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

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 782
3134439

	BETWEEN	GHX Applicant
	AND	HEC Respondent

Member of Authority:	Nicola Craig
Representatives:	Tania Kennedy, counsel for the applicant Philip Skelton KC and Bridget Smith, counsel for the respondent
Investigation Meeting:	11 and 12 September 2023
Submissions received:	At the investigation meeting and 25 September 2023 for the applicant At the investigation meeting for the respondent
Date of determination:	22 December 2023

THIRD DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, identified as GHX, formerly worked for the respondent, identified as HEC.

[2] The employment relationship problem between them involves to a settlement agreement they reached which was signed off under s 149 of the Employment Relations Act 2000 (the Act) by a mediator from the Ministry of Business, Innovation and Employment.

[3] Submissions for GHX paint a rosy picture of the parties being free to head off in their own directions after the settlement agreement was signed, with GHX being free to pursue any opportunities without fear of negative consequences from their time with HEC - a clean slate.

[4] Under other circumstances that may have been realistic. Here the parties found themselves in a situation neither party likely expected, with their worlds colliding. GHX applied for a senior role with an organisation connected with HEC, identified as IMR.

[5] Essentially this is a case about whether HEC then wrongfully disparaged GHX. GHX argues that HEC comprehensively breached provisions of the settlement agreement through statements made.

[6] HEC asserts it did its best to restrict statements about GHX whilst still meeting its statutory obligations. The organisation denies that its words amounted to breaches as they were not disparaging in the context of this agreement or were justified by statutory and related contractual obligations it had to meet.

Non-publication orders

[7] In the first determination the following order was made:

(a) the parties' names (and any identifying details) in relation to this proceeding, the fact of the application and supporting documents attached to that application are subject to an interim non-publication order to be in place until further order of the Authority;[1] and

(b) the Authority's file may only be accessed by anyone outside the Authority, other than by the parties, with the prior approval of a Member.

[8] The parties' views on a permanent continuation of that order were sought, including whether it was appropriate to continue an order referring to the fact of the application.

[9] GHX sought to have the order made permanent with additions referred to below.

[1] Explanation relating to the situation at the time of the first determination not repeated here.

[10] HEC did not oppose the making of a permanent order to anonymise the parties' names and identifying information. However, as an organisation subject to significant public reporting obligations it opposed an order that extends to the fact that an application has been made in the Authority. In response GHX provided detailed submissions downplaying relevant reporting obligations. They also identify the risk that a report with details on orders against HEC could be linked to this determination and thus HEC's identity be revealed, risking the same for GHX.

[11] That submission is compelling and no arguments in response received from HEC. Less compelling is the submission seeking to have all the evidence and pleadings subject to a non-publication order as well. That is too extensive. Aspects of the evidence and pleadings are already publicly available.

[12] I make non-publication orders that:

(a) the parties' names and any identifying details, the fact of this application and supporting documents attached to the application are not to be published;[2] and

(b) the Authority's file may only be accessed by anyone outside the Authority, other than by the parties, with the prior approval of an Authority Member.

[13] For the sake of clarity this order does not prevent publication of this or previous determinations in this matter.

[14] If the nature of the orders causes difficulties with HEC's reporting requirements leave is granted for it to return to the Authority to seek a variation of the order.

The Authority's investigation

[15] The Authority initially issued a determination in this matter declining the application for an interim injunction by the GHX.[3]

[16] A second determination decided that there was not sufficient basis to include HEC's CEO, identified as QOI, as a party to this proceeding.[4]

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[2] Explanation relating to the situation at the time of the first determination not referred to here.
[3] *GHX v HEC* [2021] NZERA 268.
[4] *GHX v HEC* [2021] NZERA 343.

[17] A number of complex issues then arose regarding documents. There were also difficulties establishing dates suitable to all those needing to be involved in the hearing.

[18] An investigation meeting was held on 11 and 12 September 2023. I heard evidence under oath or affirmation from GHX, QOI (HEC's CEO) and UDI (HEC's in house lawyer). Submissions were made at the investigation meeting with an additional memorandum for GHX subsequently received.

[19] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[20] In this instance, the parties were informed that in order to ensure the efficacy of the non-publication orders the determination would likely need to broadly describe the situation under examination. References are made to portions of witness statements in order to ensure clarity for the parties about what is being referred to.

