

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 113
5454894

BETWEEN KEA PETROLEUM HOLDINGS
LIMITED
Applicant

AND KRISTEL McLEOD
Respondent

Member of Authority: Michele Ryan

Representatives: Peter Wright for the Applicant
No appearance by or on behalf of the Respondent

Investigation Meeting: 4 November 2014 at New Plymouth

Determination: 7 November 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kea Petroleum Holdings Ltd (Kea) is a small company involved with oil and gas exploration. It has offices in New Plymouth, Wellington and London.

[2] Kea claims the respondent, Ms Kristel McLeod has breached an agreed Record of Settlement (the settlement agreement). It alleges Ms McLeod posted two separate articles on Facebook about Kea and its management, in contravention of a settlement term that she would not "*not disparage or speak ill of the company... or its Officers*".

[3] When Kea first lodged its statement of problem on 7 April, it sought to have Ms McLeod comply with the settlement agreement, and a penalty imposed. The articles of concern have since been removed from Facebook however Kea pursues its claim for a penalty.

The Authority's investigation meeting

[4] Kea's Finance Director, Mr Peter Wright attended the Authority's investigation meeting.

[5] Ms McLeod did not lodge a statement in reply. Nor was she present at the case management conference or the Authority's investigation meeting. I am satisfied however, that Ms McLeod was both aware of the date, time and location of the investigation meeting based on email correspondence¹ between her and the Authority's support staff. Initially she advised that she would "*not participate in this rubbish*"². She later asserted she would not attend the Authority's investigation but that she would respond to Kea's claims in an affidavit³, but no documentation of that nature has been received.

[6] On 29 October 2014 the Authority sent an email to Ms McLeod seeking confirmation that she would attend the investigation and whether she intended to provide documentation, and if so, when. That communication emphasised that the Authority wished to ensure Ms McLeod had an opportunity to respond to the claims against her. No response was forthcoming and in the absence of good cause for non-attendance or representation at the scheduled investigation meeting, the meeting proceeded.⁴

The settlement agreement

[7] Ms McLeod and Kea signed a settlement agreement on 28 May 2013. The settlement agreement was forwarded to a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 29 May 2013 and duly completed and signed pursuant to s.149 of the Employment Relations Act 2000.

[8] The settlement agreement recorded that the terms therein were and in full and final settlement of all claims arising from Ms McLeod's employment with Kea and contained a confidentiality provision. For the purposes of examining whether enforcement action is necessary I need to examine clause 4 and 6, as follows:

¹ 2, 19, 23, 25 (x2) September 2014; 20 October 2014

² 2 September 2014

³ 19 and 23 September 2014 and 20 October 2014

⁴ Clause 12 of Schedule 2 of the Employment Relations Act

- 4, ...*Further, Kristel warrants that she has delivered up to her representative all hard copies of documents or records relating to her personal grievances or to the investigation and that she had deleted from any computer to which she has access all soft copies of such documents or records which she has held.*
- ...
6. *Kristel will not disparage or speak ill of the company or any employee, director or Officer of the company, including Richard Parkes.*
- ...

Summary of relevant information

July 2013

[9] Almost two months after execution of the settlement agreement Ms McLeod posted a number of images⁵ on Facebook⁶ which exhibited Kea's well sites and drilling operations.

[10] Mr Wright became aware of Ms McLeod's use of the images on or about 23 July 2013 and corresponded with her by email. He produced a copy of the email exchange between them,⁷ which evidenced Mr Wright's request that she remove all "Kea images" from Facebook and destroy any Kea material she may have. He asked for her written assurance that she would comply with his directives and reminded her of her warranty, pursuant to the settlement agreement, that she had either returned or deleted any documentation referencing Kea.

[11] Ms McLeod responded by advising that she had deleted all Kea images from her Facebook page. She asked if her written assurance by way of email will suffice, and apologised for using Kea's images.

March 2014

[12] On 26 March 2014 an article comprising approximately 500 words about Kea's management and operations was placed on the same Facebook page as previously, and was available for anyone to access and read. Viewers were invited to record any comment they wished to make in response to posted articles.

⁵ Mr Wright reports 5 or 6 images were placed on Facebook but have since been removed

⁶ Ms McLeod is the sole director of a company called Taranaki Wellsafe Security Limited (TWSL) and the images were placed on that company's facebook page.

⁷ 23 July 2013 to 29 July 2013

[13] I have not produced the entirety of the article, but the following excerpts taken from the article are at the heart of Kea's application to the Authority:

"Take Kea Petroleum for example...Richard Parkes, Managing Director made many false statements via RNS (Registered News Service)."

...

[14] The article set out statements made allegedly by Mr Parkes, and then proceeded to discuss operational matters:

...([Kea] cannot afford to drill it now and are entering into farm out negotiations) and each passing RNS that figure got lower and lower until it stabilised ...

The cost of extracting the ways crude combined with all their blockage problems meant revenue was not calculated at simply approx. \$100/BBL. They made considerably less which did not even cover their admin expenses (yes, that's right ...Admin). This is not "insider info" by the way. This is info collected from a) common sense b) RNS's c)the many contractors they hired d) Financial statements and e) AGM. It should be noted tha at not them a CPR (Competent Persons Report been issued...That speak volumes in itself ..

[15] Near its conclusion the article stated:

"Everyone in the industry knew this and yet [Mr Parkes] still disrespected shareholders by lying to them."

[16] Mr Wright says the article remained on Facebook for approximately three months and was then removed. He speculates that it was not until Ms McLeod became aware that Kea was progressing its application with the Authority that the article was deleted. Mr Wright reports that the article was replicated and published on an international bulletin board which provides information updates on the oil and gas industry.

[17] Mr Wright produced an additional copy of a Facebook⁸ entry dated 22 April 2014 which states:

I have some juicy news and i was right!!!! Richard Parkes, Managing Director of Kea Petroleum has been fired effective 15 May 2014."

Issues

[18] The Authority needs to determine:

⁸ Mr Wright reports that the name of the Facebook page had altered but that the (newly titled) page remained linked to Ms McLeod's company

- whether Ms McLeod has breached the settlement agreement; and
- if so, whether penalties should be awarded.

Did Ms McLeod breach the settlement agreement?

[19] In an email dated 19 September 2014 Ms McLeod advised the Authority's support staff of the following:

I have not said anything that wasn't truthful on my Facebook page and i have deleted the post [Mr Wright] was not happy with.

[20] On 24 September 2014 Ms McLeod sent a further email to the Authority. Amongst other things she stated:

I accept that I should have never have mentioned Kea on my Facebook Page and will never publically mention the Company again. I will not be participating in any conference call. If I am to be fined, so be it... I do take responsibility for my actions. I genuinely wish I had not posted those comments and will never again blog about Kea or any of it's staff, past or present (sic). At the time I believe what i posted to be true, now I simply want to move on.

[21] On 25 September 2014 Ms McLeod sent two additional emails⁹ following an inquiry from the Authority as to how Ms McLeod wished to respond to Kea's claims. The first of these reiterated information sent to the Authority on 19 and 24 September 2014. Her later email advised:

In my humble opinion this has been completely blown out of all proportion. I made a few comments on a Facebook page and was asked to delete them which I have done. I have no other documents or any story.

[22] Ms McLeod concedes that she wrote the statements of concern. I have no hesitation in concluding that Ms McLeod's statements with respect to Mr Parkes are disparaging, as is her appraisal of Kea's management of operational matters. I find that the statements were authored with that purpose in mind. Even if Ms McLeod did genuinely regard her statements as accurate and true, there is nothing contained in clause 6 of the settlement agreement which exempts disparaging remarks about the Company and/or Mr Parkes on those grounds.

Should a penalty be awarded against Ms McLeod?

⁹ At 9.52am and 3.11pm

[23] Section 149(4) of the Act states:

A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty by the Authority.

[24] In *Xu v McIntosh* [2004] 2 ERNZ 488 the Employment Court provided guidance to the Authority when exercising its discretion to order a penalty. It made the following observations:

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 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.

[25] Mr Wright says it has been difficult to assess what, if any, harm Ms McLeod's statements may have had on Kea. He reports that he was notified by at least one shareholder that the article was replicated and published on an international bulletin board that provides information updates on the oil and gas industry. He says the article gives cause for Kea's shareholders to lose trust in it.

[26] The settlement agreement reflects a substantial sum of money was offered by Kea and accepted by Ms McLeod to resolve an employment relationship problem. In exchange Ms McLeod agreed not to pursue a personal grievance and not to disparage or speak ill of the company, or Mr Parkes. Ms McLeod was legally represented when she entered into the settlement agreement and the mediator involved with certifying the settlement agreement recorded that she was satisfied that Ms McLeod understood the effects of the settlement agreement, including that the terms were final, binding and enforceable.¹⁰

[27] The evidence demonstrates a pattern of breaches to the settlement agreement by Ms McLeod, which I find are intentional and deliberate. When Kea first contacted Ms McLeod as regards the use of its images in July 2013, Ms McLeod removed the images, apologised, and sought confirmation from Kea that her written assurances

¹⁰ Section 149(3) of the Employment Relations Act

would satisfy its concerns. I find her response at that time objectively indicates she was cognisant of the terms of the settlement agreement and aware that her actions were in breach. Kea does not seek to claim a penalty with respect to that particular incident but furnished the information in support of its view that later breach actions on 26 March and 22 April 2014 were both wilful and blameworthy. I accept Kea's submission in this regard.

[28] The Employment Relations Act promotes resolution of employment relationship problems between parties. Settlement agreements under s.149 of the Act provide an effective methodology for parties to resolve their differences. It is important for parties to be assured that arrangements made pursuant to s.149 are adhered to, and that there are consequences if they are not. In all the circumstances I find it is appropriate to impose a penalty against Ms McLeod to reflect condemnation of her actions and to dissuade her from engaging in further action which breaches the settlement agreement between her and Kea.

Costs and disbursements

[29] Kea has not incurred legal costs in relation to this matter.

[30] On the day of the investigation meeting Mr Wright was required to catch return flights between Wellington and New Plymouth and was obliged to travel by taxi to and from New Plymouth airport.

[31] Copies of invoices associated with Kea's disbursements were provided. I am satisfied that the following expenses were incurred and paid to progress Kea's claim:

- \$387.50 – flights from Wellington to New Plymouth and return;
- \$80.00 – taxi and airport parking fees;
- \$71.56 – filing fee.

Orders

[32] Pursuant to s.149(4) and s.136(1) of the Employment Relations Act I order Ms McLeod to pay a penalty of \$2,000 to the Crown Bank Account.

[33] Ms McLeod is also ordered to reimburse Kea the sum of \$539.06 for disbursements listed at para [28] of this determination.

[34] Payment of these sums must be made with 14 days of this determination.

Michele Ryan
Member of the Employment Relations Authority