

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 38
3040172

BETWEEN GRP
 Applicant

AND LAH
 First Respondent

AND BFQ
 Second Respondent

Member of Authority: Michael Loftus

Representatives: Phil Mitchell for the Applicant
 Steph Dyhrberg and Jordan Boyle for the
 Respondents

Investigation Meeting: On the papers and by telephone conference on 27 and
 28 November 2018

Date of Determination: 29 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, GRP, claims the second respondent, BFQ, is guilty of a breach of confidentiality that should see a penalty imposed upon her with it being payable to him.¹ It was originally claimed that as BFQ was acting on behalf of her employer, LAH, it too should be penalised. A compliance order was also sought.

[2] LAH asserts BFQ was not an employee but acted in a private capacity for which it can have no accountability.

¹ Sections 133 and 149(4) of the Employment Relations Act 2000

[3] BFQ accepts the alleged breach occurred and that she was responsible but denies the circumstances warrant a penalty.

Conduct of the Investigation

[4] A number of issues were discussed during the first telephone conference on 27 November 2018 with the most significant being the costs associated with the claim and LAH's status. As a result both representatives sought instruction from their clients. That led to an agreement at the teleconference of 28 November that any claims against LAH would be withdrawn given BFQ was not an employee thereof and those against BFQ would be determined on the papers and without submissions.

[5] The parties also asked their identity be anonymised and various compelling arguments were tendered in support of the request. Having considered those arguments I accept them and having done so order a prohibition on the publication of the names of the parties or anything that may identify them.²

Background

[6] GRP raised an employment relationship problem with LAH, his then employer. He was represented and LAH sought the assistance of BFQ, a lawyer operating her own practice.

[7] GRP's problem was resolved with the terms there-of being recorded in a settlement entered into pursuant to s 149 of the Employment Relations Act 2000 (the Act). One of the terms provided *The negotiations for and terms of settlement shall remain strictly confidential to the parties and any legal advisor of the parties.*

[8] On 11 July 2018 BFQ complained to the New Zealand Law Society about the way GRP's lawyer had conducted himself during the resolution process. Attached to the complaint were documents which both identified GRP and disclosed the terms of settlement in contravention of a confidentiality clause contained therein.

[9] According to GRP this occurred inadvertently and despite her knowledge of the confidentiality provision with that being reflected in the letter of complaint via the comment: *'... was acting for an employee of [LAH] (anonymised in the attached documents for confidentiality purposes)'*

² Clause 10 of the Second Schedule to the Employment Relations Act 2000

[10] On 9 September 2018 GRP also laid a complaint with the Law Society about BFQ having identified him in documents appended to her complaint. BFQ was made aware of that complaint on 21 September 2018 by which time these proceedings had been initiated in the Authority.

[11] BFQ replied to the Law Society on 1 October 2018. Amidst other things she asked the person who administers complaints, NZLS's Legal Standards Officer, arrange her offending document be anonymised before being provided to the Standards Committee. She asked the same apply to GRP's lawyer's response to her initial complaint as it also referred to GRP by name,.

[12] On 1 October BFQ also wrote to GRP. She acknowledged her error in not anonymising the document and apologised. She advised she had written to the Legal Standards Officer asking the document be anonymised before noting the information had to be kept confidential under s 188 of the Lawyers and Conveyancers Act 2008.

[13] BFQ followed this by calling the Legal Standards Officer on 18 October 2018 to confirm the documents had been anonymised before being provided to the Standards Committee. The Legal Standards Officer confirmed they had.

Discussion

[14] As already said BFQ accepts she is in breach of the settlement agreement and it is common ground this is a breach for which a penalty may be imposed.³ The issue is whether that should occur in this instance.

[15] The factors to be considered when determining an appropriate level of penalty are prescribed in s 133A of the Employment Relations Act 2000. The Authority must have regard to all relevant matters including:

- a. the Act's objects; and
- b. the nature and extent of the breach; and
- c. whether it was intentional, inadvertent, or negligent; and

³ Section 149(4) of the Employment Relations Act 2000 and *Musa v Whanganui District Health Board* [2010] ERNZ 236 at [55].

- d. the nature and extent of any loss or damage suffered by the victim and/or gains made or losses avoided by the person in breach; and
- e. whether the person in breach has already paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects; and
- f. the circumstances in which the breach took place, including the vulnerability of the employee; and
- g. whether the person in breach has previously been found to have engaged in any similar conduct

[16] In respect to these points I record the following.

[17] Regarding the Act's objectives I note that while the settlement in question brought an end to the employment relationship which therefore appears to nullify the effect of those objects in this instance there is a previously enunciated view with which I agree that there is a significant public interest in protecting the integrity of confidential settlement agreements.⁴

[18] With respect to the nature and extent of the breach I note that when it was brought to BFQ's attention she tried, with alacrity, to address the breach and rectify it in a way that would limit any potential damage. There is then s 188 of the Lawyers and Conveyancers Act 2008 which requires people handling complaints made to NZLS keep all information confidential. This, along with the fact there was no further dissemination, severely limited the effect of the breach.

[19] I consider the reference in BFQ's letter of complaint to anonymity shows she was aware of the confidentiality provision and was of a view to comply. Her resulting failure to do so was, I therefore conclude, inadvertent as opposed to the type of wilful conduct which penalties are designed to punish.

[20] There is no evidence GRP suffered any damage or loss and nor is there any evidence of gain on BFQ's part. I also note that in his response GRP similarly breached the agreement but there is no evidence GRP or any other person has taken issue with that.

⁴ *P v Q* [2015] NZERA Auckland 181

[21] There has been no restitution but then there has been no noticeable damage and again reference must be made to BFQ's attempts to rectify the breach and any consequences thereof. There was also the apology.

[22] While a number of the above comments reflect to some extent on the circumstances in which the breach took place I consider it inappropriate I comment further. That is because I have concluded any further comment might well stray into reflection upon the original complaint and its veracity. That is a matter for NZLS.

[23] Finally I note I know of no previous instances of BFQ having previously acted in a similar way.

[24] Having considered the above I conclude this is not an instance in which I consider a penalty warranted and I decline to order one as asked.

[25] Turning to the request a compliance order be made. Again I conclude this is not an instance in which such an order is warranted. The evidence and BFQ's subsequent actions satisfy me she is well aware of what she did and there will be no repetition.

Conclusion

[26] For the above reasons I decline to impose a penalty on the second respondent, BFQ, or issue a compliance order.

[27] The claims against the first respondent, LAH, were withdrawn.

[28] There is an order prohibiting the publication of anything which might identify the parties pursuant to clause 10 of Schedule 2 of the Employment Relations Authority Regulations 2000.

[29] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority