New Zealand Employment Relations Authority Decisions

R v Halse (Auckland) [2018] NZERA 253; [2018] NZERA Auckland 253 (16 August 2018)

Last Updated: 14 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 253
3033038

BETWEEN R Applicant

A N D

A N D

Allan Halse

First Respondent

CultureSafe NZ Limited
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Samuel Hood, Counsel for Applicant

Mr Halse in person as First Respondent and as Director of CultureSafe NZ Limited

Investigation Meeting: On the papers

Submissions Received: 03 August 2018 from Applicant

03 August 2018 from First and Second Respondents

10 August 2018 from Applicant

13 August 2018 from First and Second Respondents

14 August 2018 from Applicant

15 August 2018 from First and Second respondents

15 August 2018 from Applicant

Date of Determination: 16 August 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

[1]

There is currently a non-publication order in place that prohibits publication of

the Applicant's name or information that is likely to identify the Applicant.[1]

[2]

This non-publication order remains in force until further order of the

Authority.

[3]

The Applicant has therefore been identified as R in this determination. The

first respondent Mr Halse is an employment advocate based in Hamilton. Mr Halse is the sole director and shareholder of CultureSafe NZ Ltd, the second respondent.

Mediation

[4]

The parties were directed to attend mediation on 13 August 2018. The parties

agreed to attend mediation on this date during a telephone conference with the

Authority held on 27 July 2018.

[5]

Mediation services subsequently advised the Authority that it had cancelled

mediation as a result of communications it had with the parties. Therefore mediation in respect of this matter has not occurred.

Timetable directions

[6]

The Authority issued agreed timetable directions for the parties to provide

evidence and submissions in this matter.

[7]

Because the parties agreed this compliance order application could be dealt

with on the papers, the Authority's agreed timetable directions required the parties to file sworn affidavit evidence.

[8]

The Applicant did that but Mr Halse and CultureSafe did not. The

Respondents emailed the Authority on 03, 13 and 15 August 2018 so those emails have been taken to be the respondents' unsworn evidence and submissions.

Employment Relationship Problem

[9]

The applicant has made various claims against Mr Halse and CultureSafe.

1 [2018] NZERA Auckland 250.

[10]

This determination is confined to the applicant's applicant for compliance

orders only. A substantive investigation meeting has been scheduled to determine some of the applicant's other claims later this month.

[11]

The applicant seeks that compliance orders be issued against Mr Halse and

CultureSafe ordering them to comply with a non-disparagement clause in a record of settlement dated 05 March 2018. This was certified by a mediator under s.149 of the Employment Relations Act 2000 (the Act).

Applicant's claims

[12]

The applicant claimed that Mr Halse and/or CultureSafe have disparaged

and/or made negative remarks about it in breach of their obligations under the non- disparagement clause in the certified record of settlement.

[13]

The applicant pointed to posts Mr Halse admits to writing and which he posted

on CultureSafe's social media platforms as instances of Mr Halse and/or CultureSafe

disparaging or making negative remarks about the applicant in breach of the certified s.149 settlement.

[14]

These alleged breaches are referred to in this determination as *"the disputed*

communications".

[15]

The applicant has given evidence about the adverse effects the respondents'

alleged breaches of the record of settlement have had on it, its employees and Board members.

[16]

The applicant also provided evidence about the issues the alleged breaches

have created within its workplace and within the local small community in which the

applicant's business is based.

[17]

The applicant has attempted to resolve the alleged breaches by agreement with

Mr Halse and/or CultureSafe but that has been unsuccessful. It is evident that the

respondents' communications with the applicant are acrimonious.

[18]

The applicant said it has suffered and will continue to suffer reputational

damage and associated adverse consequences if Mr Halse and CultureSafe are not ordered to comply with their record of settlement obligations.

Respondents' response

[19]

Mr Halse admitted he wrote the disputed communications and that he caused

those to be published on CultureSafe's social media platform.

[20]

Mr Halse and CultureSafe disputed that the record of settlement dated 05

March 2018 imposed any legally enforceable obligations on them, so they say compliance orders should not be made.

[21]

Mr Halse and CultureSafe said that if the record of settlement does apply to

them then any restrictions it imposed on them are limited to remarks they make about the employment relationship the applicant had with the employee who was a named

party in that certified s.149 settlement.

[22]

Mr Halse and CultureSafe said they cannot have breached the record of

settlement because none of the disputed communications relate to the employee who was named in the certified settlement.

[23]

Mr Halse and CultureSafe said that their disputed communications cannot be

restricted by way of a compliance order because such communications were made in the course of them advocating for clients who are employed or were employed by the

applicant.

[24]

Mr Halse and CultureSafe said that the applicant's application for a

compliance order to address alleged breaches of the certified s.149 settlement is an unlawful attempt to limit their (the respondents') ability to raise health and safety concerns about the applicant's workplace.

The record of settlement

[25]

The record of settlement dated 05 March 2018 was certified under s.149 of the

Act. It therefore met all of the requirements of that section.

[26]

The mediator from Mediation Services who signed the record of settlement

held the necessary authority from the Chief Executive of the Ministry of Business

Innovation and Employment (MBIE) to provide mediation services under the Act.

[27]

The record of settlement was signed by;

(a) The applicant;

(b) The applicant's employee;

(c) Mr Halse;

(d) A mediator from Mediation Services.

[28]

Immediately under Mr Halse's signature was the following information:

We confirm that we fully understand that once the mediator signs the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and

2. Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, application for review, or otherwise; and

3. The terms of settlement cannot be cancelled under s 37 of the

Contract and Commercial Law Act 2017; and

4. That s. 149(4) of the Employment Relations Act 2000 provides that a person who breaches an agreed record of settlement to which subsection (3) applies is liable to a penalty imposed by the Employment Relations Authority.

[29]

The mediator certified that;

(a) She was employed by MBIE to provide mediation services under the

Act;

(b) She held a general authority from the MBIE Chief executive to sign a s.149 agreed terms of settlement;

(c) The parties had asked her to sign the agreed terms of settlement;

(d) Before signing she had explained the effect of s 148A, 149(1) and s 149(3) of the Act;

(e) The parties were not foregoing minimum entitlements;

(f) She was satisfied that the parties understood the effects of s.148A, s.149(1) and s.149(3) of the Act and had affirmed their request that she

certify the agreed terms of settlement.

[30]

The mediator, who is very experienced, certified the settlement pursuant to

s 149(1) and 149(3) of the Act.

Non-disparagement clause

[31]

The material clause in the record of settlement is clause 8, a non-

disparagement clause. This stated:

Neither party, nor their representatives, shall make disparaging or negative remarks about the other. Allan Halse has agreed to sign the record of settlement to indicate his agreement at being bound to this term in the record of settlement.

Issues

[32]

The following issues are to be determined:

(a) Does the Authority have jurisdiction over the applicant's claims for a

compliance order against the first and/or second respondent?

(b) If so, are the first respondent and/or the second respondent bound by the record of settlement dated 05 March 2018?

(c) If so, what if any restrictions or enforceable obligations does the non- disparagement clause impose on the first respondent and/or second respondent?

(d) If the first respondent and/or second respondent are bound by the non- disparagement clause, did one or both respondents breach it as a result of the communications identified by the applicant2 as the;

(i) Original post on 21 April 2018 (ii) First post on 27 April 2018

(iii) Second post on 27 April 2018 (iv) Third post on 28 April 2018 (v) Fourth post on 28 June 2018

(vi) First ERA post on 18 July 2018 (vii) Second ERA post on 27 July 2018 (viii) Third ERA post on 03 August 2018

(ix) Fourth ERA post on 13 August 2018

2 See applicant's Amended Statement of Problem dated 25 July 2018, its affidavit dated 03 August

2018 and its memorandum to the Authority dated 14 August 2018.

(x) Fifth ERA post on 14 August 2018.

(e) If so, have any breaches that may have occurred been remedied or are they continuing?

(f) Should the Authority order the first respondent and/or second respondent to comply with their obligations under the record of settlement dated 05 March 2018?

(g) If so, what are the terms of any compliance order(s) that may be issued by the Authority?

(h) What if any costs should be awarded?

Does the Authority have jurisdiction over the applicant's claims for a compliance

order against the first and/or second respondent?

[33]

Mr Halse and CultureSafe claimed the Authority did not have jurisdiction to

investigate the applicant's compliance order application because the parties are not

and have never been in an employment relationship.

[34]

Section 151 of the Act provides for the enforcement of terms of settlement

which have been certified by a mediator in accordance with s.149(3) of the Act. That is the case here.

[35]

Section 137(1)(a)(iii) of the Act empowers the Authority to issue a compliance

order where "*any person*" has not complied with "*any terms of settlement*" of a s.149

record of settlement.

[36]

Section 149(4) of the Act makes "*any person*" who breached a s.149 record of

settlement liable to a penalty. The Employment Court in *Musa v Whanganui District*

Health Board[3] held that "*any person*" liable to a penalty is not limited to a party but

includes any person who knew the terms of settlement but breached them.

[37]

Following the reasoning in *Masu,* the reference in s.137 of the Act to any

person is wider than just an employer or employee. There is no dispute that Mr Halse and CultureSafe both knew;

3 [2010] NZEmpC 120.

(a) that a record of settlement under s.149 of the Act had been entered into on 05 March 2018; and

(b) the specific terms of the s.149 record of settlement, including the existence and content of the non-disparagement clause.

[38]

The Authority has jurisdiction under the Act to determine the applicant's

compliance order application even though the parties are not in an employment relationship.

Is the first respondent and/or second respondent bound by the record of settlement dated 05 March 2018?

First respondent

[39]

Mr Halse expressly agreed to be bound by the non-disparagement clause in the

record of settlement because he agreed to be personally named to signify his agreement to the restrictions imposed on him under clause 8 of the certified

settlement.

[40]

The mediator's certification recorded that Mr Halse was aware of the

consequences of signing before he signed the record of settlement.

[41]

Mr Halse is therefore legally bound to observe the non-disparagement clause

in the certified settlement because that is exactly what he freely and voluntarily agreed to.

Second respondent

[42]

The non-disparagement clause expressly referred to the parties'

"*representatives*". Mr Halse signed as "*representative*" for the named employee.

[43]

It is evident from CultureSafe's invoice, which was provided to the Authority,

that Mr Halse was the person who attended mediation on behalf of CultureSafe in his capacity as an authorised officer of CultureSafe and/or as an advocated engaged by CultureSafe to provide advocacy services for it to one of CultureSafe's clients.

[44]

Looked at another way, if it were not for CultureSafe's representation of the

named employee then Mr Halse would not have attended the mediation.

[45]

The invoice from CultureSafe makes it clear that it was CultureSafe who

represented the named employee, because it was CultureSafe who invoiced for attendance at mediation. The invoice was not from Mr Halse personally – it was from

his company CultureSafe.

[46]

CultureSafe was therefore one of the "*representatives*" referred to in the non-

disparagement clause so it is bound by the non-disparagement clause in the certified s.149 settlement.

What, if any, restrictions or enforceable obligations does the non-disparagement clause impose on the first respondent and/or second respondent?

Ambit of non-disparagement clause

[47]

The obligation in clause 8 is on the parties and "*their representatives*" and it

required them to refrain from making disparaging or negative remarks about the other.

[48]

The respondents said that the non-disparagement clause only relates to

disparaging or negative remarks they may make about the applicant's relationship

with the employee who was named in the record of settlement dated 05 March 2018.

[49]

However clause 8 does not say that. Clause 8 is not restricted in the way the

respondents suggest it is because it was not stated to be limited to certain topics, issues or employees.

[50]

The reference to "*representatives*" means CultureSafe as the employee's

representative and Mr Halse as the authorised or nominated CultureSafe officer who was actually providing the services.

[51]

It is not uncommon for parties to enter into a non-disparagement clause as part

of agreed terms of settlement. In which case, the actual terms of any particular non- disparagement clause will reflect what the parties agreed to at the time they entered into it.

[52]

In this current case the non-disparagement clause has a wide and unlimited

ambit. While the parties could have elected to refine the ambit of their non- disparagement obligations, they did not in fact do so.

[53]

Clause 8 cannot now be rewritten to include additional restrictions that were

not actually agreed by the parties at the time.

[54]

The whole point of a certified settlement under s.149 of the Act is that it is

final binding and enforceable. The mediator certified that those who signed the s.149 settlement (including Mr Halse) had been told that before they signed.

Meaning of "disparaging"

[55]

When determining what disparage means, the Employment Court's decision in

Lumsden v Sky City Management Limited4 is helpful because it set out the definition of *"disparage"* contained in the shorter Oxford Dictionary. That stated disparage meant to:

(a) bring discredit or reproach upon; dishonour; lower in esteem; (b) degrade, lower in position or dignity; cast down in spirit; and

[56]

(c) speak of or treat slightingly or critically; vilify; undervalue, depreciate.

The Court in *Lumsden*[5] noted that this definition of disparage did not require

the disparaging comments to be fabricated or untruthful. That observation by the

Court means that a genuinely held belief may still be disparaging.

Meaning of "negative remark"

[57]

In addition to prohibiting the respondents from disparaging the applicant,

clause 8 also prevented Mr Halse and CultureSafe from making negative remarks about the applicant.

[58]

A negative remark used in this context is a harmful, damaging, detrimental,

belligerent, acrimonious, antagonistic, attacking or critical comment. A disparaging remark is also likely to be a negative remark.

4 [2017] NZEmpC 30.

5 Supra.

Did the first respondent and/or second respondent breach the record of settlement dated 05 March 2018?

What breaches are claimed?

[59]

The applicant identified ten social media posts it claimed breached the non-

disparagement clause in the certified s.149 settlement.

[60]

The references used to identify each disputed communication is the term given

to it in the Amended Statement of Problem or in the applicant's memorandum to the

Authority dated 14 August 2018.

[61]

The "*third ERA post*" is the disputed communication referred to as the "*latest*

post" in paragraph 60 of the applicant's affidavit dated 03 August 2018.

[62]

The text of the disputed communications has not been set out to avoid further

publicising the alleged breaches.

What breaches occurred?

[63]

The "*original post*" is clearly disparaging and negative so it breached clause 8 of the record of settlement.

[64]

The "*first post*" is clearly disparaging and negative so it breached clause 8 of the record of settlement.

[65]

The "*second post*" on 27 April 2018 relates to information[6] that is not covered by clause 8 so it does not breach the record of settlement.

[66]

The "*third post*" relates to information[7] that is not covered by clause 8 so it does not breach the record of settlement.

[67]

The "*fourth post*" on 28 June 2018 is clearly disparaging and negative so it breached clause 8 of the record of settlement.

[68]

The "*first ERA post*" on 18 July 2018 is clearly disparaging and negative so it breached clause 8 of the record of settlement.

6 The applicant's concern here appears to involve alleged misuse of its potentially confidential information.

7 Supra.

[69]

The "*second ERA post*", "*third ERA post*", "*fourth ERA post*" and "*fifth ERA post*" do not name the applicant. The applicant has not discharged the burden of proof of establishing on the balance of probabilities that these four ERA posts disparaged it or that the negative remarks the posts contained were about the applicant.

[70]

Accordingly the applicant's claims that Mr Halse's and/or CultureSafe's "*second ERA post*", "*third ERA post*", "*fourth ERA post*" or "*fifth ERA post*" breached the certified s.149 settlement do not succeed.

Who is responsible for the breaches that occurred?

[71]

Mr Halse wrote the disputed communications that breached the certified s.149 settlement then published and publicised them using CultureSafe's social media platform.

[72]

Mr Halse and CultureSafe are very closely interlinked so they can be said to essentially have been working together as one. Mr Halse's photo appears beside the disputed communications. CultureSafe's name appears underneath the photo of Mr Halse that sits alongside the disputed communications.

[73]

There is no real distinction between Mr Halse's and CultureSafe's actions in

terms of the breaches that occurred. Mr Halse has complete control over his company

CultureSafe. As the sole shareholder and director, Mr Halse is effectively the 'mind'

of CultureSafe.

[74]

At the time that occurred Mr Halse and CultureSafe both had the same

knowledge and awareness of the non-disparagement clause in issue.

[75]

Mr Halse and CultureSafe are so closely connected that they are to be held

jointly and severally liable for the four breaches of the certified settlement that have been proven.

Have these breaches been remedied or are they continuing?

[76]

The applicant says that the disputed communications posted on CultureSafe's

social media platform were still visible to it on 30 July 2018 but were not visible to it on 31 July 2018.

[77]

Mr Halse and CultureSafe have not explained any actions they may have taken

regarding the visibility of the disputed communications.

[78]

Mr Halse and CultureSafe continue to make disparaging and negative

comments about the applicant as evident in the emails they have sent the Authority.

[79]

Although the applicant is not pursuing these email communications as discrete

breaches of the non-disparagement clause, the Authority is nevertheless satisfied that they are relevant evidence to be considered when assessing whether or not breaches

are continuing.

[80]

Breaches are therefore continuing.

Should the Authority order the first respondent and/or second respondent to comply with their obligations under the record of settlement dated 05 March

2018?

[81]

The issuing of a compliance order is discretionary. The Authority's discretion

must be exercised on a principled basis.

Enforcement of civil obligations

[82]

This case is about the enforcement of civil obligations. In particular whether or

not Mr Halse and/or his company CultureSafe;

(a) Had legal obligations under the certified s.149 settlement dated 05

March 2018 (it has been established that they did);

(b) Breached their legal obligations under the non-disparagement clause (it has been held that they did);

(c) Should be ordered to comply with their civil obligations under the certified s.149 settlement (that involves an assessment of whether

compliance orders should be made).

[83]

So to summarise, this case is simply about whether or not the Authority should

issue compliance orders under s.137 of the Act.

Respondents' reframing of this case.

[84]

Mr Halse and CultureSafe have sought to reframe this case as an attempt to

unlawfully restrict their ability to represent or advocate for their clients, some of whom are still employed by the applicant. That is not correct.

[85]

The respondents' view about that not only demonstrates a fundamental

misunderstanding about the nature of these proceedings but it also presupposes that effective advocacy or representation requires the respondents to disparage and make

negative remarks about the applicant.

[86]

That is not the case. Thousands of representatives engage with, or appear

before, the Authority every year without disparaging others.

[87]

Mr Halse and CultureSafe appear to believe that the applicant's desire to hold

them (the respondents) to their civil obligations under a certified s.149 settlement represents an unlawful attempt to prevent health and safety issues being raised or

pursued.

[88]

It clearly is not.

[89]

There is no restriction on health and safety issues or for that matter any other

legal claims being raised or pursued by Mr Halse and/or CultureSafe provided they do so without disparaging or making negative comments about the applicant.

Legislation relied on by respondents

[90]

Mr Halse and CultureSafe have referred the Authority to four pieces of

legislation they claim;

(a) allowed them to disregard the civil obligations they entered into under the record of settlement; or

(b) gave them immunity from any legal consequences associated with their breaches of the certified s.149 settlement.

[91]

The legislation they rely on consists of the Employment Relations Act 2000

(the Act); The Health and Safety at Work Act 2015 (HSAW); the New Zealand Bill of

Rights Act 1990 (NZBOR); the Protected Disclosure Act 2000 (PDA).

Employment Relations Act 2000

[92]

The Act sets out the rights and obligations of parties to an employment

relationship. It also contains the mechanisms for records of settlement to be enforced. One of the key aspects of the Act is the mutual good faith obligations section 4 of the

Act places on parties to an employment relationship in their dealings with each other.

[93]

Section 4(1A) of the Act provides that the mutual good faith obligations are

wider than the implied mutual obligations of trust and confidence.

[94]

Section 4(1A)(b) of the Act requires parties to an employment relationship to

be "*active and constructive in maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*."8

[95]

The disparagement by one party in an employment relationship of another

party to the employment relationship is the antithesis of good faith.

[96]

Good practice suggests that those same principles should guide and inform the

way representatives engage with each other when representing parties who are in an employment relationship.

[97]

Communicating about alleged employment relationship problems in a

disparaging way would also be the antithesis of good faith. Such actions are not constructive or productive and are more likely to be destructive of the trust and

confidence inherent in an employment relationship.

[98]

The Act sets out ways in which an employee can raise or pursue employment

relationship problems, which include concerns an employee has about health and safety issues that are affecting them.

[99]

Every employment agreement must contain an employment problem

resolution clause. Parties are expected to follow the obligations imposed on them under that clause.

[100]

Parties to an employment relationship may also seek mediation from

Mediation Services, which is provided free of charge.

[101]

The Act gives parties in an employment relationship the right to file a

Statement of Problem with the Employment Relations Authority.

8 Section 4(1A)((b) of the Act.

[102]

The Authority is a neutral investigative statutory body. The Authority has wide

powers to objectively investigate and determine the full range of employment relationship problems, including claims arising from health and safety concerns.

[103]

The Authority uses an inquisitorial approach to investigating employment

relationship problems, which differs from the Employment Court's adversarial

approach.

[104]

The Authority's powers enable it to ensure it has been provided with all

relevant evidence regarding the matters it is investigating. This includes the ability to require relevant documents to be produced and to compel witnesses who have relevant information to attend an investigation meeting in person so they can be

questioned.

[105]

Parties have the right to challenge some or all of an Authority determination to

the Employment Court. They may also elect for the Employment Court to hear the entire case again.

[106]

The stated objectives in s.3 of the Act include building productive employment

relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[107]

Section 3(a)(i) of the Act recognises that employment relationships must be

build not just on the implied mutual obligations of trust and confidence but also on the requirement for good faith behaviour.

[108]

There is nothing in the Act that preserves or protects the right of one party in

an employment relationship to disparage the other. To do so would seem counterproductive and contrary to the good faith behaviour the Act is intended to

promote and encourage.

[109]

Requiring Mr Halse and/or CultureSafe to comply with their non-

disparagement obligations is likely to have a positive effect on the underlying employment relationships because it would require them to provide communicate in a

way that is consistent with an employee's good faith obligations.

[110]

There is a risk that if the Authority declined to issue compliance orders to

enforce obligations Mr Halse and Culturesafe freely and voluntarily entered into (and

financially benefited from) that could be seen as the Authority condoning or supporting behaviour by a representative that appears to undermining of their clients'

good faith obligations.

[111]

Mr Halse and CultureSafe can be said to have financially benefited from

signing the s.149 settlement because in accordance with clause 6 of the settlement CultureSafe invoiced the applicant and the applicant then paid CultureSafe's invoice. Mr Halse as the sole shareholder of CultureSafe therefore benefited as a result of

money being paid to CultureSafe.

[112]

The Act's objective of supporting parties to an employment relationship to

deal with each other in good faith is a factor that supports issuing compliance orders.

Health and Safety at Work 2015

[113]

The respondents say they have rights and obligations under the Health and

Safety at Work Act 2015 (HSWA) to continue communicating their alleged health and safety concerns in the manner that has occurred.

[114]

WorkSafe New Zealand is the government agency that administers the

HSAW.

[115]

Anyone is able to notify WorkSafe of serious work related health and safety

concerns. This can be done via its online form or by speaking to someone by telephone. Posting concerns or complaints about an employer on social media does

not amount to making a formal complaint to WorkSafe.

[116]

WorkSafe issued a media release on 02 August 2018 which stated it would

typically only investigate bullying and harassment claims where there is a diagnosis of serious mental harm.

[117]

The Authority asked Mr Halse and CultureSafe to provide it with information

about what if anything they had done to raise any alleged serious health and safety concerns with WorkSafe. That did not occur.

[118]

Mr Halse emailed the Authority yesterday and said (among other things) that

"*WorkSafe NZ has also been involved and will be investigating*." He did not clarify

whether a formal complaint had been made to WorkSafe or, if so, what it related to, or

when it was made.

[119]

If no formal complaint has been made to WorkSafe, then there is nothing for it

to investigate. If WorkSafe has received a formal complaint and is investigating that then it is in everyones' best interests to let that occur in an unimpeded manner. Public disparagement of the applicant is not necessary or required to enable WorkSafe to do

an investigation.

[120]

It is not accepted that Mr Halse's and/or CultureSafe's ability to continue

making disparaging and/or negative remarks about the applicant in public, on social media or to the media would in any way contribute constructively to, or assist with,

WorkSafe's independent investigation (if one is occurring).

[121]

It is also difficult to see how Mr Halse posting disparaging and/or negative

remarks on CultureSafe's social media platforms can objectively or reasonably be viewed as appropriately raising or pursuing health and safety concerns on behalf of

clients who continue to work for the applicant.

[122]

Formal complaints by employees need to be made to the employer in the first

instance so the employer can investigate the concerns. The applicant has policies and procedures in place to enable that to occur in a constructive manner.

[123]

The parties were asked to provide information about exactly what had been

done to comply with the applicant's internal complaint process but that has not been

forthcoming.

[124]

If an internal complaint does not resolve an employment relationship problem

then employees are able to make a formal complaint to the investigative body that has been tasked with independently and objectively investigating such complaints.

[125]

A complaint about actual or potential serious harm or one that involves serious

mental health and safety concerns can be made to WorkSafe. Claims that an employer has breached an employment agreement or has subjected an employee to a personal grievance can be raised with the Authority.

[126]

There is no need for Mr Halse and/or CultureSafe to have to make disparaging

and/or negative remarks9 about the applicant when submitting a complaint to an independent authority for investigation.

[127]

However were that to occur, the applicant is unlikely to pursue those as

breaches of the certified s.149 settlement because it understands that independent investigating authorities are not swayed by such communications and can instead

focus on the substantive concerns.

[128]

That is what has occurred here. Mr Halse and CultureSafe have disparaged and

made negative remarks about the applicant to the Authority during the course of this investigation but the applicant has not pursued those communications as discrete

breaches of the certified s.149 settlement.

[129]

In this case none of the disputed communications involved the submission of a

formal complaint to an independent investigative body.

[130]

A compliance order would therefore not prevent Mr Halse or CultureSafe from

participating in an independent investigation undertaken by WorkSafe because that can be done without disparaging the applicant.

[131]

It would also not prevent Mr Halse or CultureSafe from lodging Statements of

Problem for their clients with the Authority or from representing clients during an

Authority investigation because that can (and should) also be done without disparaging the applicant.

[132]

That disparagement of others is not required to pursue legitimate concerns can

be seen from the many thousands of employment related claims that come before the employment institutions every year.

[133]

This significant body of cases demonstrates that a wide range of

representatives and parties from different backgrounds and experience levels can successfully pursue legal claims without

disparaging others.

New Zealand Bill of Rights Act 1990

9 As defined in this determination.

[134]

The respondents say that the disputed communications are protected by the

New Zealand Bill of Rights Act 1990 (NZBORA).

[135]

Section 14 of NZBORA states:

Everyone has the right to freedom of expression, including the freedom to

seek, receive, and impart information and opinions of any kind in any form.

[136]

Section 5 of the NZBORA places some "*justified limitations*" on that freedom

of expression. Section 5 states:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society.

[137]

A record of settlement certified under s.149 of the Act which contained terms

limiting an individual's general right of free speech is a justified limitation on the freedom of expression protected by the NZBORA.

[138]

In *ALA v ITE*[10] the Employment Court considered the application of the

NZBORA to obligations parties had entered into under a certified s.149 settlement under the Act.

[139]

In *ALA v ITE*[11] a confidentiality clause in a record of settlement signed by the

parties under s.149 of the Act prevented the employee from airing his views about employment issues. That restriction was held by the Court to be a "*justified*

limitation" on the employee's free speech rights as permitted by s.5 of NZBORA.

[140]

In reaching that conclusion the Court approved the Authority's analysis in *P v*

Q[12] of the relationship between the freedoms in the NZBORA and the restrictions that could be voluntarily imposed by a settlement certified under s.149 of the Act.

[141]

Applications by the employee for leave to appeal the Employment Court's

finding on that point in *ALA v ITE* were dismissed by the Court of Appeal13 and

Supreme Court.[14]

10 [2016] NZEmpC 42.

11 Supra.

12 [2015] NZERA Auckland 181.

13 *B v ALA* [2016] NZCA 385.

[142]

This line of authorities make it clear that it is now settled law that the non-

disparagement obligation in the record of settlement the parties signed under s.149 of the Act is not an unreasonable fetter on Mr Halse's or CultureSafe's right of

expression as contained in s.14 of the NZBORA.

[143]

The respondents' argument to the contrary does not succeed.

[144]

The fact that Mr Halse and CultureSafe;

(a) Voluntarily agreed to restrict their freedom of expression;

(b) Did so only after being advised by an independent mediator of the consequences of doing so;

(c) Received a financial benefit from doing so;

(d) Signed the record of settlement under s.149 of the Act;

(e) Then asked a mediator to certify the settlement to make it final binding and enforceable;

are factors that weigh in favour of the Authority issuing compliance orders.

[145]

It would be contrary to equity and good conscience for the applicant to

perform its obligations under the certified s.149 settlement (by paying CultureSafe)

while Mr Halse and CultureSafe could effectively avoid their obligations under clause

8 of the same settlement by continually disparaging the applicant.

[146]

Emails produced to the Authority show that Mr Halse has been continuously

disparaging the applicant in the emails he has been sending it since April 2018.15 Mr

Halse has also repeatedly disparaged the applicant in his emails to the Authority.

[147]

The NZBORA does not override the civil obligations Mr Halse and

CultureSafe agreed to in the certified s.149 settlement they signed. Nor does the

NZBORA prevent the Authority from exercising its statutory discretion under s.137 of the Act to issue compliance orders in this case.

14 *B v ALA* [2017] NZSC 51.

15 The applicant's case has focused solely on social media communications and not on the email communications Mr Halse has been having with it or with the Authority.

Protected Disclosure Act 2000

[148]

Section 6 of the Protected Disclosure Act 2000 (PDA) protects employees who

disclose information about serious wrongdoing in accordance with the provisions of the PDA. A disclosure that is made in bad faith is not protected.16

[149]

Neither Mr Halse or CultureSafe are employees of the applicant so they are

not protected by the PDA.

[150]

Even if I am wrong about that, the respondents have not complied with the

requirements of ss.7-10 of the PDA regarding the disputed communications. That omission prevents them from relying on the protections granted under the PDA.

[151]

The Authority asked Mr Halse and CultureSafe to provide information about

the steps they had taken to make a "*protected disclosure*"17 under the PDA. That information has not been provided. Failure to provide that information suggests it

does not exist.

[152]

An employee who wants the protection of the PDA must generally disclose

their concerns about alleged serious wrongdoing in accordance with the employer's internal procedures first.18 The applicant has provided the Authority with copies of its internal complaint procedures. That also sets out an employee's internal rights of

appeal.

[153]

Under the PDA an employee may make a protected disclosure to the head of

their organisation if;19

(a) the employer does not have internal procedures for receiving and dealing with information about serious wrongdoing,

(b) the person who receives such complaints is reasonably believed to be involved in the wrongdoing, or

(c) the employee believes on reasonable grounds that the person who is designated to receive the report of wrongdoing has a relationship or

association with the wrongdoer.

16 Section 20 PDA.

17 Section 6(2) of the PDA.

18 There are some exceptions relating to intelligence, security and international relations that do not apply to this matter.

19 Section 8 PDA.

[154]

Section 9 of PDA deals with disclosures that may be made to an "*appropriate*

authority" in certain circumstances. Section 3(1) of the PDA sets out the "*appropriate authorities*" an employee may make a protected disclosure to.

[155]

One of the stated purposes of the PDA is to promote the public interest in

facilitating the disclosure and investigation of serious wrongdoing.20 The appropriate authorities listed in the PDA are well placed to enable appropriate investigations to

occur.

[156]

Unsurprisingly the listed "*appropriate authorities*" do not include social media

platforms or the media. Social media platforms are designed to generate engagement, publicity, comments or views but they do not have the resources or ability to independently investigate serious wrongdoing within an organisation. Likewise the

media is not an "*appropriate authority*".

[157]

If an employee's protected disclosure, which was made under sections 7, 8 or

9 of the PDA, has not been addressed and the employee continues to believe on reasonable grounds that the information they have disclosed is true or likely to be true, then they may make the protected disclosure to a Minister of the Crown or to the

Ombudsman. There is no evidence that occurred here.

[158]

As well as receiving a protected disclosure under s.10 of the PDA the

Ombudsman can also provide information and guidance to an employee who wants to make a protected disclosure. Again there is no evidence that occurred in this case.

[159]

The Court of Appeal in *Reeves v One World Challenge LLC*[21] emphasised the

importance of an employee adhering to the prescribed procedures in the PDA when making a protected disclosure if the employee wanted to receive protection for

disclosures of serious wrongdoing made under the PDA.

[160]

The Employment Court in *ALA v ITE*[22] also recognised that protected

disclosures needed to be made to a person or body who had a proper interest in receiving the information.

20 Section 5 PDA.

21 [2005] NZCA 314; [2006] 2 NZLR 184 (CA).

22 [2017] NZEmpC 128.

[161]

The PDA does not protect disclosures made to the public at large.[23] The

purpose of a disclosure by an employee under the PDA is to enable the employee's

allegations of serious wrongdoing to be appropriately investigated.

[162]

Nothing in the PDA requires or authorises an employee to make disparaging

remarks on social media or to the media about individuals or organisations the employee claims was involved in or associated with the alleged serious wrongdoing.

[163]

It is worth noting that an employee who does so would potentially put

themselves at risk of breaching their implied duty of fidelity and/or the implied trust and confidence that underpins all employment relationships.

[164]

Mr Halse's and CultureSafe's failure to provide evidence of compliance with

the PDA reporting procedures meant that they have been unable to establish that their disputed communications are protected by the PDA.

[165]

The PDA does not therefore grant Mr Halse or CultureSafe immunity from

civil proceedings or legal responsibility arising from the disparaging and negative remarks they have made, or may make in future, about the applicant.

[166]

The PDA does not prevent the Authority from issuing compliance orders.

Respondents' allegations of frivolous, vexatious and malicious claims

[167]

Mr Halse and CultureSafe claim that the applicant's attempts to enforce

adherence by them (the respondents) to their obligations under the certified s.149 settlement is frivolous, vexatious, malicious and illegal/unlawful.

[168]

Such claims by Mr Halse and CultureSafe are entirely devoid of merit.

[169]

Clause 12A of the Second Schedule to the Act gives the Authority power to

dismiss frivolous or vexatious proceedings. Clause 12A(1) of Schedule 2 of the Act makes it clear that it is *"a matter or defence"* that may be dismissed.

[170]

The Employment Court in *Lumsden v Sky City Management*[24] held that the

reference in *"proceedings"* in clause 12A Schedule 2 of the Act relates to the whole

23 *Maoate v Allied Investments Limited* [2011] NZERA Auckland 368 and *Hauiti v Te Reo Irirangi o*

Nga Raukawa Trust t/a Raukawa F M [2015] NZERA Auckland 10.

24 Ibid 5.

of a claim or defence rather than a part of it. The Authority therefore has no power

under clause 12A to dismiss part of a matter before it.

[171]

A frivolous case is a case that disclosed no cause of action. This application

obviously involved a legitimate cause of action because it related to alleged breaches of a record of settlement. That is not a trivial matter.

[172]

The applicant cannot objectively be said to have acted frivolously, vexatiously,

maliciously, improperly, unlawfully or illegally by legitimately pursuing its legal rights through an appropriate channel.

[173]

The applicant is entitled to use the enforcement mechanisms in the Act to

enforce its legal rights. It cannot fairly be criticised for doing so because it succeeded in establishing that on four separate occasions Mr Halse and CultureSafe breached their obligations under a certified s.149 settlement.

Assessment of overall public interest

[174]

Mr Halse and CultureSafe claim there is a strong public interest in allowing

them to say whatever they want to say about the applicant. They believe their free speech rights should be unfettered because of what they claim is the importance of the

matters they wish to speak about.

[175]

The Employment Court, Court of Appeal and Supreme Court[25] have all

confirmed that restrictions in a certified s.149 settlement override the desire of an individual to publicise matters that the certified settlement prohibits them from

publicising.

[176]

That is settled law. That is the law that must be applied to Mr Halse and

CultureSafe in this case.

[177]

The public interest considerations which must be assessed by the Authority are

those that relate to maintaining public confidence in certified s.149 settlements.

[178]

There is a risk that the effective administration of justice could be undermined

if the Authority's failure to issue compliance orders creates a public perception that certified s.149 settlement obligations can be ignored or breached without redress.

25 *ALA v ITE* [2017] NZEmpC 39, *B v ALA* [2017] NZCA 385 and *B v ALA* [2017] NZSC 51.

[179]

orders.

Public interest considerations therefore favour the making of compliance

Understanding of legal obligations

[180]

Neither Mr Halse or CultureSafe demonstrated any real appreciation or

understanding of the legal obligations created by a certified s.149 settlement.

[181]

Nor have Mr Halse or CultureSafe demonstrated any recognition of the need

for record of settlement obligations to be complied with.

[182]

Those are factors that support the exercise of the Authority's discretion in

favour of issuing compliance orders to ensure compliance occurs.

Lack of undertakings

[183]

The Authority invited Mr Halse and CultureSafe to provide undertakings

regarding their record of settlement obligations but they have not done so.

[184]

There is no evidence before the Authority to indicate that Mr Halse or

CultureSafe will agree to abide by the non-disparagement clause in the certified s.149 settlement if compliance orders are not made.

[185]

That is a factor that weighs in favour of issuing compliance orders.

Likelihood of breaches continuing

[186]

Based on the information that has been produced to the Authority there

appears to be a high likelihood of further/future breaches occurring if compliance orders are not issued.

[187]

The issuing of compliance orders would prevent future breaches. It would also

bring home to Mr Halse and CultureSafe the seriousness of their obligations not to disparage or make negative remarks about the applicant.

[188]

Those factors weigh heavily in favour of issuing compliance orders.

Would compliance orders unduly restrict the respondents' ability to represent clients

who are employees of the applicant?

[189]

The issuing of compliance orders will not unduly restrict or impede Mr

Halse's and/or CultureSafe's ability to represent clients who are employed by the applicant. Compiance orders can be crafted to protect Mr Halse's and CultureSafe's

rights to represent their clients and to raise legitimate concerns.

[190]

The issuing of compliance orders in this particular case may assist the parties

to engage with each other in a more productive and constructive manner, which is an outcome that would be consistent with the underlying principles and objectives of the

Act.

[191]

Mr Halse and CultureSafe say that they have been representing 12 or so of the

applicant's employees since April 2018. However only one employee's case has been

lodged with the Authority, and that did not occur until late last week.[26]

[192]

The issuing of compliance orders will not prevent Mr Halse and/or

CultureSafe from lodging Statements of Problem with the Authority for clients they are representing because that can be done without disparaging or making negative remarks about the applicant.

Exercise of discretion

[193]

After standing back and carefully weighing and balancing all relevant factors I

am satisfied on the balance of probabilities that it is necessary and appropriate to

exercise the Authority's discretion in favour of issuing compliance orders against Mr

Halse and CultureSafe.

[194]

Compliance orders are necessary to ensure that Mr Halse and CultureSafe

observe the non-disparagement clause in the certified s.149 settlement.

Timing of compliance orders

[195]

These compliance orders will take effect from 6pm on the date of this

determination. They do not have an expiry date so will remain in place permanently because the non-disparagement obligation was not time limited.

26 It was lodged on 09 August 2018.

[196]

The time of 6pm today has been set to give Mr Halse and CultureSafe time to

remove any previous or current disparaging and/or negative remarks they have made about the applicant from public view.

What are the terms of the compliance order?

[197]

The compliance orders that are to be issued must closely align to the specific

legal obligations that Mr Halse and CultureSafe agreed to in the certified s.149 settlement. They must be formulated to the minimum extent necessary to achieve compliance.

Compliance orders against first and second respondents

[198]

Mr Halse and CultureSafe are both ordered to comply with the certified s.149

settlement dated 05 March 2018. That settlement agreement is exhibit B of the

applicant's affidavit dated 03 August 2018.

[199]

Compliance by the Mr Halse and CultureSafe with the obligations in clause 8

of the certified s.149 settlement dated 05 March 2018 is to occur by no later than 6pm on the date of this determination.

[200]

Compliance with the non-disparagement obligations recorded in clause 8 of

the certified s.149 settlement dated 05 March 2018 requires Mr Halse and CultureSafe to jointly and severally refrain from making disparaging and/or negative remarks

about the applicant.

[201]

These compliance orders also require Mr Halse and CultureSafe jointly and

severally to refrain from repeating the disparaging and/or negative comments they made about the applicant in the;

(a) Original post

(b) First post

(c) Fourth post

(d) First ERA post.

[202]

The compliance orders are not just limited to the posts identified in the

paragraph above.

[203]

These compliance orders also require Mr Halse and CultureSafe to jointly and

severally take active steps to ensure that their past present and future communications about the applicant do not breach the non-disparagement clause in the certified s.149

settlement.

[204]

The requirement on Mr Halse and CultureSafe to take active steps to comply

with the non-disparagement clause means they must remove any published or publically available disparaging and/or negative remarks they have already made

about the applicant on social media platforms and/or websites they control.

[205]

That must occur whether or not the applicant is already aware of the

disparaging and/or negative remarks. All disparaging and/or negative remarks must be removed by Mr Halse and/or CultureSafe from channels they control by no later than

6pm on the date of this determination.

[206]

The applicant requested immediate compliance because the non-

disparagement clause is already in effect. However a time delay has been given before these compliance orders come into force so that Mr Halse and CultureSafe have time

to comply.

[207]

Compliance also requires Mr Halse and CultureSafe to remove disparaging

and/or negative remarks others have made about the applicant which Mr Halse and/or CultureSafe are hosting/publishing/publicising on their own social media channels. This only relates to social media channels that Mr Halse and/or CultureSafe own or

operate and have administration rights and/or editing control over.

[208]

Disparaging remarks will include remarks about the applicant that discredit

it, dishonour it, lower its esteem position standing or dignity, degrade it, vilify it, depreciate it, treat it slightingly or are critical.27 A remark may still be disparaging

even if it is believed to be factually correct or truthful.

[209]

Mr Halse and CultureSafe are therefore put on notice that a remark they may

consider is a genuinely held belief by them about the applicant may nevertheless still be held to be disparaging or negative if it falls within the definition of disparaging or

negative remarks in this determination.

27 See discussion of disparage in *Lumsden,* ibid 5.

[210]

Negative remarks consist of remarks about the applicant that are harmful,

damaging, detrimental, belligerent, acrimonious, antagonistic, or which attack or criticise it. A disparaging remark is also likely to be a negative remark.

Exceptions to these compliance orders

[211]

Some limitations are imposed on these compliance orders to enable Mr Halse

and CultureSafe to raise legal claims and concerns on behalf of their clients with appropriate investigatory bodies without fear that doing so may result in breaches of

these compliance orders.

[212]

These compliance orders **do not apply** to information that Mr Halse or

CultureSafe provides to, or communications they have with;

(a) Mediation Services

(b) The Employment Relations Authority

(c) The Employment Court

(d) The Court of Appeal

(e) WorkSafe - only in relation to the making of a formal health and safety complaint or in the course of facilitating WorkSafe's investigation of any such formal complaint

(f) The Ombudsman – in relation to obtaining information and guidance about making a protected disclosure under the PDA

(g) The applicant's external independent investigator - only to the extent that such information or communications are necessary to facilitate that person's investigation into the applicant's employees' concerns

(h) New Zealand Police

(i) Waitako Bay of Plenty Law Society

(j) New Zealand Law Society.

[213]

These exceptions mean that the applicant will not be able to pursue Mr Halse

and/or CultureSafe for breaches of these compliance orders in relation to communications they have with the bodies named above, even if such communications contain derogatory or negative remarks about the applicant.

Legal obligations imposed on respondents

[214]

Ignorance of the law is not a defence to breaching these compliance orders.

[215]

Mr Halse and CultureSafe are therefore encouraged to take legal advice to

ensure that they understand the legal obligations imposed on them by, and the consequences that may result from breaches of;

(a) clause 8 of the record of settlement;

(b) the non-publication orders that have been issued in this matter; (c) these compliance orders.

Breach of these compliance orders

[216]

The legal consequences of breaching these compliance orders are serious.

[217]

If Mr Halse and/or CultureSafe breach these compliance orders the applicant

may apply to the Employment Court to exercise its powers under s.140(6) of the Act.

[218]

To be clear and to minimise the likelihood of further breaches, Mr Halse and

CultureSafe are on notice that if one or both of them in future makes disparaging and/or negative remarks about the applicant (including but not limited to communications on social media or to the media) then that is likely to involve a

breach of these compliance orders.

[219]

However whether or not a breach of these compliance orders has in fact

occurred will always need to be independently determined by the employment institutions in accordance with the specific facts and particular circumstances that

applied at the time any alleged breach occurs.

[220]

Any alleged breaches of these compliance orders will also still have to be

proven by the applicant on the balance of probabilities.

What, if any, costs should be awarded?

[221]

The applicant as the successful party is entitled to a contribution towards its

actual costs. Costs will be timetabled after the substantive claims have been resolved.

Rachel Larmer

Member of the Employment Relations Authority