IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 136
3026572

	BETWEEN	TURUKI HEALTHCARE SERVICES Applicant
	A N D	REPETA MAKEA-RUAWHARE First Respondent
	A N D	CULTURESAFE NZ LIMITED Second Respondent
	A N D	TRACEY SIMPSON Third Respondent
	A N D	ALLAN HALSE Fourth Respondent
Member of Authority:	James Crichton	
Representatives:	Anthony Drake, Counsel for Applicant No appearance for Respondents	
Investigation Meeting:	On the papers	
Submissions Received:	13 April 2018 from Applicant No submissions from Respondent	
Date of Determination:	1 May 2018	

SECOND DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

History

[1] In my first determination on this matter, issued as *Turuki Healthcare Services Charitable Trust v Makea-Ruiwhare and ORS* [2018] NZERA Auckland 95 I made urgent interim orders on an ex parte basis to seek to prevent further breaches of a settlement agreement reached between these parties.

[2] The purpose of those interim orders was to signal to the respondents that they had obligations pursuant to the settlement agreement and to seek their compliance with those obligations.

[3] In particular, the record of settlement contained the standard confidentiality provision binding the parties to that mediated settlement to keep its terms confidential.

[4] Moreover, there was an explicit non-disparagement clause which precluded any of the parties (including CultureSafe NZ Ltd) from making disparaging comments about any other party and further precluded CultureSafe NZ Ltd from making any reference whatever to this employment relationship problem in any publication including in social media.

[5] In that first determination on this matter I ordered:

(a) Compliance with the terms of the mediated settlement agreement dated 13 November 2017; and

(b) No further breaches of this confidentiality provisions in that settlement agreement; and

(c) No publication of the name of the applicant (Turuki); and

(d) Compliance to be fulfilled immediately.

[6] Matters concluded in respect to the interim proceeding with a direction that the statement of problem and the associated documents be served on the respondents, that a statement in reply would need to be filed and served and that once that was to hand, there would be a telephone conference to timetable the investigation of Turuki's substantive claim.

[7] In the result, no statement in reply has been filed in the Authority. The only material that has come to hand from the respondents is a copy of a letter dated 14 April 2018 from CultureSafe's Mr Halse to the Minister of Workplace Relations and Safety seeking my dismissal from office. The evidence before me by way of affidavit from Te Puea Winiata, for Turuki is that there have been continuing breaches of the mediated settlement agreement and as a consequence breaches of the orders that I made in the first determination I issued between these parties.

[8] The affidavit catalogues an exchange of email correspondence between counsel for Turuki, Mr Anthony Drake, and both Mr Allan Halse and Ms Tracey Simpson for the respondents.

[9] That email traffic from Mr Halse and Ms Simpson is characterised by a hectoring, bullying tone and suggests amongst other things that unless the Turuki proceedings are withdrawn, Turuki funders would be contacted by CultureSafe. Moreover, threats were made in this correspondence from Mr Halse and Ms Simpson that Turuki would be publically named by CultureSafe.

[10] On 9 April 2018, Mr Halse forwarded to Mr Drake a copy of a letter sent to the Minister of Workplace Relations and Safety dated 2 April 2018 together with a press release issued by CultureSafe on 5 April 2018. The letter to the Minister draws his attention to my first determination in this matter and seeks my dismissal from office for what the author of the letter Mr Halse, describes as *corrupt behaviour*.

[11] There is nothing in the affidavit evidence before me that suggests there have been further public disclosures of Turuki or the employment relationship problem between Turuki and the first respondent, save for the material referred to above.

[12] However, the correspondence that I have already referred to from CultureSafe to Mr Drake seems to proceed on the footing that CultureSafe seek an opportunity to publically debate matters with Mr Drake about the bona fides of Turuki and in addition, CultureSafe has threatened the funding lines of Turuki.

[13] While it could perhaps be contended that the respondent parties have not committed further public breaches of my interim orders, the threat to do so again in the future seems evident from the correspondence and the prospect of the respondents damaging Turuki's funding lines is potentially very serious indeed.

[14] Put shortly, even although I accept there has been no further public breach of the interim orders I made on 23 March 2018, the threats made by the respondents to Mr Drake would seem to foreshadow further improper behaviour and I am satisfied entitled me to consider permanent orders.

Process

[15] The interim orders that I made were made on an urgent ex parte basis. They were properly served on the respondents. It is evident from the response to counsel for Turuki, that that material was received by the respondents. Moreover, counsel for the applicant party Turuki helpfully reminded the respondents of their obligation to file a statement in reply to the present proceeding. This was in addition to the Authority's own standard process in that regard.

[16] Despite all of that, none of the respondent parties have taken any steps in the matter save for the letter to the Minister seeking to have me removed from office. There is no statement in reply for me to reflect on.

[17] I am satisfied that the absence of a statement in reply is deliberate. CultureSafe and the other respondents knew full well that a statement in reply was required. They had ample opportunity to file a statement in reply and were reminded of the requirement. I am satisfied they have chosen not to engage.

[18] That being the case, I can proceed to deal with this matter on the basis of the comprehensive material filed by Turuki and I will do so now on the papers.

The application

[19] Turuki seeks the making of the interim orders permanent together with penalties, general damages and indemnity costs.

[20] I deal first with the question of the permanent orders sought. Interim orders have already been made. I am satisfied that the proper course is to make those interim orders permanent ones.

[21] I reached that conclusion for two principal reasons. The first is that while there seems to have been no continuing publicity since the interim orders were made, there have been ample threats of further publicity concerning Turuki and secondly, the non-disparagement provision of the record of settlement has been extensively broken by Mr Halse and Ms Simpson in correspondence with Mr Drake. It is apparent that the observations made by the respondents in their communications with Mr Drake continue to find fault with Turuki notwithstanding the plainest evidence that the parties to the settlement agreement entered into a voluntary commitment, a

fundamental term of which there was no admission of liability by Turuki to having bullied the first respondent or indeed anybody else. References such as Ms Simpson's allegation that Turuki *continue their offending* are clear breaches of that.

[22] A final and subsidiary point but one that is appropriate to mention is the evidence from CultureSafe's Facebook page of its enthusiasm to *name and shame* employer parties who, according to CultureSafe breached their health and safety obligations to staff.

[23] That willingness to engage in that sort of offensive and improper identification of parties suggests to me an undesirable enthusiasm for exposing what CultureSafe sees as wrongdoing even if there is no evidence of such wrongdoing save for CultureSafe's own representations on the matter.

The issues

[24] It will be necessary for me to address the following questions:

(a) the place of the Protected Disclosures Act 2000;

(b) should penalties be awarded;

(c) are general damages appropriate?

The place of the Protected Disclosures Act

[25] It is appropriate that I address the respondents' apparent reliance on the Protected Disclosures Act 2000. While, as I have already noted, the respondents have filed no submissions in this matter, there is frequent reference in their correspondence with Turuki and Turuki's counsel, to the Protected Disclosures Act as if that statute either provided some protection to the respondents or indeed somehow justified their behaviour.

[26] I do not accept that the Protected Disclosures Act 2000 either justifies the behaviour of the respondents or protects them. The short point is that the respondents entered into a voluntary record of settlement with specific terms relating to

confidentiality and non-disparagement and they have flagrantly breached those obligations by their behaviour and communication strategy.

[27] My colleague Member Arthur observed in P v. Q [2015] NZEA Auckland 181, a case where the respondent relied on the New Zealand Bill of Rights Act 1990 to justify his conduct, that the overarching principle of free speech is constrained by the commitment made to confidentiality in a settlement agreement.

[28] To quote Member Arthur's Determination:

> While s.14 of the New Zealand Bill of Rights Act affirms (the respondent's) public right to impart information and opinions of any kind in any form, (the respondent) chose to fetter his own public right by exercising his private and personal right to enter a legally binding agreement ...

Should penalties be awarded?

[29] I turn now to consider Turuki's submission for the imposition of a penalty in respect to a breach of the settlement agreement

[30] The grounds on which the Authority may consider evaluating the quantum of any penalty are clearly enunciated in the decision of Judge Inglis (as she then was) in *Tan v Yang* [2014] NZEmpC 65.

[31] The several factors that the Authority must consider begin with the seriousness of the breach. In this case, I accept the submissions for Turuki to the effect that the breaches are serious, that the respondents undertook a deliberate and sustained attack on Turuki and the settlement agreement and in particular, in the letter to the responsible Minister, Hon. Iain Lees-Galloway, MP, the respondents specifically allege that Turuki was engaged in bullying behaviour and they suggest an investigation into that behaviour, given Turuki was a recipient of tax payer funding.

[32] It is hard not to assess that conduct as designed to cause harm to Turuki by damaging its reputation.

[33] The second element to consider is whether there are ongoing breaches. This is a clear case where the breaches are ongoing, deliberate and sustained.

[34] Next, is the impact, if any, on the claimant. While it is difficult at this point to identify what, if any, impact there has been on Turuki, it is hard to believe that the sustained attack on its credibility in the public domain has not had an effect on Turuki's reputation with funders and other stakeholders.

[35] The next element to consider is the need for deterrence. The present case involves the flagrant breach of the clear terms of the settlement agreement. The particular terms of that settlement agreement that are breached are the confidentiality provision and the non-disparagement provision.

[36] It is a truism that the vast majority of mediated settlement agreements contain a confidentiality provision and while non-disparagement clauses are less common, there is a clear need to deter parties from contemplating flagrant breaches of voluntarily agreed settlement terms.

[37] There is no evidence whatever of any remorse being shown by the respondents; indeed, quite the reverse is the case. The respondents appear to behave as if it is their bounden duty to continue to make these statements which breach their obligations under the settlement agreement.

[38] Finally, there are few precedents to guide the Authority in assessing the range of penalties imposed in other comparable cases. I have been referred to only one decision which is *Tibbitts v EWP Sales Limited* [2015] NZERA Auckland 236 where a flagrant and deliberate breach of a provision contained in a settlement agreement resulted in an award of the maximum penalty for an individual of $10,000.

[39] The total penalties available in the present case could amount to $50,000 because CultureSafe as a corporate entity could be penalised to the tune of $20,000 and each of the individuals could be penalised to the tune of $10,000.

[40] However, I am not persuaded there is evidence that the first respondent has any involvement in the breaches and I do not propose that she be subject to any penalties. I should for the sake of completeness make clear that Turuki does not seek a penalty against the first respondent.

[41] The penalties sought by Turuki are in the sum of $30,000 being $10,000 for each of CultureSafe, Mr Halse, and Ms Simpson. I think this is a case where the

maximum penalty ought to be imposed in respect of those individuals/entities for the reasons that have already been enunciated.

Are general damages appropriate?

[42] General damages are also sought. A figure of $3,500 is submitted as being appropriate, $500 to come from the first respondent and the balance of $3,000 to be paid jointly and severally by CultureSafe, Ms Simpson and Mr Halse.

[43] The law on general damages is clear enough. It exists as a mechanism for compensating a party where its losses are not easy to calculate. As with all cases involving compensatable loss, the principle that applies is the aggrieved party is entitled to an amount that will restore it to substantially the same position financially that it would have been in if that other party had not caused the damage which in turn occasioned the loss.

[44] It is acknowledged that in many of these cases, as in this case, quantification of the loss is not straightforward. But as Chief Judge Goddard observed in *Medic Corporation Limited v Barrett* (No. 2) 1992 3 ERNZ 977, loss of executive time may be recovered as general damages and the fact that it was difficult to calculate the actual loss did not mean that the claim could not be made.

[45] In the present case, it is plain that the respondents breached the settlement agreement that they entered into with Turuki and by doing that they infringed Turuki's rights, and in the course of trying to restore Turuki to the position it was in prior to the default, Turuki and its executive team have suffered disruption and inconvenience. But more importantly, it had to divert resources away from their core business, to addressing this matter.

[46] A claim for $3,500 is made, as I have already noted. However, I am not persuaded that the first respondent, Ms Makea-Ruawhare ought to contribute at all as it is difficult to see any evidence that she is involved in any way in the breaches by the other respondents, save by giving her name to the initial proceeding. That being the case, I intend to award general damages of $3,000 only to be paid jointly and severally by CultureSafe, Ms Simpson and Mr Halse.

Determination

[47] I now make the following orders:

(a) The interim orders I made in the first Determination in this matter which are set out in paragraph 19 of that Determination are now to become permanent orders;

(b) I grant permanent orders suppressing any publication relating to the settlement agreement or Ms Makea-Ruawhare's employment with Turuki;

(c) I order that CultureSafe NZ Limited, Ms Simpson and Mr Halse jointly and severally pay a total of $30,000 as a penalty in terms of s.149(4) of the Employment Relations Act 2000 and that that penalty be paid to Turuki;

(d) I direct that CultureSafe NZ Limited, Ms Simpson and Mr Halse jointly and severally pay to Turuki the sum of $3,000 as general damages;

(e) Those payments to be made within 30 days of the date of this Determination.

Costs

[48] Turuki have made extensive submissions in respect to costs and seek an order for indemnity costs.

[49] I feel obliged to make a further request to the respondents that they address this issue by filing submissions on the fixing of costs. They have 14 days from the date of this Determination to file a submission as to costs. Forthwith, after the expiry of that 14 day period, I will address costs on the papers.

[50] Because Turuki seek indemnity costs, I ask their counsel to provide me with evidence of the total amount spent by Turuki in his firm's legal services in this matter and I direct that a copy of that information is to be provided to the respondents as well, to assist them in compiling and then filing their submissions in the matter.

James Crichton
Chief of the Employment Relations Authority