New Zealand Employment Relations Authority Decisions

Maangi v Whistler Orchards Limited (Auckland) [2018] NZERA 119; [2018] NZERA Auckland 119 (17 April 2018)

Last Updated: 27 April 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 119

3014073 & 3016915

BETWEEN VERBENA MAANGI Applicant

AND WHISTLER ORCHARDS LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person

Wendy Macphail, Counsel for Respondent

Investigation Meeting: 11 April 2018 at Tauranga

Submissions received: 12 April 2018 from Applicant

11 April 2018 from Respondent

Determination: 17 April 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Record of Settlement (the Settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, Ms Verbena Maangi and the Respondent, Whistler Orchards Limited (Whistler Orchards). The Settlement was signed by Ms Maangi and by Mr Colin Campbell, sole Director, on behalf of Whistler Orchards.

[2] The issue now brought before the Authority by Ms Maangi is that Whistler Orchards has not complied with, and breached, clauses 8, 11, and 16 of the Settlement, which state:

8 Without admitting any liability whatsoever, the Respondent shall pay the Applicant the sum of $8,750.00 in terms of the provisions of s 123(1)(c)(i) of the Employment relations Act 200. Half of this amount being $4,375.00 will be paid to the Applicant by way of direct credit into a nominated bank account within seven days (7) of the date of this Agreement being signed by the mediator. The other half of the payment will be paid following a successful inspection of the property undertaken on 16 July 2016.

11. The Respondent agrees to unreservedly apologise to the Applicant for any confusion he may have created around Orchard figures after the peacock faeces incident. The Respondent also unreservedly apologises to the Applicant for any loss of Mana his actions may have caused Bena this was

not my intent and trusts that the apology and agreement restores Bena's

Mana.

16. The Applicant agrees that the Applicant will not, and the Respondent agrees that it will make reasonable efforts to ensure that its employees and officers do not make disparaging remarks about the other party.

[3] Whistler Orchards by way of a counterclaim alleges that Ms Maangi has breached clauses 4, 5 and 6 of the Settlement which state:

4. The Applicant is residing at a property (the Property) owned by the Respondent. The applicant understands and agrees that while the ability to reside at the Property attached to her employment she is permitted to reside at the Property for a further calendar month from 15 June 2017 with the weekly value of rent agreed between the parties as $288.00 a week. The Respondent has agreed to waive the rent as part of the settlement between the parties provided the Applicant complies with her obligations as recorded in this Agreement.

5. The Applicant understands and agrees that no later than 5 pm Saturday 15

July 2017, she (and her dogs and family) shall vacate the property and leave the Property in a clean state with no damage.

6. The Applicant understands and agrees that she shall have the Property's carpets commercially cleaned on or before 15 July 2017 and shall provide the Respondent with a copy of the receipt for the commercial carpet cleaning by way of email no later than 5 pm 15 July 2017.

[4] Clause 17 of the Settlement states:

The Parties agree that the payment referred to above are in full and final settlement of all claims, grievances, rights and entitlements (whether existing, contemplated or not yet known to the Applicant) which the Applicant may have against the Respondent (including any related or associated companies and their respective officers, directors, and/or employees) in respect of the Applicant's employment or the termination of the Applicant's employment with the Respondent.

Issues

[5] The issues for determination are whether:

• Whistler Orchards breached clause 8 of the Settlement

• Whistler Orchards breached clause 11 of the Settlement

• Whistler Orchards breached clause 16 of the Settlement

• Ms Maangi breached clause 4 of the Settlement

• Ms Maangi breached clause 5 and 6 of the Settlement

Brief Background Facts

[6] Whistler Orchards operates fruit orchards in the Bay of Plenty area. Ms Maangi was employed by Mr Campbell, sole Director, to manage the orchards. As part of her remuneration package Ms Maangi resided at a property owned by Whistler Orchards (the Property).

[7] Following employment related issues, the parties entered into an agreement setting out the terms on which the employment related issues were to be resolved. The agreement terms dated 15 June 2017 had been signed by the parties and forwarded to the Mediation Services of The Ministry of Business, Innovation and Employment (MBIE) for signing by a mediator. The terms of agreement had been signed by the MBIE mediator on 22 June 2017 (the Settlement) and copies of the Settlement forwarded to the parties.

[8] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

• were final, binding and enforceable; and

• could not be cancelled; and

• could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms

[9] Ms Maangi vacated the Property on 15 June 2017. Ms Maangi said she had the Property carpets commercially cleaned shortly before 15 June 2017; however she had paid in cash and despite requesting one, had not received an invoice or proof of payment from the service provider.

[10] Ms Maangi said she had cleaned the Property intending to complete this on 15 June

2017, but as Mr Campbell was present in the vicinity of the Property that day, she had been unable to do so.

[11] Ms Serena Reed, witness for Ms Maangi, agreed in her written evidence that Ms Maangi had not complied with clause 5 of the Agreement, and confirmed that the Property had not been left in a satisfactory state.

[12] Ms Maangi said that Mr Campbell had breached clauses 11 and 16 of the Agreement by making disparaging comments in an email dated 17 June 2017 in which he referred to a sum of $30,000.00 to be paid by Ms Maangi in respect of an incident related to one of the orchards under her management.

[13] By email forwarded by his representative at that time, Mr Campbell had provided apologies. The email stated:

Dear Bena,

I apologise if my initial communication was unclear in stating the clean up costs could be up to $20,000. I was led to believe the cost for the clean up and fruit loss could have been significantly higher in the early days of this incident. I also apologise if you feel I have not been respectful towards you in dealing with this matter. It was not my intention to make you feel this way or to impact in a detrimental way on your Mana.

[14] Ms Maangi said she had considered that the apology ought to have referred to amount of the cost involved and as such it did not meet the requirement as to restoration of her Mana.

Determination

Breaches by Whistler Orchards

Did Whistler Orchards breach clause 8 of the Settlement?

[15] In accordance with clause 8 of the Settlement Whistler Orchards was required to pay Ms Maangi the second half of the payment due in the sum of $4,375.00: *"following a successful inspection of the property undertaken on 16 July 2017".*

[16] Mr Campbell said he undertook an inspection of the Property on his own on 15 July

2017, and on 16 July 2017 accompanied by a property manager.

[17] The clause specifies '*successful inspection'*; it does not state that the inspection was

'*satisfactory*' or specify what was intended to be '*successful*'. The Oxford dictionary

definition of successful is: "*accomplishing a desired aim or result'1*.

[18] On an objective reading of the clause, I find that Whistler Orchards was able to complete an inspection of the Property on 16 July 2017 and in that sense a successful

1 Oxford Dictionary online

inspection of the Property had been accomplished and the second half payment became due and payable.

[19] I note that Whistler Orchards' understanding that the second half of payment was to be paid following a *satisfactory* inspection of the Property.

[20] However these views do not reflect the wording of clause 8 of the Settlement which does not refer to *satisfactory*.

[21] I also note the evidence given by Ms Reed at the Investigation Meeting that Ms Maangi accepted that the Property had not been left in a satisfactory condition and amending Ms Maangi's claim from the whole amount of $4,375.00 to the residue of that amount after deduction of the costs of rectifying the defects in the condition of the Property after Ms Maangi had vacated it.

[22] This statement by Ms Reed was confirmed by Ms Maangi.

[23] Notwithstanding I determine that Whistler Orchards breached clause 8 of the

Settlement.

Did Whistler Orchards Limited breach clause 11 of the Settlement?

[24] In accordance with the provisions contained in clause 11 of the Settlement Whistler Orchards was to issue an apology to Ms Maangi for any confusion about the Orchard figures and for any loss of Mana his actions had caused Ms Maangi.

[25] Clause 11 does not state that an amount was to be specified in the apology to be issued by Whistler Orchards.

[26] I find the wording of the apology written by Mr Campbell on behalf of Whistler

Orchards and forwarded to Ms Maangi on 22 June 2017 fulfilled the terms set out in clause

11.

[27] I determine that Whistler Orchards did not breach clause 11 of the Settlement.

Did Whistler Orchards Limited breach clause 16 of the Settlement?

[28] Ms Maangi claimed that the email sent on 17 June 2017 which made reference to the amount of money lost due to her actions was disparaging.

[29] Disparaging or negative statements are not defined in the Act and therefore are to be interpreted in line with the common or ordinary meaning attributed to the words. The Concise English Dictionary2 defines 'disparage' as: "*bring discredit on; speak slightingly of, depreciate"* and 'negative' as: "*expressing or implying denial, prohibition, or refusal" "lacking, or consisting in the lack of positive attributes".*

[30] The claim that Ms Maangi was responsible for a significant loss to Whistler Orchards I regard as being considered as falling within the definition of disparaging referred to above. However the reference made in the email dated 17 June 2017 predated the terms of agreement being signed by the mediator, and was not final and binding on the parties until 22 June 2017.

[31] Moreover I find that clause 11 of the Settlement addressed this issue by specifying the issuing of apologies to address any confusion about the Orchard figures and any loss of Mana to Ms Maangi as a result.

[32] As I have found, the apology issued to Ms Maangi on 22 June 2017 fulfilled the requirements of clause 11.

[33] I determine that Whistler Orchards did not breach clause 16 of the Agreement.

Breaches by Ms Maangi

Did Ms Maangi breach clause 5 of the Settlement?

[34] Clause 5 of the Settlement specified that the Property was to be vacated leaving it in a clean state with no damage.

[35] Mr Campbell said that the Property had not been left in a clean state but required cleaning which was completed by a commercial cleaner, and had been damaged by Ms Maangi, requiring work to be carried out which was completed by a building contractor.

[36] A report from the Property Manager who had inspected the Property with Mr Campbell on 16 July 2017, and invoices confirming that the remedial work had been carried out, were provided to the Authority.

[37] Ms Maangi's evidence was that she had not finished the work required to leave the

Property in a clean condition, and this is confirmed by the evidence of Ms Reed.

2 Seventh Edition, Oxford at the Clarendon Press

[38] I find that Ms Maangi had not vacated the Property on 15 July 2017 leaving it in a clean state with no damage.

[39] I determine that Ms Maangi breached clause 5 of the Settlement.

Did Ms Maangi breach clause 6 of the Settlement?

[40] Clause 6 the Settlement required Ms Maangi to have the carpets in the Property commercially cleaned prior to 15 July, and to provide a copy of the receipt for the commercial carpet cleaning by email no later than 5 pm on 15 July 2017.

[41] Whilst Ms Maangi stated that she did have the carpets commercially cleaned, this was not supported by any evidence. Moreover she did not comply with the requirement to provide a receipt confirming of the commercial carpet cleaning by 5 p.m. on 15 July 2017.

[42] I determine that Ms Maangi breached clause 6 of the Settlement.

Did Ms Maangi breach clause 4 of the Settlement?

[43] Clause 4 of the Settlement waived the rent owed for the Property for one calendar month from 15 July 2017 provided Ms Maangi complied with her obligations contained the Settlement.

[44] I have found that Ms Maangi breached with the obligations contained in clauses 5 and

6 of the Settlement and breached these clauses.

[45] I determine that Ms Maangi breached clause 4 of the Settlement.

Remedies

Compliance

[46] I have found that Whistler Orchards breached clause 8 of the Settlement by not paying Ms Maangi the second half payment specified in that clause.

[47] Ms Maangi's claim for compliance in respect of the breach of clause 8 was amended during the Investigation Meeting to the amount of $4,375.00 less the amount paid by Whistler Orchards in respect of the necessary remedial work.

[48] The Authority in making a determination has regard to the substantial merits of the case and: "*without regard to technicalities"*3. I accordingly accept the late amendment of Ms Maangi's claim for compliance.

[49] The remedial work totalled $2,379.30 as supported by invoices submitted by Whistler

Orchards.

[50] I therefore order compliance by Whistler Orchards in the sum of $2,000.00 with clause 8 is seeking compliance by Whistler Orchards with clause 84.

[51] **I order that Whistler Orchards pay Ms Maangi the sum of $2,000.00 within 28 days to effect compliance with this clause.**

[52] Whistler Orchards is not seeking compliance with clauses, 5 and 6 of the Settlement as it completed remedial works on the Property due to an urgent requirement to reallocate the Property to a tenant. It is not seeking compliance with clause 4 of the Settlement. However it is seeking penalties in respect of the breaches of the Settlement.

Penalties

[53] Whistler Orchards is seeking penalties in respect of the breaches of clauses 4,5 and 6 by Ms Maangi. Ms Maangi is seeking a penalty in respect of the breach by Whistler Orchards of clause 8.

General considerations

[54] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[55] Section 3(a)(v) of the Act provides that an object of the Act is to "*promote mediation as the primary problem-solving mechanism."* A settlement agreement certified and signed by a mediator is an enforceable agreement. It is not in the interests of justice or within the objects of the Act that such an agreement should be able to be breached without consequence.

[56] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent

3 S 157 of the Act

4 In reaching this decision I have relied upon s 157 of the Act in particular the requirement to make determinations without regard to technicalities and in accord with equity and good conscience

or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach.

[57] In addition, in the Employment Court case of *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited5 (Borsbom v Preet)* a Full Court set out a four-step analysis for reaching decisions on whether to penalise and how to fix penalties.

Penalty against Whistler Orchards

[58] I have found that Whistler Orchards breached clause 8 of the Settlement by not paying the second tranche of money due to Ms Maangi under clause 8.

Boorsbom v Preet considerations

Step One: Identification of nature and number of breaches

[59] I am satisfied that I need to consider the imposition of a penalty for the breach of the Settlement. There was one breach. As Whistler Orchards is a company the maximum penalty the Authority can impose is $20,000.00, and that is the starting point for my consideration of

a penalty for this breach.

[60] Because there was one breach, I do not need to consider whether there should be a global penalty.

Step Two: Assessment of the severity of each breach – aggravating and mitigating factors [61] Ms Maangi claimed that as a result of the non-compliance and associated loss of income as a result, she felt stressed and unwell.

[62] I find that Whistler Orchards did not deliberately breach clause 8, it believed that it was not obligated to pay the second tranche of the payment due under clause 8 because of its understanding that a 'successful inspection' equated to a 'satisfactory inspection'. Whilst I have found this to be a misunderstanding, I consider it to have been a genuine misunderstanding of what had been agreed.

[63] Moreover I have found that Ms Maangi had breached clauses 4,5 and 6 by not fulfilling her obligations as recorded in the Settlement, namely by not vacating the Property in

5 Boorsbom v Preet *[2016] NZEmpC 143*

a clean state with no damage or providing a receipt in respect of having the carpets commercially cleaned.

[64] Ms Maangi had a month in which to fulfil the requirements of clauses 5 and 6 of the Settlement, a month moreover in which Whistler Orchards allowed her to reside at the Property rent free. She failed to fulfil the requirements of clauses 5 and 6 during that month as she confirmed in her evidence.

[65] During the Investigation Meeting Ms Maangi amended for claim for compliance to payment of a sum representing the second half payment, less the remedial costs of cleaning and repair work.

[66] I find this to be an acknowledgment of her contribution to the circumstances in which the breach of clause 8 arose and to inform the severity of the breach.

Step Three – the Respondent's financial circumstances

[67] Whistler Orchards has stated that it would have difficulty paying any penalty that I

impose.

Step Four - Proportionality

[68] I do not find this to be a deliberate and perverse breach, and consider that the starting point for deductions or credits should be significantly less than the maximum penalty.

[69] In considering proportionality in the imposition of a penalty I consider that a penalty of $300.00 is proportionate in relation to the type of breach and its impact, when balanced against the contribution of Ms Maangi to the circumstances in which the breach occurred. This penalty is to be paid to the Crown.

Penalty Against Ms Maangi

Step One: Identification of nature and number of breaches

[70] I have found that Ms Maangi committed 3 breaches of the Settlement. As an individual the maximum penalty the Authority can impose in respect of Ms Maangi is

$10,000.00, and that is the starting point for my consideration of a penalty for these breaches.

[71] Whistler Orchards did not seek compliance with clauses 5 and 6 because there was an urgent need to rent the property to an incoming tenant and the remedial work required following the vacation of the Property by Ms Maangi needed to be completed as soon as possible.

[72] Whistler Orchards also did not seek compliance with clause 4 which involved a waiver of 4 weeks rent in the sum of $288.00 per week, a total of $1,152.00.

[73] Ms Macphail submitted that a global penalty is appropriate in this case, and having considered the matter, I agree that there should be a global penalty.

Step Two: Assessment of the severity of each breach – aggravating and mitigating factors [74] The breaches resulting from Ms

Maangi's failure to adhere to comply with her obligations under the Settlement resulted in Whistler Orchards incurring remedial work costs in the sum of $2475.00, and it also incurred the loss of Ms Maangi's rental income for a one month period.

[75] Ms Maangi had the benefit of a calendar month in which to ensure that she vacated

the Property in a clean undamaged condition with the carpets commercially. She had failed to fulfil these requirements.

Step Three – the Respondent's financial circumstances

[76] Ms Maangi is presently managing an orchard, owns a car and also is a partner in a company C&V Maangi Partnership.

[77] I am not persuaded that Ms Maangi would have difficulty meeting any penalty that I

impose.

Step Four - Proportionality

[78] I find that Ms Maangi had full knowledge of clauses 4, 5 and 6 of the Settlement. She had confirmed that she understood and accepted them to the mediator before the mediator signed the Settlement. Despite being granted a month rent-free in which to complete the requirements of clauses 5 and 6, Ms Maangi did not do so,

[79] I find that the breaches committed by Ms Maangi were deliberate.

[80] I therefore consider it correct to impose a penalty to punish Ms Maangi for her breaches of the Settlement and to deter other employees from breaching the terms of a settlement agreement. On that basis I find it is appropriate to impose a penalty that will act as a deterrent to others who may contemplate engaging in such behaviour.

[81] I consider that a penalty of $6,000.00 is proportionate in relation to the type of breach and its impact on Whistler Orchards, when balanced against the contribution of Ms Maangi to the circumstances in which the breach occurred.

[82] I order that Ms Maangi pay to a penalty in the sum of $6,000.00 within 28 days of which $1,000.00 is to be paid to the Crown and $5,000.00 to Whistler Orchards.

Summary of Penalties

[83] *To summarise the penalties:*

- **Whistler Orchards is ordered to pay a penalty in the sum of $300.00 to the MBIE Trust Account within 28 days.**

• Ms Maangi is ordered to pay a penalty in the sum of $6,000.00 of which

$1,000.00 is to be paid to the MBIE Trust Account and $5,000.00 to

Whistler Orchards within 28 days. Costs

[84] Costs are reserved. The Respondent submitted its costs submissions on 11 April

2018. The Applicant has indicated its intention to also file submissions. It therefore has 14 days from 11 April 2018 in which to do so. However I note that Ms Maangi represented herself and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

[85] No application for costs will be considered outside this time frame without prior leave.

[86] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority
