IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 483
5457152

	BETWEEN	EWEN GROVES Applicant
	AND	MAUNGAKIEKIE GOLF CLUB INCORPORATED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Tom Duffy for the Respondent
Investigation Meeting:	21 November 2014
Determination:	24 November 2014

DETERMINATION OF THE AUTHORITY

A. The application by Ewen Groves for findings that Maungakiekie Golf Club Incorporated did not carry out some of its obligations under a settlement agreement made with him is declined.

B. Costs are to lie where they fall.

Employment relationship problem

[1] Ewen Groves was employed as general manager of the Maungakiekie Golf Club Incorporated (the Club) from 3 December 2012 until 12 January 2014. His employment ended by redundancy. A caretaker's position was also disestablished by the Club around the same time.

[2] On 16 January 2014 Mr Groves and the Club entered a full and final settlement agreement to resolve an employment relationship problem about the ending

of his employment. The agreement was made in mediation and certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act).

[3] Mr Groves applied to the Authority in April 2014 for findings that the Board of the Club had not met the requirements of four of the terms of the settlement agreement. Under s 159 of the Act the parties were directed to mediation about Mr Groves' applications but he did not attend a mediation arranged on 9 June. It took several months before a further mediation, still under direction, was arranged and held on 2 October 2014. The matter was not resolved there. It proceeded to investigation after – at the Authority's direction – Mr Groves lodged an amended statement of problem and the Club lodged an amended statement in reply. The Club insisted it had carried out its obligations under the settlement agreement.

Investigation and issues

[4] The settlement agreement included a term that the agreed terms would be kept confidential as far as the law allowed. For the purposes of this determination (and as a result of Mr Groves' application) it was necessary to make public, rather than keep confidential, four of those terms. It was not necessary to disclose other terms about which there was no dispute (and which remain confidential).

[5] The four terms at issue were:

> *2. As Board Chair and on behalf of the Board of the respondent, Tom Duffy apologises to [Mr Groves] for the way the ending of his employment was handled.*
>
> *...*
>
> *6. As soon as practicable after the signing of this agreement, the [Club] will provide [Mr Groves] with a certificate of service confirming [Mr Groves'] length of service, role and duties. The certificate of service will include comment to the effect that the [Club] needed to terminate [Mr Groves'] employment due to the financial issues it faced, that this was the sole reason the employment ended, and that the [Club] wishes [Mr Groves] well.*
>
> *7. [The Club] will make a communication to all members noting that [Mr Groves] has ended his employment with it, wishing him well for the future, and stating that he enjoyed his time with the club.*
>
> *8. Neither [Mr Groves] nor the board of the [Club] will make any negative comment about the other.*

[6] The issues for resolution by the Authority were:

(i) Was the apology required by clause 2 provided?

(ii) Was sending the certificate of service to a person who the Club understood represented Mr Groves sufficient to meet the requirements of clause 6 and if so, was this done and was what was sent sufficient?

(iii) Was the communication to Club members required by clause 7 made and, if so, was its contents sufficient?

(iv) Did the contents of two items included in minutes of a meeting of the Club's board, held on 16 January 2014, amount to negative comments about Mr Groves in breach of clause 8?

[7] In considering those issues I heard sworn oral evidence from Mr Groves and affirmed oral evidence from Mr Duffy at the investigation meeting and took account of the contents of the Club's amended statement in reply and Mr Groves' amended statement of problem, a written reply from Mr Groves to the Club's statement and a written submission provided by Mr Groves at the investigation meeting.

[8] As permitted by s174 of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The apology (clause 2)

[9] Mr Groves considered that the apology to him recorded at clause 2 of the settlement should have been reported to the Board, should have been recorded in the Board minutes, and should have thereby 'become public' to members of the Club and others.

[10] The agreed term did not require any such action. The apology, given by Mr Duffy as Board Chair and on behalf of the Club's board, was recorded in writing as one of the terms of settlement. The terms of settlement also agreed that term and all others were to be confidential, so no further publication or dissemination of the apology was required or appropriate.

The certificate of service (clause 6)

[11] Mr Groves said the Club had not provided the agreed certificate to him and showed "*a wilful desire*" not to do so.

[12] Mr Duffy's evidence – supported by copies of emails he provided – was that he had sent a certificate of service for Mr Groves to Keith Sanders, a person that Mr Duffy understood was acting as Mr Groves' representative. However Mr Groves' view was that – even if what Mr Duffy said was true – it was not sufficient as the certificate should have been provided to him personally, in 'hard copy', on Club letterhead and signed by Mr Duffy.

[13] The evidence from Mr Groves and Mr Duffy established the following facts. Mr Sanders attended the 16 January 2014 mediation with Mr Groves. At that mediation Mr Duffy (accompanied by a solicitor acting on a pro bono basis for the Club) understood Mr Sanders was attending in a representative capacity for Mr Groves.

[14] On 15 March 2014 Mr Groves spoke to Mr Sanders while they were playing golf together. Mr Groves said that he mentioned to Mr Sanders that the Club had "*not done anything*" about the agreed terms and Mr Sanders said he would send the Club an email, to which Mr Groves agreed. An email Mr Sanders sent to a Club email address the next day (that was then sent on to Mr Duffy) began with the words: "*On behalf of Ewen Groves*" and enquired about what was being done to "*honour the agreement between the parties*". An exchange of emails between Mr Sanders and Mr Duffy followed. That exchange included one, sent on 27 March 2014 by Mr Duffy, with an attached document in PDF format titled "*Ewen Groves record of employment*". A copy of that document shows it was on the Club's letterhead and signed by Mr Duffy in his capacity as president of the Club.

[15] A further email from Mr Duffy to Mr Sanders on 10 April asked Mr Sanders to confirm that he had received the 27 March email and its attachment and that had forwarded it on to Mr Groves. There was no record of a reply from Mr Sanders to that request for confirmation.

[16] Mr Groves' evidence was that Mr Sanders told him in March that he had not received the document from Mr Duffy. However in a further email exchange with Mr Duffy in October Mr Sanders confirmed that he had received "*the email in question*" but wrote that he was unable to locate "*trail*" confirming that he had forwarded the email to Mr Groves at the time "*although that would have certainly been the intent*".

[17] As a result of Mr Sanders' attendance at the 16 January mediation and his subsequent email correspondence, stated to be on Mr Groves' behalf, I have concluded – as matters of fact and law – that the Club was entitled to deal with Mr Sanders as Mr Groves' representative and that the Club complied with the terms of clause 6 of the settlement agreement by sending the certificate of service to Mr Sanders. The Club was not responsible for Mr Sanders' subsequent action or inaction (whichever may, in fact, be the case) in respect of forwarding that email and the attached document to Mr Groves.

[18] From reading its contents I was also satisfied that the certificate of service sent to Mr Sanders complied with the requirements of clause 6. There was no obligation on the Club to provide it directly to Mr Groves or to do so on a 'hard copy' letterhead.

Communication to members (clause 7)

[19] Mr Duffy's evidence was that the end of Mr Groves' employment with the Club was communicated to members in an email newsletter (titled *Chip and Putt*) sent to members on or soon after 29 January 2014. Mr Duffy provided a copy of the newsletter and said he knew it was sent because he had received the email newsletter at his own email address.

[20] The newsletter included this notice under the heading "*Board Announcement*":

> *The board are sad to announce that as part of the financial restructuring of the Club it had to make two positions redundant, that of the Caretaker/Groundsman and the General Manager role. Both Peter and Ewen had served the club well during their time with us and we wish them all the best in their future endeavours.*

[21] Mr Groves said there was no evidence that the newsletter was sent and that, even if it were, it was not written in the terms required by clause 7. He said he had

asked some other members of the club if they had received that issue of *Chip and Putt* but none said they recalled doing so.

[22] I have preferred Mr Duffy's direct evidence that the newsletter was issued by email over Mr Groves' indirect evidence about what he said some Club members told him about what they remembered of newsletters sent to them.

[23] The notice was deficient in one respect of the wording required by clause 7. It did not include the phrase referring to Mr Groves having "*enjoyed his time with the club*". However I have concluded that was a minor and technical omission and the notice published substantially complied with the purpose of the term.

[24] Mr Groves also complained about the end of the caretaker/groundsman's job being mentioned in the notice about the end of his position at the Club. He described it as "*insulting*" to him as general manager to be "*lumped in with the groundsman*". Clause 7 did not require the communication about the end of Mr Groves' employment to be exclusively about his position.

No negative comments (clause 8)

[25] Mr Groves considered two items in the Club's Board Minutes of 16 January 2014 contained "*obvious*" references to him and cast him in a negative light. He said it breached the agreement at clause 8 that neither party would "*make any negative comment about the other*". He said all club members and former club members he had approached saw the information in those items as negative and damaging to his reputation.

[26] The Minutes recorded, under the heading "*Attempted Destruction of Intellectual Property*", a report from the marketing director that financial and other data was lost due to the deletion of a critical directory from the office administrator's workstation but the directory was later recovered from a USB drive. The marketing director was recorded as saying he was concerned about the club's IT systems and volunteering to investigate further.

[27] Under the heading "*Unauthorized Capital Expenditure – Broiler*" the Minutes also recorded a report from the marketing director about a dispute between the club and a kitchen appliance supplier over payment for a broiler installed in the club

kitchen. Information found during recovery of the data revealed the dispute. The treasurer was asked to investigate options to resolve the dispute with the supplier.

[28] Mr Duffy denied that the items included any obvious references to Mr Groves. However Mr Duffy said that even if any members read those items as referring to Mr Groves, the Minutes simply reported information rather than making any negative comment about Mr Groves. Mr Duffy did not accept that a reasonable club member would necessarily assume those two items referred to Mr Groves or his work rather than other people who might have been involved. No one was named in those Minute items as being responsible for the state of affairs discussed and Mr Duffy said they could read as referring to a number of other people, including the office administrator, members of the Club's previous board or the Club's former caterer.

[29] Mr Groves accepted that his view of the items required an assumption about their contents referring to him but said it was an easy assumption for members to make. He said he also had "*second-hand or third-hand*" reports that "*certain*" board members had told Club members that the item about the broiler dispute referred to him and that it had been "*fedback*" to him that they were accusing him. He said he had heard those reports from members at the Maungakiekie Golf Club and at his own club in Remuera.

[30] I have concluded that Mr Groves' evidence was not sufficient to establish the two items in the Minutes either actually were, or were intended to be, negative comments about him in a manner that would amount to a breach of clause 8. The Club was not responsible for assumptions or supposition by others about those items or the supposed comments others may have made about them.

[31] The Club's Board was entitled to receive reports about items of business that needed to be attended to (about an IT issue and a disputed debt) and to record those in its Minutes. It did so and it did not include any negative comments about Mr Groves in those records.

[32] Mr Groves considered the two Minute items were evidence of a personal vendetta against him by the Club's marketing director, with whom he had fallen out during his first week as general manager and on other occasions since. Mr Duffy's riposte to that assertion was that Mr Groves had his own personal vendetta against not

only the marketing director but also the Club's whole board who Mr Groves blamed for his redundancy. Neither opinion, ultimately, was relevant to the Authority's task of considering whether or not the terms of the settlement agreement were breached. On the available evidence I concluded what was or was not done did not disclose breaches of the kind alleged by Mr Groves or did not provide a sufficient basis to make the findings he sought. On that basis his application had to be declined.

Costs

[33] Neither party reported any legal costs related to those matters. However if there were any, such costs are to lie as they fall.

Robin Arthur
Member of the Employment Relations Authority