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Armaan Dev Enterprises Limited breached the Record of Settlement it had with Stephen Duggan.**
- B There is a corresponding order for payment of a penalty of \$3000 within 28 days from the date of this determination as below:**
- (a) Payment of the sum of \$2250 to Stephen Duggan.**
 - (b) Payment of the balance of \$750 to the Authority for payment into the Crown bank account.**

C Armaan Dev Enterprises Limited is ordered to pay to Stephen Duggan the sum of \$1350.00 costs, and reimburse the filing fee of \$71.56.

Employment Relationship Problem

[1] Stephen Duggan and Armaan Dev Enterprises Limited (the company) entered into a Record of Settlement under s 149 of the Employment Relations Act 2000 (the Act) on 15 October 2018. The Record of Settlement was signed by a mediator empowered to do so under s 149(3) having explained to the parties the effect of subsection (3) and having heard the parties affirm their request for the mediator's signature. It was in full and final settlement of all matters between Mr Duggan and the company.

[2] Mr Duggan says that the company breached an agreed term of settlement not to disparage him.

[3] He seeks a penalty under s 149(4) of the Act and costs associated with his application to the Authority.

[4] A director of the company, Amit Gulati says that he did not post any comment on Facebook in breach of the non-disparaging clause and that the comment was posted by another person.

The Issues

[5] The Authority is required to determine the following issues in this case:

- (a) Has the company breached the Record of Settlement?
- (b) If there is a breach of the Record of Settlement is it an appropriate case for an award of penalties?
- (c) If so, what penalty should be awarded, and should part or the entire penalty be paid to Mr Duggan.
- (d) Should there be an order for costs and if so in what amount?

Prohibition from publication

[6] I prohibit from publication the agreed terms of settlement contained in the Record of Settlement, except for clause 4.

Clause 4

[7] Clause 4 of the Record of Settlement provides:

The parties agree that they will not act in a manner or make any comments to any third party about the other that are disparaging or likely to bring the other into disrepute. This includes comments and postings on social media.

Was there a breach of the Record of Settlement?

[8] On or about early November 2018 a comment was posted to Mr Duggan's then employer's Facebook page using Mr Gulati's Facebook account. I do not intend to set the comment out. It was a comment about Mr Duggan's personality but not his competence. I accept that it was disparaging of Mr Duggan and the company did not argue to the contrary.

[9] Mr Duggan said that he was alerted to the comment in a text from a friend on 8 November 2018. He viewed the comment using his girlfriend's Facebook and took photos of it. He raised concerns with his representatives who alerted the then representatives of the company. The comment was removed a week or so later in late November 2018. I accept that by that stage the comment had been visible for about three weeks.

[10] Mr Gulati said that it was his friend M who posted the comment and not him. He said that he was having a meal with his nephew and M and saw the picture of Mr Duggan on his then employer's page. He showed the picture to M and did not know that M had subsequently posted the comment using his Facebook account. He said that he was not aware of the comment until two to three weeks later when it was raised, and he deleted it at that time.

[11] The Authority held a telephone conference with Mr Braithwaite, Ms Hua and Mr Gulati on 15 February 2019. Mr Gulati was advised at the telephone conference that he could bring M to the investigation meeting. That advice further appeared in the notice of direction

and encouraged Mr Gulati to bring any relevant witnesses including M to the investigation meeting. There was further advice that weight could only be given to witnesses who presented in person.

[12] Mr Gulati attended the Authority's investigation meeting. M did not. I am unable therefore to be satisfied that M and not Mr Gulati posted the comment. I conclude then that it is more likely than not that Mr Gulati posed the comment.

[13] By posting the comment on the Facebook page I find that the company, through the actions of its human agent director Amit Gulati, breached clause 4 of the Record of Settlement.

Is it appropriate to impose a penalty against Armaan Dev Enterprises Limited?

[14] Section 149(4) of the Employment Relations Act 2000 (the Act) provides that a person who has breached an agreed term of settlement in a record of settlement under s 149 of the Act is liable to a penalty imposed by the Authority. The Authority has found one breach of clause 4 of the Record of Settlement. The Act provides in s 135(2)(b) that a company is liable to a maximum penalty of \$20,000.

[15] I am not satisfied that the breach with the posting of the comment was inadvertent or negligent. The nature of the comment was about the character of Mr Duggan. I conclude it likely that it was intentional and designed to do harm.

[16] When two parties enter into a binding agreement under s 149 of the Act they should adhere to that agreement. Any resulting breach is a serious matter. Clause 4 specifically referred to disparaging comments including comments and postings on social media. A penalty should be imposed commensurate with the need for deterrence of such breaches and the maintenance of public confidence in the binding and enforceable nature of Records of Settlement in the employment area.

What penalty should be imposed?

[17] Section 133A of the Act sets out a number of factors that the Authority should consider when determining the appropriate penalty and I will assess these in this matter.

[18] The company breached its agreement with Mr Duggan not to disparage him. There was one breach of the Record of Settlement and s 135(2) of the Act provides that the company is liable to a maximum penalty of \$20,000.

[19] Mr Duggan said that on discovering the comment he felt the need to address it with his new employer who then asked him questions. That put him in a position where he had to explain about the ending of his previous employment and he felt that things were then different at work as a result. He chose to leave that employment on his own accord about a month and a half later.

[20] Properly assessed it appears that it was Mr Duggan raising the comment with his new employer that caused his work situation to become less satisfactory, rather than his employer seeing the comment. I accept however that Mr Duggan felt the need to address the comment because of its nature. Mr Duggan said that he felt the comment had affected his chance of getting further roles and he was very down and depressed because he was out of work for a long time. A causal link between the comment and subsequent difficulties in obtaining employment was not clear enough for me to be satisfied about that.

[21] Mr Duggan said that many friends and people in the industry he works in would have seen the comment although it is difficult to conclude with any degree of accuracy how wide the audience would have been. I accept that some of Mr Duggan's friends and some in the industry would have read the comment.

[22] There is no evidence that the company has engaged in similar conduct in the past. I do take into account that there was one comment and that the company did take the comment down, when asked, after about three weeks. Whilst Mr Gulati did not show any remorse as his defence was that M posted the comment, he did show an awareness of the fact that he should not be posting such comments or making disparaging remarks.

[23] I do conclude this was a deliberate and serious breach. It was a comment posted on Mr Duggan's employer's Facebook page causing him a degree of distress and humiliation. I assess an appropriate starting point with this degree of severity at 45% of a potential penalty of \$20,000, which is \$9000.

[24] The comment was removed shortly after a request was made and there was some awareness that it should not have been posted. I take that into account to reduce the potential penalty to \$7000.

[25] Mr Gulati advised that the company was about to go into liquidation, that the place where Mr Duggan worked has been sold, and that he owes a large amount to the Inland Revenue Department. There were no records provided to support the financial position of the company but I accept that there are some financial difficulties. The lack of clarity about exactly what they are does not persuade me to make a reduction on the basis of the lack of ability to pay.

[26] It is desirable to have consistency with other similar cases in the imposition of a penalty. I have considered several Authority determinations. One involved a company making a number of disparaging comments of a previous employee in a letter to a third party calling into question the employee's competence.¹ There was clear and undisputed evidence of reputational damage. This was a more serious breach than the one that I am considering. The penalty awarded in that case was \$5000 although it took into account evidence that the company had not traded for some years and had no assets.

[27] I have also considered another case where the ex -employee breached the Record of Settlement sending a number of disparaging text messages about a director, in breach of a settlement agreement, to another staff member. The breach was ongoing and extended to speaking ill of other staff.² The employee was ordered to pay a penalty of \$2,500. Objectively assessed that was a more serious breach than in this case.

[28] Another case I have considered is X and Y v Z³ where there was a breach of both confidentiality and non-disparagement clauses. There were ten breaches of a Record of Settlement with five Facebook postings and five further disparaging emails. There was an exacerbating factor in that the disparaging emails were sent after Z was placed on notice by

¹ *Free v Shelf Company No 5 Limited* [2017] NZERA Auckland 232

² *Jacks Hardware and Timber Limited v R Beentjes* [2015] NZERA Christchurch 29

³ *X and Y v Z* [2017] NZERA Auckland 244

way of the Authority proceedings that the applicant considered he had breached the Record of Settlement. A global penalty of \$6000 was awarded.

[29] I do not find that the breach in this matter was as serious as those in the first two determinations. This matter does not have the number of breaches or the exacerbating factors in the third determination I have referred to.

[30] I conclude that an appropriate penalty that is consistent and proportionate to the harm occasioned is \$3000.

Who should receive the awarded penalty?

[31] Mr Braithwaite submits that part of or the entire penalty should be paid to Mr Duggan.

[32] Penalties are normally paid to the Crown however I accept Mr Duggan has suffered as a result of the breach and consider it appropriate to award 75% of the penalty to him in accordance with s 136(2) of the Act.

[33] Within 28 days of the date of this determination Armaan Dev Enterprises Limited is ordered to pay a penalty of \$3000 as below:

- (a) The sum of \$2250 to Stephen Duggan.
- (b) The sum of \$750 to the Authority to be paid by the Authority into the Crown Bank Account.

Costs

[34] Mr Braithwaite submits that costs incurred by his client as at the date of the investigation meeting were \$1750 plus GST and the filing fee.

[35] The investigation meeting commenced at 9.30am. There was no appearance by Mr Gulati. When telephoned by the Authority Officer he indicated that he may not attend. The Authority then commenced its investigation meeting and heard from Mr Duggan. Mr Gulati then advised the Authority Officer he was on his way into the Authority. An adjournment of

about 20 minutes was taken and the Authority then heard from Mr Gulati on his arrival. The meeting concluded at 10.45am.

[36] Mr Duggan was successful and I find that costs should follow the event. An assessment of costs solely based on the daily tariff of \$4,500 for the time taken for the investigation meeting would not adequately reflect the additional costs involved before the meeting commenced. These costs include preparation and lodging of the statement of problem, attending a case management conference and attending the investigation meeting. A fair and reasonable award would be on the basis of 30% of the daily tariff. This is the sum of \$1350 together with reimbursement of the filing fee of \$71.56.

[37] I order Armaan Dev Enterprises Limited to pay Stephen Duggan the sum of \$1350 being costs, together with reimbursement of the filing fee of \$71.56, within 28 days of the date of this determination.

Further matter

[38] On hearing about the possibility of the company being placed into liquidation Mr Braithwaite suggested that the Authority could proceed to make an order against Mr Gulati. There are fundamental difficulties with that. Mr Gulati is not a party to the proceedings and is not a party to the Record of Settlement.

Helen Doyle
Member of the Employment Relations Authority