

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 158
3133215

BETWEEN

ONEAIR LIMITED
Applicant

AND

LANA MAREE AUCAMP
Respondent

Member of Authority: Vicki Campbell
Representatives: Jeremy Ansell, counsel for Applicant
Respondent in Person
Investigation Meeting: 20 April 2021
Determination: 21 April 2021

DETERMINATION OF THE AUTHORITY

- A. Ms Aucamp is ordered to comply with clauses 1 and 14 of the record of settlement with immediate effect.**
- B. Ms Aucamp is ordered to pay penalties of \$500 to OneAir Limited pursuant to s 136(2) of the Employment Relations Act 2000 within 28 days of the date of this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] OneAir Limited (OneAir) lodged a statement of problem with the Authority on 22 October 2020 seeking interim orders and relief in respect of alleged breaches by Ms Aucamp of provisions of the employment agreement between the parties.

[2] The parties attended mediation on 23 November 2020 and reached an agreed settlement of the employment relationship problems between them. The settlement was recorded in a Record of Settlement and signed by a Ministry of Business, Innovation and Employment Mediator pursuant to section 149 of the Employment Relations Act 2000 (the Act).

[3] The record of settlement provided for the terms of settlement and all such matters discussed in mediation to remain, as far as the law allowed, confidential to the parties. Clause 14 of the record of settlement requires neither party to speak ill of the other, including on social media.

[4] OneAir claims Ms Aucamp has breached the terms of the record of settlement and seeks compliance orders and penalties. Ms Aucamp denies the breaches.

Issues

[5] In order to resolve OneAir's application I must determine the following questions:

- (a) Did Ms Aucamp breach the terms of the record of settlement;
- (b) If so should compliance orders be made;
- (c) Should penalties be imposed;
- (d) If penalties are imposed should the whole or any part of the penalty be paid to OneAir.

[6] An investigation meeting was convened via Zoom to accommodate attendance by Ms Aucamp. Sworn affidavits had previously been received from Mr Ramon Schagen, the sole director and a shareholder of OneAir, two employees from AD Riley Limited and Ms Aucamp.

[7] 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 received I have carefully considered all relevant material lodged with the Authority.

Did Ms Aucamp breach the terms of the record of settlement?

[8] The following are the relevant terms of the record of settlement signed by the parties on 23 November 2020:

1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.

...

14. Neither party will speak ill of the other; including on social media.

[9] On 28 January 2021 Mr Schagen became aware Ms Aucamp may have breached the terms of the record of settlement when she disclosed to a third party that there had been legal proceedings between herself and OneAir, had specified a payment made by Ms Aucamp to OneAir and spoke ill of OneAir when Ms Aucamp spoke in a disparaging way about Mr Schagen.

[10] OneAir says that although some of the comments made by Ms Aucamp refer to Mr Schagen personally and not OneAir, Mr Schagen and OneAir are essentially one and the same given that he is the only director and is the face of the company. All OneAir clients and business parties know Mr Schagen and his personal reputation is inextricably linked to that of the company.

[11] AD Riley and OneAir have offices in the same premises and the staff are acquainted with each other. It was common ground that Ms Aucamp attended the premises and spoke with AD Riley's operations co-ordinator.

[12] In an affidavit dated 19 February 2021 AD Riley's operations co-ordinator deposed that:

(a) Ms Aucamp told her "...he took me for [\$ amount withheld]" while pointing toward OneAir offices;

(b) When asked who, Ms Aucamp confirmed it was Mr Schagen and said he was a horrible human;

(c) Upon asking whether the money had to be paid to Mr Schagen Ms Aucamp confirmed it was;

(d) Ms Aucamp confirmed she had seen some of OneAir's clients and Mr Schagen had found out;

(e) Three clients had written affidavits saying what she had done;

(f) When the operations co-ordinator pointed out that Mr Schagen was a nice guy, Ms Aucamp replied "...oh that's what you think".

[13] Ms Aucamp was adamant that she did not disclose any information contained in the record of settlement and did not talk about OneAir or Mr Schagen in the terms set out by AD Riley's operations coordinator.

[14] The standard of proof in this case is on the balance of probabilities. A second employee, the Health and Safety co-ordinator, was present in the office at the time of Ms Aucamp's visit. He has provided an affidavit setting out what he overheard of the conversation between Ms Aucamp and the operations co-ordinator. The version of events given by the AD Riley employees is too similar to be a coincidence.

[15] The operations co-ordinator confirmed she had not discussed her affidavit with the Health and Safety co-ordinator and they had been completed independently of each other.

[16] On balance I find it is more likely than not that Ms Aucamp did disclose information covered by the confidentiality provision of the record of settlement and spoke ill of Mr Schagen and therefore OneAir.

Compliance orders

[17] The public interest in having terms of a record of settlement, made and certified in mediation, honoured by the parties to that record of settlement favours an order for compliance. I consider it appropriate to exercise my discretion and make a compliance order.¹ A compliance order is necessary to prevent further non-observance of, or non-compliance with the record of settlement.

[18] Ms Aucamp is ordered to comply with clauses 1 and 14 of the record of settlement with immediate effect.

Penalties

¹ Employment Relations Act 2000, s 137(2).

[19] The Act includes provisions encouraging parties to resolve their employment relationship problems between themselves. The record of settlement represents such a resolution. The failure by one party to honour the terms of a resulting agreement is a serious matter.

[20] Public confidence in records of settlement will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[21] Ms Aucamp breached the record of settlement on one occasion only. The maximum penalty is therefore \$10,000. I am satisfied Ms Aucamp was well aware that the terms of settlement and all matters discussed at mediation were confidential and that the record of settlement included non-disparagement prohibitions.

[22] The action by Ms Aucamp was not only in breach of the record of settlement but was irresponsible. Although Ms Aucamp has been adamant at all times that she did not disclose the information attributed to her by AD Riley's operations coordinator, I have found as a matter of fact that it is more likely than not, that she did.

[23] The harm caused by the breach was limited. There was a swift and firm response from OneAir and nothing further was said or done by Ms Aucamp to breach the terms of the record of settlement.

[24] After considering the principles that govern the imposition of penalties, and other similar cases in which penalties have been ordered, I consider a penalty of \$500 is appropriate in all the circumstances of this case.²

[25] Ms Aucamp is ordered to pay penalties of \$500. The penalties are to be paid to OneAir Limited pursuant to s 136(2) of the Act within 28 days of the date of this determination.

Costs

[26] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so OneAir shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Ms Aucamp shall have a

² *Borsboom v Preet PVT Ltd and 1 Or* [2016] NZEmpC 143; *Xu v McIntosh* [2004] 2 ERNZ 448.

further seven 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.

[27] 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. For the sake of completeness I record that the investigation meeting took less than one hour.

Vicki Campbell
Member of the Employment Relations Authority