Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 261
5429828

	BETWEEN	STEPHEN THOMPSON Applicant
	A N D	ANGLICAN FAMILY CARE Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Diana Hudson, Counsel for Respondent
Investigation meeting:	22 November 2013 at Dunedin
Submissions Received:	28 November and 11 December 2013 from Applicant 10 December 2013 from Respondent
Date of Determination:	20 December 2013

DETERMINATION OF THE AUTHORITY

A. **There was no binding agreement between the parties that the respondent would release the words of an agreed statement.**

B. **There is no evidence that the respondent has breached a term of the record of settlement not to speak ill of the applicant, save on one occasion.**

C. **A compliance order is not appropriate.**

D. **No penalty is awarded against the respondent.**

E. **Costs are reserved.**

Prohibition of publication order

[1] During the Authority's investigation meeting a record of settlement was produced which contained information at clauses 2 and 3 which is not relevant to the issues to be determined, and which is confidential between the parties. I therefore prohibit from publication the information contained in these two clauses.

[2] The Authority also saw information which relates to allegations made against Mr Thompson which led to his dismissal from the employment of the respondent in March 2012, prior to the record of settlement being signed. The details of the allegations are not relevant to the issues to be determined and I prohibit from publication the details of those allegations.

Employment relationship problem

[3] Mr Thompson seeks compliance orders in relation to the terms of a record of settlement dated 25 May 2012, entered into through the assistance of the Mediation Service. He also seeks a penalty in relation to alleged breaches of the record of settlement.

[4] The respondent denies that it has breached the terms of the record of settlement and resists the orders sought.

Brief account of the events leading to the dispute

[5] Mr Thompson worked for 19 years for the respondent in the roles of counsellor, counselling manager and Family Start manager.

[6] On 2 December 2011 Mr Thompson was stood down from his position as manager of Family Start by the director of the respondent Ms Taylor and, following an investigation meeting, was notified that he was dismissed from the employment of the respondent on 30 March 2012. Mr Thompson raised a personal grievance for unjustified dismissal, sought immediate reinstatement through the Employment Relations Authority and then attended two mediation sessions, the first on 26 April 2012 and the second on 24 May 2012.

[7] On 25 May 2012 an agreement in full and final settlement was reached between the parties which was recorded in a record of settlement signed by Mr Thompson and Ms Taylor on behalf of the respondent. A local Mediation

Services mediator also signed the agreement certifying that the requirements of s.149 of the Employment Relations Act 2000 (the Act) had been complied with.

[8] The material operative clauses of the record of settlement are as follows:

> 1. *These terms of settlement shall remain, so far as the law allows, confidential to the parties. …*
>
> 4. *The parties have an agreed statement as follows - Both Mr Thompson and the Anglican Family Care have met to discuss Mr Thompson's future with the organisation. The parties have now agreed, for the purposes of resolving this matter and avoiding costly litigation, to withdraw the dismissal and instead receive Mr Thompson's resignation. Both parties agree that this matter is now at an end and all future dealings will be on a cordial and professional basis and neither party will speak ill of the other. …*
>
> 6. *This is the full and final settlement of all matters between the applicant and respondent arising out of their employment relationship.*

[9] In the normal way, the agreement went on to record that the settlement was final and binding on and enforceable by the parties, that neither could seek to bring those terms before the Authority except for enforcement purposes and that s.149(4) of the Act provided that a person who breached an agreed term of settlement is liable to a penalty imposed by the Authority.

[10] It is Mr Thompson's evidence that, after about 10 days, it became apparent to him that the respondent, and in particular Ms Taylor, was not complying with the record of settlement in that they were not releasing the statement in clause 4 as he understood they had agreed to do.

[11] It is Mr Thompson's evidence that it was important to him that key stakeholders be advised that he had resigned, so that his credibility in the sector would be restored, and also because many people had voluntarily written in support of him or offered to attend an Authority investigation meeting to support him and they wanted to know the outcome.

[12] Mr Thompson said that he had a conversation with the mediator about what he saw as the respondent's failure to abide with what they had agreed, and the mediator advised him that one course of action was for Mr Thompson himself to release the agreed statement to the people who had written in support of him.

[13] The contemporaneous evidence showed that Mr Thompson sent two emails; the first was dated 31 May 2012 and stated as follows:

> *Hi … - thanks for your letter of support. In the end it was not presented to AFC as they decided to settle at mediation without proceeding to the ERA and without viewing any additional evidence I had gathered. I understand that AFC will promulgate an email with the statement we agreed upon at mediation which will conclude our business. Please feel free to contact me if you don't hear any outcome and I will forward the statement.*

[14] A subsequent email sent by Mr Thompson was dated 20 June 2012. It stated the following:

> *Thank you for your recent support. AFCC and myself have been through a process and agreed to the following statement:*
>
> *"Both Mr Thompson and the Anglican Family Care have met to discuss Mr Thompson's future with the organisation. The parties have now agreed, for the purposes of resolving this matter and avoiding costly litigation, to withdraw the dismissal and instead receive Mr Thompson's resignation. Both parties agree that this matter is now at an end and all future dealings will be on a cordial and professional basis and neither party will speak ill or the other."*

[15] Ms Taylor wrote a letter to Mr Thompson dated 21 June 2012 in the following terms:

> *Dear Stephen*
>
> *I am aware that you continue to email staff at Anglican Family Care Centre, most recently providing details of the confidential settlement we reached.*
>
> *Staff do know that you were dismissed as a result of the investigation, and that the wording of the settlement reflects our attempts to mitigate the impact of a lengthy dispute in the court on the vulnerable staff most affected by your serious misconduct while the Manager of Family Start over a period of some years.*
>
> *If you continue to harass agency staff with inappropriate emails in this fashion, we will notify the Police.*
>
> *Yours sincerely.*

[16] Mr Thompson responded to this letter on 1 July 2012. In this letter he stated:

> *The legal position, however, which we agreed in good faith to abide by at mediation, was that you accepted my resignation. This is what you should be advising people and failure to do so in spite of your*

> *feelings to the contrary could be used as evidence in a penalty action in the Employment Relations Authority.*

[17] He also stated that it had been agreed by Ms Taylor at mediation that there would be a public statement made by her immediately upon settlement which was to be released by her to staff and those people she had notified by email of his dismissal.

[18] It was Mr Thompson's evidence to the Authority that, in the intervening year, he had established a private practice as a counsellor but had also applied for other jobs. He stated that one of the interviewers provided him with feedback advising him of his rejection for a job and that Ms Taylor had refused to speak to the prospective employer when contacted for a reference and had refused to confirm the dates that he had been employed by the respondent. He also says that, at a second job interview, an interviewer had told him that she would be very concerned to employ him without a reassurance that there would not be *a repeat of what had happened at Anglican Family Care.*

[19] Mr Thompson also said that, in March 2013, he had been working as a counsellor at the Rape and Abuse Support Centre in Invercargill when a member of the auditing staff from the Ministry of Social Development, Family Community Services, with whom Mr Thompson had been acquainted for several years through his work, visited the Centre and expressed some surprise at seeing him working there because he *had been told by the Director of the Anglican Family Care Centre that you had been fired for serious misconduct.* This member of audit staff, Mr Gray, thought that this would have precluded Mr Thompson from working as a counsellor. Mr Thompson says that he showed Mr Gray the extract from the record of settlement supporting his assertion that he had resigned.

[20] It is Ms Taylor's evidence on behalf of the respondent that she has been very careful, since the signature of the settlement document on 25 May 2012, not to breach the agreement. However, she said that she had never agreed to any formal release or circulation of the agreed statement set out in clause 4 of the settlement agreement. She said that she would never have agreed to release a statement because the disciplinary investigation had caused *a huge amount of distress in the workplace.*

[21] Ms Taylor's evidence is that she has not breached the settlement agreement and that, when asked, she had said that Mr Thompson had resigned. She said,

however, that a problem arose when people made comments to her that they had already been told by Mr Thompson that he had been dismissed. She said that all she could do was confirm that Mr Thompson had resigned and said this in accordance with the agreed statement.

[22] An email was put before the Authority which had been sent by Mr Thompson to unnamed recipients on 15 May 2012, prior to the date of the record of settlement being signed. This email explained in detail the fact that Mr Thompson had been stood down from managing Family Start, that the Director of AFC had investigated allegations of misconduct against him, what the allegations were, that he had been dismissed, and the reasons for the dismissal. The purpose for the email was clearly to seek to get written statements of support for his then pending Authority investigation.

The issues

[23] The Authority must investigate the following issues:

(a) Whether the parties agreed that a statement would be released by the respondent;

(b) Whether the respondent has breached the terms of the record of settlement by speaking ill of Mr Thompson;

(c) Whether it is appropriate to impose a penalty against the respondent for the alleged breaches of the settlement agreement.

Did the parties agree that a statement would be released by the respondent?

[24] During the Authority's investigation meeting Mr Thompson stated that, whilst he accepted that the wording of clause 4 of the record of settlement does not state that the statement contained in it had to be released or promulgated by the respondent, such an agreement had been reached orally during the second of two mediation meetings that had taken place prior to the signing of the record of settlement. Evidence was also heard from Ms Duff, a supporter of Mr Thompson, that she believed that an oral agreement had also been reached to do so during the first of the two mediation meetings.

[25] Section 148(1) of the Act provides:

> *Except with the consent of the parties or the relevant party, a person who—*
> *(a) provides mediation services; or*
> *(b) is a person to whom mediation services are provided; or*
> *(c) is a person employed or engaged by the department; or*
> *(d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided—*
> *must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.*

[26] During the Authority's investigation meeting, both Mr Thompson and the respondent consented to evidence being given with respect to the contents of the second mediation meeting (on 24 May 2012), together with evidence in regard to discussions that took place at the first mediation meeting (on 26 April 2012) solely relating to the promulgation or release of a written statement.

[27] Mr Thompson's evidence was that, at the meeting on 24 May 2012, he was present with his brother, Andrew Thompson, who is a lawyer, and another legally trained support person, Ms Duff. The mediator was also present, as was Ms Brazil, counsel employed by the Otago Southland Employers' Association, who was representing the respondent. The director of the respondent, Ms Taylor, was not present on that day, but was in contact with Ms Brazil during the meeting by telephone.

[28] Mr Thompson's evidence was that, on 24 May 2012, he discussed with Ms Brazil that he wanted the wording of the statement, which they were debating and negotiating, to be released by the respondent. He said that Ms Brazil frequently left the room during the negotiations to telephone Ms Taylor, and that, at the end of the day, she came back in and said *yes we have an agreement.*

[29] Mr Thompson said that he assumed that Ms Brazil had discussed with Ms Taylor the issue of promulgation of the statement, as well as the words of the statement and that, when she came back to say *yes we have an agreement*, he assumed it included the oral agreement with respect to the promulgation.

[30] He said that, in retrospect, he should have insisted that the promulgation of the statement be written into the record of settlement. He also noted that the record of settlement did not state that he would have to submit a letter of resignation, but that he

did so in any event. Mr Thompson also said that the respondent took no action to withdraw the dismissal, even though the clause contemplates this.

[31] The evidence of Ms Duff was that the focus of the second meeting was agreeing the words of the statement set out in clause 4, that there were a lot of negotiations and that, from her perspective, it was clear that Mr Thompson wished the statement to be agreed to be released to everyone. Ms Duff said, however, that she remembered that there had already been an agreement at the mediation meeting on 26 April 2012 that any statement would be promulgated by the respondent. She said that, at the second meeting, when it was agreed that Mr Thompson's dismissal would be changed to a resignation, release of the statement was mentioned again. Ms Duff said that, at the end of the second meeting, where it appeared they had reached agreement, someone had summarised what was to happen next. She believed that that summary had included mention of releasing the statement.

[32] Ms Brazil gave evidence on behalf of the respondent and said that, during the first mediation meeting, the parties had not sat in the same room at any time and that all communications had been carried out via the mediator. She said that she could not, of course, comment on what Mr Thompson and his support people had said to the mediator but that she was clear that the mediator had never mentioned to her during that first meeting that part of what Mr Thompson had wanted was the release of a statement.

[33] Ms Brazil also said that the only focus of the first meeting was how much money was to be paid as part of the settlement, if it were to be achieved, but, at the end of the first mediation meeting, no agreement had been reached of any kind.

[34] Ms Brazil said that, by the second meeting, agreement had been reached separately on the issue of money to be paid and, therefore, she agreed with Ms Duff that the focus of that second meeting had been to agree the wording of the statement to go into clause 4. She said that her understanding of the purpose of agreeing a statement had been to agree wording that either party could rely on if questioned in the future about Mr Thompson's employment. She said that it was not unusual to agree a statement as part of settlement negotiations when there had been a dismissal.

[35] Ms Brazil said that she was surprised that Mr Thompson had agreed to the wording of the statement as it referred to a dismissal but that she had been very

comfortable that nothing in what has been agreed would compromise her client. She said that she had no memory of any discussion about the way that the statement should be circulated and that, if there had been discussion of that, she would have sought instructions and would not have been comfortable about her client releasing a statement.

[36] The evidence of Ms Taylor was that there had been no agreement reached at the end of the first mediation meeting and had no recollection of the mediator saying during the first mediation meeting that Mr Thompson wanted a statement to be released. She recalled that the purpose of the second meeting was to agree the wording of a statement to go into clause 4. She recalled receiving telephone calls from Ms Brazil on the day of the second meeting and she said she understood that the purpose of the statement being negotiated on that day was to reach an agreement as to how the parties were to conduct themselves thereafter. Ms Taylor said that she did not recall any discussions about releasing the statement.

[37] Sub-sections 149 (1) to (3) provide as follows:

> *(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—*
> *(a) who is employed or engaged by the chief executive to provide the services; and*
> *(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—*
> *may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.*
> *(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—*
> *(a) explain to the parties the effect of subsection (3); and*
> *(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.*
> *(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—*
> *(a) those terms are final and binding on, and enforceable by, the parties; and*
> *(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*
> *(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.*

[38] The reference in sub section 149(3) to the agreed terms of settlement being signed clearly contemplates those terms being in writing. The subsection goes on to

provide that those (written) terms are final and binding on the parties. The corollary of this, I believe, is that the only enforceable terms existing between the parties after s.149 has been complied with, comprise solely what is set down in writing in the record of settlement, and no more. This means that any agreement reached orally between the parties before the terms have been signed and which are not contained in those terms, has no effect.

[39] It is for this reason that I decline to accept Mr Thompson's submission that a record of settlement is in essence a *bare bones* summary of the mediation process and needs to be read in a broader context. On the contrary, I believe that the record of settlement records precisely what has been agreed after the to-ing and fro-ing of a negotiation. Once an employment relationship has ended, there are no longer any duties remaining between the parties imposed by statute or common law (save in a very limited sense) and so the record of settlement must spell out precisely what is expected of each party post termination.

[40] Mr Thompson is also incorrect in his assertion for a second reason; namely, the confidential nature of the mediation process, where the parties to it must be certain what remains confidential and what can be made public. The only way that certainty is achieved is in a carefully drafted record of settlement.

[41] Therefore, in conclusion, if there was an oral agreement between the parties that the statement in clause 4 be released by the respondent, in the absence of express reference to that agreement in the written terms, it can have no effect after the signing of the record of settlement, and compliance with s.149. Therefore, the respondent has not breached any such agreement.

[42] If I am wrong in that legal analysis of the effect of s.149, I am not satisfied in any event that there is cogent evidence of an oral agreement having been reached between the parties about release of the statement. There is a flat denial by the respondent of any such agreement. I do not doubt that Mr Thompson had in his mind that a statement should be released but, on balance, do not believe that such a wish or requirement was clearly communicated to the respondent, nor was it agreed to. Mr Thompson and his advisers may have talked about his wishes to the mediator and Ms Brazil, but I do not believe that these desires were communicated to Ms Taylor, who was the decision maker for the respondent in what was to be agreed. In other

words, I do not believe that there was a meeting of minds about the issue between Mr Thompson and the respondent.

[43] A final possible approach for Mr Thompson is to argue that the terms of clause 4, as written, imply release of the statement contained in that clause. Certainly, a *statement* usually has, as its purpose, the conveying of information, and such conveying usually occurs by publication, promulgation, dissemination or release in some way.

[44] Clause 4 could just have recorded an agreement between the parties that the dismissal was withdrawn, that Mr Thompson's resignation would be received, that all future dealings would be on a cordial and professional basis and that neither party would speak ill of the other. The words, *The parties have an agreed statement as follows*, are clearly intended to add a further element to the agreement. However, there is no express wording as to:

(a) who would release the statement,

(b) at what time,

(c) by what means, and

(d) to whom.

[45] In the absence of express terms about those fundamental aspects of such an agreement, I do not accept that one can imply into the words an agreement that the statement was to be released, as I understand Mr Thompson to be arguing,

(a) by the respondent,

(b) immediately upon payment of the monies,

(c) by email, and

(d) to all individuals who had been informed by Mr Thompson of the investigation and dismissal (who would have had to have been named).

Conclusion

[46] In conclusion, I do not accept that the respondent has breached an agreement to release the statement set out in clause 4 of the record of settlement and decline to issue a compliance order in respect of such release.

Did the respondent breach the terms of the record of settlement by speaking ill of Mr Thompson?

[47] Mr Thompson believes that the respondent, through the actions of Ms Taylor, has breached the record of settlement by the following acts:

(a) telling Mr Gray that Mr Thompson was dismissed for serious misconduct, rather than having resigned;

(b) failing to provide dates of employment or a reference to an interviewer from an Australian recruitment agency;

(c) Giving information to a person working for the University of Otago which disclosed details of the allegations against him;

(d) Saying to at least three people in the social services field that Mr Thompson was *manipulative and deceitful* and saying *if you knew what I know about him you would have nothing to do with him*.

Mr Gray

[48] Mr Gray's evidence was that he did not know that Mr Thompson had been dismissed until February 2013, when Ms Taylor had said to him words to the effect of *I can manage performance, I fired Stephen Thompson*. Prior to that, he only knew that Mr Thompson had left his position at the respondent. Mr Gray said he had been involved in the investigation into Mr Thompson's alleged misconduct but had not known the details.

[49] Mr Gray said that the Ministry of Social Development had a *high trust* relationship with the respondent, and that he had felt that *these* matters (which I understood to include the fact of Mr Thompson's dismissal) would have been *shared and given*.

[50] Ms Taylor stated in evidence that she had been having a heated discussion with Mr Gray about the respondent's performance when she had stated that she had fired Mr Thompson. She did not disagree that Mr Gray had not known about Mr Thompson's dismissal until February 2013. She said that she had then told Mr Gray that there had been a settlement agreement and that a dismissal had been withdrawn and a resignation substituted. She also said in evidence that, before February 2013, she had told Mr Gray and the Ministry of Social Development that Mr Thompson had resigned.

[51] On balance, I do not believe that, after telling Mr Gray that she had fired Mr Thompson, she then immediately told him that the respondent had withdrawn the dismissal and then received a resignation. If she had done so, he would not have been surprised when he saw Mr Thompson working later and Mr Thompson would not have felt compelled to have shown him the extract from the settlement agreement.

[52] If Ms Taylor had told Mr Gray that she had fired Mr Thompson and had then gone on to say that that dismissal had been withdrawn and a resignation received, that would not have been in breach of the agreement, given that the agreed statement refers to the dismissal in any event. I therefore conclude that, when she told Mr Gray in the heat of the moment that Mr Thompson had been fired, but did not immediately tell him about the withdrawal, and resignation, the respondent acted in breach of contract.

[53] However, I must also judge whether Ms Taylor telling Mr Gray that she had fired Mr Thompson justifies a compliance order being made. Mr Gray clearly now knows that the parties had agreed that the dismissal had been withdrawn and a resignation substituted. There is no more to be done to ensure compliance with clause 4 as far as Mr Gray is concerned.

[54] As I do not conclude, as I explain below, that there have been further breaches of the agreement, I decline to order a compliance order pursuant to s.137 of the Act as I believe that the breach in respect of Mr Gray was a one off breach.

The Australian recruitment agency

[55] Ms Taylor's evidence is that she did give dates of employment in reply to an email received by her from an Australian company, but did not provide a reference. However, the record of settlement does not state any requirement to provide a

reference, and I do not accept that there is any implied requirement to do so. If such a requirement had been agreed, one would have expected not only for the record of settlement to have stated such a requirement expressly, but also the exact wording of the reference to be spelled out, together with a description of the circumstances under which it was to be given, and by whom. Accordingly, I do not accept that there was any breach of the agreement by Ms Taylor's actions in this regard.

The University of Otago

[56] The allegation is that, when Mr Thompson was applying for a position as counsellor at the University of Otago, the interviewer said words to the effect that he wanted *a reassurance that there would not be a repeat of had happened at Anglican Family Care*. Ms Taylor denied having spoken to anyone at the University about Mr Thompson.

[57] Mr Thompson accepted in evidence that it is possible that the interviewer at the University may have heard rumours about his alleged misconduct separately, and not from Ms Taylor. In addition, Mr Thompson had said that there had been a period of *hot gossip* going about, which he was hoping to control by a released statement.

[58] In light of this evidence, and further, in light of the fact that Mr Thompson had released an email to, in his words, *a large group* of people which had referred to the details of the allegations against him, and finally, in light of the absence of any cogent evidence that Ms Taylor had made statements about Mr Thompson's alleged misconduct after the signing of the agreement, I cannot find that there has been a breach of the agreement by the respondent in this respect.

Statements to people in the social services field

[59] Mr Thompson declined to name the individuals who he said had told him that Ms Taylor had been making statements against his interests. His evidence is therefore hearsay, and whilst admissible in the Authority, cannot bear as much weight as direct evidence.

[60] Ms Taylor admitted that she had referred to Mr Thompson as manipulative and deceitful to people in the respondent organisation itself, but had done so in April 2012, before the record of settlement had been signed (but after Mr Thompson had been dismissed). She also admitted saying *if you knew what I know about him you*

would have nothing to do with him, but this was said at the same time as the other statement, to the same people. She denied making these statements repeatedly, as alleged.

[61] I must prefer Ms Taylor's evidence on this, as her evidence was direct evidence, and not hearsay. As she made the statements prior to the record of settlement being signed, there cannot have been any breach of it by her in doing so.

Conclusion

[62] Having found that there has been one breach of the record of settlement, which I believe was an one off event, and which has now been rectified, and further as the respondent has not stated that it will not comply with terms of the record of settlement, it is not appropriate to order compliance.

Is it appropriate to impose a penalty against the respondent for the alleged breaches of the settlement agreement?

[63] Having found that the respondent has breached the term of the record of settlement in one respect only, by telling Mr Gray that Mr Thompson had been dismissed, I take into account the fact that no cogent evidence exists that any long term adverse effects (or indeed any adverse effects) ensued from the breach, that Mr Gray expected to have been told of Mr Thompson's dismissal in any event given his role, and the respondent has not breached the record of settlement in any other respect as alleged. I therefore do not agree that it is appropriate to order the imposition of a penalty.

Costs

[64] Costs are reserved. The parties should seek to agree between them how their legal costs incurred by taking part in these proceedings shall be dealt with. In the absence of such an agreement, any party seeking a contribution to its legal costs may

serve and lodge a memorandum within 28 days of the date of this determination. Any party opposing such an application may then serve and lodge a memorandum in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority