

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 95
5615108

BETWEEN KARENS WHOLESALE
LIMITED t/a FERRY AUTO
COURT
Applicant

A N D LAWRENCE MARK SLOANE
Respondent

Member of Authority: Helen Doyle

Representatives: Karyn Brown, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 23 June 2016 at Christchurch

Date of Oral Determination: 23 June 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Karens Wholesale Limited t/a Ferry Auto Court (KWL) and Lawrence Sloane entered into a record of settlement dated 5 February 2016 under s 149 of the Employment Relations Act 2000 (the Act).

[2] The settlement was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) to provide mediation services. The mediator certified that she had explained to the parties the effect of s 149(3) of the Act and was satisfied that in the knowledge of that subsection, the parties affirmed their request.

[3] Section 149(3) provides that once signed by an MBIE mediator, the agreed terms of settlement are final and binding, may not be cancelled under s.7 of the Contractual Remedies Act 1979 and may only be brought before the Authority for enforcement purposes.

[4] Corrina Leigh Brown (Karyn Brown) is the sole director of KWL. She says that Mr Sloane has breached clause 4 of the settlement agreement. Clause 4 provides:

Both parties agree not to speak ill of the other to any third party at any time.

[5] I prohibit from publication the other terms of the settlement.

[6] Mr Sloane denies in his statement in reply that he breached clause 4 of the settlement agreement and says that he never spoke ill of KWL/ Ferry Auto Court.

[7] Ms Brown initially asked in her statement of problem that Mr Sloane reimburse moneys already paid and KWL not pay a remaining amount owing under the settlement agreement. All moneys have now been paid pursuant to the agreement and in an amended statement of problem Ms Brown seeks on behalf of KWL a penalty under s 149(4) of the Act for the breach.

[8] Mr Sloane did not appear at the investigation meeting. I am satisfied from the administration file that he was served with the investigation meeting notice, amended statement of problem and the Authority's notice of direction.

The issues

[9] The issues for the Authority are as follows:

- (a) Was there a breach of clause 4 of the settlement agreement;
- (b) If there was a breach of clause 4 of the settlement agreement, should a penalty be awarded?

Was there a breach of clause 4 of the settlement agreement?

[10] KWL relies on the following Facebook posting by Mr Sloane on the KWL/Ferry Auto Court Facebook page in response to a posting from another person about a review. Mr Sloane appears to have been asked to respond to a question whether he had had a bad experience there and whether he could do a review. Mr Sloane wrote:

I used to work there and it didn't end well. So nah can't review man sorry lol. Alexia Sloane you can though.

[11] There is no evidence of a review of any sort by Ms Sloane, who is Mr Sloane's sister.

Discussion

[12] The New Zealand Oxford Dictionary defines *speak ill* as *to say something unfavourable about*. Mr Sloane wrote two matters in his post that were of concern to Ms Brown. The first was the words *it didn't end well*. Whilst I accept that certain inferences can be drawn from those words, I could not be satisfied that that written comment was an unfavourable statement. The reasons for work not ending well for example could be something Mr Sloane did rather than Ferry Auto Court.

[13] The second matter that was of concern, understandably, was the rather mischievous comment that Alexia Sloane could review. The concern Ms Brown had was that Mr Sloane may fabricate an unfavourable review and post that under Ms Sloane's name or that Ms Sloane may fabricate a review. I could not be satisfied, though, that actually occurred and/or that Mr Sloane either fabricated or encouraged Ms Sloane to undertake such an action.

Determination

[14] I could not be satisfied that Mr Sloane breached clause 4 of the settlement agreement and spoke ill of KWL. This was a borderline case but the Authority does need to be satisfied that there is a breach of clause 4 and I could not be so satisfied that the Facebook posting went that far. The reference to Mr Sloane's sister being able to review was somewhat mischievous but there is no evidence that she did post a review.

[15] Mr Sloane should be careful in future not to act in a manner that breaches clause 4 of the settlement agreement of KWL.

Costs

[16] Neither party was represented. No issue of costs arises.