IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 376
3096452

	BETWEEN	DIANNE MARSHALL Applicant
	AND	W GARTSHORE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	David Balfour, advocate for Applicant Sophie Law, counsel for Respondent
Investigation Meeting:	On the papers and by telephone
Submissions Received:	5 June 2020 from Applicant 12 June 2020 from Respondent
Further Information Received:	17 September 2020
Determination:	21 September 2020

DETERMINATION OF THE AUTHORITY

A. Ms Marshall's application for compliance orders and penalties is declined.

B. Costs are reserved.

Employment relationship problem

[1] Ms Marshall worked for W Gartshore Limited (WGL) as its Contract Administrator and Health and Safety Officer from June 2017 until 4 September 2018 when her position was disestablished and her employment terminated.

[2] After the end of her employment Ms Marshall raised a number of employment relationship problems with WGL regarding her employment and its ending. The parties attended mediation in December 2018 and attempted to resolve their differences. No resolution was achieved at that time however, discussions between the parties continued and agreement was reached in March 2019.

[3] Ms Marshall and WGL entered into a Record of Settlement (the settlement agreement) on 28 March 2019.

[4] The settlement agreement was certified under s 149 of the Employment Relations Act 2000 (the Act) by a Mediator employed by the Ministry of Business, Innovation and Employment. This certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreement terms:

a) were final, binding and enforceable;

b) could not be cancelled; and

c) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[5] The settlement agreement required the payment of an amount of money to Ms Marshall as compensation under s 123(1)(c)(i) of the Act and the following material terms:

> 6. The above payments are accepted in full and final settlement of all matters arising out of or relating to the employment, except for any subsequent breach of her post employment obligations as outlined in 5. above.
>
> 9. The Employee agrees not to speak ill of, or make any disparaging comments about, the Employer. The Employer through Rob Gartshore, Bill Gartshore and Cullum Vibert will comply with the same in respect of the Employee.

[6] Ms Marshall alleges WGL breached the terms of the settlement agreement when Mr Robert Gartshore, a director of WGL, made disparaging comments about her during an interview with a Worksafe Inspector (the Inspector) on 30 April 2020. She seeks a compliance order pursuant to s 137 of the Act and the imposition of a penalty.

[7] WGL denies the allegations and says Mr Gartshore was legally required to answer questions under s 168(1)(f) of the Health and Safety at Work Act 2015 (the HSW Act). It says this legal requirement overrides clause 9 of the record of settlement.

Authority's process

[8] On 5 May 2020 the presiding Member at that time, set out in a Minute, a proposal to progress the investigation and determination of Ms Marshall's claims. This included a proposal that the matter be dealt with on the papers. A timetable for the lodgement of affidavits and other evidence was set out in the Minute and the parties were invited to seek amendments to the timetable and/or oppose the proposed process within seven days of the date of the Minute.

[9] The parties did not oppose the proposed process and met the timetables set out in the Minute. This matter has now been allocated to me to determine due to the presiding Member's resignation.

[10] While drafting this determination it became apparent that more information about the interview with the Inspector would be of assistance. Accordingly, a telephone conference was convened for that purpose.

[11] In line with the original proposal this matter has been determined on the papers before the Authority including the untested affidavits provided by Ms Marshall and Mr Gartshore and the information obtained during the short telephone conference on 17 September 2020.

Issues

[12] In order to resolve Ms Marshall's application I must determine the following questions:

a) Was there a breach of clause 9 of the record of settlement?

b) Does the statutory duty prescribed by s 168(1)(f) of the HSW Act and/or the immunity rule override clause 9 of the record of settlement?

c) If so, should the Authority:
    i. Order WGL to pay a penalty?

ii. Make a compliance order?

[13] 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 as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Disparaging comments

[14] 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 slightingly or critically; vilify; undervalue; depreciate.

[15] The word disparaging is capable of broad effect. Any statement having a negative meaning could be disparaging in a general sense.[2] Not every disparaging remark one party might make about the other would fall foul of clause 9.[3]

[16] Applying the principles of contract interpretation on the face of it, the language contained in clause 9 suggests both parties committed to an absolute obligation not to make any disparaging comments about the other.[4]

[17] It is plain from the context that the disparagement clause related to the employment circumstances which had existed up to the point of resignation. Relevant contextual factors include:

a) The non-disparagement statement is contained in a document where WGL and Ms Marshall agreed to compromise employment-related differences;

b) A workplace accident had occurred at WGL prior to the settlement agreement being signed;

---

[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 [70].
[2] *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [80].
[3] Ibid at [85].
[4] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; *New Zealand Airline Pilot's Association Inc. v Air New Zealand Ltd* [2017] NZSC 111, (2017) 1 NZLR 948.

c) Worksafe was undertaking an investigation into the workplace accident and it remained open to it to prosecute WGL at the time the settlement agreement was signed;

d) Mr Gartshore signed the settlement agreement on behalf of WGL and is named specifically in the clause dealing with non-disparagement;

e) The parties agreed, without any admission of liability by either party, there would be a full and final settlement of all matters arising out of or relating to the employment.

Was there a breach of clause 9 of the settlement agreement?

[18] In September 2018, after Ms Marshall's employment had ended, one of WGL's contractors was injured onsite when he fell from a height and received serious back and head injuries. Worksafe commenced an investigation into the accident and WGL's health and safety procedures.

[19] On 15 March 2020 Mr Gartshore, was requested by Worksafe to attend an interview and to provide a voluntary statement. Mr Gartshore was a duty holder at the site (being the director of Persons in Control of a Business of Undertaking that had some control over the workplace where the accident occurred).

[20] Mr Gartshore deposed that although Worksafe courteously asked him to attend the interview on a voluntary basis, he was in fact required to attend pursuant to s 168(1) of the HSW Act. He deposed that if he had not agreed to be interviewed on a voluntary basis, he would have been directed to attend the interview pursuant to s 168(1) of the HSW Act.

[21] Prior to attending, and at the interview, Mr Gartshore received legal advice as to which questions needed to be answered and the level of detail required when answering questions. Mr Gartshore understood that all questions were required to be fully answered unless the privilege against self-incrimination applied, and that the interview record was not publicly available unless applicable disclosure grounds existed under legislation (namely the Privacy Act 1993, the Official Information Act 1982 or the Criminal Disclosure Act 2011).

[22] The interview proceeded on 30 April 2020. The interview was recorded and a transcript of the recording was made.

[23] After Mr Gartshore's interview Ms Marshall was approached by Worksafe to also attend an interview. During the course of her interview with the Inspector, Ms Marshall learned about the accident and that Mr Gartshore had been interviewed.

[24] Having heard from the Inspector, Ms Marshall became very concerned about statements Mr Gartshore may have made to the Inspector about her performance, the ending of her employment and the authenticity of some documents he had provided to the Inspector. Upon making an enquiry, Ms Marshall was informed she could make a request under the Privacy Act 1993 if she wished to obtain a copy of the transcript of Mr Gartshore's interview.

[25] Ms Marshall duly made a request and received a copy of the transcript which she has now provided to the Authority. The transcript is largely redacted.

[26] Mr Gartshore is recorded during the interview explaining to Worksafe that Ms Marshall had responsibility for health and safety and stated, for the record, several areas where he was not satisfied Ms Marshall had met his expectations in performing her role.

[27] In addition to raising these concerns about Ms Marshall's performance Mr Gartshore told the Inspector that within the first two or three months of him working with Ms Marshall, he could tell she wasn't going to "…cut the mustard". He told the Inspector the paper work and records were lacking.

[28] It is apparent from the record of the interview that Mr Gartshore implies Ms Marshall's employment ended as a result of her not meeting his expectations in relation to her health and safety role. Mr Gartshore does not clarify to the Inspector that Ms Marshall's role was disestablished and she was dismissed by reason of redundancy. Instead he says:

> ...found that the person wasn't quite getting the job done to the level I required, and you'll see that evident in some of the SSP's and mis-match of documents and very poor record keeping. Would start a meeting and not finish it off type of thing.
>
> Um, and that wasn't really working with how I saw the business going. So we've ended her employment, for want of a better ... for want of a better term.

[29] When considered in the context in which they arose, these remarks made by Mr Gartshore amounted to a breach of clause 9 of the record of settlement. Not only do the words used by Mr Gartshore fall clearly within the definition of disparage, the making of such comments was envisaged by the parties when signing the settlement agreement.

[30] Mr Gartshore was well aware when he signed the settlement agreement on 28 March 2019 that Worksafe was investigating the September 2018 accident. He had received the request to provide a voluntary statement on or about Friday, 15 March 2019 and was required to contact Worksafe by Friday, 22 March 2019 to inform Worksafe of who would represent WGL at the interview and to arrange the interview date.

[31] Mr Gartshore was required to answer the Inspector's questions. There can be no dispute about that. Any failings in WGL's systems needed to be investigated as part of Worksafe's enquiries. Mr Gartshore was entitled to explain to the Inspector, the shortcomings in WGL's systems.

[32] However, in my opinion Mr Gartshore went further than was necessary. The statements made by Mr Gartshore about Ms Marshall's performance and the associated implications about the ending of her employment were not relevant to the Inspector's inquiry which was focussed on WGL's actions.

[33] Further, when they signed the settlement agreement the parties agreed that the ending of Ms Marshall's employment would be categorised as a redundancy as a result of a restructure. Implying Ms Marshall's employment ended for any other purpose was disparaging and a breach of the settlement agreement.

Does the HSW Act and/or the immunity rule trump the settlement agreement?

[34] WGL says its statutory obligations under the HSW Act overrides the terms of the record of settlement. It says the obligation under clause 9 of the record of settlement could not prevent Mr Gartshore from answering questions put to him by Worksafe.

[35] WGL relies on section 168(1)(f) of the HSW Act which allows an Inspector to:

> Require the PCBU or a person who is or appears to be in charge of the workplace to make or provide statements, in any form and manner that the Inspector specifies.

[36] WGL also relies on the witness immunity rule which, as a matter of public policy, protects disclosures made by witnesses in judicial proceedings. As noted by the Employment Court, this immunity from civil action relates to things said or done in the course of preparing evidence for judicial proceedings.[5]

[37] Criminal proceedings under the HSW Act are commenced by the filing of a charging document under s 14 of the Criminal Procedural Act 2011 or the issuing of an infringement notice under the HSW Act.

[38] Mr Gartshore attended the interview as the "duty holder" on behalf of WGL. The duty holder interview is usually the final step before a decision about whether a prosecution will proceed, is made by Worksafe.

[39] The letter inviting Mr Gartshore to attend the interview requested Mr Gartshore to make a voluntary statement. However, if Mr Gartshore had refused to attend the interview, Worksafe could proceed to a prosecution on the basis that the Inspector was being obstructed while exercising his statutory power.[6]

[40] At the beginning of the interview the Inspector set out Mr Gartshore's rights including his right:

a) to leave at any time, the door was shut for privacy and Mr Gartshore was not being detained;

b) to choose not to answer questions; and

c) to consult a lawyer in private.

[41] Mr Gartshore was informed that anything said would be recorded and may be used in evidence.

---

[5] *Balfour v Chief Executive of Department of Corrections* [2007] ERNZ 808 at [34]-[35].

[6] Worksafe Prosecution Policy (https://worksafe.govt.nz/laws-and-regulations/operational-policy-framework/operational-policies/prosecution-policy/).

[42] At the end of the interview Mr Gartshore was informed that Worksafe believed WGL may have breached s 36(1) of the HSW Act and provided him with an opportunity to comment on that.

[43] Since these events criminal proceedings have eventuated and WGL has entered a guilty plea. It is now awaiting sentencing.

[44] The rule of immunity from civil action is absolute regardless of the nature of the proceeding, and irrespective of whether the evidence was true or false, given in good faith or with malice.[7]

[45] While the comments made by Mr Gartshore went further than was necessary, his statements are covered by the immunity rule because at the time they were made judicial proceedings were in contemplation. Accordingly, the application for compliance orders and penalties is declined.

Costs

[46] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so WGL shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Ms Marshall shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

[7] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; applied by the Employment Court in *Balfour v Chief Executive of Department of Corrections* 2007] ERNZ 808 at [36].