

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 426
3232419

BETWEEN KOH I-LYN
Applicant

AND PRICEWATERHOUSECOOPERS
Respondent

Member of Authority: Sarah Blick

Representatives: Applicant in person
Tim Clarke, counsel for the Respondent

Investigation Meeting: 1 May 2024 by audio visual link

Determination: 12 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Koh I-Lyn worked for PricewaterhouseCoopers Malaysia until she applied for and was offered employment with PricewaterhouseCoopers New Zealand (PwC). She successfully obtained a work visa, travelled to New Zealand, and started work with PwC here in January 2019. By 2020 an employment relationship problem had arisen, and in July 2020 the parties entered into a written settlement agreement (the agreement) which contained a full and final settlement clause. Her employment was at an end. Ms Koh later returned to Malaysia where she remains.

[2] Nearly three years after her employment ended, Ms Koh lodged an application with the Authority, appearing to pursue a personal grievance claim and indicating PwC had a role in preventing her from securing new employment. It cannot be said the facts Ms Koh relied on were fully, fairly or clearly stated or how Ms Koh wanted the problem resolved.

[3] After receiving further information from the parties (largely from PwC) the Authority considered, as a preliminary issue, whether or not the parties had reached accord and satisfaction such that the agreement was binding on them. The Authority found they had, and Ms Koh was unable to pursue a personal grievance claim against PwC, but noted there appeared to be a remaining issue of PwC allegedly breaching a non-disparagement clause in the agreement.¹ An investigation meeting was set down to hear evidence relevant to that issue.

[4] Ms Koh has made it clear she is now seeking “total nullification and voidance” or “cancellation” of all documents between herself and PwC, including her employment agreement and the agreement. She clearly still wishes to pursue a personal grievance claim against PwC, despite the Authority’s earlier findings.

[5] PwC points out jurisdictional and evidential problems with Ms Koh’s claims, and submits the available evidence does not support a claim to cancel the agreements in any event. It denies breaching the agreement. It says the application should be dismissed.

The Authority’s process

[6] Having determined the preliminary matter, in directions issued on 16 February 2024 the Authority directed Ms Koh to provide an amended statement of problem with sufficient particulars of the remaining problem she wanted resolved, and of the remedies she was seeking. The Authority also directed her to provide an affidavit or witness statement for herself and any other witnesses, and any additional relevant documents. It also encouraged Ms Koh to take up the opportunity to seek advice or representation.

[7] An amended statement of problem was not lodged, nor were affidavits or witness statements. Rather, the Authority received an email from Ms Koh saying it would serve as her affidavit, which stated:

1) Amended statement of problem by email

Inability to cancel all agreements and settlements

2) Employment relationship problem she wants resolved

¹ *Koh I-Lyn v Pricewaterhousecoopers* [2023] NZERA 781.

To cancel all agreements and settlements
To remove unsigned pages to be concise -refer to 4) below.

3) Remedies

Investigate and provide evidence of the misconduct that Koh I-Lyn has been accused of. Koh I-Lyn cannot provide evidence of misconducts that does not exist. To quantify on damage inflicted and award monetary compensation.

To explain to people who would employ me on what has happened and for me to move on with life.

4) Evidence she relies on in this matter:

Offer letter attached is the copy received by me prior to employment.

In the offer letter, it contains two offers:

- 1) To accept PwC's recommended terms and conditions through initials
- 2) To accept the offer of employment through signature

I comply to terms and conditions in accordance with the New Zealand Employment Relations Act. Only pages with my signatures or initials are to be relied upon.

[8] In terms of documents, the email attached a screenshot of Ms Koh's letter of offer of employment with PwC dated 15 November 2018, which had already been provided to the Authority.

[9] When asked for PwC's views on next steps towards resolving this matter, counsel expressed the view that none of the matters raised in the email were capable of being investigated by the Authority and the matter ought to be treated as being at an end. PwC further stated it was entitled to a contribution to its legal costs in relation to the preliminary investigation, but if the matter could be treated as being at an end, no further issue as to costs would arise.

[10] In further directions issued on 4 April 2024, the Authority outlined jurisdictional and evidential issues with Ms Koh's claims. It drew Ms Koh's attention to PwC's likely entitlement to an award of costs in relation to the preliminary investigation, and out of caution attempted to make it clear, in a way Ms Koh might understand, that she had an opportunity to withdraw her application without any costs orders being made. The Authority stated Ms Koh should give careful consideration as to whether to continue with her application in light of the issues with it, and again encouraged Ms Koh to seek advice about her claims.

[11] It became clear Ms Koh wished to proceed with her application, and an investigation meeting date was set down. Shortly prior to the investigation meeting, Ms Koh administratively withdrew her claim, stating she did not wish to be liable for associated costs, but still wanted her matter investigated. Ms Koh was advised that as with any other matter, if a party is unsuccessful the other party may apply for a costs award.

[12] The parties attended the investigation meeting by audio visual link, with Ms Koh attending from Malaysia. She was questioned under affirmation at the investigation meeting by myself and counsel for PwC. She was given the opportunity to provide submissions and further relevant information after the investigation meeting.

[13] Information outlined in the statement of problem, statement in reply, other information received from Ms Koh, and in the form of an affidavit from PwC's General Counsel Stewart McCulloch has been considered for this determination. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received and considered but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders as a result.

The issue

[14] The remaining issue for determination is whether PwC has acted in breach of the non-disparagement clause in the agreement, and if so, what if any remedy is available.

Background

[15] The parties entered into the agreement on 16 July 2020. It contains a "non-disparagement" term as follows:

Neither party will make any statements to any person or organisation or to the general public that are disparaging or reflect negatively on the other.

[16] At the investigation meeting the Authority asked Ms Koh to elaborate on the claim in her statement of problem that other employers fear employing her because of PwC's actions, and employers had told her that. She says she has made job applications

to PwC with (at least) its Malaysia office and New Zealand, as well as other employers. Ms Koh believes she still has good standing with the PwC Malaysia office.

[17] Ms Koh referred to being invited to and attending interviews but then suddenly being told her applications could not proceed. Ms Koh gave evidence that nobody could tell her why her applications could not proceed (at odds with the claim in the statement of problem that employers told her they feared employing her because of PwC).

[18] When questioned about whether she had considered her employability or suitability for the roles she applied for as a reason for not obtaining employment, Ms Koh said she is a certified chartered accountant and applies for roles for which she is qualified. Further, that if she was not suitable for the roles applied for, she would not have proceeded through to interview. She said she asks prospective employers to say if she needs to improve in some way, because she wants their feedback. Ms Koh believes there is a “hidden barrier” to remove, so she can obtain employment again.

[19] At the investigation meeting, Ms Koh gave evidence that at some point her phone was stolen, and someone had used it to ask for a loan from PwC Malaysia, while impersonating her. Ms Koh said she told PwC that if someone who sounded like her or looked like her asked for money, to not give them any money. She says if the impersonator had done this to one employer, it could be happening to others.

[20] Ms Koh expressed concern about telling prospective employers how her employment ended if that was untrue. She gave evidence she would usually say if a prospective employer wanted to know what happened in relation to her employment with PwC, they should reach out to PwC. She said she did not want to find out what would happen if she accidentally or indirectly breached the agreement.

[21] PwC says Ms Koh has on various dates sought to return to New Zealand to work for PwC and its offices overseas. In its statement in reply, PwC stated it had not received any enquiries or requests for references or had any dealings with other prospective employers of Ms Koh.

Reference to November 2020 date in agreement

[22] Ms Koh has noted a reference in the agreement to an employment agreement dated 15 November 2020. Ms Koh has suggested this reference meant there was an

intention she would be re-employed under a further employment agreement with PwC in November 2020. At the investigation meeting Ms Koh stated she remained in New Zealand after her employment ended because PwC had still not given her an employment agreement by November 2020, as the agreement foreshadowed. PwC maintains the reference to 15 November 2020 is simply a typographical error, and it should have read 15 November 2018, being the date of Ms Koh's original letter of offer and employment agreement. PwC also pointed out the agreement demonstrates Ms Koh's employment was clearly at an end, and the reference to 15 November 2020 related to a "non-solicitation" provision in the parties' employment agreement.

Discussion

Cancellation remedies not available

[23] Ms Koh is asking the Authority to cancel the agreement, and for it to investigate her personal grievance claims and award remedies. The Authority has already clearly determined Ms Koh is prevented from pursuing a personal grievance by the terms of the agreement – with accord and satisfaction having been reached between the parties. For the avoidance of doubt, no evidence was or has since been provided to suggest there is any basis for cancelling or setting aside the agreement, such that Ms Koh was coerced, misled, deceived, mistaken or disadvantaged by the terms of the agreement. The agreement does not stop Ms Koh from obtaining another job, nor does it stop her from providing answers in good faith to prospective employers. While it is clear Ms Koh now regrets entering into a settlement agreement with PwC in which they agreed to resolve all employment matters, the settlement remains binding unless or until both parties agree otherwise, which is not the case here.

[24] Another remedy Ms Koh seeks is the cancellation of her employment agreement with PwC and that unsigned pages of it be "removed". Even if an employment agreement could be cancelled years after the employment ended, there is no evidential basis for cancelling the parties' employment agreement, and the statutory threshold for remedies is set high.² This claim is declined.

² Employment Relations Act 2000, sections 68, 69 and 164.

No disparagement established

[25] The remaining claim is whether there has been some breach of the agreement by PwC which has damaged Ms Koh's reputation, namely, a breach of the non-disparagement clause. To disparage is to bring into discredit, degrade or speak of critically. There is no need for the comment to be untruthful or fabricated.³

[26] Ms Koh references a "hidden barrier" to her obtaining employment, but she has not provided any relevant evidence (documentary or otherwise) that might support the claim PwC has taken actions or made disparaging statements to others. Documentary evidence of applications made or responses received from employers has not been provided by Ms Koh, except one email response from PwC in March 2022 in response to her application for a role with PwC here, clarifying an issue raised by her.

[27] Ms Koh does not appear to have self-reflected at all on whether her own communications, actions, work experience, or suitability for employment have been a factor in not being able to obtain comparable employment. Given its own experience of Ms Koh's written communication style and the frequency of her communications, the Authority cannot discount this and such other factors being at play.

[28] There is no evidence PwC has made disparaging statements to others in breach of clause 6.1 of the agreement. No breach of the agreement has therefore been established. Even if a breach had been established, there is no apparent basis for cancelling the agreement, and no other available remedies are sought.

November 2020 reference was a typographical error

[29] For completeness, the Authority finds the reference to an employment agreement dated 15 November 2020 was a typographical error for the reasons PwC points out. The agreement records Ms Koh had resigned with an effective date of 22 June 2020, and that was her final date of employment and last working day in the office. The agreement further referred to a termination payment and stated a certificate of service would be provided, in accordance with the agreement. Ms Koh could not have reasonably understood or relied on the error as PwC agreeing to offer her further employment at or by that date in the circumstances. There is also no evidence before

³ *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [37]–[38].

the Authority that Ms Koh raised this as an issue with PwC at or around that time or within the nearly three years before lodging her application with the Authority.

Outcome

[30] Koh I-Lyn remains unable to pursue a personal grievance claim against PwC.

[31] There is no evidential basis for a finding PwC has breached clause 6.1 of the settlement agreement.

[32] Koh I-Lyn's application to void or cancel or otherwise set aside her employment agreement or the agreement is dismissed.

[33] There are no further outstanding matters before the Authority as a result. Except for the limited issue of costs below, this matter is at an end.

Costs

[34] Costs are reserved. As the successful party, PwC is entitled to costs, including in relation to the investigation of the preliminary matter. If the parties are unable to resolve costs, and an Authority determination on costs is needed, PwC 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 Ms Koh 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.

[35] 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.⁴

Sarah Blick
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1