The issues

[21] The issues for investigation are:

(a) Did HEC breach the settlement agreement (including clauses 1, 3, 4, 5, 6, 11, 14 and/or 16) in:

(i) discussions and other communications with representatives of the connected organisation IMR;

(ii) dealings with a journalist; and

(iii) internal communications?

(b) If HEC breached the settlement agreement should:

(i) a compliance order be issued against it and/or QOI; and

(ii) a penalty be imposed?

(c) Should either party have to contribute to the other party's costs?

[22] There are also some points to be made about other concerns of GHX. They are dissatisfied about not receiving all the information they believe they should have from

HEC, both through the time the events were occurring and through the Authority process. GHX felt a proposed Official Information Act (OIA) release to the journalist was wider that what GHX received from their request and the incorrect provision of material was only prevented by GHX and their representative's interventions done under inappropriate time pressures. In addition that part of GHX's information request was transferred to IMR whereas the journalist's request was not.

[23] I recognise that GHX found all these things frustrating but the Authority is not in a position to enforce either the Privacy Act or the OIA. HEC owed no duty of good faith to GHX in the relevant period, simply its obligations under the settlement agreement. Any dissatisfaction with IMR's actions can also not be the subject of claims in this proceeding.

What happened

[24] Some years after the signing of the settlement agreement GHX applied for a senior IMR role. GHX had had some connection with HEC staff in a role held after leaving HEC. This did not present a difficulty. But when applying GHX was unaware of the level of connection between HEC and IMR.

[25] QOI was not GHX's direct manager at the time the settlement agreement was reached but was aware of GHX, attended the mediation and was aware at the time of the terms of settlement.

[26] HEC had statutory responsibility for administration and management of a substantial project, with a governmental requirement that IMR be appointed to sub-manage the project.[5] The statute includes a requirement on HEC to manage consistently with a governmental statement. The statement imposed management obligations on HEC and anticipated HEC and IMR entering an agreement which required governmental approval (HEC/IMR agreement).[6]

[27] The HEC/IMR agreement established a joint group which had to approve certain postings and positions. Although there was some difficulty with a definition identifying

[5] The statute and governmental statement are those referred to in paragraphs 14 and 15 of QOI's witness statement of 10 August 2023.
[6] The agreement is that referred to in the quote in paragraph 15 of QOI's witness statement.

a particular person who had been in the same role before GHX, I accept it should have referred to the role itself. IMR had to consult in good faith with HEC.

[28] HEC had a statutory obligation to prepare a procedures document which included identification of the criteria it would use for appointments and checks on performance.[7] In order to meet its obligations, HEC took on a specific obligation to approve some items.

[29] The year GHX applied for the role HEC had concerns about IMR including change in personnel and the organisational environment.

[30] GHX applied for the IMR role and was interviewed and appointed.

Pre-appointment communications between HEC and IMR

[31] I now move to examine the communications which GHX complains of, looking firstly at those very shortly prior to IMR appointing them to the role.

[32] QOI received a call from DNB from IMR. DNB informed QOI that IMR were talking to someone unnamed for the senior role. Some information was provided. DNB asked QOI to guess who it was.

[33] QOI did not guess correctly and DNB named GHX. QOI asked if this was a formal reference process with DNB replying it was not as he had not sought GHX's consent to talk to HEC. QOI was cautious, being aware of the settlement agreement.

[34] DNB asked whether QOI would hire GHX again. QOI says he took that to mean in the role GHX now applied for with IMR, rather than would he re-employ GHX at HEC.

[35] QOI said he had worked with GHX for less than a specified period and would not employ GHX but appointment with IMR was a matter for that organisation. I do not consider whether the question and answer related to the IMR role or one at HEC to be critical. Given the minimal amount of information QOI knew about GHX's employment history since HEC, the answer necessarily reflected what QOI knew about GHX when at HEC, even if merely GHX's level of appointment or the scope of the HEC role.

[7] The procedures document is that referred to in 16 of QOI's witness statement.

[36] DNB described where GHX had worked more recently. QOI suggested DNB should ask for references from subsequent employers, where GHX had worked for short stints. DNB indicated IMR thought GHX would be really good in the role.

[37] After the call, QOI obtained advice about what could and could not be said. QOI then called DNB back, suggesting that DNB or the recruiter get GHX's consent to talk to HEC.

[38] Some days later DNB and NTS (also from IMR) phoned QOI, advising they had completed reference checks and were going to offer the role to GHX. There was discussion about an unnamed referee who was an ex-HEC employee. QOI again suggested GHX's consent was sought (to speak to a current HEC employee). The IMR representatives indicated they were comfortable with their process and intended to announce the appointment.

Post-appointment communications between HEC and IMR

[39] QOI's comments were not enough to dissuade IMR with that organisation announcing GHX's appointment. QOI received IMR's announcement and forwarded it to a few specific HEC people. Having received a comment QOI phoned DNB and NTS to ask them to hold off to work through things at HEC's end. QOI said he thought the recruiter had done IMR a disservice and questioned how the approval process from HEC's end would go.

[40] A later call between QOI and DNB include the former identifying that HEC would struggle to agree with GHX's appointment to a posting in the arrangements between them. DNB indicated that would have to be for a proper reason and QOI said it would be. QOI did not consider that another set up (namely one with GHX in the role but someone else in the posting) would be acceptable. DNB asked a question and QOI replied that GHX had worked from them for an identified (short) period. DNB replied that that sounded like the kind of reference that would be given if there was a settlement agreement. QOI did not comment on that but made a suggestion about what references the recruiter should look for. Also QOI indicated the consultation was supposed to happen prior to appointment.

[41] On another call NTS asked QOI for a certificate of service for GHX. QOI suggested that was obtained directly from GHX, who had been given a certificate earlier. QOI sent though a HEC press release from when GHX was appointed to HEC.

[42] GHX describes themselves as gobsmacked to learn that there was a requirement to get HEC approval and there was a difficulty with that. GHX's lawyer asked a HEC representative if there was a problem with GHX taking up the posting and on what basis the decision was made. HEC referred the question to IMR as GHX's employer.

[43] Later GHX decided not to continue with the IMR role. GHX attributes this to the difficulties with HEC and the posting.

Interactions with the journalist

[44] Very shortly before the IMR public announcement of GHX's departure an HEC representative commented to a journalist about the appointment of a person taking over DNB's senior IMR role. This includes the "official line" as being HEC were advised of the appointment and "look forward to working with" the appointee.

[45] The journalist asked about GHX and the representative replied that the appointment is a matter for IMR and HEC was "not consulted on the appointment" of GHX. Shortly thereafter a published article stated that HEC confirmed it "was not consulted" on GHX's appointment.

[46] It appears there was a cordial relationship between the HEC representative and the journalist. GHX found this disconcerting when they later discovered it.

[47] QOI describes the reference to there not being consultation as a statement of fact rather than suggesting anything about whether HEC would not have been agreeable to GHX's posting, had it been asked.

[48] QOI was aware that it would likely upset GHX (whose lawyer had already been in contact with HEC by this point) as he comments to UDI to start the stopwatch (until a complaint or claim arrives).

Official Information Act request

[49] The same journalist later made an OIA request to HEC. Others were involved, but in house lawyer UDI was responsible for assessing communications from GHX's representative and those involving internal and external lawyers.

[50] HEC's usual process is to consult with those referred to in documents which fall within the proposed release. The organisation's external legal representative consulted

with GHX's representative which resulted in a re-review of the proposed disclosure. GHX was dissatisfied, including because some of the information proposed to be released was information which HEC had seemingly refused to provide to them under an earlier information request of their own.

[51] GHX's representative identified to HEC's representative that there were elements proposed to be released which would impact upon GHX's health, welfare and privacy as well as disparage them, were they to be released.

[52] UDI's evidence was that the organisation wanted to comply with its OIA obligations but took into account GHX's elements which justified the withholding of a portion of information. Some redacted documents were provided but the journalist was dissatisfied.

[53] As mentioned above the proposed and actual releases are largely outside the Authority's remit.

Communications within HEC

[54] Within the organisation there were several communications which GHX objects to:

(a) An internal email from UDI specifying that GHX used to work for HEC, including they were "not here that long";

(b) An HEC staff member messages another (identified as BWD) with a screenshot of an article mentioning GHX's appointment. BWD replies "I knew it was in the pipeline but it ain't over until …", likely referring to either the saying attributed to baseball star Yogi Berra ("it ain't over till it's over") or the one mentioning the lady singing; and

(c) The stopwatch comment referred to above.

Terms of the settlement agreement

[55] The settlement agreement sets out a number of provisions limiting what the parties and particularly HEC can say about GHX's departure.

[56] First, under cl 1 the terms of the agreement shall remain confidential, in "so far as the law allows".

[57] GHX agrees to resign. The agreement provides in cl 3 that a particular statement will be made about GHX's departure from HEC and that if questioned about the departure HEC's response was to be consistent with the wording of the announcement. There were to be no other statements or communications about GHX's departure without written agreement.

[58] GHX accepts that cl 3 would allow HEC to say that they had worked there, had resigned and HEC wished them well.

[59] Central to this case is cl 4 of the settlement agreement which provides:

> Both p arties agree not to make any statement, or disclose any document, which are disparaging and/or likely to damage the reputation of the other … unless required by law.

[60] Additional provisions include:

(a) Clause 5 – disciplinary allegations withdrawn regarding GHX and matters raised by GHX and another employee brought to an end;

(b) Cl 6 – a certificate of service to be provided and all verbal enquiries responded to consistently with that certificate;

(c) Cl 11 – specified HEC people to be instructed that GHX's "employment situation is strictly confidential and should not be discussed with anyone" whether within HEC or externally;

(d) Cl 14 – terms to remain confidential "subject to any disclosures required by law"; and

(e) Cl 16 – full and final settlement.

Interpretation principles

[61] The Supreme Court's decision in *Firm PI Ltd v Zurich Australian Insurance Ltd* sets out the applicable principles of contractual interpretation.[8] An objective approach is used to determine the meaning a reasonable person, having all the reasonably available

[8] *Firm PI Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147.

background knowledge, would take from the agreement. The context informs the meaning.

Communications with IMR

[62] I now move to look at the first of the three areas of concern for GHX. There is a substantial overlap between comments which GHX argues breached cl 3 due to speaking of GHX's departure and those which breached cl 4 being disparaging. For example, QOI telling DNB that GHX had only worked for the organisation for less than a specified period and QOI would not re-employ GHX. GHX had not agreed in writing for further comment to be made.

Clause 4 – Disparagement

[63] GHX identified a number of instances which are seen as involving disparagement. These include that:

- GHX worked with HEC for less than a specified period (which could be seen as short) or more explicitly a short period
- Suggesting IMR ask for a reference from subsequent employers, where GHX had been for "short stints" since leaving HEC
- QOI would not re-employ GHX
- HEC would need to work through the implications and struggle to accept GHX's posting and there was a proper reason for its position
- Suggesting IMR pause an announcement.

[64] Disparagement means bring discredit on, lower in esteem or depreciate.[9] A requirement such as this one not to disparage is on its face a broad one.[10] Disparagement can be expressly stated or implied.[11]

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[9] *Lumsden v Skycity Management Ltd* [2017] NZEmpC 30.
[10] *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [80].
[11] *Byrne*, above.

[65] There is no requirement that the comments be untruthful or fabricated. A statement that an organisation would not rehire, whilst potentially perceivable as a true reflection of its current position, must almost unavoidably be characterised as critical.[12]

[66] In record of settlement situations, the Authority must determine the intended scope of the non-disparagement clause by reference to relevant context at the time the parties signed their settlement agreement.[13] The contextual factors identified by Judge Corkill in *Byrne v The New Zealand Transport Agency* are very largely applicable to the context in this matter.[14] As is the following reference:

> It is plain from the context that the disparagement clause related to the employment circumstances which had existed up to the point of resignation. Consequently, it must follow that cl 9 should not be construed broadly. It does not preclude either party from making any disparaging remark about the other in any circumstances.[15]

[67] In that case it was concluded that confidential facts related to the reaching of the settlement, discussions leading to and around it as well as related issues which were not investigated (as a result of the settlement). Those were the circumstances about which disparagement could not occur, explicitly or implicitly.

[68] Although bad motivation is not a necessary part of disparagement GHX certainly feels that QOI had a personal vendetta against them. However, it was difficult to establish that that was the case on the evidence. Clearly QOI felt strongly resistant to GHX's appointment to the role and to GHX's possible posting to the joint group. QOI described that as being related to GHX's seeming lack of relevant, sufficiently high level or broad experience, in the context of an organisation which was facing some serious difficulties.

[69] The conversations with IMR representatives have a strained quality reflecting QOI's awareness of there being restrictions on him and later having sought advice. He says he was trying not to go into detail because of the settlement agreement and avoid references to mediation content. He completely avoided referring to there being a settlement. References were made to public documents or other referees, in order to focus on the process without providing details about GHX.

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[12] *Lumsden*, above.
[13] *Byrne*, above.
[14] *Byrne*, above at [81].
[15] *Byrne*, above at [82].

[70] Aspects of statements made, such as a description of GHX's length of service, have potential to come within what is permitted under clause 6 as statements consistent with the certificate of service.

[71] Others plainly do not. An indication that QOI would not employ GHX, whether as a statement about re-appointment to HEC or his view about whether IMR should appoint, is disparaging. I am satisfied that it is captured by clause 4.

[72] I have considered whether any of the disparaging comments could be said to concern a matter not related to the scope of the non-disparagement clause. Particularly information subsequently learned about circumstances not related to the HEC employment.

[73] The connection between GHX and IMR was certainly new. However, QOI did not really know much new about GHX. He was basing his views on what he knew about GHX from their time at HEC.

[74] I conclude that there were comments made by QOI which disparaged and/or were likely to cause damage to GHX's reputation thereby breaching the settlement agreement unless there is sufficient justification to make the comments.

Statutory obligations

[75] Both the non-disparagement provision (cl 4) and the confidentiality provisions (cls 1 and 14) have exceptions relating to the law. The terms of the agreement are confidential "so far as the law allows" and "subject to any disclosure required by law". Disparagement is not to occur "unless required by law".

[76] Both parties knew, at least broadly, at the time the settlement agreement was entered into, the nature of the organisation and that it was subject to statutory obligations.

[77] I note there was no indication of HEC or QOI having any negative impact on GHX's career after their resignation from HEC until the application with IMR.

GHX's position

[78] Submissions for GHX suggest they were entitled to move forward from the HEC employment positively and without HEC having any role in any future employment and not to have any disparaging or other remarks made about them by HEC.

[79] GHX does not accept that there is any legal basis on which to externally or internally discuss GHX's application and IMR's decision over who they would appoint to the role. Also, there was no requirement in the HEC/IMR agreement for any discussion by IMR with HEC about who they had decided to appoint. The agreement could not be used to circumvent the settlement agreement obligations.

[80] Submissions refer to internal legal advice, for which any privilege is waived, advises that HEC is not "involved in the process of selecting" for the IMR role. Similarly there is no stipulation in the HEC/IMR agreement that the person in that role must have the posting.

[81] GHX appears to accept that HEC's approval was needed for the posting but that the informal discussion outlined above between QOI, DNB and NTS were the approval process for the posting. As the process was over any possible justification for further comments had finished.

HEC's position

[82] HEC argues that the words "required by law" and the like in the settlement agreement should be interpreted so that it can comply with its statutory and contractual obligations. I note that the statutory requirement is more compelling than contractual ones.

[83] HEC refers to *Evans-Walsh v Southern District Health Board* where the Employment Court concluded that the board was not in breach of a settlement agreement which specified confidentiality "so long as the law allows" when it notified the Nursing Council of the employee's resignation.[16] The disparagement provision was not infringed by simple factual statements about complaints made which the board thought were about the employee's competence.

[84] Regarding the posting process, QOI saw it as involving more than simple discussions such as he had had with DNB and NTS. He expected a proposal with material supporting the person's suitability.

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[16] *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46.

Conclusion

[85] HEC is an organisation established by statute. It had substantial statutory obligations to administer and manage. It was required by government to deal with IMR.

[86] The HEC/IMR agreement identified the posting by way of the name of the previous person in the role IMR offered GHX and another more specified posting, which was linked to an IMR role different to the one GHX was offered.

[87] There was some lack of certainty about the process for the posting. No process had been needed previously. QOI expected a more formal proposal and that was a not unreasonable expectation. I cannot be satisfied that the posting process was over.

[88] From the opposite angle, it could be suggested that QOI should have waited until an application was forthcoming before feeling the need to comment. However, the expectation was the person in the role GHX was appointed to would get the posting. This is likely reflected in the communications from DNB and then NTS proceeding the appointment to the role.

[89] It was not impossible that someone else could have been offered that posting, having been approved by HEC. However, that is most unlikely. GHX accepted in their evidence that it would look very strange and create speculation if they were not appointed to the posting. Their predecessor in the role had held that posting. As such the role and the posting became intertwined.

[90] Although the arguments are finely balanced, I must be guided by the wide statutory requirement on HEC to administer and manage this significant project. I conclude that it was reasonable of QOI to act on the basis that IMR would put up GHX for approval for the posting and HEC's approval would effectively be needed.

[91] Some might see it as better if QOI had focused on suggesting DNB sought GHX's consent to disclosure before commenting. Both QOI and DNB were not as frank as they would likely have been had consent been granted. It would usually have been IMR's responsibility as potential and then actual employer to seek GHX's consent. QOI suggested twice that GHX's consent be sought but IMR decided to process on with making GHX an offer. In those circumstances HEC had to act.

[92] To the extent that GHX suggests the various clauses about matters being at an end as well as and full and final settlement meant that adverse comments could never be made about GHX's possible posting, I reject that.

[93] Although a decision not to agree to GHX's posting could be misconstrued that did not mean that HEC was obliged to simply succumb to the posting if for example, it had serious doubt about the sufficiency of GHX's experience for the role in the context of an organisation that was in some strife.

[94] I conclude that in these specific and unusual circumstances there was not a breach of the settlement agreement regarding QOI's interactions with IMR as HEC was justified by its legal obligations.

Statements to journalist

[95] Broad claims are made on behalf of GHX that HEC and QOI provided disparaging and personal information about GHX to the media, including during the time they were with IMR. One journalist in particular is suggested to have had special access.

[96] Without having heard from the journalist and others at HEC who had contact with him I cannot rule out that there was a special relationship resulting in information being provided. But that is not enough to uphold GHX's claims.

[97] What I need to look at is the evidence before the Authority.

[98] QOI acknowledges HEC was being responsive to the journalist. He accepts that the journalist's question about consultation was not treated as an OIA request. Not all questions were. QOI also recognises that there were options to go back to the journalist and say 'it's confidential information and we will not comment' or, treat it as an OIA request. It was seen as information about the process rather than the person.

[99] UDI raised the need for HEC to be transparent and accountable to the public. While there is something in that, I see this as a different situation to the discussions with IMR where GEC had particular statutory obligations to administer and manage.

[100] The context of the comment about HEC not being consulted about GHX's appointment is important. It follows about an hour and a half after a positive comment about the expected working relationship with the other person appointed. In that context

I accept that the comment was disparaging and/or likely to damage GHX's reputation. It therefore breached clause 4 of the settlement agreement.

Additional OIA point

[101] I do not accept that the documents which were released disparaged GHX except in the sense that the journalist was provided again with the email he already had, saying that there was no consultation.

[102] GHX's concern is that in any future request for information about them may be responded to without consulting them. This seems speculative. HEC considered itself obliged to consult with GHX about this request and extensively reduced the amount of material provided. It is hard to see that that would not be the approach taken in future to a request which covers material about GHX.

[103] It is suggested that the Authority does not consider individually each document proposed to be released but rather assess whether the proposed documents paint an overall disparaging picture of GHX. I do not agree to comment on whether future releases of versions of material would be disparaging. Likewise, the request that I comment on the conditions proposed by GHX to HEC if they agree to a release of any information.

[104] HEC is thoroughly on notice as a result of this proceeding, including through GHX's evidence and submissions, that GHX considers they should be consulted in future about relevant proposed information releases and that releases of such material could be is disparaging on them and that it would be in breach of the settlement agreement.

Internal HEC communications

[105] It is not established that there was any failure to instruct identified staff under cl 11 of the settlement agreement. There were however, a few internal communications which GHX objects to, including by one of the identified staff.

[106] BWD's response to the article forwarded about GHX's appointment to IMR suggests there is trouble that will follow. This is disparaging and/or likely to damage GHX's reputation.

[107] Regarding the comments about GHX not being at HEC that long, QOI suggested that staying in a job for a short time could have been for a variety of reasons, not all negative. There is some legitimacy in that but it is fair to say in the context it is likely to be seen as a critical comment suggesting something did not go well. I conclude this discredits GHX and is disparaging.

[108] The "start the stopwatch" comment from QOI to another staff member after the media made contact about GHX not taking up the departure is disparaging as it speak critically or depreciates GHX, suggesting they are a complainer or litigious.

[109] These internal comments breached the settlement agreement.

Compliance orders made

[110] GHX seeks compliance orders against HEC and QOI personally which are seen as necessary to prevent any future breach and bring home to both the seriousness of their obligations.

[111] HEC does not consider it is necessary to make a compliance order against it as being a responsible agency it will comply without one.

[112] HEC does not consider that is appropriate to make a compliance order against an employee as there is no basis to suggest that QOI would not comply with an Authority compliance order if made against it.

[113] Under s 137(2) of the Act the Authority may make a compliance order to prevent further non-observance of, or non-compliance with, provisions of a settlement agreement.

[114] I understand that HEC and QOI view themselves as responsible operators, conscious of comply with their obligations. However, there are at least some elements of conduct I consider justify the issuing of a compliance order. More care should have been given to the communications with the journalist and moderation exercised about the internal HEC communications.

[115] The orders sought by GHX do however expand the scope of the terms of the settlement agreement. This includes providing more details of things to happen and removing aspects of the settlement agreement wording, such as the reference to so far as, or as required, by law.

[116] It is appropriate for the compliance order to reflect the terms of the agreement.

[117] I have considered whether an order is necessary regarding QOI. Most of his actions have been found to be justified, but not all. In order to ensure that the important obligations under the settlement remain with QOI an order should be made.

[118] HEC and QOI are ordered to immediately comply with the terms of HEC's settlement agreement with GHX.

Penalty ordered

[119] GHX seeks penalties of at least $20,000 against HEC and $10,000 against QOI.

[120] I have considered the elements in s 133A of the Act and relevant judgments.

[121] Breaches are established regarding the statement to the journalist and internal comments. GHX sees these as intentional. But it has not been established that HEC deliberately wished to do GHX harm. It was focused on ensuring its responsibilities to administer and manage were met.

[122] I have considered the desirability for broad consistency in whether penalties should be imposed in settlement agreement cases. In *Byrne*, no penalty was imposed where the Transport Agency was trying to protect employees from a perceived health and safety issue. A penalty was awarded in *Lumsden* but that involved what could be seen as a cynical entry into a settlement agreement with no intention to comply and an immediate breach. A penalty of $7,500 was imposed by the Court.

[123] It is important to the operation of the system for the resolution of employment relationship problems that participants comply with the obligations they have taken on in settlement agreements. I consider a modest penalty against HEC is warranted.

[124] In terms of the impacts on GHX, there was very limited evidence of financial loss by GHX. They were offered and accepted employment with IMR after QOI's first comments. That continued for a period before QOI withdrew from the role. Any payment arrangements were not detailed. Alternative employment was secured within a few months.

[125] Whilst there is very substantial evidence of emotional impact on QOI, my assessment is that a substantial component of this relates to the comments to IMR which I have concluded were not in breach of the agreement.

[126] There was no indication of HEC having been found to have breached a settlement agreement previously.

[127] I order HEC to pay within 28 days of the date of this determination a penalty of $2,500 for its breaches of the settlement agreement with all of that amount being paid to GHX under s 136(2) of the Act.

[128] It is not appropriate to impose a penalty on QOI. His comments were largely aimed to dealing with the organisation's statutory obligation and the remaining comments less substantial.

Costs

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

[130] Taking into account the time of the year, if the parties are not able to not able to reach an agreement, then a party seeking costs should lodge and serve a memorandum on costs by **26 January 2024**. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[131] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.[17]

Nicola Craig
Member of the Employment Relations Authority

[17] See www.era.govt.nz/determinations/awarding-costs-remedies.