

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 54
5640638

BETWEEN SILVER FERN FARMS
 LIMITED
 Applicant

A N D PAUL NORTON
 Respondent

Member of Authority: Peter van Keulen

Representatives: Tim Cleary, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 10 April 2017 at Timaru

Submissions Received: Submissions from Applicant on 10 April 2017

Date of Determination: 12 April 2017

DETERMINATION OF THE AUTHORITY

- A. Mr Norton has breached the record of settlement dated 21 June 2016 between himself and Silver Fern Farms Limited by sending an email of 31 August 2016, containing disparaging remarks about Silver Fern Farms Limited.**
- B. Mr Norton must comply with the record of settlement dated 21 June 2016 between himself and Silver Fern Farms Limited. In particular Mr Norton should only speak of Silver Fern Farms Limited in positive or neutral terms and he should not disparage Silver Fern Farms Limited.**
- C. Mr Norton must pay a penalty of \$2,000.00. \$1,500.00 is to be paid to Silver Fern Farms Limited. The remaining \$500.00 is to be paid to the**

Authority and the Authority will then pay it into a Crown bank account.

D. Mr Norton is to pay Silver Fern Farms Limited \$1,800.00 as a contribution to its legal costs and \$71.56 for the filing fee in this matter.

Employment relationship problem

[1] Paul Norton and Silver Fern Farms Limited (SFF) signed a record of settlement (the "Record of Settlement") on 21 June 2016. A mediator from the Mediation Services of the Ministry of Business Innovation and Employment also signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the "Act").

[2] SFF contends that Mr Norton has not complied with clause 5 of the Record of Settlement relating to non-disparagement.

[3] SFF seeks a compliance order and a penalty for the breach by Mr Norton.

Preliminary matter

[4] The statement of problem in this matter was served by registered delivery to Mr Norton's home address on 21 September 2016. Mr Norton did not file a statement in reply.

[5] On 31 October 2016, an Authority officer advised Mr Norton in writing that a case management telephone conference call would be held on 7 November 2016 at 10:30 am.

[6] Mr Norton could not be contacted on 7 November 2016 and the telephone conference proceeded without him. Directions were issued for this investigation meeting.

[7] On 14 December 2016 a notice of direction, a notice of investigation meeting and a further copy of the statement of problem were personally served on Mr Norton's wife, Rowena Norton. The notice of investigation meeting advised that "If the Respondent does not attend the investigation meeting, the Authority may, without

hearing evidence from the Respondent, issue a determination in favour of the Applicant.”

[8] On 9 February 2017 Mrs Norton lodged a statement of evidence for the investigation meeting.

[9] Despite lodging a statement of evidence neither Mr Norton nor Mrs Norton attended the investigation meeting. And neither of them contacted the Authority to advise that they would not be attending.

[10] I am satisfied that Mr Norton was aware of this matter and in particular of the date, time and place for the investigation meeting. There was no apparent reason why this matter could not continue in his absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

Background facts

[11] Mr Norton was employed by SFF. During the course of his employment, an employment relationship problem arose between the parties.

[12] In order to resolve that employment relationship problem, the parties attended mediation on 21 June 2016. The parties reached an agreement in full and final settlement, which was recorded in the Record of Settlement.

[13] The operative clause of the Record of Settlement is:

5. Having attended mediation and resolved their employment relationship problem [Mr Norton] & SFF undertake that when speaking of each other to third parties they will only do so in positive or neutral terms to the intent they will not disparage one another.

[14] On 31 August 2016, Mr Norton sent an email to five people, including Rob Lindsay at SFF. In that email, Mr Norton made disparaging comments about SFF.

[15] Mr Norton concluded his email by calling for a boycott of SFF products. This part of the email is confused and rambling but it appears to be suggesting that people should not support SFF.

[16] Immediately prior to the mediation on 21 June 2016 SFF became aware of similar accusations emerging in two emails. The language in those emails suggest that the allegations came from Mr Norton. SFF was particularly concerned to close

down these types of unfounded and unnecessary allegations about it. As a result, it told Mr Norton the comments had to stop and with Mr Norton's acceptance of this, it included clause 5 in the Record of Settlement to ensure he complied with this.

The issues

[17] I must determine the following issues:

- (a) Has Mr Norton breached the Record of Settlement – does his email of 31 August 2016 speak of SFF in negative terms, does it disparage SFF; and
- (b) If there is a breach of the record of settlement, is a compliance order required and is a penalty appropriate?

Has Mr Norton breached the record of settlement?

[18] Clause 5 of the Record of Settlement is straightforward; it required the parties to speak about each other in positive or neutral terms so that they do not disparage the other party.

[19] It is not necessary for me to repeat the disparaging comments contained in the email of 31 August 2016. I am satisfied that the comments are disparaging of SFF and the email contains serious accusations levelled at SFF.

[20] By sending the email of 31 August 2016, Mr Norton has breached clause 5 of the Record of Settlement.

Is it appropriate to make a compliance order?

[21] As Mr Norton has breached the Record of Settlement a compliance order is necessary. I will make an order for compliance pursuant to s 137(2) of the Act.

Is it appropriate to impose a penalty against Mr Norton for the breach of the Record of Settlement?

[22] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement in a record of settlement signed pursuant to s 149 of the Act, is liable to a penalty imposed by the Authority.

[23] Section 135(2)(a) of the Act provides that an individual who is liable for a breach of a record of settlement is liable to a penalty not exceeding \$10,000.00.

[24] Section 133A of the Act sets out a number of factors the Authority should consider when determining the approximate penalty. These factors include:

- (a) The object stated in s 3 of the Act;
- (b) The nature and extent of the breach;
- (c) Whether the breach was intentional, inadvertent or negligent;
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach, because of the breach;
- (e) Whether the person in breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) The circumstances in which the breach took place, including the vulnerability of the employee;
- (g) Whether the person in breach has been previously found to be engaged in similar conduct.

[25] Judge Inglis considered these factors in *David Lumsden v Skycity Management Limited*¹ and concluded that two further factors were relevant; the need for general and particular deterrence and the desirability of broad consistency with other penalties in similar cases. I accept that both of these factors should be considered in my assessment of whether a penalty is appropriate and if so, the quantum.

[26] In *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*² the Employment Court set out a four stage approach to the determination of a penalty.

[27] So, I will assess whether a penalty should be imposed by reference to s 133A of the Act and the two additional criteria outlined by Judge Inglis and then, if I am to

¹ [2017] NZEmpC 30

² [2016] NZEmpC 143

award a penalty I will determine quantum by reference to these matters applying them in line with the four stage approach set out in *Preet*.

[28] The breach of the Record of Settlement was a significant breach. The email of 31 August 2016 contained serious allegations against SFF and it encouraged people to take action that would cost SFF revenue. As SFF had specifically raised concerns over similar behaviour and its desire that Mr Norton stop that behaviour, in the course of negotiating the non-disparagement clause, I conclude the breach was blatant and deliberate. I also believe it was designed to cause harm to SFF. This kind of flagrant behaviour cannot be condoned. A penalty should be imposed based upon the nature of the breach, and the need for general and specific deterrence.

[29] I will now consider quantum of that penalty based on the four stage process set out in *Preet*.

[30] Stage one is to identify the number of breaches and the maximum penalty applicable. In this case there has only been one breach of the Record of Settlement and pursuant to s 135(2)(a) of the Act Mr Norton is liable to a maximum penalty of \$10,000.00.

[31] Stage two is to consider the severity of the breach. I should consider the nature and extent of the breach, whether the breach was intentional, the nature of any loss suffered and whether there have been any previous breaches. I have already stated that I consider this a significant breach, one that was blatant, deliberate and designed to cause harm to SFF. There was no quantifiable loss caused to SFF by the breach but there may have been some damage to its reputation. The narrow audience for the 31 August email probably limits the extent of any damage, although as with any use of social media or email it may be difficult to know if the comments have been passed on to a wider audience. I assess the degree of severity at 50%, a potential penalty of \$5,000.00.

[32] The second part of stage two is to consider any mitigating circumstances, whether compensation has been paid and/or some steps taken to mitigate the effect of the breach, and the personal circumstances of Mr Norton. In this case no mitigating steps have been taken but Mrs Norton's statement suggests that Mr Norton has suffered because of his employment relationship problem and the end of his employment with SFF after a significant period of employment. Mrs Norton advises

that she is taking steps to shield Mr Norton from any adverse effects arising out of these events and Mr Norton is undertaking counselling. Mrs Norton also says she has taken some responsibility for controlling any further actions by Mr Norton toward SFF.

[33] I consider it appropriate to reduce the potential penalty because of the steps taken by Mr Norton and Mrs Norton to deal with any ongoing issues for Mr Norton. I am not convinced however that they have taken full responsibility for his actions, neither Mr Norton nor Mrs Norton attended the investigation meeting and consequently there is no reassurance that Mr Norton will not breach the Record of Settlement again by making further disparaging comments about SFF. The need for deterrence remains an important balance against any mitigating factor. I therefore reduce the potential penalty to \$4,000.00.

[34] Stage three is an assessment of Mr Norton's ability to pay. There was no evidence of means provided and the only financial information I have is that Mr Norton received a substantial compensatory payment under the Record of Settlement. I conclude that this stage has a neutral effect on my calculation.

[35] Stage four is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. I am to assess if the amount is just in all of the circumstances and I believe I should consider consistency as part of my assessment. Looking at recent Authority and Court imposed penalties for breach of non-disparagement provisions and confidentiality provisions I have a range of penalties from \$250.00³ through to \$7,500 in *Lumsden* (arguably \$3,750.00 as \$7,500.00 was awarded against a company for which the maximum starting point in the assessment is double). I am also guided by submissions on behalf of SFF in which counsel suggested that \$2,000.00 is the appropriate amount. Based on my assessment of proportionality and counsel's submissions I conclude the appropriate penalty is \$2,000.00.

[36] Adopting the approach applied by Judge Inglis in *Lumsden* I also consider it appropriate that part of the penalty be paid to SFF as it suffered the impact of the breach and it has been obliged to take steps to enforce its rights. I apply the same ratio of payment as Judge Inglis to reflect this.

³ *Wanaka Sun (2003) Limited v Brooke Woodrow* [2017] NZERA Christchurch 3

Determination

[37] Mr Norton has breached the Record of Settlement by sending the email of 31 August 2016.

[38] Mr Norton must comply with the Record of Settlement. In particular, Mr Norton should only speak of SFF in positive or neutral terms and he should not disparage SFF.

[39] Mr Norton must pay a penalty of \$2,000.00. I direct that \$1,500.00 is to be paid to SFF. The remaining \$500.00 is to be paid to the Authority and the Authority will then pay it into a Crown bank account.

Costs

[40] SFF sought costs on the basis of the daily tariff. Counsel submits that a half day is appropriate, given the work involved in preparing for the investigation meeting, the travel expense and time for counsel and the witness and the actual time of the investigation meeting.

[41] Costs should follow the event and it is appropriate for me to make an assessment based on the daily tariff, applying it to part of one day. The actual time of the investigation meeting was closer to one quarter of a normal hearing day. However, I do not think a reduction of the daily tariff by 75% accurately reflects the work involved in preparing and lodging the statement of problem, attending the case management conference, preparing witness evidence, preparing for the investigation meeting including preparing any cross-examination and submissions, and attending the investigation meeting.

[42] I consider 40% of the daily tariff to be an appropriate reflection of the work involved. The applicable daily tariff is \$4,500.00 so I order Mr Norton to pay \$1,800.00 as a contribution to SFF's costs. Mr Norton must also pay \$71.56 for the filing fee on the statement of problem.

Peter van Keulen
Member of the Employment Relations Authority