

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 149
3064132

BETWEEN DARRYL GRAUMAN
Applicant

AND WESTCON GROUP NZ
LIMITED
Respondent

3072252

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LIMITED
Applicant

AND DARRYL GRAUMAN
Respondent

Member of Authority: Vicki Campbell

Representatives: Matthew McGoldrick, counsel for Mr Grauman
Jeremy Lynch and Simon Mitchell, counsel for Westcon
Group NZ Ltd

Investigation Meeting: 14 February 2020

Submissions Received: 14 February 2020

Determination: 15 April 2020

DETERMINATION OF THE AUTHORITY

- A. The applications for compliance orders and penalties is declined.**
- B. Costs are reserved.**

Employment relationship problems

[1] Mr Grauman was employed by Westcon Group NZ Ltd as the National Manager – Innovation and Services. Westcon embarked on a restructuring process in February 2019 proposing to disestablish Mr Grauman's role. On 12 April 2019 Mr Grauman's employment ended by way of redundancy.

[2] Before his employment ended, on 5 March, Mr Grauman met with Mr David Corcoran, Chief Financial Officer – Asia Pacific, and Ms Laura Lesley-Pryor, Westcon's HR representative. During that meeting the parties reached a settlement resolving employment relationship problems between the parties. The settlement terms were reduced to writing and the parties entered into a Record of Settlement (the agreement) under s 149 of the Employment Relations Act 2000 (the Act).

[3] The agreement was signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 12 March 2019 after the Mediator had explained to the parties the effect of ss 148A, 149(1) and 149(3) of the Act.

[4] The agreement provides for payment to Mr Grauman of sums of money including redundancy compensation, compensation for hurt and humiliation, any unpaid salary including holiday pay, unpaid expenses and payment of the Executive Compensation Plan (ECP) for the fiscal year 2019 (FY19). The parties agreed the ECP would be paid in accordance with policy.

[5] Mr Grauman claims Westcon breached the terms of the agreement when it failed to pay him the complete payment due to him for FY19 ECP. Westcon denies this and says it has correctly calculated and paid the ECP payment to Mr Grauman.

[6] The agreement also contains clauses protecting the confidentiality of the agreement and prohibiting the parties from making disparaging comments about each other. Westcon has lodged a counter-claim against Mr Grauman alleging Mr Grauman breached both the confidentiality and non-disparaging clauses of the agreement. Mr Grauman denies this claim.

[7] Both parties are seeking compliance orders and penalties against the other for the alleged breaches.

[8] By consent these two matters have been heard together.

[9] This determination confirms the oral indication of preliminary findings given to the parties at the end of the investigation meeting.

Issues

[10] In order to resolve the two applications I must determine:

- a) Whether Westcon breached the terms of the agreement and if so whether a compliance order should be issued and what, if any penalties should be imposed;
- b) Whether Mr Grauman breached the terms of the agreement and if so whether a compliance order should be issued and what, if any penalties should be imposed.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I record that all evidence and submissions have been carefully considered.

Payment of the FY19 ECP

[12] Clause 5(a) of the agreement states that the FY19 ECP payment will be paid in accordance with Westcon's policy.

[13] The ECP policy provides participants, including Mr Grauman, with financial incentives for achieving and exceeding assigned performance targets during the fiscal year of 1 March to 28 February.

[14] ECP calculations are made using financial data extracted from Westcon's accounting software system, SAP and a tool call Hyperion. Hyperion is a data extraction tool used to automatically extract from SAP, certain data sets. For example, revenue, margins, vendors, customers, and details of sales.

[15] Sales data is manually entered into SAP. When Westcon receives an order from a customer it is entered into the SAP system and at the end of each month, the Finance Department reviews and reconciles all data entered.

[16] The last day of the fiscal year is the last day of February. Once the records have been closed off the SAP/Hyperion data is used to calculate ECP for all participants in the scheme.

[17] On 6 June 2018 Mr Kevin Cooney, VP Financial Planning and Advice, advised Mr Grauman that he would be participating in the FY19 ECP plan. Mr Grauman had participated in the scheme each year since 2005. In his letter, Mr Cooney set out the key performance measures Mr Grauman was required to meet in order to receive an ECP payment.

[18] In accordance with the agreement Westcon calculated and paid Mr Grauman the ECP payment on 5 April 2019. Mr Grauman questioned the calculation claiming it was not correct and requested it be recalculated. After investigating Mr Grauman's claims Westcon accepted a further payment of \$18,133 was owing to Mr Grauman and advised him payment of this additional amount would be made to him.

[19] Mr Grauman disputed the reviewed figures and asked that they be reviewed further. Westcon did not review the figures further, preferring to rely on the figures produced by the SAP/Hyperion system following the initial adjustment raised by Mr Grauman.

[20] Mr Grauman received FY19 ECP payments totalling \$186,064. Mr Grauman says the payment should have been \$221,790 and seeks payment of the additional \$35,726.

[21] Mr Grauman told me he became aware of what he could expect to receive as a payment under the FY19 ECP after he was shown a spreadsheet by Mr David Corcoran, Chief Financial Officer, during their meeting on 5 March 2019.

[22] Mr Corcoran told me, and I have accepted his evidence, that at the meeting on 5 March he showed Mr Grauman a spreadsheet that contained information relating to the payments he could receive by way of redundancy compensation, holiday pay and unpaid salary.

[23] At the 5 March meeting (being within days of the end of the financial year) the February figures were not available. Mr Corcoran did have access to the January figures from the Hyperion system and during their discussion he gave Mr Grauman an

estimate that his ECP could be about \$220,000 but this would depend on the final results for the year.

[24] At the investigation meeting Mr Grauman acknowledged that during the conversation on 5 March he was aware the final figures were not available and that the \$220,000 sum was an estimation only.

[25] I have been provided with extensive financial information showing how Mr Grauman's ECP payment was calculated. Mr Grauman has not established to my satisfaction that his ECP payment has not been calculated in accordance with Westcon's policy.

[26] I am satisfied Westcon has paid Mr Grauman his entitlement to FY19 ECP in accordance with its policy and accordingly Westcon is not in breach of the agreement. Mr Grauman's application for a compliance order and penalty is declined.

Disparaging comments

[27] The agreement signed by the parties on 6 March 2019 includes the following relevant clauses:

9. The parties agree that the existence, terms and process used to reach this Agreement, including the payment of any sums above, shall be confidential to the parties and shall not be disclosed, copied or transmitted to any other person in any circumstances whatsoever, except with the prior written consent of the other party or where required by law.

...

12. The parties agree not to make any disparaging comments about the other party.

[28] Westcon claims Mr Grauman breached these terms of the agreement in July 2019 when he had a conversation with Mr Shailesh Prasad while on holiday in Fiji.

[29] Mr Prasad is the Financial Controller for Westcon. In July 2019 he holidayed in Fiji with his family. Coincidentally Mr Grauman was also on holiday with his family staying at the same hotel as Mr Prasad.

[30] Mr Prasad says he saw Mr Grauman in the Hotel lobby, approached him and they exchanged pleasantries. Mr Prasad says that during his short discourse with Mr Grauman he mentioned that Mr Prasad's manager must be working on his numbers.

He told me Mr Grauman said he was taking Westcon to court for under paying him. Mr Prasad says he thought Mr Grauman must have been referring to his ECP payment.

[31] Mr Grauman says he did not have the conversation as relayed by Mr Prasad. Mr Grauman acknowledges that in answer to a question by Mr Prasad about how life was outside of Westcon, Mr Grauman told him it was great but it was a pity that there was litigation in progress. Mr Grauman says that when Mr Prasad asked for more details he simply referred him to his managers for details.

[32] The Court has defined disparage as meaning:¹

- (a) Bring into discredit or reproach upon; dishonour; lower in esteem;
- (b) Degrade, lower in position or dignity; cast down in spirit; and
- (c) Speak of or treat slighting or critically; vilify; undervalue, deprecate.

[33] Mr Prasad's role as a Financial Controller included making the payment of Mr Grauman's ECP payment. When Mr Prasad holidayed in Fiji he was aware Mr Grauman had left Westcon and that he had been paid his ECP.

[34] I am satisfied that while Mr Grauman was ill advised to make any comment about litigation his comments were not disparaging and there has been no breach of the agreement. The statement made by Mr Grauman was factual and was said to a person who was responsible for ensuring he was paid any money's owing to him.

[35] Westcon's application for compliance orders and penalties is declined.

Costs

[36] Costs are reserved. I am of a mind to let costs lie where they fall and the parties are invited to resolve the matter on that basis. If they are unable to do so they have 14 days from the date of this determination in which to file and serve a memorandum on the matter. Each party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

¹ *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30 at[36].

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority