IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 391
3053235

	BETWEEN	HYUNWOO KIM Applicant
	AND	KOKOS NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Jun Sung Kim, director of the Respondent
Investigation Meeting:	1 July 2019
Oral Determination:	1 July 2019
Written record issued:	1 July 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hyunwoo Kim, also called Wayne Kim, asked the Authority to determine whether his former employer, Kokos New Zealand Limited, had breached the terms of a settlement agreement through comments made by the company's director, Jun Sung Kim, also called Simon Kim.

[2] Their settlement agreement, made in mediation on 14 December 2018, was certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act 2000 (the Act). This certification meant the terms of their agreement were final, binding and could only be brought before the Authority for enforcement of terms.

[3] One of those terms was that their agreement was made in full and final settlement of all matters between the parties arising out of their employment

relationship. This meant nothing about the employment relationship or what either party said had happened during it could, in this case, be considered by the Authority.

[4] However the agreement also included this term: "The parties agree they will refrain from making any negative or disparaging remarks about each other".

[5] Wayne Kim said Simon Kim had breached this non-disparagement term during a telephone conversation on 31 January 2019 and his actions on three other occasions. Wayne Kim asked for a penalty to be imposed on Kokos New Zealand Limited for the breaches he said had occurred.

[6] The parties were directed to attend further mediation to see if they could resolve this matter between themselves. That mediation, held by telephone on 10 April 2019, did not resolve the matter and Wayne Kim asked the Authority to investigate and determine his application.

[7] Both men were asked to attend an investigation meeting to answer questions about what had happened. In advance of that meeting Wayne Kim was asked to provide in writing some information about one alleged instance of a breach of the non-disparagement clause since he had lodged his statement of problem. He did so by email on 26 June 2019 and this was copied to Simon Kim so he had notice of it before the investigation meeting.

[8] An interpreter of Korean was available at the investigation meeting to assist both men, if they wished. After they had answered questions and had the opportunity to make any closing submissions, this matter has been resolved by the following oral determination issued under s 174A of the Act. As permitted by s 174E and s 174A of the Act this determination has not recorded all evidence and submissions received but has expressed conclusions on matters requiring determination to dispose of the matter, stated any necessary findings of relevant fact or law and specified any orders made.

What the phrase "negative or disparaging remarks" means

[9] For the purposes of this determination, the term about neither party making negative or disparaging remarks is interpreted on the basis of the ordinary or plain meaning of those words. To 'disparage' is to suggest someone is of little worth or to

speak scornfully, that is to express open contempt or disdain of the person.[1] It has also been defined as speaking slightingly or critically of the person.[2] The word 'negative', in this context, is to the same effect of expressing disapproval of the person. Taken together the two words refer to making the kind of remarks (in spoken or written form) that would diminish a person's standing or reputation in the eyes of other people.

[10] Non-disparagement clauses are often included in settlement agreements certified under s 149 of the Act but, as typically, prohibit either party making disparaging remarks to any one else. In this case the clause was not limited to remarks made to a third party. It technically also applied to any such remarks made by Wayne and Simon (or any other company representative) to one another, after the settlement was reached.

The alleged breaches of the non-disparagement clause

The telephone call on 31 January 2019

[11] On 31 January 2019 Simon Kim contacted Wayne Kim by telephone. The call lasted around two minutes. Wayne made an audio recording of about one minute long of the latter part of the call. Simon accepted he knew Wayne might record the call. As well as the audio recording I had a transcript prepared by Wayne translating their conversation in Korean into English. There were no significant differences over that translation.

[12] Simon said the purpose of his call was to check whether Wayne had received a payment due under their settlement agreement. However Simon continued the conversation by asking Wayne why he had lied, asking whether he was sorry to Simon and the other staff of the company and stating Wayne would keep the "shame" of what he had done forever. Wayne then asked if Simon was trying to scare him. Simon hung up.

[13] Simon's comments referred to his view that Wayne had not been truthful in what he had said during the dispute about the end of his employment relationship with Kokos NZ Limited. Saying that Wayne had lied, should apologise to Simon and

[1] Concise Oxford Dictionary (11th edition, 2004).
[2] See Shorter Oxford Dictionary definition referred to in *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [36].

others, and would continue to bear some shame for what happened were clearly remarks that were critical, slighting and expressing contempt and disdain for Wayne. They breached the non-disparagement clause. Given the parties had reached a full and final settlement of all employment issues between them, Simon's comments were intemperate and unnecessary.

[14] Wayne was upset by the call. He said he immediately contacted the Mediation Service and said he was advised to contact the Police. He went to a local Police station and then to another Police station to complain about it. The Police told him they would not take any action on his concern but an officer did agree to contact Simon about it. Simon confirmed that around 20 minutes after ending his 31 January call with Wayne he received a telephone call from a Police representative who suggested that he did not call Wayne again.

The email on 5 February 2019

[15] However Simon did send Wayne an email on 5 February. In the email he asked why Wayne had contacted the Police and the mediation service. The email also attached a personal file belonging to Wayne that Simon said he had found on the company's Google Drive. Simon referred to Wayne having used the company system "for personal use" but also said: "Let me know if you need other files".

[16] After getting that email Wayne lodged his application in the Authority. He said he was being harassed and living in fear following Simon's phone call.

[17] In his evidence at the Authority investigation meeting Wayne accepted that the content of Simon's 5 February email, including sending on a personal file belonging to Wayne, did not breach the non-disparagement clause.

The mediation on 10 April 2019

[18] The parties were directed to attend mediation over this dispute about breach of the non-disparagement clause. The mediation was held by telephone. Simon took part in that call with the assistance of an advocate, as he was entitled to do. Wayne said that the advocate made comments about him during that call that were either disparaging or indicated that Simon must have made negative remarks about Wayne to that person before the call. Even if that was so, s 148(1) and (3) of the Act required the parties to keep statements made in mediation confidential and prevented any

evidence of what was said being admitted for the purpose of the Authority's investigation. However if that prohibition on taking any account of what Simon's advocate said in the mediation did not apply, Simon was nevertheless entitled to brief that person about the situation for the purposes of the mediation. There was no breach of the non-disparagement clause in doing so.

A different and unspecified occasion

[19] Wayne Kim also alleged there was another instance where Simon had made a "negative comment" about him to a former colleague. Wayne accepted at the investigation meeting that no evidence of that alleged instance was available and no account could be taken of that allegation.

Overview and outcome

[20] The evidence established one instance of Simon clearly breaching the agreed term that the parties would refrain from making negative or disparaging remarks about each other. This comprised Simon's comments during the 31 January phone call that Wayne was a liar, should apologise and would bear shame for what he had done.

[21] The Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.[3] It requires a realistic and pragmatic approach to what people did in a particular circumstance and how that should be treated.

[22] In his oral evidence Simon said that Wayne had also been a friend when he worked for the company and his comments to him on 31 January were made as an individual and reflected the human emotion of the situation. That was not an adequate explanation. Simon was the company director and he was obliged to comply with the obligations of the settlement agreement made on the company's behalf, including by not making negative or disparaging remarks. There was nothing necessarily wrong with Simon's call to check if Wayne had received a payment, if Simon had stopped there. He did not and the company had to bear the responsibility for what he went on to say.

[3] Employment Relations Act 2000, s 157.

[23] However, a realistic assessment of the situation also needed to acknowledge that Wayne chose to allow the telephone call to continue. The fact that Wayne began recording it showed this was a deliberate measure. He could have chosen to end the call but did not. Rather he prolonged it and it was during that part of the call that the comments to which Wayne took offence were made. Wayne was speaking when Simon hung up. In closing comments made at the investigation meeting Wayne said he understood that some people might see his actions in contacting the Police, and his subsequent pursuit of the issue in his application to the Authority, were an overreaction.

[24] Despite his contribution to the situation, Wayne Kim had established the agreement was breached and Kokos New Zealand Limited was liable to a penalty as a result of Simon's actions.[4] In setting a penalty I have had regard to the factors set out in s 133A of the Act and been guided by the case law for their application but have described the reasons for the penalty figure reached in summary form only.[5]

[25] The objects of the Act promote mediation as the primary problem-solving mechanism. Other provisions of the Act establish that settlement agreements are agreements made to be kept and measures should be taken to punish and deter parties from breaching their agreed terms.

[26] Simon's actions in breaching the agreement were deliberate but of limited extent. He had telephoned Wayne on one occasion only and made what could be called some angry, disappointed or intemperate remarks that, in light of the non-disparagement term, were inappropriate.

[27] There was no repetition of that action. There was no evidence that could be relied on to show he made negative and disparaging remarks about Wayne to anyone else.

[28] The damage was limited to some upset to Wayne as a result of comments made to him, not to other people. Wayne also lost some peace of mind that such a non-disparagement clause is intended to give both parties.

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[4] Employment Relations Act 2000, s 149(4).
[5] *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

[29] There was no evidence Kokos New Zealand Limited had previously breached settlement agreements or been penalised for doing so. It was however, through Simon's actions, culpable for what he said, albeit briefly. A penalty was necessary to express disapproval of that breach and to deter other employers or employees who are parties to such settlement agreements from breaching their terms.

[30] Considering the nature of the breach, its extent, the limited damage done, a penalty of $800 was a modest and proportionate penalty to impose. It is four per cent of the maximum of a $20,000 penalty that can be imposed in the worst cases. There was nothing to suggest Kokos NZ Limited lacked the financial capacity to pay the amount of $800 that has been ordered.

[31] Wayne Kim's application to the Authority asked for a penalty to be imposed on the company. He did not ask for any part of it to be paid to him.

[32] The penalty must be paid to the Authority within 28 days of the date of issue of the written record of this determination. When paid the Authority is to transfer the penalty to the Crown account.

Costs and expenses

[33] Wayne Kim represented himself in bringing this application but had incurred some costs in getting advice from an employment advocate for which he was charged $356.42. Kokos New Zealand Limited must contribute $200 to those costs and also reimburse Wayne Kim the sum of $71.56 for the fee he paid to lodge his application. The reimbursement must be made within 28 days of the date of issue of the written record of this determination.

Summary of orders

[34] Within 28 days of the date that the written record of this determination is issued, Kokos New Zealand Limited must pay:

(i) $800 to the Authority as a penalty under s133 and s 149(4) of the Act; and

(ii) $271.56 to Wayne Kim as costs and expenses.

[35] As both parties now very clearly understand, the obligation to refrain from making negative and disparaging remarks about the other party remains in place. It is

up to both parties to continue to observe that obligation and put this entire matter, and the end of their employment relationship, behind them and move on with their own lives and business.

Robin Arthur
Member of the Employment Relations Authority