

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 26
3078532

BETWEEN NICOLA MARCELLINO
Applicant

AND PIETER VEENHUIJSEN
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Gerard Elwell, advocate for the Applicant
Andrew Schirnack, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further 11 December 2019 from the Applicant
Information Received: 11 December 2019 and 15 January 2020 from the
Respondent

Date of Determination: 23 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nicola Marcellino alleges that Dr Pieter Veenhuijsen breached the terms of a record of settlement entered into with her on 27 September 2019 by making disparaging remarks about her. She seeks compliance orders pursuant to sections 137 and 151 of the Employment Relations Act 2000 (the Act) and the imposition of a penalty. Dr Veenhuijsen denies the allegations made by Ms Marcellino.

[2] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Issues

- [3] The issues identified for investigation and determination are:
- a. Did Dr Veenhuijsen breach the record of settlement by making disparaging comments about Ms Marcellino?
 - b. If so:
 - i. Should a penalty be ordered under s 149 (4) of the Act?
 - ii. Should a compliance order be made under s 137 of the Act?
 - c. Should either party contribute towards the costs of representation of the other party?

Background

[4] Ms Marcellino was employed by Devonport Family Medicine as a receptionist. Devonport Family Medicine was the trading name of a partnership operated during Ms Marcellino's employment by Dr Veenhuijsen, through his company Dr Piet Limited, and Dr Smith, through his company DFM Limited (the Partnership).

[5] In or about March 2019, the Partnership agreed to dissolve and Dr Piet Limited agreed to buy out DFM Limited's interest in Devonport Family Medicine. The dissolution of the Partnership was acrimonious with the two partners arguing over who was responsible for payment of various debts.

[6] On 15 March, after Ms Marcellino declined Dr Veenhuijsen's offer of on-going employment, Dr Veenhuijsen advised Ms Marcellino that she would be paid in lieu of working out her notice period. I understand this was because of Ms Marcellino's notification that she had accepted an offer of employment with another doctor who I shall refer to as Dr L. Dr L worked with the partnership and was intending on working with Dr Smith following the Partnership being dissolved. In contemporaneous correspondence exchanged with Dr Smith, Dr Veenhuijsen explained that he did not trust Ms Marcellino to be loyal to the practice given her decision to work for Doctor L. Dr Veenhuijsen's decision was overturned by Dr Smith.

[7] On 20 March Dr Veenhuijsen overheard Ms Marcellino talking with a patient. He believed that the comments that she made during this conversation were undermining the sale of the Partnership and became upset. He advised Ms Marcellino that she was dismissed and was to leave the premises. Ms Marcellino did not accept this dismissal and, following further discussion between the parties, it was agreed that she would work out her notice period, which she did, finishing on 29 March being the last day the Partnership operated Devonport Family Medicine.

[8] Following her termination Ms Marcellino raised a personal grievance against Dr Veenhuijsen personally and filed proceedings with the Authority. The parties were directed to attend mediation which they did. Dr Smith also attended as a result of a dispute between himself and Dr Veenhuijsen as to the correct identity of Ms Marcellino's employer.

[9] A record of settlement was signed on 27 September 2019. As well as including a payment of an amount of money to Ms Marcellino as compensation under s 123(1)(c)(i) of the Act it included the following material terms:

3. Neither party shall make disparaging comments regarding the other to any other party, including on social media.
5. This is a full and final settlement of all claims Nicola Marcellino has or may have against Dr Piet Limited; DFM Limited; and those entities trading as Devonport Family Medicine arising out of the employment relationship.
6. It is intended that all parties named at clause 5 above shall be entitled to rely upon and enforce these terms of settlement and shall be entitled to a copy of them.

Issue One: Did Dr Veenhuijsen breach the Record of Settlement by making disparaging comments about Ms Marcellino?

[10] The meaning of disparage commonly adopted by the Court and the Authority is that referred to by the Shorter Oxford Dictionary. Namely:¹

Bring discredit or reproach upon; dishonour; lower in esteem; degrade; lower in position or dignity; cast down in spirit; and speak of or treat slightly or critically; vilify; undervalue; depreciate.

¹ Lesley Brown *New Shorter Oxford English Dictionary* (6th ed, Oxford University Press, New York, 2007) at 709; *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [37], *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [79].

[11] As the Court said in *Byrne v The New Zealand Transport Agency*, the word disparaging is capable of broad effect. Any statement having a negative meaning could be disparaging in a general sense.²

[12] Ms Marcellino claims that Dr Veenhuijsen breached the non-disparagement provision set out at Clause 3 of the record of settlement on two occasions. First, in a civil proceeding that came before the Disputes Tribunal in October 2019 between Dr Smith and Dr Veenhuijsen. Second, in an email that Dr Veenhuijsen sent to Ms Marcellino's current employer on 6 October 2019 raising concern with her conduct towards his new receptionist.

The first alleged breach – the civil proceedings

[13] In August 2019 Dr Smith filed proceedings against Dr Veenhuijsen in the Disputes Tribunal. The allegations included a claim for repayment of legal fees paid by the Partnership relating to the employment dispute with Ms Marcellino.

[14] Dr Veenhuijsen responded to this claim in or about early October 2019 in a comprehensive 7 page written document. In terms of the allegation relating to the payment of legal fees he set out the background to the employment dispute arising with Ms Marcellino and the reason for legal fees being incurred. He then went on to address some of the specific allegations made by Dr Smith about the confrontation that took place between Ms Marcellino and himself on 15 March. He concluded with the comment "I suspected Ms Marcellino was tampering with patient information."

[15] It is these final words that Ms Marcellino claims were disparaging and breached clause 3 of the record of settlement. I agree. Not only do the words fall clearly within the definition of disparage, the making of such a comment was clearly envisaged by the parties when signing the settlement agreement. Namely, that neither party could disparage the other by referring to the facts relating to the reaching of the settlement, discussions leading up to it and surrounding it, including any related issues that were not investigated.

[16] I find Dr Veenhuijsen breached Clause 3 of the record of settlement.

² *Byrne v The New Zealand Transport Agency*, above at n1 at [80].

The second alleged breach – the email

[17] On 6 October 2019 Dr Veenhuijsen sent an email to Ms Marcellino's new employer that made allegations about her phone manner with his new receptionist. It is not necessary to repeat the content of that email.

[18] I accept that the first sentence of that email was disparaging. However, I am not satisfied that the email constitutes a breach of clause 3 of the record of settlement. It is clear from the context of the agreement that the disparagement clause was intended to prohibit the parties from disparaging the other by referring to the employment circumstances which had existed up to the point of the agreement. It did not preclude either party from making any disparaging remark about the other in any other non-related circumstances.

[19] I find Dr Veenhuijsen did not breach clause 3 of the record of settlement by sending the email on 6 October 2019.

Issue Two: Penalty

[20] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[21] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach. In addition, the Court has set out additional considerations in its judgments in *Borsboom v Preet PVT Limited* and *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.³

[22] Having considered the mandatory and other considerations, and for the reasons that follow, I decline to order a penalty against Dr Veenhuijsen. A penalty would be disproportionate in the present circumstances taking into account:

- a. The disparaging comment Dr Veenhuijsen made was an isolated incident made in the context of defending himself during civil proceedings. It is readily accepted by the Courts that parties who participate in judicial

³ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

proceedings are immune from civil proceedings in respect of the evidence that they give.⁴

No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of works used by them in the course of such proceedings or against juries in respect of their verdicts.

- b. There was no evidence before the Authority that the statement made by Dr Veenhuijsen to the Disputes Tribunal was provided by him to anyone other than Dr Smith and the Tribunal. Dr Smith already had inherent knowledge of the circumstances leading up to the ending of Ms Marcellino's employment and the terms of settlement by virtue of his position in the Partnership, his attendance at the mediation, and his position as director of DFM Limited. Disputes Tribunal hearings are private and are closed to the public. There is no evidence that the comment made by Dr Veenhuijsen was repeated in any decision issued by the Disputes Tribunal.
- c. Dr Veenhuijsen did not deliberately breach clause 3. There is no need to punish and any need to deter is low.

Issue three: Compliance order

[23] For the same reasons as I have particularised when discussing penalties, I decline Ms Marcellino's application for a compliance order. A compliance order is not necessary to prevent further non-observance of, or non-compliance with, clause 3 of the record of settlement.⁵

Issue four: Costs

[24] There has been a mixed level of success between the parties. It may well be that the parties can therefore reach an agreement that costs lie where they fall.

[25] In the event that an Authority determination on costs is needed, the parties must serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the opposing party will then have 14 days to lodge any reply memorandum. Costs will

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, *Balfour v Chief Executive Department of Corrections* [2007] ERNZ 808 at [35]-[34].

⁵ Employment Relations Act, s 137.

not be considered outside this timetable unless prior leave to do so is sought and granted.

Outcome

[26] The overall outcome that I have reached is:

- a. Dr Pieter Veenhuijsen breached clause 3 of the record of settlement dated 27 September 2019.
- b. No compliance order is made.
- c. No penalty is payable by Dr Pieter Veenhuijsen.
- d. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority