

**ATTENTION IS DRAWN TO THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN INFORMATION REFERRED  
TO IN PARAGRAPHS 6 – 9 OF THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 12  
5314814

BETWEEN

KIM HONEYFIELD  
Applicant

AND

REID HOLDINGS LIMITED  
Respondent

Member of Authority: G J Wood

Representatives: Ian Matheson, for the Applicant  
Alison Maelzer, for the Respondent

Investigation Meeting: 7 September 2011 at New Plymouth

Submissions Received: By 27 September 2011

Determination: 31 January 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] In my first determination on this matter, I dismissed Ms Honeyfield's claims for unjustifiable disadvantage and dismissal, as well as penalties for breach of contract, because of a settlement agreement entered into by the parties following Ms Honeyfield's dismissal by the respondent (Reid). I determined that Mr Matheson's alternative argument, however, that a claim could be made for damages for breach of a settlement agreement and/or a breach of a duty surviving employment could be pursued, as they could have post-dated the settlement agreement and would require evidence on oath to determine. This investigation was thus into the matters set out below only.

[2] Ms Honeyfield has the following claims:

- Damages in relation to the reasons given by Reid to staff for termination of Ms Honeyfield's employment on 23 June 2010;
- Two claims for penalties under s.149(4) of the Employment Relations Act 2000 – one for breaching clause 4(e) of the settlement agreement by giving information about the termination of Ms Honeyfield's employment at the above staff meeting, and the second by publishing an article in a trade magazine with information that was in breach of the agreement;
- Compliance orders for two breaches of the Authority's non-publication order – one as a result of the above trade magazine publication, and the second for disclosing a witness statement to a third party.

[3] The respondent denies each claim.

### **Factual discussion**

[4] On 22 June 2010, Ms Honeyfield was summarily dismissed by Reid after almost four years of employment. Her dismissal was because she had allegedly breached an instruction from the principal of Reid, Ms Olsen-Henderson, to tell one of the staff Ms Honeyfield supervised that he was not to attend work while an issue was sorted out, whereas Ms Honeyfield indicated to the staff member that he had been dismissed, which she claimed was the instruction given to her. This was seen by Reid as serious misconduct because of a deliberate failure to follow a lawful and reasonable instruction.

[5] The next day, Ms Olsen-Henderson informed Reid's other employees, in a staff meeting, about Ms Honeyfield's dismissal. I accept that the written notes of the meeting prepared by Ms Olsen-Henderson accurately reflect what occurred there, despite some evidence to the contrary. It is more likely than not that Ms Olsen-Henderson's notes at the time were accurate, particularly given her behaviour around that time (and subsequently) in relation to Ms Honeyfield.

[6] In that address to staff, Ms Olsen-Henderson informed them of Ms Honeyfield's dismissal, but added additional reasons that were never raised with

Ms Honeyfield and that I accept were not the reasons for her dismissal. At the dismissal meeting, the parties reached an understanding as to certain terms that would apply between them that would not normally apply in a summary dismissal situation. Following further discussions held between 22 and 25 June, the parties reached a confidential settlement, which was later signed by a mediator pursuant to s.149 of the Act. Two key terms of that settlement were:

- (e) *This agreement and the discussions leading up to it are confidential, and may not be discussed with anyone other than your legal or other professional adviser;*
- (f) *This agreement, and the payments set out above, are in full and final settlement of any and all claims you may have ...*

[7] Ms Honeyfield also signed an acknowledgment accepting the terms “*in full and final settlement of all matters relating to the employment relationship and the termination thereof*”.

[8] Subsequently, Ms Honeyfield filed these proceedings, which have been the subject of four amended statements of problem. The first substantive determination was issued on 13 May 2011, which contained an interim order prohibiting the publication of any claims or evidence in any way related to the reasons allegedly given to staff by Ms Olsen-Henderson after Ms Honeyfield’s dismissal. That prohibition is to continue in permanent form. At the current investigation meeting, I added a further non-publication order, prohibiting the publication of the name of Ms Honeyfield’s current employer, or any of its staff, or any details likely to identify it in connection with these proceedings. Again, such an order is now made in permanent form.

