

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 18  
5397237

BETWEEN            GRAHAM HUNT  
                                 Applicant  
  
AND                    DYNAMIC MEATS (2005)  
                                 LIMITED  
                                 Respondent

Member of Authority:     Michele Ryan  
  
Representatives:           Jenny Murphy for the Applicant  
                                 Justine Foden for the Respondent  
  
Investigation Meeting:     5 February 2013 at Palmerston North  
  
Determination:             11 February 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mr Graham Hunt claims that his former employer, Dynamic Meats (2005) Limited (DML) is in breach of a previously agreed Record of Settlement, by failing to pay monies due to him pursuant to clause 6 of a Record of Settlement. Mr Hunt seeks a compliance order, a penalty against DML, interest on the sum owed and costs.

[2]     DML has made counterclaims. It says Mr Hunt has breached the “non-disparaging” provisions contained at clause 12 of the Record of Settlement. DML also seeks a compliance order for the duration of 6 years and a penalty of \$10,000 against Mr Hunt.

## **The Record of Settlement**

[3] Mr Hunt and DML signed a Record of Settlement on 12 September 2012. The Record of Settlement was forwarded to a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) and it was duly completed and signed pursuant to s.149 of the Employment Relations Act 2000 on 14 September 2012.

[4] The Record of Settlement contains a confidentiality provision but for the purposes of enforcement action as has been applied by both parties it is necessary to refer to material details of the terms of settlement.

[5] The relevant terms are as follows:

6. On a denial of liability basis, the employer will pay the employee the sum of \$4900.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. This payment will be made to the employee's nominated bank account within 7 days after this record of settlement is signed by all parties, including a mediator from the Ministry of Business, Innovation and Employment, Mediation Service.
- ...
12. Neither party will speak ill of the other. For the avoidance of doubt this includes the employer's customers and suppliers.
- ...
13. Agreement to these terms will constitute full and final settlement of all employment relationship problems, claims or complaints either party has against the other arising out of the employment relationship, including (without limitation) its termination.

## **Summary of relevant information leading to the parties' claims**

[6] DML accepts that the payment provided in clause 6 of the Record of Settlement was not paid to Mr Hunt on Friday 21 September 2012. The Director of DML, Mr Ted Hindmarsh, says that on 21 September 2012 the company's then office administrator made a recording error with Mr Hunt's bank account number and the bank had been unable to complete the transaction. He says was unaware of the error until Mr Hunt's representative contacted him on Tuesday 25 September 2012 to inquire why the monies recorded at clause 6 of the Record of Settlement had not been paid.

[7] Around the same time on 25 September 2012 Mr Hunt phoned DML's Butchery Manager, Mr Brent Murphy, and in the course of their conversation told Mr Murphy that DML's General Manager was living with a DML employee.

[8] Mr Murphy's evidence was that during the previous two months there had been widespread rumours amongst DML staff that the General Manager and another employee may have been in an intimate relationship, but he says he was surprised by Mr Hunt's statement on the basis that DML's General Manager had previously denied the substance of the rumours and because he was a married man with two young children.

[9] Mr Murphy reported Mr Hunt's statement to Mr Hindmarsh and to the General Manager.

[10] Mr Hindmarsh says that when he heard of Mr Hunt's statement he considered Mr Hunt's actions were in breach of the Record of Settlement. He says he formed this view on the grounds that Mr Hunt had called him on 21 September 2012 after the Record of Settlement had been signed and had sought to discuss matters he believed had been concluded by virtue of their agreement for full and final settlement of all matters between the company and Mr Hunt. He considered Mr Hunt's statement about the General Manager was another means to undermine DML.

[11] Mr Hindmarsh says that there had been some speculation among staff as to the exact nature of the relationship between the General Manager and another staff member. He says however that the rumours were good hearted banter and were quite different in nature to the statement made by Mr Hunt which he considers was aimed to cause damage to the General Manager's reputation and therefore DML's reputation.

[12] Mr Hunt acknowledges that he rang Mr Hindmarsh on 21 September 2012. Mr Hunt described the phone call as a means to "clear the air" but conceded that during the telephone call he had told Mr Hindmarsh that he regarded a matter of dispute between them as "below the belt".

[13] Mr Hunt accepts that he called Mr Murphy on 25 September 2012 and told him that the General Manager was living with another employee. During the

Authority's investigation Mr Hunt conceded that the purpose of his conversation with Mr Murphy was largely to engage in gossip, but says he received the information about the General Manager from DML's office administrator (whose last day of work had been on 21 September 2012) and says he regarded the content of the gossip as true and it was common knowledge. He denies he had any malicious intent by his statement.

[14] It does not appear to be in dispute that the office administrator who speculated about the General Manager's living circumstances with Mr Hunt also called the General Manager's wife on or about 25 September to pass on the same information.

[15] There is evidence of an exchange of correspondence between Mr Hunt's representative and Mr Hindmarsh between 26 September 2012 and mid-October where each allege the other breached the Record of Settlement. On 12 October 2012 Mr Hindmarsh wrote to Mr Hunt's representative on a without prejudice basis although the privilege was waived by both parties at the time of the Authority's investigation meeting. The communication advised inter alia:

In the interests of putting this behind us I require a written statement from Graham Hunt assuring us he will not make disparaging remarks about Dynamic Meats or its staff. We agree in return to pay \$2450 on 23<sup>rd</sup> of October and the remaining \$2450 on the 23<sup>rd</sup> of November, provided Graham Hunt has not made disparaging comments about Dynamic Meats or its staff in that time.

[16] No agreement was reached by the parties and it falls to the Authority to determine the matter.

## **Discussion and analysis**

### ***Did DML breach the Record of Settlement?***

[17] It is clear that DML has not paid monies that it agreed to pay Mr Hunt under the terms contained in the Record of Settlement.

[18] DML's initial explanation that there was a mistake in transferring Mr Hunt's correct bank account number as cause for its failure to make payment on 21 September 2012 was supported by a copy of a text sent by the office administrator to

Mr Hunt apologising for the mistake. Whilst I consider that DML was in breach of the terms of the Record of Settlement by not making payment within the agreed timeframe reflected in the Record of Settlement, there is no evidence that the omission was deliberate and I regard the breach at that time as inadvertent.

[19] However once DML became aware of the error on 25 September 2012 it was obliged to correct the mistake and make payment of the monies agreed to. It did not.

[20] Although not argued as a defence at the time of the Authority's investigation it appears that when DML became aware of Mr Hunt's statement to Mr Murphy it concluded that Mr Hunt was in breach of the settlement agreement, and that the alleged breach provided grounds for it to not make payment of the agreed sum. DML was mistaken in this regard. There are no provisions within the Record of Settlement allowing DML to resile from its obligations and DML is not able to "set off" its contractual obligations on the basis of a perception that Mr Hunt had not complied with his.

[21] DML has breached its agreement to pay Mr Hunt the sum of \$4,900.00. I order DML to comply with the Record of Settlement and pay Mr Hunt according to clause 6 of the Record of Settlement with 7 days of the date of this determination.

***Did Mr Hunt breach the Record of Settlement?***

[22] Although I consider Mr Hunt's conversation with Mr Murphy may reflect poorly on him as a gossip I am unwilling to find that his communication was a breach of his obligation not to speak ill of DML.

[23] Mr Hindmarsh stated that the purpose of clause 12 was to preserve the reputation of the DML. He says at the time of drafting the Record of Settlement Mr Hunt's representative had proposed that clause 12 state the following: "*Neither party will speak ill of the other*". Mr Hindmarsh says he had specific concerns that Mr Hunt would speak badly of DML to external suppliers and customers and as a consequence he required inclusion of a second sentence to the clause as follows: "*For the avoidance of doubt this includes the employer's customers and suppliers*".

[24] Mr Hindmarsh submits that Mr Hunt's obligation to not speak ill of the "other" included the General Manager of DML. I do not accept Mr Hindmarsh's proposition.

[25] I consider reference to "other" in the context of the Record of Settlement refers to the entities named as parties to the agreement, namely Mr Hunt and DML. There is no evidence to support a view that it was in the contemplation of DML and Mr Hunt at the time the Record of Settlement was agreed that the General Manager and/or other employees would have obligations or receive benefits pursuant to the Record of Settlement. If it was Mr Hindmarsh's desire to have employees of DML included as part of the "other" then the Record of Settlement should have been drafted to reflect that requirement by making specific reference to DML's employees, so that Mr Hunt would have been cognisant of the extent of the provision he was agreeing to. The evidence was that at the time Mr Hindmarsh was negotiating the Record of Settlement on behalf of DML he was interested in preserving DML's business reputation rather than the personal reputation of one or more of its employees. I do not consider that the meaning of clause 12 of the Record of Settlement can or should be extended beyond the natural and ordinary meaning of the words agreed to by the parties.

[26] I also consider it debateable as to whether Mr Hunt's statement that the General Manager was living with another employee amounts to "speaking ill" especially in circumstances where there was already speculation and banter amongst DML staff as to the nature of his relationship with another staff member. However I consider this matter does not require determination where I have found that the obligations contained in the Record of Settlement did not apply to the General Manager.

***Should penalties be awarded against DML?***

[27] Section 149(4) of the Act states:

A person who breaches an agreed term of settlement to which subsection 3 applies is liable to a penalty by the Authority.

[28] However the Authority's power to order a penalty is discretionary and it does not automatically follow that where a breach of an agreed term has been found, a penalty must be awarded.

[29] In *Xu v McIntosh* [2004] 2 ERNZ 488 the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[30] Mr Hunt did not provide any evidence of harm other than he was not paid as agreed under the terms of settlement. It is also clear that following Mr Hunt's telephone discussion with Mr Hindmarsh and Mr Hunt's conversation with Mr Murphy as to the personal circumstances of the General Manager, DML assumed that Mr Hunt did not intend to be bound by the terms of the Record of Settlement and sought assurances that Mr Hunt would comply with the agreement.

[31] I have already found that DML was not entitled to regard its perception that Mr Hunt was in breach of the Record of Settlement as grounds to not comply with the Record of Settlement.

[32] Nor do I find that DML was able to renegotiate the timing of payment pursuant to the settlement until Mr Hunt provided the written assurances it considered it required.

[33] I consider however that although DML's actions were misguided they were made in response to Mr Hunt's communications with Mr Hindmarsh and Mr Murphy and in these circumstances I do not regard its omission to make payment in

accordance with the Record of Settlement can be characterised as so blameworthy and flagrant that it should be met with punitive action such as an order of penalties against it. In all the circumstances I decline to make such an order.

### **Determination**

[34] Pursuant to s. 151(2) and s.137 of the Employment Relations Act I order DML to comply with clause 6 of the Record of Settlement and pay Mr Hunt \$4,900.00. Payment of this sum must be made with 7 days of this determination.

[35] Mr Hunt has applied for interest on the payment due to him as set out in the Record of Settlement. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908 which is currently 5% per annum.

[36] I find that DML should have paid Mr Hunt pursuant to the agreed date of payment contained in the Record of Settlement. I consider that it is appropriate that DML is ordered to pay interest according to the current rate for the period commencing 22 September 2012 until payment according to paragraph [34] of this determination.

[37] I decline to make an order for penalties.

### **Costs**

[38] Costs are reserved.

Michele Ryan  
**Member of the Employment Relations Authority**