

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

[2020] NZERA 32
3063875

BETWEEN FNN
Applicant

A N D OES
Respondent

Member of Authority: Peter van Keulen

Representatives: Deborah Hendry, counsel for the Applicant
Respondent in person

Investigation Meeting: 23 October 2019

Submissions and further information received: 23 October 2019, 22 November 2019 and 6 December 2019 for the Applicant
23 October 2019, 4, 5 and 22 November 2019 and 9 December 2019 for the Respondent

Date of Determination: 27 January 2020

DETERMINATION OF THE AUTHORITY

- A. OES has breached the record of settlement dated 3 August 2018 between herself and FNN by posting a comment to Facebook which was disparaging of FNN.**
- B. OES must comply with the record of settlement dated 3 August 2018 between herself and FNN. In particular OES should not disparage FNN.**
- C. OES must pay a penalty of \$1,000.00. \$500.00 of this penalty is to be paid to FNN. The remaining \$500.00 is to be paid to the Authority and the Authority will then pay it into a Crown bank account.**

D. Costs are reserved

Employment relationship problem

[1] FNN and OES signed a record of settlement (the “Record of Settlement”) on 3 August 2018. A mediator from the Mediation Services of the Ministry of Business, Innovation and Employment signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the “Act”) on 8 August 2018.

[2] FNN claims that OES has not complied with clause 2 (h) of the Record of Settlement relating to non-disparagement.

[3] FNN seeks a compliance order and a penalty for the alleged breach by OES.

Non-publication orders

[4] There are two aspects to this case which are potentially problematic for the parties:

(a) The claim deals with alleged disparagement of FNN and my analysis necessarily requires repeating the alleged disparaging comment which may reflect adversely on FNN.

(b) OES has led medical evidence to explain and mitigate her actions. My analysis requires me to address the medical evidence and in doing so I may cause some hardship to OES by having her otherwise private medical information set out in a publicly available document. Given the nature of the medical information that may impact her health by causing further concerns for her.

[5] The easiest and appropriate way to deal with the concerns I have is to simply anonymise the parties’ identities and prevent any publication of their identity so that they are not publicly associated with the evidence I will analyse.

[6] Therefore, pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication:

- (a) the name of FNN, the applicant in the application before the Authority, and any information which may lead to its identification – it is referred to as FNN in this determination;
- (b) the name of OES, the respondent in the application before the Authority, and any information which may lead to her identification – she is referred to as OES in this determination.

[7] In addition, this matter concerns the enforcement of a record of settlement, which contains a confidentiality clause. Other than discussing the clauses that are subject to this claim, it is appropriate that the confidentiality is preserved.

[8] Therefore pursuant to clause 10 of schedule 2 of the Act I also prohibit from publication any of the terms of the Record of Settlement except for those referred to in this determination.

Background facts

[9] FNN is a nursery and preschool. OES was employed by FNN until 3 August 2018 when the relationship came to an end.

[10] Whilst I heard evidence about OES's experience whilst working at FNN and her departure it is largely not relevant to my investigation. The points of context I take from that evidence is that FNN's departure was not amicable, with an employment relationship problem being raised and settled and OES holding some residual feelings towards FNN about how it conducted its nursery and preschool operations.

[11] After OES raised her employment relationship problem the parties reached an agreement in full and final settlement, which was recorded in the Record of Settlement.

[12] The operative clause of the Record of Settlement is:

2. An employment relationship problem has arisen between the parties ... The parties have agreed to resolve matters between them as follows:
 - a. The parties agree that [OES's] employment with [FNN] will end at the close of business on 3 August 2018 as a result of resignation;
 - b. ...

- h. Neither party will make any disparaging remarks about the other and each will only speak of the other in positive or neutral terms.

[13] It appears that both OES and FNN complied with the terms of the Record of Settlement, although OES had to follow up with certain aspects as FNN did not meet two of its obligations in the stipulated time frames.

[14] Then on 31 May 2019, OES responded to a question posted on a Facebook group. The question posted was “*if you choose a childcare/nursery for your little one what were the criterias (sic) you were looking at*”? OES’s response was a post stating “*whatever you do don’t go to [FNN] ... then you should be fine!!!*”

[15] OES says that after making the post she spoke to her husband about it as she was concerned about breaching the Record of Settlement. After discussing it with her husband OES decided to remove the post. OES mistakenly believed her post would be deleted if she left the Facebook group, which she did on the evening of 31 May 2019.

[16] When OES subsequently realised her post was still on the Facebook group page she applied to re-join the group and then deleted the post once she was accepted as a member.

[17] OES’s post was deleted on 5 June 2019.

The issues

[18] Based on the these facts, I must determine the following issues:

- (a) Has OES breached the Record of Settlement – was the post she made on Facebook disparaging of FNN; and
- (b) If there has been a breach of the Record of Settlement, is a compliance order required and is a penalty appropriate?

Has OES breached the record of settlement?

[19] Clause 2 (h) of the Record of Settlement is straightforward; it requires the parties to not to make disparaging comments about the other party.

[20] Whilst OES attempted to persuade me that her post was not disparaging, because it was not a comment that was adverse to FNN and in any event it was in her view correct, I am satisfied that the post is disparaging. Responding to a question about selecting a nursery and preschool by stating do not go to a particular nursery or preschool can only be a negative comment about that nursery and preschool. At its simplest the post is saying this nursery or preschool is not an okay place to send your children, which is a negative comment or statement about that nursery or preschool.

[21] OES has breached the Record of Settlement by posting a disparaging comment on Facebook about FNN.

Is it appropriate to make a compliance order?

[22] As OES has breached the Record of Settlement a compliance order is necessary. I will make an order for compliance pursuant to s 137(2) of the Act.

Is it appropriate to impose a penalty against OES for the breach of the Record of Settlement?

[23] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement in a record of settlement signed pursuant to s 149 of the Act, is liable to a penalty imposed by the Authority.

[24] Section 135(2)(a) of the Act provides that an individual who is liable for a breach of a record of settlement is liable to a penalty not exceeding \$10,000.00.

[25] In *Allan Nicholson v Matthew Ford*¹ Chief Judge Inglis analysed s 133A of the Act, which specifies factors relevant to the assessment of a penalty, and *Borsboom v Preet PVT Limited*², a case dealing with penalties for breaches of minimum standards and set out guidance on applying the principles to the imposition of penalties. In particular Her Honour stated:

[18] Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

¹ *Allan Nicholson v Matthew Ford* [2018] NZEmpC 132

² *Borsboom v Preet PVT Limited* [2016] NZEmpC 143

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
7. previous conduct (mandatory statutory consideration 7);
8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4); and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

[26] I will apply this approach to my assessment of the claim for a penalty.

What is the number of breaches for penalty-setting purposes in this case?

[27] There has been one breach of the Record of Settlement, so my starting point is to consider a penalty up to \$10,000.00.

Mandatory statutory consideration 1: the object stated in s 3

[28] In terms of this employment relationship two parts of the object of the Act are relevant; protecting the integrity of individual choice and reducing the need for judicial intervention.

[29] In my view therefore, protecting and upholding settlement agreements, which represent individual choice and avoid the need for judicial intervention, is a consideration

impacting on my assessment of any penalty. A breach of a record of settlement is to be treated seriously in order to uphold these things, suggesting the penalty should be reasonably high.

Mandatory statutory consideration 2: the nature and extent of the breach

[30] The breach is reasonably serious and had potential to seriously damage FNN's reputation. The Facebook group was a private group but it had a number of members – estimated to be 8,000.

[31] I heard evidence from parents who read the posting and their response to it. It is not necessary for me to deal with the detail of this suffice to say it was compelling and credible and I am satisfied that the post had a negative impact on people's perception of FNN.

[32] The nature and extent of the breach is serious, which again suggests the penalty should be high.

Mandatory statutory consideration 3: whether OES's breaches were intentional, inadvertent or negligent

[33] I conclude that OES's actions in posting as she did were intentional but I do not think she wanted to harm FNN, rather I find she was motivated by genuinely held views about FNN and wanting people to know her concerns. In this regard, the post was not malicious.

[34] What is also relevant is OES's medical history. Medical evidence shows OES has a history of suffering with anxiety and depression and that she was suffering from post-natal depression at the time she made the post. The evidence from OES's GP was that in his view, this could have caused OES to act out of character and make comments that were more negative than she might normally.

[35] Whilst I am not convinced that OES's medical condition at the time of making the post excuses her behaviour completely it does provide context for the behaviour which is in my view a mitigating element and in my view this significantly reduces the amount of the penalty.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered

[36] It is difficult to measure the extent of any damage suffered by FNN, but in the circumstances I am satisfied that there was some damage to its reputation, potentially this could have been significant and widespread, given the number of members of the Facebook group. However, given that I cannot fully assess the extent of any actual damage I am not persuaded that the penalty should be influenced by this, rather I have considered the fact that there was some damage as part of my assessment of the seriousness of the breach (step 2 above).

Mandatory statutory consideration 5: whether OES has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[37] OES took steps to remedy her behaviour by removing the post. Whilst this did not occur immediately it did happen and this mitigates the effect and impact of her actions and suggests a further reduction in the penalty is appropriate.

Mandatory statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place

[38] OES's medical condition, which I have outlined above, is relevant and is mitigating.

Mandatory statutory consideration 7: whether OES has previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

[39] There was no evidence that OES had engaged in similar conduct prior to these events. This is a mitigating factor for OES.

Preet additional mandatory consideration 1: deterrence, having regard to the particular person to be penalised and the wider community of employers

[40] There is a need for parties to settlement agreements to understand that they should respect the terms of the agreements they enter into. This applies to OES but given the particular circumstances of this case I am not persuaded that deterrence is an important factor to influence the amount of any penalty.

Preet additional mandatory consideration 2: degree of culpability

[41] In my view, OES's culpability appears high but is mitigated by her personal circumstances.

Preet additional mandatory consideration 3: the general desirability of consistency in decisions on penalties

[42] I have previously reviewed cases that deal with penalties for breaches of records of settlement – these were cases dealing with breaches of confidentiality or non-disparagement (or both) and involved a single breach or two or three breaches. A review of these cases indicates that penalties range from \$2,000.00 to \$6,000.00.

[43] Whilst consistency is desirable there are circumstances pertaining to this case that warrant a penalty being imposed below this range. The mitigating features, particularly OES's personal circumstances are relevant and warrant a lower penalty being imposed.

Preet additional mandatory consideration 4: ability to pay

[44] I have considered the evidence provided by OES about her financial position and the ability to pay any penalty – I am satisfied that this warrants a further, albeit small, reduction in the penalty amount.

Preet additional mandatory consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

[45] Based on all of the factors assessed above I believe I should impose a penalty of \$1,000.00. Standing back and assessing this outcome against the breach I am satisfied that that is appropriate and proportionate.

Conclusion

[46] I will impose a penalty on OES and given the circumstances of the breach and all of the factors outlined in my assessment I set the penalty at \$1,000.00.

[47] Adopting the approach applied by Judge Inglis (as she was then) in *David Lumsden v Skycity Management Limited*³ I also consider it appropriate that part of the penalty be paid to

³ *David Lumsden v Skycity Management Limited* [2017] NZEmpC 30

FNN as it suffered the impact of the breach and it has been obliged to take steps to enforce its rights.

[48] OES must pay \$500.00 of the penalty to FNN and the balance to the Authority.

Orders

[49] OES has breached the Record of Settlement.

[50] OES must comply with the Record of Settlement. In particular, OES should not make any disparaging comments about FNN.

[51] OES must pay a penalty of \$1,000.00. I direct that \$500.00 is to be paid to FNN. The remaining \$500.00 is to be paid to the Authority and the Authority will then pay it into a Crown bank account.

Costs

[52] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[53] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority