

Attention is drawn to the order prohibiting publication of certain information (refer paragraph 1)

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 498  
3306300

BETWEEN	GQM Applicant
AND	PSK Respondent

Member of Authority:	Andrew Gane
Representatives:	Claire Mansell, counsel for the Applicant Respondent in person
Investigation Meeting	On the papers
Submissions received and other material	12 and 19 July 2024 from the Applicant 17 July 2024 from the Respondent
Date:	19 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] GQM requests that the Authority exercise its discretion under Schedule 2 Clause 10 of the Employment Relations Act 2000 (the Act) not to publish the identities of the parties in this matter. Given this matter concerns a settlement agreement where the parties attempted to resolve all the issues between themselves in a confidential manner, I have limited the material referred to in this determination to the extent feasible.

[2] I am also satisfied it is appropriate to make an order under the Act that any information identifying the parties is prohibited from publication until this order is revoked or varied by further orders of the Authority. The parties will be identified only

by randomised initials which have no correlation to the parties' actual name. The applicant is GQM and the respondent is PSK. Any information referencing the identity of the parties is prohibited from publication.

## **Background**

[3] PSK was previously employed by GQM in May 2023. PSK and GQM entered into a settlement agreement to resolve an employment relationship problem between them (the record of settlement). The record of settlement was signed by a mediator on 12 June 2024.

[4] GQM claimed PSK had breached the confidentiality and non-disparagement provisions of the record of settlement, by making adverse comments about GQM to a third-party company. The third-party company is a current client of GQM.

[5] GQM also alleged PSK had breached the record of settlement by failing to return GQM's property.

[6] GQM made an application to the Authority for a compliance order and penalties to be ordered against PSK in respect of the record of settlement.

[7] A case management conference (CMC) with the parties was convened by Authority on 5 July 2024. During the CMC PSK confirmed his actions in relation to the alleged breaches. Specifically, this was in respect of his contact with the third-party company. PSK also indicated that he would continue contacting the third-party company. The Authority granted GQM's application urgency.<sup>1</sup>

[8] PSK has lodged a separate counterclaim with the Authority.

## **The Authority's investigation**

[9] In the interests of avoiding unnecessary costs and time, the parties agreed for the matter to be heard on the papers.<sup>2</sup> The parties also agreed to lodging and serving of affidavits, supporting evidence and submissions to support their position. GQM lodged an affidavit from its director and submissions. PSK lodged an unsworn statement in reply and submissions.

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<sup>1</sup> Employment Relations Act 2000, cl 17 Schedule 2.

<sup>2</sup> Employment Relations Act 2000, s174D.

[10] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

### **The issues**

[11] The issues requiring investigation and determination are:

- (a) Should compliance orders under s 151 of the Act requiring the PSK to comply with the terms of the record of settlement, executed in accordance with s 149 of the Act; and
- (b) For any established breach of the record of settlement by PSK, should a penalty be imposed against him under s 149(4) of the Act; and
- (c) Should one party pay costs to the other?

### **The record of settlement**

[12] Key terms of the record of settlement summarised include:

- (a) Clause 1.4.1 sets an obligation for the employee to return any items belonging to the employer.
- (b) Clause 1.7 - The parties agreed that the existence and terms of the record of settlement, and documents regarding the employment relationship problem and its resolution would remain strictly confidential to the parties and would not be disclosed in any circumstances, except with the other party's prior written consent or as required by law.
- (c) Clause 1.8 - The parties agreed not to make any disparaging comments about each other. This included statements by the employee regarding the officers and employees of GQM and vice versa.

### **Alleged breaches of the record of settlement**

[13] GQM submits that PSK has breached the return of property, confidentiality and disparagement obligation clauses 1.4.1, 1.7 and 1.8 of the record of settlement, on several occasions.

[14] GQM also alleges PSK has failed to return two keys in his possession in breach of clause 1.4.1 of the record of settlement. PSK was requested to return these items to GQM in an email of 14 June 2024.

[15] PSK states he had returned the keys and that GQM has breached the terms of the record of settlement.

[16] On 26 June 2024, PSK sent an email to a client of GQM in which he discussed the employment relationship problem and its settlement and inferred that GQM had undertaken fraudulent activities. PSK stated that he would share the findings of his investigations regarding these allegations of fraud with the client.

[17] On 26 June 2024, GQM's legal representative wrote to PSK notifying him of GQM's intention to seek compliance orders against him and requesting that he cease his activities.

[18] On 26 June 2024, PSK responded to this letter via email, in which he made further allegations of fraudulent and illegal activities against GQM.

### **Relevant Law**

[19] A Record of Settlement is made under s 149 of the Act. A mediator will only sign a settlement after the parties have affirmed their understanding that the terms are final and binding on, and enforceable by the parties and may not be cancelled under the Contract and Commercial Law Act, and except for enforcement purposes may not be brought before the Authority or the court.

[20] "Enforcement purposes" under s 149(3)(b) of the Act refers to the procedures for enforcing the terms of agreements and orders or directions, such as the procedures for recovery of wages, and for compliance orders or penalties.

[21] A compliance order may be made when any person has not observed or complied with the provision of any terms of settlement or a decision that is a breach of s 149(3), and s 151 of the Act provides it may be enforced by a compliance order.<sup>3</sup> A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority under section 149(4) of the Act.

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<sup>3</sup> Employment Relations Act, s 137(1)(a)(iii).

### **Did PSK fail to return GQM's property?**

[22] Based on the contradictory evidence from both parties on a number of property issues, including the return of the keys by GQM, I am unable to make findings. The matter can be dealt with in subsequent proceedings regarding PSK's counterclaim.

### **Was there disparagement?**

[23] Clause 1.7 of the record of settlement, prohibits GQM and PSK from making disparaging comments about each other or the officers and employees of GQM.

[24] To disparage is to bring into discredit, degrade or speak of critically. There is no need for the comment to be untruthful or fabricated.<sup>4</sup>

[25] GQM submits that PSK's comments to GQM's client on 26 June 2024 were disparaging; particularly:

I am writing to bring to your attention an issue I have encountered following my departure from [GQM]. My last working day with [GQM] was 30 May. Despite [GQM's] promise to settle my dues as per the Record of Settlement and MBIE mediator, they have failed to do so.

I would also like to inform you that I'm still investigating a few of the things and found a lot of fraudulent work done by this company. In case there is something regarding ... and I come across it, I'll let you know.

[26] GQM refers to PSK's email of 26 June 2024 to a third party as being particularly disparaging, specifically the statement that PSK would be willing to share information to assist any legal action brought against GQM.

Note I can't share the attachment ATM due to some reason but in case you are willing to take any legal action against [GQM] and a third party requires the attachment I'm happy to share it with them.

[27] GQM submitted that the fact that PSK would willingly assist an unrelated third party to bring legal proceedings against GQM discredits or degrades GQM.

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<sup>4</sup> *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at 37] – [38].

[28] I accept PSK's contact with GQM's client about claims of 'fraudulent behaviour' amounted to disparaging behaviour. This was in breach of clause 1.7 of the record of settlement.

**Did PSK breach the record of settlement by disseminating confidential information?**

[29] Clause 1.8 of the record of settlement prohibits the parties from disclosing confidential information including the existence and terms of the record of settlement, including the payment of any sums, and all matters discussed during any emails, meetings and or telephone calls between the parties and or their legal advisors regarding the employment relationship problem and its resolution.

[30] PSK's email of 26 June 2024 to GQM's client specifically refers to the record of settlement and monies due to him under that agreement.

[31] I find the PSK's emails to the client amount to the disclosure of confidential information regarding the settlement and was in breach of clause 1.8 of the record of settlement.

**Should compliance orders be imposed?**

[32] Having found that PSK has breached the record of settlement I conclude that compliance orders against PSK should be issued pursuant to s 137(2) of the Act to prevent recurrence. PSK is to comply with the terms of the record of settlement with GQM effective immediately.

[33] The imposition of a compliance order is a serious matter. Should PSK fail to comply with the compliance order I have made, GQM is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.<sup>5</sup>

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<sup>5</sup> Employment Relations Act, Section 139 and 140(6).

### **Should a penalty be imposed?**

[34] 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 PSK breached the record of settlement he became potentially liable to a penalty being imposed on him for each discrete breach.

[35] Given PSK's breaches of the record of settlement, I consider it would be appropriate to impose a penalty against him. In assessing the quantum of this penalty, I have considered the relevant factors set out at s 133A of the Act and looked at the range of penalties awarded in similar cases. Based on this I conclude that the appropriate penalty is \$500.00, and I also conclude that this penalty should be paid to the Crown.

### **Orders**

[36] PSK breached the terms of the record of settlement by making disparaging comments about GQM and by breaching the confidentiality obligations as set out in the record of settlement.

[37] PSK must comply with the record of settlement, in particular by:

- (a) refraining from making disparaging comments about GQM as set out in clause 1.7; and
- (b) maintaining the strict confidentiality of the settlement as set out in clause 1.8.

[38] I impose a penalty of \$500.00 against PSK and order that this amount be paid to the Crown within 14 days of this determination.

### **Costs**

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

[40] If the parties are unable to resolve costs, and an Authority determination on costs is needed, GQM may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum PSK will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[41] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>6</sup>

Andrew Gane  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

