

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 486
5334612

BETWEEN VIRGINIA SUSAN
MACFARLANE
Applicant

AND DUTCH VILLAGE TRUST
Respondent

Member of Authority: R A Monaghan

Representatives: R Crotty, counsel for applicant
M Tolich, counsel for respondent

Investigation meeting: 26 October 2011

Determination: 11 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Virginia Susan Macfarlane (known as Sue) says her former employer Dutch Village Trust (the trust) breached two of the terms of a settlement recorded by a mediator under section 149 of the Employment Relations Act 2000.

[2] Ms Macfarlane seeks orders for the payment of a penalty under s 149(4) of the Act in respect of the two breaches she cited, and further orders under s 136(2) that the payments be made directly to her.

The alleged breaches of the settlement agreement

[3] Despite the presence in the settlement of a confidentiality provision, it is often necessary to refer in detail to the terms of a settlement in the course of an enforcement action. It has been necessary to detail certain of the terms of settlement here.

[4] The first of the terms said to have been breached read as follows:

3. The employer shall provide to the employee a positive written reference on or before 31 January 2010 detailing the employee's position, duties achievements and length of service. The employer agrees to confirm the content of this document when contacted by prospective employers. Such reference document shall be placed on the employer's letterhead and signed by Michael Boersen, Chairman.

[5] The second read:

5. The parties agree not to make any disparaging remarks about the other.

[6] Ms Macfarlane says she did not receive a reference of the kind specified in clause 3. In particular she says the document dated 20 September 2010 she eventually received was headed 'certificate of employment' and was signed by a person other than Mr Boersen.

[7] Regarding clause 5 Ms Macfarlane says that, when a prospective employer telephoned the trust seeking a reference, the trustee to whom he spoke made disparaging remarks about her.

The reference

[8] The settlement was reached in December 2009. It included provision for the termination of Ms Macfarlane's employment on 31 January 2010. The written agreement was completed by the signature of the mediator on 5 January 2010. Michael Boersen was the chairman of the trust at the time. He resigned in or about February 2010. Dirk Huizing was appointed as the new chairman.

[9] The trust accepted that subsequently it overlooked the provision of a reference. After several approaches it provided Ms Macfarlane with the document headed 'certificate of employment', dated 20 September 2010 and signed by Mr Huizing.

[10] I record that the parties resolved this matter during the investigation meeting. By agreement:

(a) the 20 September 2010 document will be re-issued;

- (b) the re-issued document will be signed by Mr Boersen, with an annotation identifying the period during which Mr Boersen was the chairman of the trust;
- (c) the heading 'certificate of employment' will be removed; and
- (d) the trust will pay to Ms Macfarlane the sum of \$2,000 without deduction as compensation.

[11] I order accordingly.

Disparaging remarks

1. Background

[12] In early – mid 2010 Ernie Uganecz was preparing to establish a brokerage selling insurance to small businesses. To that end he was working on setting up an office and administrative support, and recruiting people to act as advisors. Regarding the latter, he sought people aged in their 40s – 50s whose experience in running a business meant they would be confident working with other managers as well as lawyers, and be able to work through risk issues. Experience in the insurance industry was not required as Mr Uganecz intended to provide the necessary training opportunities, but a background in sales was sought.

[13] Ms Macfarlane was acquainted with Mr Uganecz through her friendship with Mr Uganecz' wife. Through his wife Mr Uganecz knew Ms Macfarlane was looking for work, and he saw Ms Macfarlane as a possible candidate for engagement in the new business. Ms Macfarlane was cautious. However she embarked on what she called a fact finding process, and undertook in-service training in sales and associated matters in a period from approximately July – September 2010. She undertook some commission-based selling later in 2010 when she had acquired enough confidence to begin work of that kind. In addition she assisted Mr Uganecz to set up office systems and procedures on an unpaid basis.

[14] Although no written agreement was ever concluded between Ms Macfarlane and Mr Uganecz or the business, work began on the preparation of an agreement in or about March or April 2010. By about early July discussions had proceeded as far as

the preparation of a draft 'consultancy agreement' under which Ms Macfarlane was to be engaged as a self-employed commission-based consultant.

[15] Mr Uganecz' wife told him there was a difficulty between Ms Macfarlane and Maryanne Vulinovich, who became a trustee of the trust in April 2010. Ms Macfarlane and Ms Vulinovich were known to each other because the trust had employed Ms Macfarlane as the manager of the aged care facility where Ms Vulinovich's parents resided. Ms Vulinovich had in her personal capacity raised issues concerning her father with Ms Macfarlane, and had become very dissatisfied with Ms Macfarlane.

[16] Mr Uganecz decided to contact Ms Vulinovich to find out about the conflict between Ms Vulinovich and Ms Macfarlane. He did so by telephone on 6 August 2010. Ms Macfarlane denied any knowledge of the approach, and I have no reason to reject her denial.

[17] It was common ground that Mr Uganecz began the conversation by saying he was looking to employ Ms Macfarlane, that he was doing a background check on her, and that he asked Ms Vulinovich what she could say about Ms Macfarlane's performance.

[18] Mr Uganecz did not disclose that he already knew Ms Macfarlane, the nature of his connection with her, that he had been informed there was conflict between Ms Macfarlane and Ms Vulinovich, that the purpose of his enquiry was to assess the nature of the conflict, or that by then Ms Macfarlane's possible involvement in the new business had been the subject of several months' discussion. Even aside from any privacy issues that may have arisen, in those respects he acted inappropriately and it is not surprising that the trust believes it was 'set up'.

[19] It was also common ground that Ms Vulinovich responded by making certain statements about Ms Macfarlane which I accept were derogatory of her. In general Ms Vulinovich, too, acted inappropriately although that does not necessarily mean the trust is liable for her actions.

[20] Ms Vulinovich said she made the statements in her personal capacity and as a result of her personal experience prior to becoming a trustee. I accept that was the case, although not that Ms Vulinovich explained this to Mr Uganecz.

[21] From his point of view Mr Uganecz obtained confirmation of the existence of conflict between Ms Vulinovich and Ms Macfarlane, but concluded the conflict was personal and that was the end of the matter. It had no impact on his subsequent dealings with Ms Macfarlane.

2. Whether the trust breached the settlement agreement

[22] Section 149(4) provides:

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

[23] No remedy has been sought against Ms Vulinovich herself. The trust is said to be the 'person' in breach of the settlement. Since Ms Vulinovich's statements were derogatory of Ms Macfarlane, the question is whether her actions were actions of the trust and in that respect amounted to a breach by the trust of the settlement agreement.

[24] The trust relied on the fact that Ms Vulinovich did not become a trustee until some three months after the settlement was reached and had no knowledge of the settlement, that she spoke to Mr Uganecz in her personal capacity, and that she was aware of the trust's communication policy. The policy emphasised the importance of confidentiality as a general principle. It provided that the chairman of the board be the principal spokesperson on policy and political issues, while the village manager was the principal spokesperson on all operational and staff issues. Ms Vulinovich held neither of these positions.

[25] Otherwise there were no submissions on the law regarding whether Ms Vulinovich's statements amounted to the statements of the trust, or its application to the facts. Counsel made the bare submission on behalf of Ms Macfarlane that it was beyond doubt that the trust was bound by the statements.

[26] In a proceeding removed to the Employment Court in *Musa v Whangau District Health Board & Solomon*¹ the question of whether the Board was liable to Mr Musa for the actions of a board member, Mr Solomon, was posed. Mr Solomon was said to have made statements about Mr Musa which were contrary to the provision in a settlement agreement that the parties would not 'speak ill' of each other. Remedies were sought in the court against both the Board and Mr Solomon in his personal capacity.

[27] Mr Solomon sought to have the claims against him struck out. In determining the application for strike out the court acknowledged the duty of the board to bind its members to the settlement agreement, but otherwise addressed among other things whether there was a tenable cause of action against Mr Solomon for a penalty under s 149(4) of the Act. It found there was.

[28] When the court later heard the merits of the claims for penalties it appeared to have found that the board itself was not in breach of the agreement, although there was no further discussion.²

[29] In general the trust had a duty to ensure the trustees observed the terms of the settlement. However I find as a fact here that Ms Vulinovich was speaking in her personal capacity from her personal experience, and about matters which occurred when she was a stranger to the employment relationship. In reality Mr Uganez's inquiry also concerned those matters, the underlying circumstances of which he already had some knowledge through the personal connection between his wife and Ms Macfarlane. He even concluded from Ms Vulinovich's statements that the conflict was personal. Overall I find the exchange was outside the ambit of the employment relationship between Ms Macfarlane and the trust, as well as outside the scope of the settlement agreement.

[30] For these reasons I conclude that the trust was not in breach of clause 5 of the settlement agreement.

[31] There will be no order for a penalty.

¹ Wellington Employment Court, WC 20/08, 18 November 2008

² *Musa v Whanganui District Health Board* [2010] ERNZ 236.

Costs

[32] Costs are reserved.

[33] If a party seeks an order for costs a memorandum on the matter is to be filed and served within 28 days of the date of this determination. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority