

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 147
3014452

BETWEEN VIRAT VIJ
Applicant

A N D NELSON-MARLBOROUGH
INSTITUTE OF TECHNOLOGY
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
K Chapman, Advocate for Respondent

Investigation Meeting: Determined on the papers by consent

Submissions Received: 14 and 28 August 2017 from Applicant
23 and 29 August 2017 from Respondent

Date of Determination: 7 September 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. The respondent did not breach the terms of the record of settlement.

B. Costs are reserved.

Prohibition from publication order

[1] The terms of the record of settlement that are the subject of these proceedings are expressed to be confidential to the parties and I prohibit from publication the terms of the record of settlement save to the extent set out in this determination.

Employment relationship problem

[2] Mr Vij alleges that the respondent has breached the terms of a record of settlement entered into between the parties in respect of obligations of the respondent concerning the giving of references. The respondent denies that it has breached the terms of the record of settlement.

Background

[3] Mr Vij was employed by the respondent as an International Marketing Manager. The parties entered into a record of settlement which, although signed by the parties, was not dated by them. However, Benjamin McGregor, a mediator at Wellington, signed the standard certificate pursuant to s.149(1) and (3) of the Employment Relations Act 2000 (the Act) on 5 September 2017. The respondent does not argue that it is not bound by the record of settlement.

[4] The record of settlement recorded that Mr Vij's employment had ended by reason of redundancy and, pursuant to its terms, the respondent agreed to make certain payments to Mr Vij.

[5] The following paragraphs of the record of settlement are material to the matter currently to be determined:

7. The parties agree not to speak ill of each other, and the employee will not speak ill of any person employed by NMIT, past or present, or the work carried out by NMIT or its joint venture partners. In addition, the Employee will maintain as confidential the Employer's business affairs and will not make any comment to third parties. The employee's only comment to third parties will be that his position in NMIT was disestablished.
8. The two attached written references will be provided to the employee, one each from Tony Gray and Virginia Watson. They will be provided on NMIT letterhead and signed respectively, and provided within 3 working days of a Ministry of Business, Innovation and Employment mediator signing this agreement.
- ...
10. This is the full and final settlement of all matters between the Applicant and the Respondent arising out of their employment relationship.

[6] The two attached written references referred to in para.8 of the record of settlement stated as follows:

Draft
23 August 2016

To Whom It May Concern

Testimonial for Virat Vij

Virat was employed at Nelson Marlborough Institute of Technology as the International Market Manager from 19 May 2014 to 19 March 2016. His employment with us ended due to redundancy.

In this position Virat was required to travel internationally, representing the Institute. Virat's geographical areas of responsibility were India and Nepal. In these areas he was responsible for market development and recruitment that made a significant contribution to both the financial and international recruitment goals of NMIT.

The position of International Market Manager developed and supported the growth of international business, supporting NMIT's International Education Strategy, contributing to New Zealand's export education goals, regional economic and social development and opportunities for community engagement.

The position also contributed to the overall support for international students through pastoral care input.

Virat was very successful at meeting annual recruitment targets. He worked well with agents, forming the required relationships and promoting NMIT in an effective manner.

As Virat explores alternative career opportunities I wish him well in his future endeavours.

Yours sincerely,

Tony Gray
Chief Executive

[7] The reference letter from Virginia Watson (the Director of Marketing and International Development for NMIT) was in essentially the same terms although differing slightly. As Mr Vij argues that the respondent has failed to comply with its obligations in respect of the giving of references, I set out the full text of the reference document signed by Ms Watson as follows:

Draft
23 August 2016

To Whom It May Concern

Reference for Virat Vij

Virat was employed at Nelson Marlborough Institute of Technology as the International Market Manager from 19 May 2014 to 19 March 2016. His employment with us ended due to redundancy.

In this position Virat was required to travel internationally, representing the Institute. Virat's primary geographical areas of responsibility were India and Nepal. In these areas he was responsible for market development and recruitment that made a significant contribution to both the financial and educational recruitment goals of NMIT.

The position of International Market Manager developed and supported the growth of international business, supporting NMIT's International Education Strategy, contributing to New Zealand's export education strategy, regional economic development and industry engagement and regional social development and community engagement.

Virat worked very well to targets, ensuring he remained focused and motivated to achieve the best recruitment results possible. He travelled independently requiring minimal supervision or guidance, managing his own travel arrangements and itinerary.

I wish Virat well in his future endeavours.

Yours sincerely,
Virginia Watson
Director of Marketing and International Development

[8] On 23 March 2017, Ms Watson received an email from a marketing officer from the Regent International Education Group based in Queen Street, Auckland. This email to Ms Watson was as follows:

Subject: Reference check for VIRAT VIJ

Hello Ms Virginia.

Greetings from Regent International!

We would like to kindly advise you that **Virat Vij** (former employee of NMIT) has been shortlisted to be part of our team, and your name was given as one of his referees.

We are considering him to be our Marketing Manager for India and other Subcontinent and we appreciate if you can tell us more about him, please. Below are our questions that is certainly going to help us decide further on his application.

1. What was the reason why did Virat Vij leave NMIT?
2. Is he trustworthy?
3. How was his attitude towards his work and colleagues?
4. If given a chance that he'll apply back in your good institution, will you re-hire him?
5. Is there anything else that we should consider before we hire this candidate?

Thank you very much for your time and we look forward to hearing from you soon.

Let's have a great day!

Regards
Dhianna Micaller-Gamboa
Marketing Officer
Regent International Education Group

[9] Ms Watson responded in the following terms on the same day, four hours later:

Subject: RE: Reference check for VIRAT VIJ

Hi Dhianna,

Virat worked for NMIT, and his position was disestablished in a restructure.

All the best.
Virginia Watson
Director of Marketing and International Development

[10] It is Mr Vij's contention that the response given by Ms Watson to the reference request was in breach of the terms of the record of settlement. Specifically, Mr Vij contends that the respondent should have sent in response the actual reference document rather than giving an incomplete reference. In addition, Mr Vij contends that the nature of the response given by Ms Watson constituted a breach of the agreement not to speak ill of him as the failure to answer the questions of the prospective employer would lead it to draw a conclusion that Mr Vij was not suitable for the position and would raise alarm bells as to why his position had been restructured.

[11] Mr Vij also contends that the respondent has failed to act in good faith.

[12] In his statement of problem, Mr Vij sought damages of two years' salary plus an average commission, which he computed at around \$500,000 in total. He subsequently scaled these damages down considerably.

[13] It is the respondent's position that there was no obligation in the record of settlement upon the respondent to complete or provide any reference in addition to those specified in clause 8. Further, it contends that the record of settlement does not prohibit the respondent from stating to third parties that employment ended by reason of redundancy.

[14] Upon receiving the statement of problem and the statement in reply, the Authority reached a preliminary conclusion that Mr Vij's case, as stated in his statement of problem, was frivolous (in that it suffered from a significant lack of legal merit so as to make it impossible for the claim to be taken seriously) and so could be liable to be struck out in its entirety. Mr Vij was given the opportunity to comment upon this, which he did by way of his written statement dated 14 August 2017.

[15] Mr Vij conceded in his statement of problem that the damages he was seeking in the statement of problem were "somewhat excessive" and limited his claim to \$20,000. However, he maintained that he had a claim based upon good faith. He also made the following statement:

Mr Vij is willing to go to the media, Employment Court and every authority until this issue is resolved to his satisfaction.

[16] The respondent replied to this statement stating that it regarded the claim to be frivolous and asking for it to be struck out. This was on the basis that there was no obligation on the respondent to provide a reference in addition to the written references already provided.

[17] Mr Vij lodged a further written statement on 28 August 2017 in which he made various assertions and contentions, the nub of which I infer to be that Ms Watson providing the limited response she did to the request for information from the prospective employer caused Mr Vij harm. He also reiterated the duty of good faith that he says applies.

Is the record of settlement enforceable in the Authority?

[18] Section 149 of the Act provides as follows:

149 Settlements

(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.
- (3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.
- (4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[19] Section 151 of the Act provides as follows:

151 Enforcement of terms of settlement agreed or authorised

- (1) This section applies to—
 - (a) any agreed terms of settlement that are enforceable by the parties under section 149(3);
 - (b) any recommendation that is enforceable by the parties under section 149A(5);
 - (c) any decision that is enforceable by the parties under section 150(3).
- (2) A matter referred to in subsection (1) may be enforced—
 - (a) by compliance order under section 137; or
 - (b) in the case of a monetary settlement, in one of the following ways:
 - (i) by compliance order under section 137;
 - (ii) by using, as if the settlement, recommendation, or decision were an order enforceable under section 141, the procedure applicable under section 141.

[20] First, I am satisfied that the record of settlement in question is one that complies with s.149 of the Act. It is therefore enforceable in the Authority. However, in accordance with s.151(2) of the Act, it is enforceable only by compliance order under s.137 of the Act. Subsection 151(2)(b) does not apply here as Mr Vij is not asserting that the monetary aspects of the record of settlement had not been complied with.

[21] Section 149(4) of the Act states that a penalty may be imposed by the Authority upon a person who breaches a record of settlement. Therefore, the only remedies available to Mr Vij in respect of the record of settlement is an order to the respondent to comply with its terms and/or the imposition of a penalty on the

respondent if it has breached any of the terms. The maximum amount of penalty that may be imposed upon the respondent is \$20,000 per breach.

Has the respondent breached the record of settlement by not sending a copy of the written references to Regent International Education Group?

[22] The respondent was obliged to provide two written references to Mr Vij in accordance with paragraph 8 of the record of settlement. Mr Vij is not alleging that these two written references were not provided to him in accordance with the terms of paragraph 8. I understand that he is asserting that Ms Watson should have provided a copy of the written reference to the prospective employer. However, the record of settlement does not state that that was to be done. In fact, the record of settlement is completely silent in respect of the respondent's obligations towards Mr Vij in the event (which would have been quite predictable) that a prospective employer contacted it for information about him.

[23] Therefore, I cannot find that the respondent breached any term of the record of settlement when Ms Watson did not send a copy of the written reference to Regent International Education Group.

Did the respondent breach any obligations towards Mr Vij by Ms Watson replying in the way she did?

[24] There is no express term in the record of settlement stating what the respondent was to do if it received a request for a reference from a prospective employer. It was therefore neither expressly obliged to respond to a request, nor to do so in a specific way, save that it was not to speak ill of Mr Vij. Nor was the respondent prohibited from responding to a request for a reference. Therefore, the respondent replying to the request for a reference from Regent International Education Group in the way it did cannot be in breach of any term of the record of settlement.

Did the respondent breach the term in the record of settlement prohibiting it from speaking ill of Mr Vij?

[25] I do not believe that it did. First, Ms Watson said nothing in the response to Regent International Education Group that was not literally true. Secondly, the prohibition on "speaking ill" of Mr Vij is a prohibition not to make positive statements in my view. I do not believe that its meaning can be extended to include the respondent failing to make statements.

Does the respondent owe a duty of good faith to Mr Vij after the ending of his employment?

[26] The record of settlement is expressed to constitute the full and final settlement of all matters between Mr Vij and the respondent arising out of the employment relationship. The duty of good faith exists during an employment relationship. Section 4(2) of the Act sets out in a list which parties to an employment relationship are obliged to deal with each other in good faith. That list, in s.4(2), is a closed list and does not make reference to former employees. The duty of good faith owed by the respondent to Mr Vij therefore ended when his employment ended. I do not accept that there is any continued duty of good faith imposed by the record of settlement upon the respondent in respect of Mr Vij which obliged it to take an action not expressly provided for in the terms of that record of settlement.

[27] I do not know whether Mr Vij was legally represented when he entered into the record of settlement but, if he had wanted the respondent to respond to prospective employers' inquiries about him in a particular way, that expectation needed to have been recorded expressly and unambiguously in the terms of the record of settlement. They were not, and I do not accept that it is possible to imply into the record of settlement a duty upon the respondent to respond to prospective employers' inquiries about him in a particular way.

[28] I conclude by saying that I do appreciate that Mr Vij has had difficulty in finding new employment since he left the employment of the respondent and that he attributes this difficulty, at least partly, to the respondent's response to the prospective employer, Regent International Education Group. However, even if that prospective employer decided not to employ Mr Vij on the strength of the response it received from Ms Watson to its inquiries about him, that response was not an unlawful one by reference to the terms of the record of settlement.

[29] Mr Vij spoke in his written submissions about wishing to have justice. The problem with this is that everybody has their own idea of justice and different parties to the same employment relationship problem can have very different views as to how justice should be achieved. This is why the Authority must make its determinations by reference to the existing legislation and established legal principles.

[30] Finally, I refer to Mr Vij's statement that he will "go to the media, Employment Court and every authority until this issue is resolved to his satisfaction".

He is, of course, entitled to challenge this determination in the Employment Court. However, I caution him against the use of the media in his quest for satisfaction, as that would be likely to put him in direct breach of the confidentiality terms of the record of settlement. He had also threatened to speak to students to “tell the truth about the shady practices of the organisation”. To follow such a path would be likely to put him in breach of the non-disparagement clause of the record of settlement. Again, I caution him against such an approach.

Determination

[31] For the reasons set out above, Mr Vij fails in his application against the respondent.

Costs

[32] Costs are reserved. If the respondent has incurred costs in defending the claims against it by Mr Vij, and it wishes Mr Vij to make a contribution towards those costs, it should first seek to agree with Mr Vij how those costs are best to be dealt with.

[33] If the parties are unable to agree how costs are to be dealt with within 14 days of the date of this determination, then the respondent may, within a further 14 days, make an application in writing to the Authority, copying in Mr Vij, setting out the amount of the contribution towards its costs that it seeks from him and the basis of that. Mr Vij will then have a further 14 days within which to lodge and serve any written reply.

David Appleton
Member of the Employment Relations Authority