

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 52
5597767

BETWEEN PALMCO GARDEN LIMITED
Applicant

A N D JOHN WELCH
Respondent

Member of Authority: T G Tetitaha
Representatives: K Taurau, Counsel for Applicant
S Bliss, Advocate for Respondent
Investigation Meeting: On the papers
Submissions Received: 3 February 2016 from both parties
Date of Determination: 23 February 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. I decline to dismiss this application.

B. Costs are reserved.

Employment relationship problem

[1] The parties entered into a Record of Settlement pursuant to s.149 of the Employment Relations Act 2000 (the Act) on or about 16 September 2014. The Record of Settlement included a clause that:

John Welch and Monica Welch agree that they shall not make disparaging comments regarding Kristin Lammerting; Palmco Garden Limited and the employees and tenants thereof; Lammerting Investment Group; and Linda Robinson, Brett Alexander, Roz Jones, Susie Palley and Mike Wright.

[2] The Record of Settlement was signed by the parties. It was not signed by Monica Welch.

[3] The applicant alleges that Monica Welch breached the terms of the Record of Settlement by making disparaging, inaccurate and damaging remarks about the applicant, Palmco Garden Limited in or about October 2015. It seeks an order Ms Welch desist from this conduct, compensatory damages and costs.

Issues

[4] There is a single issue for determination, namely whether the Record of Settlement may be enforced in any way against a third party non-signatory namely Monica Welch.

[5] The applicant submits that it was accepted there was no dispute about the bona fides of the settlement agreement. The preservation of the parties' and named non-parties reputations was an essential outcome of the settlement negotiations. Monica Welch was a key person to be bound by the terms of the settlement and was well aware of its contents. The applicant referred to the decision of the Employment Court where it confirmed that it is possible for a non-party to a settlement agreement to be liable for breaches under s.149(4) of the Act¹. It also asserts there is a cause of action under s134(2) of the Act for aiding and abetting a breach of settlement agreement although it does not particularise how this arises or against whom it is pleaded.

Determination

[6] The Court has determined that s149(4) of the Act may give rise to an action for breach of a settlement agreement against any person including a non-party. Liability may arise where the non-party knew both the fact of a settlement having been achieved and of the relevant terms of that settlement.² There were concessions made by the respondent's representative that Monica Welch was present with John Welch during the settlement negotiations. This infers she was aware of the fact of settlement and possibly the relevant terms as they pertained to her. There is a prima facie case for an action for recovery of penalty in the circumstances. I understand she denies breaching the settlement agreement but that is a matter for determination at hearing.

[7] However an action for recovery of a penalty under s.149(4) or s134(2) of the Act has not been pleaded in the Statement of Problem. The remedies seek what

¹ *Musa v. Whanganui District Health Board* [2010] NZEmpC 120 at [56]

² See above at [57].

appear to be compliance orders under s137(1)(a)(iii) and 151 of the Act and compensatory damages.

[8] If the applicant wishes to now pursue an action for recovery of a penalty against Monica Welch, it needs to substantively amend and refile its statement of problem. It should name her as a party and particularise the action for recovery of a penalty under the applicable sections. The applicant should also address how the application meets the applicable tests for a penalty set down by the Court.³

[9] I had earlier indicated this matter could go to hearing on 17 May 2016. However time must now be allowed for the parties to amend and refile their pleadings and for Monica Welch to instruct counsel. Accordingly I am not prepared to set aside that date for an investigation meeting at this stage. I will make separate timetabling orders in a further Minute.

[10] Given there is evidence of a prima facie case for an action for penalty I decline to dismiss this application at this stage. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

³ See for example *Tan v. Yang & Zhang* [2014] NZEmpC 65 at para.[32]; *Xu v. McIntosh* [2004] 2 ERNZ 449 (EmpC).