

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 244
3014671

BETWEEN	X First Applicant
A N D	Y Second Applicant
A N D	Z Respondent

Member of Authority: Rachel Larmer

Representatives: Susan Hornsby-Geluk, Counsel for Applicants
Respondent in person

Investigation Meeting: On the papers

Submissions Received: 04 August 2017 from Applicants
04 August 2017 from Respondent
11 August 2017 from Respondent

Date of Determination: 18 August 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The parties entered into a Record of Settlement agreement signed under s.149 of the Employment Relations Act 2000 (the Act) by a mediator on 23 February 2017.

[2] The applicants claim that Mr Z has breached clauses 3 and 4 of the Record of Settlement. Clause 3 is a confidentiality clause. Clause 4 is a non-disparagement clause. Clause 4 also specifically records that a breach of the non-disparagement obligation “*will be regarded as a serious and material breach of this Record of Settlement*”.

[3] The applicants claim Mr Z breached clause 3 of the Record of Settlement by posting information about the employment relationship problem and its resolution to his Facebook page.

[4] The applicants further claim that Mr Z breached clause 4 of the Record of Settlement because the information he posted to his Facebook page was disparaging and that information in a number of emails he sent after the Facebook posting was also disparaging.

[5] On 27 June 2017 Mr Z posted a comment on his publicly accessible and visible Facebook profile which referred to the second applicant by name and to the employment relationship issues. Mr Z's comment on his Facebook page resulted in a thread of negative comments being made and posted about Mr Y and his partner on Mr Z's Facebook page.

[6] The applicants allege that Mr Z made further disparaging comments about Mr Y and his partner in his responses to the ensuing Facebook message thread which followed Mr Z's initial comments about Mr Y and the employment relationship issues.

[7] Mr Y claims that the comments made by Mr Z on his Facebook page were disparaging about him and therefore breached clause 4 of the Record of Settlement.

[8] Mr Z admits making the material comments on his Facebook page but says he thought it was a private communication to friends and family. Mr Z does not accept that the comments are disparaging.

[9] The applicants allege that Mr Z has also breached clause 3 of the Record of Settlement by failing to keep all matters that resulted in the Record of Settlement confidential.

[10] Clause 3 of the Record of Settlement provides that the parties were to keep all matters regarding Mr Z's claims, the Authority proceeding, the terms of settlement and even the fact that settlement had been reached confidential.

[11] The applicants allege that Mr Z breached clause 3 when he made the comments that he did on his Facebook page.

[12] When the applicants' counsel wrote to Mr Z seeking an undertaking that he refrain from further breaches of the Record of Settlement and requiring that the offending Facebook posts and subsequent thread be deleted, Mr Z did not respond.

[13] The applicants seek a compliance order requiring Mr Z to comply with the Record of Settlement by deleting the offending Facebook post and subsequent comments/thread and by requiring him to fully comply with all terms in the Record of Settlement to avoid further similar breaches of the Record of Settlement.

[14] The applicants also seek penalties of \$10,000 in respect of each discrete breach of the Record of Settlement.

[15] The applicants ask that any penalties awarded paid to them and not to the Crown. The applicants also seek indemnity costs.

The issues

[16] The following issues are to be determined:

- (a) Did Mr Z breach clause 3 of the Record of Settlement?
- (b) Did Mr Z breach clause 4 of the Record of Settlement?
- (c) If so, should a penalty be imposed?
- (d) If so, should some or all of any penalty be paid to the applicants?
- (e) Should a compliance order be issued?
- (f) What if any costs should be awarded?

Did Mr Z breach clause 3 of the Record of Settlement?

[17] Clause 3 of the Record of Settlement states:

All matters related to the employee's personal grievance and the proceedings in the Employment Relations Authority (including the substance of the employee's personal grievance and claims in the Authority, and all matters alleged by the employer), the terms set out in this Record of Settlement, and the fact settlement has been reached, are strictly confidential to the parties and their representatives, except as required by law.

[18] On 27 June 2017 at 7.13am Mr Z posted on his Facebook page a comment which referred to Mr Y by name and to the fact that he had negotiated his way out of an employment relationship issue.

[19] I am satisfied that the posting Mr Z made to his Facebook page referred to the fact that there had been an employment relationship problem, that there had been negotiations between the parties and that the matter had been settled. There was also a strong implication that it had been settled by way of a payment in Mr Z's favour.

[20] I am therefore satisfied that Mr Z's posting to his Facebook page on 27 June 2017 at 7.13am breached clause 3 of the Record of Settlement.

Did Mr Z breach clause 4 of the Record of Settlement?

[21] Clause 4 of the Record of Settlement states:

The parties agree that they will not make any disparaging comments about each other at any time in the future. The parties agree that for the purposes of this clause, the employer includes [Mr Y]. The parties further agree that any breach of this clause will be regarded as a serious and material breach of this Record of Settlement.

[22] Disparaging comments are not defined in the Act or in the Record of Settlement so they are to be interpreted in line with the common or ordinary meaning attributed objectively to the words. The Concise Oxford English Dictionary¹ defines "*disparage*" as "*bring discredit on; speak slightingly of, depreciate*".

[23] I do not consider it necessary to repeat the comments made by Mr Z on his Facebook page. Suffice to say they are clearly negative and paint Mr Y in a bad and negative light. The disparagement continues in Mr Z's responses to the comments posted by others in response to his initial posting because Mr Z is negative about Mr Y.

[24] I recognise that Mr Z is not responsible for any adverse comments made by others who commented on his original Facebook post or subsequent comments so I am careful to only hold Mr Z responsible for comments he has personally made on his Facebook page.

¹ 7th edition, Oxford at the Clarendon Press.

[25] I find that all of the comments identified by Ms Hornsby-Geluk in her submissions which were made by Mr Z about Mr Y unquestionably express negative and derogatory sentiments about Mr Y. Mr Z has therefore breached clause 4 of the Record of Settlement.

[26] In addition to the originating posting which occurred at 7.13am on 27 June 2017 and included disparaging comments about Mr Y, Mr Z made three further disparaging comments in response to comments that others had posted in response to his original posting.

[27] Ms Hornsby-Geluk also drew the Authority's attention to Mr Z's response to the applicants' proceedings which she says involved continuing disparagement by Mr Z of Mr Y.

[28] Ms Hornsby-Geluk refers to two emails on 6 July, an email on 10 July and an email on 21 July 2017 all of which involve Mr Z making disparaging comments about Mr Y.

[29] I find that the emails referred to by Ms Hornsby-Geluk all contained comments which were negative, adverse and derogatory of Mr Y. These are therefore also in breach of the non-disparagement clause in the Record of Settlement.

Should a penalty be imposed?

[30] Section 149(4) of the Act allows the Authority to impose a penalty of up to \$10,000 on an individual for a breach of a Record of Settlement. Each time Mr Z breached the Record of Settlement he became potentially liable to a penalty being imposed on him for each discrete breach.

[31] Section 133A of the Act sets out a number of factors the Authority should consider when determining penalties. I have had regard to those.

[32] The Employment Court in *David Lumsden v Sky City Management Ltd*² identified two further factors in addition to those specified by s.133A of the Act as relevant to an assessment of penalties, namely the need for general and particular deterrence and the desirability of broad consistency with other penalties in similar cases. I have also accounted for those two additional factors when assessing penalties.

² [2017] NZEmpC 30.

[33] The Employment Court in *Labour Inspector v Preet Pvt Ltd & Warrington Discount Tobacco Ltd*³ set out a four stage approach to the determination of penalties sought by a Labour Inspector. I have adopted that approach to fixing penalties in this matter.

[34] This is a case in which penalties need to be imposed. There is a clear need for punishment, to signal the Authority's disapproval and to act as a disincentive for others who may be inclined to breach their Record of Settlement obligations.

[35] The Record of Settlement specifically stated that a breach of the non-disparagement clause would be regarded as a "*serious and material breach*". Mr Z agreed to that term by signing the Record of Settlement on 20 February 2017.

[36] Mr Z was on notice that there was likely to be adverse consequences for him if he did not adhere to his obligations under the Record of Settlement. Just over four months after entering into these obligations Mr Z posted disparaging comments to his Facebook page. He also sent a number of subsequent emails which also disparaged Mr Y.

[37] I find that there were five breaches of the Record of Settlement which occurred as a result of Mr Z's Facebook postings on 27 June 2017. Mr Z engaged in five further breaches of the non-disparagement clause by disparaging Mr Y in emails Mr Z wrote dated 2 July (two on this date), 10 July, 14 July and 21 July.

[38] For the purposes of assessing penalties I consider that Mr Z engaged in 10 breaches of the Record of Settlement which were drawn to the Authority's attention in these proceedings. The maximum potential penalties that may be imposed for Mr Z's breaches of the Record of Settlement are \$100,000 (10 x \$10,000).

[39] In considering the severity of Mr Z's breaches, I have regard to the nature and effect of the breach, whether it was intentional, the nature of any loss suffered and whether there were any previous breaches.

[40] I consider that these breaches were serious and material as provided for in clause 4 of the Record of Settlement.

³ [2016] NZEmpC 149.

[41] I consider that the breaches that occurred in the emails that Mr Z sent over the period 6-21 July 2017 were more serious because those breaches occurred after Mr Z had been put on notice by way of these Authority proceedings that the applicants considered he had breached the Record of Settlement a number of times.

[42] I do not consider there has been any quantifiable loss to Mr Y although I acknowledge that he believes that there has been some damage to his reputation. I consider that there was a narrow audience of Mr Z's friends and family for the Facebook postings which were in breach of the Record of Settlement.

[43] Although these could be publicly viewed (and were obviously viewed by the applicants and/or their representative), this was not publication in the news media. The emails were viewed by a limited number of people who were already aware of the issues between the parties.

[44] I consider the Facebook breaches and the email breaches to be of a similar degree of severity because the email disparaging comments were made after the Authority proceedings had been filed for a breach of the Record of Settlement. That meant Mr Z was clearly on notice about what the applicants had objected to in terms of his communications to others which I consider is an aggravating feature of the breaches that arose from his emails.

[45] In terms of mitigating circumstances, Mr Z has been involved in a relationship breakup that has obviously coloured his view of the matters in issue. However, balanced against Mr Z's adverse reaction to his relationship breakup is the fact that he has not expressed remorse or provided any indication that he understands the seriousness of breaching a Record of Settlement or the potential harm his breaches have done to the applicants.

[46] Nor has Mr Z provided any undertakings to act appropriately in future. During the telephone conference with the Authority, Mr Z told the Authority that he wanted to cause Mr Y harm because he (Mr Z) blamed Mr Y for Mr Z's current situation and for his personal and relationship difficulties.

[47] I consider that the fact that the Record of Settlement emphasised how important the non-disparagement clause was is an aggravating feature of Mr Z's breaches.

[48] These breaches were not trivial or inadvertent. Mr Z has indicated his desire to “*expose*” the applicants in a public manner. I consider that Mr Z’s comments about that coupled with his actions in making public Facebook comments together with his failure to demonstrate any remorse or to provide any undertakings regarding his future compliance with the Record of Settlement obligations are factors to consider when assessing the level of penalties to be imposed.

[49] In terms of assessing Mr Z’s ability to pay, he was invited to provide evidence regarding his financial means. Mr Z’s financial information was minimal at best. He did not address what he had done with a lump sum he had received earlier in 2017.

[50] Mr Z confirmed he was self-employed so had the ability to increase his income depending on how much work he undertook.

[51] In general terms the imposition of a penalty is likely to impose some hardship on a party so some hardship is an expected consequence of a party’s wrongdoing. There was insufficient evidence available to enable the Authority to determine that any penalty should be reduced on the grounds of Mr Z’s inability to pay.

[52] In terms of consistency with other penalties imposed for breaches of non-disparagement and confidentiality provisions in records of settlement, the penalties have ranged from a low of \$250 to a high of \$7,500.

[53] I consider that a total overall penalty in this matter of \$6,000 is appropriate and in line with other Authority determinations. I have adopted the totality approach to penalties so have imposed one overall penalty instead of discrete penalties for each individual breach.

Should some or all of the penalties imposed be paid to the applicants?

[54] Penalties are normally paid to the Crown and not to an applicant who has made a penalty claim. However the applicants have asked that some or all of any penalties imposed be paid to them personally.

[55] Section 136(2) of the Act enables the Authority to award some or all of a penalty imposed to any person instead of the Crown. I consider it appropriate to do so in this case.

[56] Within 28 days of the date of this determination, Mr Z is ordered to pay:

- (a) The sum of \$2,000 of the penalty that has been imposed to the first respondent;
- (b) The sum of \$2,000 of the penalty that has been imposed to the second respondent; and
- (c) The sum of \$2,000 of the penalty that has been imposed to the Crown bank account.

Should a compliance order be issued?

[57] I am satisfied that there have been breaches of the Record of Settlement Mr Z's conduct during the Authority's telephone conference tends to suggest that if a compliance order was not issued Mr Z would engage in further or ongoing breaches of the Record of Settlement because he does not appear to understand the seriousness of him breaching a Record of Settlement.

[58] I consider there is a significant risk that the breaches will be ongoing given Mr Z's stated desire to "*teach the applicants a lesson*" and his wish to "*expose*" them notwithstanding the adverse effects that may have on him and/or his children.

[59] A compliance order is discretionary with the discretion having to be exercised on a principled basis. I am satisfied that Mr Z has breached the Record of Settlement on a number of occasions so the Authority does have jurisdiction to issue a compliance order regarding breaches that have already occurred.

[60] I consider that a compliance order is necessary to compel Mr Z to comply with clauses 3 and 4 of the Record of Settlement to prevent him from continuing to make disparaging comments about the applicants and to prevent him from breaching the confidentiality the parties agreed to.

[61] Because I have found that the Facebook post and subsequent comments breach Mr Z's obligations under the Record of Settlement he will need to ensure these are permanently removed from his Facebook page and that he adheres to the confidentiality and non-disparagement obligations he previously agreed to which means he is not to make additional disparaging comments about the applicants in his social media.

[62] Mr Z is ordered to comply with the Record of Settlement and in particular to observe the non-disparagement and confidentiality clauses immediately which will run from the time he receives this determination.

[63] Failure by Mr Z to comply with this compliance order is likely to attract more significant penalties than have been imposed on him today.

Costs

[64] The parties are encouraged to resolve costs by agreement. If that does not occur then the applicants have seven days within which to file a costs application with Mr Z having seven days within which to reply.

Rachel Larmer
Member of the Employment Relations Authority