[9] In June 2011, a trade magazine published an article which sets out Ms Olsen-Henderson’s views of a “*protracted personal grievance case*”. While the article does not name Ms Honeyfield, Ms Olsen-Henderson, as the employer, is named. It makes quite inaccurate and hurtful comments about X (Ms Honeyfield) and indicates that she was now employed in a similar position in the same town. Ms Olsen-Henderson’s article concluded with:

*When a little foxy gets hold of a rat, he doesn’t know initially that this one might be a big, dirty, vicious rat, but he endures the bites and hangs on until that rat is DEAD! And that’s how I feel – if I had my time again I would do it no differently!*

[10] Even Ms Olsen-Henderson can now, with the benefit of hindsight, accept that her language was intemperate, although she does not resile from the actions she took at the time.

[11] Ms Olsen-Henderson was not content to let matters lie there, however. She had heard through a third party that Ms Honeyfield had allegedly made some comments about Ms Olsen-Henderson and Reid to her new employers. She then approached those new employers and one of their employees, and had a discussion about her views about the termination of Ms Honeyfield's employment and subsequent events. To support her claims, she then gave Ms Honeyfield's new employer a copy of evidence that had been prepared by a third party for the earlier investigation meeting of the Authority. Ms Olsen-Henderson claimed that she did not understand that giving a copy of this intended evidence to someone else constituted publishing it, which she thought meant publishing in a newspaper or the like. She also stated that her only intention was to protect her own reputation, and not to hurt Ms Honeyfield.

[12] Despite efforts by the Authority to encourage the parties to resolve these longstanding and seemingly ever expanding disputes, the parties require a determination by the Authority.

### **Damages for breach of duties surviving termination of employment**

[13] Any claim in relation to what Ms Olsen-Henderson said at the staff meeting after Ms Honeyfield was dismissed took place before the settlement agreement between the parties came into effect. It is therefore very much the sort of claim that could or should be in the contemplation of employees entering into mediated settlements, and therefore Ms Honeyfield must be taken to have deliberately foregone such potential claims in reliance, in particular, on paras.[13] and [14] of my original determination.

[14] This does not apply in relation to the publication of the trade magazine article, or the discussion with Ms Honeyfield's new employer and staff, but for which no claim for damages was made in any of the five statements of problem. However I note that in final submissions Mr Matheson, while at one point describing them as aggravating features of the damages claim dismissed above, did appear to effectively

claimed damages for breach of the two points highlighted in this paragraph, without leave from the Authority.

[15] Despite this, I intend to cover the points in order that the parties' employment relationship problems can be determined and concluded for once and for all. First, I note that even if there were a term that could be implied into all employment agreements that an employer should not for all time make any comments that might impact negatively on an ex-employee's work, reputation or job prospects, unless it is done fairly and accurately, it appears a claim without precedent in New Zealand employment law. Second, I consider that Ms Honeyfield would have been on far stronger ground in relation to actions taken in the immediate aftermath of her dismissal (and for increased compensation for humiliation under s.123(1)(c)(i)), had she been able to bring a personal grievance.

[16] I conclude that this ever-expanding series of claims serves only to highlight the inherent weakness in Ms Honeyfield's claims in this particular area. The fact is that Ms Honeyfield has remedies in defamation, and for breach of the terms of settlement, and for breaches of the Authority's non-publication orders. In any event, on the facts of this case, any surviving duty would not go so far as to provide for compensatory damages to an employee in a situation such as the trade magazine article, given that only a small number of people would have known that Ms Honeyfield was even being referred to, and that would not have any direct consequences for her as an employee. Similar considerations exist for the claim over the disclosures to Ms Honeyfield's new employer and staff.

[17] Furthermore, there is no evidence that any of these matters have caused any damage to Ms Honeyfield's reputation and indeed no reason to think that they have. In addition, penalties are to be awarded to her over Reid's actions over the trade article. In these circumstances, the damages claims are dismissed.

### **Penalties**

[18] All actions for recovery of penalties must be commenced within 12 months after the earlier of:

- (a) *The date when the cause of action first became known to the person bringing the action; or*

(b) *The date when the cause of action should reasonably have become known to the person bringing the action.*

[19] I accept that Ms Honeyfield had originally claimed a penalty under s.134 of the Act in her application to the Authority received on 30 August 2010. While this was done in only one line, the staff meeting issue and Ms Honeyfield's interpretation thereof was clearly set out. It was not until 2 September 2011, in Ms Honeyfield's third amended statement of problem, that a penalty was sought under s.149(4). Section 134 relates to penalties for breach of employment agreements. Section 149 relates to penalties for breach of an agreed term of settlement.

[20] While there may be an argument that in some circumstances agreed terms of settlement can constitute variations to an employment agreement (although the employment has already ceased), in these circumstances the penalty being sought is specifically for a breach of the settlement agreement. That is the cause of action and it was only belatedly put in a statement of problem, but it is specifically the cause of action that Ms Honeyfield wants investigated and determined. Thus the penalty claim under s.134 is misconstrued and therefore dismissed.

[21] The claim for a penalty for Reid breaching the settlement agreement was not made until 2 September 2011. Ms Honeyfield was aware of what was discussed at the staff meeting after her dismissal from on or about 3 July 2010. The discussions at the staff meeting also took place before the settlement agreement had been entered into and therefore could not constitute a penalty for breach of the settlement agreement in any event, because the settlement agreement had not been agreed to. It therefore follows that the first claim for a penalty is out of time and is dismissed.

[22] There are no time issues, however, with respect to a penalty for breach of the settlement agreement by the publishing of the trade magazine article. The settlement agreement provides, as one of its terms:

*This agreement and the discussions leading up to it are confidential, and may not be discussed with anyone other than your legal or other professional adviser.*

[23] I do not accept that this term is binding only on Ms Honeyfield and not Reid. It would clearly be an implied term anyway, in the event there is any ambiguity in interpreting this document prepared by Reid, that the terms were just as binding on Reid as they were on Ms Honeyfield, particularly in relation to confidentiality.

[24] The provision provides that the agreement and the discussions leading up to it are confidential and may not be discussed with anyone other than legal or other professional advisers. The trade magazine readers and the professional trade body, through its journal or publications, are not part of the agreed exemptions.

[25] In one part of the article, Ms Olsen-Henderson referred to what happened during these meetings, including alleged threats of legal action and other alleged inappropriate comments. This is clearly a breach of the settlement agreement. Even although Ms Olsen-Henderson did not identify Ms Honeyfield the fact is that a number of people (albeit small, but obviously including Ms Honeyfield herself) would have known exactly who was being referred to in this publication, and therefore it was a breach of the terms of settlement.

[26] A penalty is appropriate in these circumstances. Part of the glue that holds the employment relationship problem resolution system together is that when parties reach a settlement its terms must be adhered to. The legislature has recently doubled the levels for penalties. In all the circumstances of this case, given the relative narrowness of the breach in both the number of people who would have known of it and the limited comments made about the disciplinary process, I conclude that a penalty of \$1,000 is appropriate. Given that the only one really affected by this breach was Ms Honeyfield, I consider that this sum should be paid directly to her, rather than the Crown. I therefore order the respondent, Reid Holdings Limited, to pay to the applicant, Kim Honeyfield, the sum of \$1,000 as a penalty.

### **Compliance orders**

[27] Given that Ms Olsen-Henderson did breach the settlement agreement over parts of the article in the trade magazine article, it is appropriate to award a compliance order to ensure that Reid follows the terms of its agreement.

[28] I therefore order the respondent, Reid Holdings Limited, to comply from the date of this determination with the terms of the settlement agreement and not to discuss the settlement agreement and the discussions leading up to it with anyone other than its legal or other professional advisers.

[29] Ms Olsen-Henderson accepts, after taking advice, that she has breached the non-publication order contained in my first determination. I accept that her disclosure of the witness statement was not flagrant, as she did not understand it constituted a

publication in breach of a non-publication order. However, despite her undertakings not to do so again, I conclude that a compliance order is still necessary to ensure continued compliance with the Authority's non-publication order, because of the history of the matter. Reid, and Ms Olsen-Henderson in particular, need disabusing of their very narrow view of what constitutes publication and that it can include any comments made to any person.

[30] I therefore order the respondent, Reid Holdings Limited, not to publish, from the date of this determination, any claims or evidence in any way related to the reasons allegedly given to staff by Ms Olsen-Henderson after Ms Honeyfield's dismissal.

### **Contempt**

[31] As requested, I reserve for later disposition any actions Ms Honeyfield may wish to take over any alleged contempt of the Authority through any of the actions of Ms Olsen-Henderson on behalf of Reid.

### **Costs**

[32] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**