

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 16
3080112

BETWEEN SUSIE DICKSON
Applicant

AND LAKESIDE DENTAL PRACTICE
LIMITED
Respondent

3094372

BETWEEN LAKESIDE DENTAL PRACTICE
LIMITED
Applicant

AND SUSIE DICKSON
Respondent

Member of Authority: Helen Doyle

Representatives: David Balfour, advocate for Ms Dickson
Adrian Paul, advocate for Lakeside Dental Practice Limited

Investigation Meeting: 27 November 2020 at Queenstown

Submissions Received: On the day

Date of Determination: 18 January 2021

DETERMINATION OF THE AUTHORITY

- A Lakeside Dental Practice Limited and Susie Dickson have immunity from the respective claims that arise out of the statements in Disputes Tribunal proceedings.**
- B Lakeside Dental Practice Limited is ordered to pay to Susie Dickson a penalty in the sum of \$1000 within 28 days from the date of this determination for a separate breach of the record of settlement for which there is no indemnity.**
- C There is no order made for compliance.**
- D Lakeside Dental Practice Limited is ordered to pay costs in the sum of \$500 and reimbursement of the filing fee of \$71.56.**

Employment Relationship Problem

[1] Susie Dickson and Lakeside Dental Practice Limited (Lakeside Dental) say the other breached a record of settlement entered into under s 149(3) of the Employment Relations Act 2000 (the Act).

[2] Ms Dickson alleges breaches of that record of settlement in respect of a document on a statement in reply form and a claim lodged by Lakeside Dental in the Disputes Tribunal after the record of settlement was signed.

[3] Lakeside Dental alleges a breach in respect of Ms Dickson's defence to the Disputes Tribunal claim.

[4] Ms Dickson and Lakeside Dental seek penalties if breaches are established. Ms Dickson also seeks an order for compliance together with costs.

[5] The investigation meeting proceeded by way submissions. Mr Balfour was connected to the investigation meeting in person whilst Ms Dickson and a director of Lakeside Dental Dr Adrian Paul attended in person. Both parties were given an opportunity to give evidence however did not wish to do so.

The issues

[6] The Authority needs to consider the following issues in this matter:

- (a) What are the relevant provisions of the settlement agreement that are alleged to have been breached?
- (b) Was there a breach of the settlement agreement by Lakeside Dental and/or Ms Dickson by:
 - (i) the content of the document on a statement in reply form provided to Mr Balfour's organisation by email dated 17 June 2019;
 - (ii) the claim lodged with the Disputes Tribunal;
 - (iii) the defence to the claim lodged with the Disputes Tribunal.
- (c) If a breach is established should penalties be awarded and an order made for compliance?
- (d) Should there be an award of costs?

The settlement agreement

[7] The material clauses are set out:

Clause 1 - confidentiality

These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.

Clause 4 - non disparagement

It is agreed that neither party will speak disparagingly of the other. For avoidance of doubt this includes, but is not limited to, any communication through social media.

Clause 6 - full and final settlement

This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[8] The parties signed the record of settlement on 7 June 2019 and it was certified by a mediator that same day. The mediator confirmed in signing that he had explained to the parties the effect of s 148A and s 149 (1) and (3) and that he was satisfied that the parties

understood the effect of these sections, and had affirmed their request that he sign the agreed terms of settlement.

[9] The parties would have understood as a result of the explanation from the mediator that the terms of the settlement are final and binding and enforceable by the parties. Further that the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 and that 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.¹

The contents of the document headed statement in reply

[10] Following the entering into of the record of settlement Dr Paul provided a document on a statement in reply form to Mr Balfour's organisation.² It was expressed to be a closing statement in reply to the mediation held on 7 June 2019. The document was provided by email to Mr Balfour's organisation on or about 17 June 2019, some ten or so days after the settlement agreement was signed.

[11] Dr Paul said in his submissions that the statement in reply document had been provided to the Authority. I have perused the online file that pertains to the original grievance and it does not show that the document was provided to the Authority. The matter is recorded as withdrawn for reasons of settlement in late June 2019.

[12] Ms Dickson in her statement of problem says that this document was a breach of the agreement about non-disparagement and the notion that matters were in full and final settlement. Dr Paul denies any breach.

[13] The three page document set out aspects of what had occurred at mediation and some timing about when statements were made.

[14] There is reference in the document to concerns about truthfulness because of what was said or was provided in documents presented for the purposes of mediation and that this "implies a deceitful strategy" to mislead. It was stated that potential investigation by the Authority into fraudulent dealing may be necessary. The possibility of needing Court orders to take the matter further is mentioned.

¹ Section 149(3) of the Employment Relations Act 2000.

² The statement in reply form used in the Authority by a respondent.

[15] The mediation process is a confidential process. This is emphasised by s 148 of the Act. Section 148(1) of the Employment Relations Act 2000 (the Act) provides that except with consent of the parties a person who provides mediation services or has had those services provided to them including a representative must keep confidential any statement, admission or document created or made for the purposes of mediation and any information that is disclosed orally in the course of mediation.

[16] Section 148(3) provides that no evidence is admissible in any court, or before any person acting judicially of the information that is required to be kept confidential by s 148(1).

[17] On receipt of this document Mr Balfour emailed a strongly worded letter about the appropriateness of this communication to the representative for Lakeside Dental in which he described amongst other matters the document as a “intemperate written tirade.” The representative advised that Dr Paul was self-represented and that she had forwarded the correspondence to him.

[18] It appears from the letter that other monetary aspects of the settlement had not been complied with. Subsequently they were complied with and do not form part of the matter before the Authority.

Did this document breach the record of settlement terms?

Confidentiality in clause 1

[19] This document was forwarded by email to the organisation Mr Balfour undertakes work for in his advocacy role rather than to Mr Balfour’s direct email address. There was a suggestion in Mr Balfour’s submission that this was deliberate and that what was said in the document about what took place in mediation was seen by those outside of the mediation process as a result.

[20] It would have been incumbent on any person at the organisation Mr Balfour undertakes work for to have forwarded the document on to him and to have maintained the necessary elements of confidentiality as if it had been sent directly to Mr Balfour in the first instance.

[21] Paragraph 10 of the document tends to support a lack of deliberateness on the part of Dr Paul as to the sending of the document. It supports that Dr Paul recognised to some

degree confidentiality between the parties to the mediation and the mediator except for enforcement purposes. I cannot be satisfied that there was deliberateness or some ulterior purpose in the sending of the document to Mr Balfour's organisation rather than directly to him.

[22] Aside from Dr Paul and his previous representative the document was seen by those who had attended mediation, or had obligations of confidentiality.

[23] I cannot be satisfied that this document constitutes a breach of clause 1 of the settlement agreement.

Disparagement in clause 4

[24] The Employment Court in *Lumsden v Sky City Management Limited* adopted and applied a definition of disparage within the Shorter Oxford Dictionary.³ That provided as follows:

- (a) Bring discredit or reproach upon; dishonour; lowering esteem;
- (b) Degrade, lower in position or dignity; cast down in spirit; and
- (c) Speak of or treat slightly or critically; vilify; undervalue; depreciate.

[25] I do not intend to repeat what was said in the document. I conclude on an objective analysis that some of the content of the document was critical of Ms Dickson and sought to discredit her and was disparaging of her. The document speaks for itself in that respect. There were statements that sit within the definition in [24] above. It was the type of conduct that the parties had agreed in clause 4 of the record of settlement was not to occur. The non-disparaging clause was not limited to statements to third parties.

[26] If there was a need to communicate further after mediation as there may be from time to time then that could have occurred without any unnecessary disparaging comments in the usual way. The communication should not have been a form used for replying to employment relationship problems lodged in the Authority.

[27] I conclude that there was a breach of clause 4 of the settlement agreement.

³ *David Lumsden v Sky City Management Limited* [2017] NZ EMPC30 at [36].

Full and final settlement of all matters in clause 6

[28] Lakeside Dental failed, as agreed in the record of settlement, by sending this document some ten days after settlement to treat the matter as finally settled. Within the document was a request for a “mandatory response” within five working days by Mr Balfour and Ms Dickson to matters that had occurred in mediation either by what was said or written.

[29] For completeness I do not conclude that the statements made in the document was made in the course of proceedings so as to attract any immunity from suit. The proceeding had been settled by a record of settlement dated 7 June 2019. The terms of that settlement could only come before the Authority for enforcement purposes. The terms could not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 including for any alleged misrepresentation innocent or fraudulent.

[30] There was a breach of clause 6 of the settlement agreement.

Claim and defence lodged with the Disputes Tribunal

[31] In early August 2019 Dr Paul on behalf of Lakeside Dental, lodged a claim with the Disputes Tribunal and after it was set down asked and was joined as an applicant to the claim. The claim was defended by Ms Dickson.

[32] The Disputes Tribunal issued its order on 19 February 2020. The claim was struck out. Ms Dickson did seek costs however the order records that there was no evidence as to what costs had been incurred and no award was made.

[33] Lakeside Dental and Ms Dickson claim the other breached the settlement agreement by the lodging of and the defending of the Disputes Tribunal claim.

[34] The Authority has considered whether there is any immunity against claims arising out of statements made in the course of Court proceedings.

[35] The Court of Appeal in *New Zealand Defence Force v Berryman* confirmed the existence of immunity from suit in respect of civil claims that arise out of statements made in the course of Court proceedings.⁴

⁴ *New Zealand Defence Force v Berryman* [2009] NZCA 392.

[36] This was a case where a bridge on land owned by the Berrymans collapsed when a worker was driving over it and that led to his death. There was a Coroner's Inquest with evidence led and submission made by the Army which had constructed the bridge. The Berrymans later claimed that the Army acted improperly in not releasing an earlier report by an Army Court of Inquiry, and in evidence and submission given and made to the Coroner. The Berrymans sued the Defence Force claiming misfeasance in public office.

[37] The Court of Appeal held that,⁵

- (a) Those who give evidence or make submissions to a Court enjoy immunity from suits. The purpose of this immunity is not to encourage dishonest or defamatory statements or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation.
- (b) The immunity is confined to what is said in Court and necessary preliminaries to that.
- (c) The case fell squarely within the immunity. It involved an attempt to impose civil liability on a party in relation to evidence given and submissions made in the course of the civil proceedings.

[38] In an Authority determination it was concluded that the principles apply to the Authority which is not a Court.⁶

[39] The Disputes Tribunal Act 1988 provides specifically in s 58(2) and (3)(c) as follows:

Section 58

Protection of Referees, Investigators, etc.

1. A Referee, in the performance of his or her duties under this Act, shall have and enjoy the same protection as a Justice of the Peace acting in his or her criminal jurisdiction has and enjoys under sections 4A to 4F of the Justices of the Peace Act 1957.
2. For the avoidance of doubt as to the privileges and immunities of Referees, parties, representatives, and witnesses in the proceedings of the Tribunal it is hereby declared that such proceedings are judicial proceedings.

⁵ At n 2 at [67] – [70].

⁶ *Veronica Byrne v The New Zealand Transport Agency* [2019] NZERA 179 at [50].

3. The proceedings and immunities referred to in subsection (2) shall extend and apply to –
 - (a) the Tribunal acting under section 40(2) of the Act; and
 - (b) an Investigator acting under section 41 of this Act; and
 - (c) a person who gives information, or makes any statement to the Investigator or Tribunal on any such occasion.

[40] In lodging in the Disputes Tribunal, Lakeside Dental had as a party, under s 58(2), the privileges and immunities of judicial proceedings. Dr Paul was also joined to these proceedings. In defending the claim Ms Dickson also had the same privileges and immunities of judicial proceedings. Under s 59(3)(c) Lakeside Dental and Ms Dickson, in making and defending a claim with the Disputes Tribunal, had given information to the Tribunal which was a preliminary step to attending the Disputes Tribunal hearing and giving evidence to that body.

[41] In submissions Mr Balfour stated that if there was immunity from suit then it could not extend to proceedings not brought in good faith.

[42] I do not find the immunity from suit in respect of civil claims is dependent on the merits and bona fides of the claim lodged in the Disputes Tribunal.

[43] Both Lakeside Dental and Ms Dickson have immunity against the respective claims by the other for breaches of clauses 1, 4 and 6 of the settlement agreement in the Disputes Tribunal proceedings.

Should a penalty be awarded for the breaches found in respect of the document headed statement in reply?

[44] The Authority's power to order a penalty is discretionary and it does not mean that even if a breach is established a penalty will inevitably be awarded.

[45] In *Xu v McIntosh* the Employment Court provided guidance to the Authority when considering penalties as below:⁷

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first

⁷ *Xu v McIntosh* [2004] 2 ERNZ 448 at [47] and [48].

question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[46] Under s 149(3) of the Act a company that breaches an agreed term of settlement could be liable to a penalty. Section 135(2)(b) provides that a company in breach is liable to a penalty up to \$20,000.

[47] Section 133A sets out a number of factors that the Authority must have regard to in determining an appropriate penalty.

[48] In this case the harm the breach caused by the document was limited because it was sent to Mr Balfour through his organisation and its circulation was thereafter limited to those who had been at mediation. There was a swift and firm response from Mr Balfour and nothing further arose from the document by way of further breach.

[49] Balanced with that is the need to deter breaches by those who enter into settlement agreements and to send a message terms of agreed settlements should be complied with. An aggravating feature in this case was that the breach occurred within ten days of agreed terms of settlement that neither party would speak disparagingly of the other and that the settlement was a full and final settlement of all matters arising out of the employment relationship. Ms Dickson was entitled to conclude when the agreement was signed that it was the end of matters involving her employment with Lakeside Dental and she would not be subjected to an attempt to re-open matters in disregard of the agreed full and final settlement of the employment relationship.

[50] There was also an element of deliberateness about what was said in the document. It could not be said to be inadvertent. In so concluding I also weigh the form of the document. I conclude that there should be a penalty which given the nature of the breaches should be considered globally. The maximum penalty available is \$20,000.

Quantum of penalty

[51] I have had regard as I must to the factors in s 133 of the Act in determining the amount of the penalty. In so doing I confirm that the matters relating to the Disputes Tribunal claim have not been considered.

[52] The company was unrepresented at the time the document was written and I weigh that. It had however been represented up to the point of the signing of the settlement agreement. There is no evidence that Lakeside Dental has previously behaved in this way. There were elements of intention. Loss and damage suffered was limited because of who saw the document and the swift response to it. Matters were not on-going in relation to the contents of the document and any adverse effects of the breach essentially ended.

[53] I have also had regard to similar cases. The breaches found in relation to the document are not as serious or ongoing and the employer was not as well-resourced in terms of advice as in *Lumsden* where a penalty of \$7000 was imposed.⁸ *Lumsden* was a case which also involved amongst concluded breaches those of non-disparagement and a failure to recognise the final nature of the settlement.

[54] The breaches were not as serious as those in *Jacks Hardware and Timber Ltd t/a Mitre 10 Mega v Beentjes* where an employee breached on numerous occasions a non-disparagement clause and the breaches were ongoing in nature with consequential harm. The penalty awarded in that case, where the maximum penalty was that for an individual of \$10,000, was \$2,500 or 25% of the maximum penalty.⁹

[55] The penalty needs to reflect the comparatively short and limited duration of any harm. I conclude an appropriate award for a penalty is the sum of \$1000.

[56] The harm suffered as a result, although limited, from the unprovoked document means it is appropriate that the sum awarded be paid to Ms Dickson. She was entitled to conclude that the record of settlement would end the matter.

⁸ Above n 3.

⁹ *Jacks Hardware v Beentjes* [2015] NZERA Christchurch 29.

Compliance

[57] I am not minded to make an order for compliance given the passage of time and the absence of any further breach of the record of settlement save as for those for which there is immunity. It suffices to set out that Lakeside Dental should take care not to breach the settlement agreement again.

Costs

[58] The investigation meeting took less than one hour. There was immunity for both parties from breaches with respect to the claim and defence in the Disputes Tribunal proceedings. That was the main claim in front of the Authority. Ms Dickson did have a measure of success with respect to the claimed breaches arising from the document headed statement in reply and is entitled to consideration of a contribution towards her costs.

[59] A quarter of a day on the basis of daily tariff of \$4,500 would be \$1125. That amount should be reduced to reflect that the meeting took less than one hour and the indemnity found with respect to the main claims.

[60] I conclude it would be appropriate to make an order for costs in the sum of \$500 together with reimbursement of the filing fee of \$71.56.

Orders made

[61] Lakeside Dental Practice Limited is ordered to pay to Susie Dickson a penalty in the sum of \$1000 within 28 days from the date of this determination for a breach of the record of settlement.

[62] Lakeside Dental Practice Limited is ordered to pay costs in the sum of \$500 and reimburse the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority