ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 331
3130194

	BETWEEN	BNY Applicant
	AND	EDJ AND DZF Respondent

Member of Authority:	Philip Cheyne
Appearances:	BNY, the Applicant EDJ and DZF, the Respondents
Investigation Meeting:	15 June 2021, at Christchurch
Date of Determination:	28 July 2021

DETERMINATION OF THE AUTHORITY

A. EDJ and DZF breached clause 6 of the record of settlement.

B. No orders are required to enforce the record of settlement.

C. Costs are reserved, subject to the timetable indicated below.

Employment relationship problem

[1] BNY entered into a record of settlement with EDJ and DZF. BNY says that EDJ and DZF breached the record of settlement and now seeks enforcement of the agreement.

[2] EDJ and DZF say that they did not breach the agreement. They say that BNY breached the agreement.

Non-publication

[3] A record of settlement was completed under s 149 of the Employment Relations Act 2000. It includes an obligation that its terms and all matters discussed in mediation shall remain confidential to the parties, so far as the law allows (clause 1). The parties agreed not to make any disparaging comment about the other (clause 6). It is a full and final settlement of all matters between the parties arising out of their employment relationship (clause 8).

[4] I raised with the parties whether I should make a non-publication order, specifically to protect their agreement about confidentiality. Information about BNY's health circumstances could also become public. EDJ and DZF supported an order. Circumstances are such that identifying one party would be likely to cause the identity of the other party to be known, at least in the community where they live. It is important for both sides that I maintain the integrity of their binding agreement about confidentiality. Enduring confidentiality is often an important part of why employment relationship problems can be resolved between the parties without the need for judicial intervention. No wider public interest is served by eroding the agreed confidentiality. I consider that the names of the parties should not be published. There will be an order to that effect.

Record of settlement

[5] The record of settlement was signed by a mediator on 24 December 2020. EDJ and DZF were required to make the first payment within 5 working days. EDJ and DZF made the payment on time. A further payment is due later this year.

[6] Section 149(3) of the Act provides that, except for enforcement purposes, no party may bring the terms of a settlement under s 149 before the Authority. BNY seeks enforcement of the agreement. In her statement of problem, BNY says that she is concerned

that EDJ and DZF will not stop harassing her unless measures are put in place and that she does not trust that the future payment would be made without more unnecessary and unwanted contact.

[7] I will first set out relevant events in December around the settlement, before assessing whether there has been a breach of the record of settlement, and if so, what should be ordered by way of enforcement.

What happened in December 2020?

[8] In evidence is an email exchange between EDJ and DZF and their solicitor dated 22 December 2020. EDJ asked whether she could write a letter to BNY saying how her actions had affected them, others and their business. The solicitor replied that they were entitled to do that. The email exchange followed BNY's acceptance of a settlement offer by EDJ and DZF but was shortly before the record of settlement was signed by the mediator. BNY doubts that the solicitor specifically approved the text of the email and the attachment before they were sent. It is not necessary to make any finding on the point, as it makes no difference to the outcome.

[9] BNY received an email at 8.56pm on 24 December from EDJ and DZF. The signature line included their daughter's name. It is not likely that the daughter would have actually been part of the drafting of the email, given her age. I accept the evidence of EDJ and DZF that she was not. EDJ and DZF knew that the record of settlement had been completed by the time they sent the email to BNY.

[10] I will paraphrase the lengthy email.[1] EDJ says that they agreed to payments to avoid costs to them and stress on them, their daughter and staff. They were left with a bitter feeling. They attached a timeline put together from memory, including of staff. All were upset and felt that BNY was taking what was not justified. Others had worked hard to get the business going. EDJ and DZF now understood that BNY should have disclosed matters before her employment. They were concerned that BNY, who had treated them brutally, lived in their district. Staff members were disappointed with BNY. A staff member had said that BNY had undermined workplace morale when they had all supported her, in light of her health. BNY had adversely affected the business. BNY had detrimentally affected EDJ's and DZF's

[1] It is not necessary to set out all of what was expressed.

wellbeing, with them now having to meet legal costs instead of another necessary business expense. BNY thought that EDJ and DZF were wealthy, leading to her instructions to her lawyer and the accusations against EDJ and DZF. Rather, EDJ and DZF had a large debt secured by mortgage and had foregone many things. BNY put everyone under pressure, made mistakes, but then took instructions aimed at correcting her errors as personal criticism. A staff member commented about how calm things were now. Staff were deprived of wage increases, additional support and equipment, due to the legal costs to defend BNY's attack on EDJ and DZF. BNY had walked away with this money, but it was unjustified. Only a wage increase mistakenly not paid to BNY was due. BNY could have talked to EDJ and DZF, as provided by the employment agreement, rather than making a comment which was seen as threatening and malicious. EDJ and DZF questioned whether BNY was aware of the ripple effect this caused. Their daughter was badly affected when BNY's letter came at a difficult time, was very upset with BNY's actions and hoped she would not see BNY at any local events. She is cautious about new employees now. Instead of engaging a local law firm, BNY (and her partner) could have come to speak to EDJ and DZF, as she had when she had wanted a job for her partner. Using an expensive, local lawyer led to EDJ and DZF engaging an expensive lawyer. In the end the lawyers benefitted while BNY had hurt local people and a local business. A well-known friend of EDJ and DZF shared their upset and the view about money taken in that way. For their own protection, EDJ and DZF had adopted stricter agreements with other staff who then felt they were being reprimanded for BNY's actions. EDJ and DZF were disappointed with BNY's partner, given that DZF had allowed him to work in the business despite his inexperience. It was an insult to DZF for the partner to act as he did. The partner's breach of trust in disclosing information about BNY was unfathomable. EDJ and DZF found both BNY and her partner a negative experience. EDJ and DZF considered BNY had breached their privacy, trust and personal lives. They considered what BNY had done was horrible and unforgiveable. BNY lacked the understanding for others that she expected of them.

[11] The email concluded by expressing hope that BNY would get well and trust that whatever she had put into the universe would come back to her.

[12] The email included a lengthy attachment. The attachment reads as EDJ's and DZF's instructions to their solicitor, refuting in substantial detail claims made by BNY. I accept it was written prior to the record of settlement. It is not necessary to set out or summarise the

attachment. The email included reference to support and advice about the claims EDJ had sought from a friend who had supported their business.

[13] BNY did not respond to the email and attachment.

[14] On 25 December, BNY's partner sent a txt to DZF, asking if he was involved in what had been sent the previous night and saying that it included details about him that were insulting, inaccurate and unnecessary. DZF in reply confirmed he was involved and supported it. DZF said that he was gutted, was fuming and wanted no further contact.

[15] On 30 December 2020, BNY received by txt from EDJ a request for her bank account details so the payment due under the record of settlement could be made. BNY replied with her account number.

[16] EDJ then sought confirmation from BNY that she and her partner would not make any further claims and that there would be no further communication from them. BNY responded that the record of settlement already covered the obligations of both parties. EDJ again sought an assurance that BNY and her partner, directly or through a lawyer, would not be in contact again. BNY in reply said it was the second time EDJ had initiated contact, then referred to the record of settlement, particularly clause 8. It records the agreement as a full and final settlement of all matters arising out of the employment relationship. BNY said that she would not reply further to direct contact. EDJ apologised, explaining that BNY's lawyer was on leave, they did not have her account number and that her partner had messaged DZF. There was no further contact.

Did EDJ and DZF breach the record of settlement – Clause 1?

[17] BNY says that the email and attachment indicate that others in the workplace and in the community know in full about confidential matters concerning the employment dispute between her and EDJ and DZF. As mentioned above, the attachment demonstrates that EDJ and DZF put together a detailed response to BNY's claims. That involved talking to other staff about the claims to gather information. They also spoke to their daughter and their friend. The information comprised both factual and opinion responses from these others about matters involving BNY. This process pre-dated the record of settlement. In follows

that EDJ and DZF did not breach the 24 December confidentiality agreement by preparing the attachment.

[18] The email also canvasses in some detail the opinions of other staff and some others about BNY. However, those statements in the email do not establish that EDJ and DZF breached the confidentiality obligation that applied from 24 December. The statements are based on the responses and views gathered earlier. The evidence of EDJ and DZF is that they have not breached that obligation. They say they shared no information with their daughter, EDJ's friend, other staff and members of the community about the terms of settlement. There is no reason to doubt that evidence, despite BNY's perception that EDJ's friends (unnamed) stare at her now. I find that the email did not amount to a breach of the confidentiality obligation.

Did EDJ and DZF breach the record of settlement – Clause 6?

[19] BNY says that the email and attachment were unwanted and contained disparaging comments. By clause 6, the parties agreed that they shall not make any disparaging comment about the other.

[20] Clause 6 must be construed objectively by reference to the natural and ordinary meaning of the words used, taken in context. The natural and ordinary meaning of the words "shall not make disparaging comment about the other" is not limited to comments to third parties about the other person. Although EDJ and DZF expressly did not admit liability (clause 5), it was a full and final settlement of all matters arising out of the employment relationship (clause 8). The context does not mean that the parties only intended to proscribe disparaging comments to third parties.

[21] The word disparage is capable of broad effect, although not every disparaging comment would breach of a record of settlement.[2] The following meaning has often been applied:[3]

> Bring discredit or reproach upon; dishonour; lower in esteem; degrade; lower in position or dignity; cast down in spirit; and speak of or treat slightingly or critically; vilify; undervalue; depreciate.

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[2] *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [80] and [85].
[3] *Lumsden v Skycity Management Ltd* [2017] NZEmpC 30 at [36].

[22] If statements contained in the 24 December email and statements set out in the attachment had been made to a third party after the record of settlement took effect, they would have been disparaging of BNY. My paraphrasing above does not convey the intensity of what was said. Although I accept the views expressed were all genuinely held, a number of the statements went beyond telling BNY how her actions had impacted EDJ, DZF, their daughter and other staff. It is not necessary to identify any particular statements, or distinguish between those that were disparaging of BNY and those that were not disparaging of her. The statements if made to a third party would have been disparaging. They did not lose that character by being made directly to BNY.

[23] EDJ and DZF refer to s 14 of the New Zealand Bill of Rights Act affirming the right to freedom of expression. Under s 5 of that Act, the right to freedom of expression may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[24] A term in a record of settlement limiting a party's ability to make disparaging comments about the other party to a third person is a limit prescribed by law that is demonstrably justified in a free and democratic society. Records of settlement typically include non-disparagement clauses expressed in various wording. When breached, they render a party liable to enforcement action, despite the right to freedom of expression. For example, in *Lumsden v Skycity Management Ltd*, disparaging comments on an internal form available to the employer's managers who had not been involved in the employment relationship problem led to a penalty. Here, EDJ and DZF were free to agree to a settlement, no doubt on the basis of advice and an assessment of the risks if not settled. The settlement involved their agreement to limit what they and BNY could say about and to each other from then on. The limit was within s 5 of the New Zealand Bill of Rights Act.

[25] I conclude that by sending the email and attachment to BNY on 24 December 2020, EDJ and DZF acted in breach of clause 6 of the record of settlement.

Did EDJ and DZF breach the record of settlement – Clause 8?

[26] BNY says that EDJ and DZF did not respect the full and final nature of the record of settlement.

[27] Section 149(3)(a) provides that the terms of agreement become final and binding, once signed in accordance with that section. The agreement was appropriately signed. Clause 8 of the agreement states that it is a full and final settlement of all matters between the parties arising out of their employment relationship.

[28] BNY says that several actions by EDJ and DZF breached clause 8.

[29] EDJ and DZF initially requested BNY's bank account number. Clause 4 of the agreement required payments to BNY's "nominated" bank account. I take it that account details were not provided at the time of the settlement offer and acceptance. There can be no reasonable objection to the txt message asking for the bank account number, as part of EDJ and DZF ensuring payment would be made on time.

[30] That was followed by several txt messages asking BNY for confirmation there would be no further claims and no further contact from her and her partner, as a condition of making the payment. BNY responded each time by referring to the record of settlement. I agree that clause 8 was a complete answer to the assurance about further claims being sought. EDJ and DZF made the payment, as required by the agreement.

[31] Although EDJ and DZF also sought an undertaking that there would be no further contact, that did not undermine the final and binding nature of the agreement as a "full and final settlement". The agreement remains unaffected.

[32] Arguably, the 24 December email and attachment could be characterised as contrary to clause 8. However, that action more directly engages clause 6 of the agreement. Further consideration of whether it was also a breach of clause 8 adds nothing more to the outcome of this problem.

[33] I find that EDJ and DZF did not breach clause 8 of the record of settlement.

Did BNY breach the record of settlement – Clause 1?

[34] EDJ and DZF say that BNY disclosed to her partner information about the terms of settlement that she was obliged by clause 1 to keep confidential.

[35] A case management conference was convened by the Member who was originally assigned. The Member noted that EDJ and DZF claimed BNY was in breach of the

agreement by disclosures to her partner and said the issue would be included in the mix of matters for investigation. EDJ and DZF were not required to lodge a separate statement of problem and did not specify remedies they sought, however I treat the matter as properly before the Authority for investigation and determination. I am mindful of the statutory objects of and role of the Authority as set out in s 143 and s 157 of the Employment Relations Act 2000.

[36] BNY's partner did not give evidence. However, the txt message from him to DZF produced in evidence indicates that at least part of the 24 December email was shared with him. BNY's description of her reaction to its receipt adds to the likelihood that it was disclosed to her partner. It is not inherently likely that only that limited part of the email was disclosed to him, despite BNY's evidence that "he didn't read the letter".

[37] I refrain from making a finding on the point as BNY and her partner might not have had sufficient notice, given the informality of the claim, that the extent of his involvement would be in issue. I also consider that resolution of the point makes no difference to the just resolution of this matter overall.

What is required to enforce the agreement?

[38] In summary, by sending the email and attachment as written, EDJ and DZF made "disparaging comment" about BNY, in breach of clause 6 of the settlement agreement. EDJ and DZF did not breach clause 1 regarding confidentiality and did not breach clause 8 regarding the full and final nature of the settlement. In her evidence, BNY said that EDJ and DZF sought to intimidate her, dissuade her from enforcing her legal rights, demoralise her and demean her. However, I do not accept that EDJ and DZF intended to do this. Having asked their lawyer, they understood that they could write to BNY to say how her claims had impacted them. However, the communication went beyond that.

[39] BNY may or may not have breached the confidentiality obligation when she received the email and attachment.

[40] In her statement of problem, BNY says that she wants the problem resolved by an investigation and by an enforcement of the agreement to prevent further breaches as she is

concerned “they will not stop harassing” her and she does not trust that the future payment will be made without unwanted and unnecessary contact.

[41] During the case management conference, BNY was asked what orders and remedies she was seeking. In reply, BNY said she would like the Authority to enforce the agreement - “basically just following what was signed”. Arrangements were confirmed on that basis for both side to attend and give evidence orally on the day. However, BNY in evidence sought a penalty as determined by the Authority.

[42] The Authority must comply with the principles of natural justice when investigating and resolving employment relationship problems. By her statement of problem, confirmed during the case management conference, BNY sought an order requiring EDJ and DZF to follow, or comply with, the record of settlement, given her concern that they had not to that point complied with it. That was the basis on which arrangements were made for the investigation meeting and on which EDJ and DZF responded to the matter. In my view, this problem is best resolved by concluding the investigation meeting, making the present findings and determination, without adjourning to allow BNY to lodge an amended statement of problem claiming penalties and for EDJ and DZF to respond, perhaps by initiating their own claim for penalties.

[43] I turn to consider whether a compliance order under s 137 of the Employment Relations Act 2000 is appropriate.

[44] Where a person has not complied with terms of a record of settlement that s 151 of the Employment Relations Act 2000 provides may be enforced by compliance order, the Authority may by order require the person to do or cease doing any specified thing, for the purpose of preventing further non-compliance with the record of settlement.

[45] Here, there is no realistic risk that EDJ and DZF will initiate any further contact with BNY, except perhaps to confirm that her bank account details remain unaltered in advance of the forthcoming payment. There is no realistic risk that disparaging comments will be made again directly to BNY. EDJ and DZF did not make disparaging comments about BNY to any third party and there is no risk that they would do so in the future. EDJ and DZF did not disclose the terms of the agreement to anyone and there is no risk that they would do so in the

future. EDJ and DZF made the first payment on time and say they will make the forthcoming payment. There is no reason to doubt that.

[46] A compliance order is a discretionary remedy. The substantial merits of the case are best recognised by the finding that EDJ and DZF breached clause 6 of the record of settlement, but declining to order compliance.

[47] Usually, costs follow the event so a successful party is usually entitled to a contribution to their legal costs, including disbursements. However, neither party was represented during the investigation meeting or at the time of the case management conference. The only issue would appear to be an award to cover the lodgement fee. I will reserve costs in case legal costs were incurred to commence the claim. If BNY seeks costs, she should lodge a submission setting out the details, within 28 days. The Authority will copy it to EDJ and DZF, who may within a further 14 days lodge a submission in response. I will then determine costs based on the submissions.

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Philip Cheyne
Member of the Employment Relations Authority