Employment Court of New Zealand

Musa v Whanganui District Health Board [2010] NZEmpC 120 (10 September 2010)

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Last Updated: 16 September 2010

IN THE EMPLOYMENT COURT WELLINGTON

[2010] NZEMPC 120

WRC 24/08

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN MEMO MUSA Plaintiff

AND WHANGANUI DISTRICT HEALTH BOARD

First Defendant

AND CLIVE SOLOMON Second Defendant

Hearing: 4-5 August and 6 September 2010 (Heard at Whanganui)

Appearances: Gerard Dewar, Counsel for Plaintiff

Peter Churchman, Counsel for First Defendant appearing and represented by leave (on 4 and 5 August 2010)

Michael Leggat, Counsel for Second Defendant

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of case

[1] Should Clive Solomon be penalised for breaching the confidentiality of the settlement of Memo Musa's personal grievance against the Whanganui District Health Board (the Board) and/or for breaching Mr Musa's employment agreement

with the Board?

MUSA V WHANGANUI DHB & ANOR WN 10 September 2010

[2] This is hopefully the last episode in a long running saga which has included the raising and settlement of two personal grievances by Mr Musa against the Board; Mr Musa's resignation; the dismissal on lack of jurisdiction grounds of a claim for damages by Mr Musa against the Board and Mr Solomon; and finally this bitterly fought and defended claim for monetary penalties by the Board's former Chief Executive Officer (CEO) against an individual member and now former surgeon employee of the Board. Despite a number of interlocutory rulings and judgments defining and confining the parameters of relevant evidence, the hearing of evidence over two days in Whanganui revealed a remarkable depth and intensity of antagonism. As I will note at the conclusion of this judgment, and as one of the witnesses said, "the time has now come for this circus to end". Before that can happen, however, Mr Musa's claims must be decided.

Relevant facts

[3] In March 2001 Mr Musa became the CEO of the Board. Mr Musa's employment agreement was renegotiated in 2006 and provided materially for the purposes of this case:

• that the first defendant as employer would act as a good employer in all its dealings with the plaintiff including treating him fairly and properly in all aspects of his employment; and

• that it was for an indefinite duration but was terminable on not less than three months' written notice.

[4] At all relevant times the second defendant was a general surgeon and an employee of the Board at Whangarei Hospital. In 2004 Mr Solomon was elected as a member of the Board.

[5] In mid 2006 issues arose within the Board about the provision of paediatric services which led to public criticism of Mr Musa by Mr Solomon in the Wanganui Chronicle, the local newspaper. These included publication of Mr Solomon's view

that Mr Musa should be replaced as CEO and Mr Solomon's promotion of another general manager at the hospital to that role.

[6] The board's standing orders (communication policy) at the time that governed both employees and board members provided, so far as board members including Mr Solomon were concerned, as follows:

15.1 No member of the Board shall discuss business conducted at a meeting, or the business of the District Health Board, with any person not a member of the District Health Board or its staff, unless authorised to do so by the Chairperson.

15.2 No member of the Board or a Committee shall release any information to any person not a member of the District Health Board or its staff, or make any statement to the media unless approved by the Chairperson.

[7] The board's relevant "Communication Policy" provided as follows:

2.1 The Chief Executive Officer is the primary spokesperson for the Whanganui District Health Board in all management and operational matters. Other staff may make media statements only when given delegated authority.

2.2 The Board Chairman may speak on behalf of the Board on matters of governance and policy.

...

2.4 The Medical Officer of Health is the spokesperson on issues relating to public health.

...

2.7 Staff, other than those identified in this policy, should not comment when approached by media and should refer the journalist to the

Communications/Media Advisor.

...

4.1.1 **Elected Members**

Members may make statements on behalf of the Board only with the specific authority of the Board or relevant committee Chair.

No statements made in this capacity shall undermine any existing policy or decision of the Board or criticise the conduct of district health board Managers or staff nor should it undermine any existing policy or decision of the Board.

[8] Among Mr Solomon's criticisms of Mr Musa was the latter's refusal or failure to speak to the news media despite Mr Musa's obligations of compliance with the Board's communication policies.

[9] After having sought legal advice about these public criticisms of him, Mr Musa wrote to the Board on 24 August 2006. He complained formally about public criticisms, not only by Mr Solomon but also by other board members, Dr PJ Faumui and Philippa Baker-Hogan. Mr Musa said that the clear inference from these public statements was that he was incompetent and was not performing adequately in his role. Mr Musa rejected these inferences and complained that the public criticisms were made contrary to board policies, a constraint that his critics had themselves acknowledged they had breached. Despite asserting that the statements were actionable, both against the individuals and the Board, Mr Musa's letter sought a constructive solution with his employer. This included a request that board members acknowledge and comply with the constraints of the Board's Standing Orders and Communication Policy, an assurance about the lawful nature of any future communications, a written apology for the damage to his reputation and stress, and reimbursement of his legal costs.

[10] The board accepted the validity of Mr Musa's complaints, apologised to him formally, and met his legal costs. The Chair at the time of the Board also wrote formally to all its members by letter dated 24 August 2006, reminding them of their obligations with regard to statements made in public and drawing their attention to the relevant standing orders and communication policies as well as to their statutory obligations under ss 53 to 57 of the Crown Entities Act 2004.

[11] There was, however, further public criticism of Mr Musa by board members in late 2007 following a clinical review of the hospital undertaken by the Ministry of Health which, despite a public perception to the contrary, concluded that the hospital provided a safe clinical environment and was comparable with other similar hospitals in New Zealand. As a result of that further public criticism of Mr Musa in late 2007, the Board sought and received an opinion from its solicitors which was

circulated to board members. This highlighted both the potential risks to, and potential liabilities of, the Board and its members in relation to public statements by board members. It emphasised that proper established processes should be followed in the event that there might, from time to time, be concerns about the Board's management, clinicians and others.

[12] The solicitors' opinion advised that the Board and its members were on notice as a result of the outcome of similar previous events involving Mr Musa, that if members made public derogatory statements about the Board's management, clinicians and others, then the Board and its individual members might face legal action. The solicitors' opinion pointed out the several different legal obligations imposed on the Board and its members in these circumstances, and the protections afforded to them for acts or omissions in their capacities as board members. The solicitors' recommendation to the Board was:

10. In respect of any employee performance or disciplinary issues which may need to be addressed then the proper process and forum for such issues is through the Board's employment protocols, not public comment through the media. To step outside those protocols exposes the Board and individual Board Members to risk, including (but not limited to):

10.1 The risk that there will be a claim against WDHB or the individual Board Member.

10.2 The risk that the Board's insurers will not accept liability for a claim.

10.3 The risk that the Board Member's right to indemnity from

WDHB will be lost.

10.4 The risk that WDHB will have a claim against the individual

Board Member for any liability which it incurs.

10.5 The risk that the individual Board Member will not be entitled to the statutory protections which may otherwise be available.

[13] On 18 May 2007 the then new board Chair, Kate Joblin, wrote to Mr Solomon about her concerns at the latter's actions which appeared to have contravened the Board's code of conduct about public statements and his level of attendance at board meetings. A special meeting of the full board was called for 25

May 2007 to consider, among other things: "Your [Mr Solomon's] apparent continued breaches of the Board's Code of Conduct and Media Policy and my concerns that these breaches have resulted in the Board being exposed to potential liability as an employer; ...".

[14] In February 2008 a report by the Health and Disability Commissioner into the events surrounding a former clinical employee of the Board, Roman Hasil, was

released. The board and its members had known of the content of that report for some time but its public release in February 2008 caused some board members, including Mr Solomon, to make further public criticism of Mr Musa. This included speculation, and even recommendation, that it was time for Mr Musa to leave his position as CEO. Mr Musa again sought legal advice.

[15] By letter dated 29 February 2008 Mr Musa's solicitors wrote to the Board notifying it of his personal grievance founded on the constant and deliberate undermining of his trust and confidence as CEO. The gravamen of the solicitors' letter as it related to the event the subject of this litigation was as follows:

In raising this matter, Mr Musa recognises and instructs us to acknowledge that the Board is, and has been, deeply divided over a number of issues for a long time, and that he has enjoyed and is grateful for the support of the current and past Chairperson and other Board members. Further, he respects the right of Board members to disagree and, in particular, to debate policy matters in public and vigorously where appropriate. He also recognises that Wanganui, as a small community, faces significant challenges. It is not his intention to simply abandon his post. He enjoys the loyalty and support of administrative and professional staff, notwithstanding the constant undermining of his role.

For the above reasons, Mr Musa will not simply walk out or take leave. He cannot, however, continue to work for an employer that is unable to maintain trust and confidence and deal with him properly. We have advised him, of course, that he is entitled to treat the actions of members of the Board as amounting to a repudiation of his contract and constructive dismissal. He has reached a point where he can no longer endure, or be expected to endure, the campaign that has been waged against him. He will terminate his employment by reason of the ongoing breaches of obligations owed to him, and the continued and repeated betrayal of his confidence. On his behalf, we emphasise that the Board should not underestimate the strength of feelings and sufferings of [him] and his family at the hands of others over the past two years. The Board has made it clear in various ways that he is required to terminate his employment, and our advice to Mr Musa is that he is entitled to treat it as constructively terminated (unjustifiably) in any event.

...

The actions of individual Board members who have campaigned against him are not just calculated to remove him from a job, but are such that the family's future in Wanganui may become untenable. Mr Musa has reached a point where he is unable to continue in the current environment and an urgent resolution of this employment problem is accordingly sought.

[16] By letter dated 10 March 2008 counsel for the Board provided it with an opinion about its position in light of Mr Musa's assertions and gave advice as to how it might resolve the issues in a way that minimised risk, cost and disruption.

[17] Counsel's opinion was, in summary, that Mr Musa was in a strong position in law and, if a settlement was not reached with him, he would be successful in obtaining substantial awards of damages. The opinion pointed out that regular reviews by the Board of Mr Musa's performance as CEO had not produced any adverse reports of his performance and, therefore, the Board did not then have any lawful basis for requiring his resignation or for otherwise terminating his employment.

[18] Counsel's opinion of the Board's position then addressed how to resolve the unsatisfactory position in which a number of members of the board were saying publicly that they had no confidence in Mr Musa and were calling on him to resign. The opinion advised:

... As you appreciate, it is untenable to expect the CEO to continue to function in an environment where there are concerted calls by members of the Board for his resignation and widespread expressions by Board members of a lack of confidence in him. ...

[19] The board was advised that it could only terminate Mr Musa's employment for one or more of four causes, none of which, in the barrister's assessment, then existed. The advice given to the Board was that if it sought an end to its employment relationship with Mr Musa, that would have to be by agreement with him in some form of negotiated settlement. The board was advised that it had a dilemma. The Chair was:

... not in the position to give an unequivocal undertaking that Board members will not continue to make public statements calling for the resignation of the CEO and expressing no confidence in his ability or competence. The CEO cannot be expected to put up with this level of attack on his integrity by Board members. Therefore, unless this matter is resolved promptly, there is a very real prospect of public and damaging litigation which would be both distracting and destructive for the Board and would also have a significant probability of resulting in the Board being found to have breached its obligations to the CEO and therefore liable to pay him damages.

[20] Counsel strongly recommended a "negotiated exit" as being the best outcome for the Board.

[21] Significantly for the purposes of this case, counsel's advice included that:

... the Board may be able to include in any settlement package [elements] which provide a benefit to the CEO and, at the same time, do not cost the Board anything. Examples of these are a positive reference, an agreed media statement and communication package to stakeholders, and an exit which is dignified and orderly and preserves the CEO's reputation to the extent possible. These factors are also of benefit to the Board in that, as far as the rest of staff are concerned, it is important that the Board is seen to be treating the CEO respectfully.

[22] There was a special meeting of the Board scheduled for 1 pm on Friday 29

February 2008. Although matters other than the CEO's position were dealt with at that meeting, which occupied a period of seven and a half hours, significant time was taken up with Mr Musa's position. Mrs Joblin briefed the Board on the state of her discussions with Mr Musa and his legal representatives and brought to the attention of board members present, who included Mr Solomon, that a letter had been received from Mr Musa's solicitors offering to meet with the Board and its representatives to discuss the issues in good faith. The board considered the advice of its Secretary/legal adviser, Peter Brown, and also counsel's opinion just referred to.

[23] The evidence indicates that five councillors, Mrs Baker-Hogan, Mr Faumui, Michael Laws, Mr Solomon and Rana Waitai, moved, seconded or otherwise supported a motion:

That in light of the Health & Disability Commissioner's report into Dr Roman Hasil and the Whanganui District Health Board, this Board resolves to begin negotiations with the Chief Executive Officer to bring our relationship with the Chief Executive Officer to an end.

[24] Voting on this resolution was equally divided and, in the absence of a casting vote, the resolution was lost. The promoters of that motion, including Mr Solomon, were recorded as then having left the meeting together. The remaining members of the Board resolved:

That in light of the Health & Disability Commissioner's report (released this week) this Board resolves to acknowledge the need for urgent dialogue between the Board and the Chief Executive Officer. That the Board Chair be authorised to meet with the Chief Executive Officer's representative early next week and report back to the Board the outcome of that meeting.

[25] Discussions and negotiations then took place between Mr Musa and the Board. Each was represented by lawyers. As well as raising a personal grievance, Mr Musa had offered dialogue with his employer in an attempt to resolve those

grievances. This included, although not willingly on his part, a proposal that he resign from the position of CEO in view of what he considered was the inevitability of future similar public criticism of him by some board members including Mr Solomon. Mr Musa's offer of resignation was conditional upon the cessation by the Board and its members of public criticisms of him.

[26] In a memorandum distributed to all board members dated 11 March 2008, Mrs Joblin, the Chairperson, updated board members on the progress of negotiations. The memorandum attached Mr Churchman's opinion dated 29 February 2008, a further opinion from counsel dated 11 March 2008, and Mr Musa's solicitors' letter dated 29 February 2008. After summarising background information, the Chair reported to board members that the parties had discussed a settlement including a resignation on four months' notice, a payment to Mr Musa for humiliation, injury to feelings but without admission of liability, payment of Mr Musa's legal fees, payment of Mr Musa's training costs as provided in his contract up to the cessation of employment, and "[a]greed media statement". The Chair confirmed that a proposal along these lines would be likely to be approved by the State Services Commissioner and the Minister of Health as would be required. Mrs Joblin recommended that the Board agreed "to the negotiating parameters but notes that the final decision on any settlement would

be subject to full board agreement."

[27] The board met again on Friday 14 March 2008 at 12.30 pm. All members were present including Mr Solomon. As on all other occasions on which these issues were discussed, Mr Musa was not present, at least for the relevant parts of the Board's meetings. The board's minutes note that Messrs Solomon and Laws opposed a resolution that when dealing with these matters, the public would be excluded from its deliberations under s 9 of the Official Information Act 1992 as was the Board's usual practice when issues affecting management or other personnel questions were discussed by it.

[28] The minutes show that there was detailed advice provided to the Board and discussion on it about Mr Musa's position. This included advice "that there may be potential risks to the Board in respect of statements or actions by board members

during the period between concluding an agreement and the CEO's departure at the end of four months from the agreement; ...". The minutes also noted that:

Board member Michael Laws recorded that he does not consider himself constrained from commenting publicly on the CEO's departure in his capacity as mayor and on behalf of the community provided that he does not disclose information gained by him in his capacity as a Board member (other board members expressed their concerns about that position); ...

[29] I note that, perhaps presciently, Board member Alan Anderson stated that:

... contrary to what some have said, the agreement would not be the end of the matter and that there will be ramifications within the organisation from what will be perceived as a dismissal of the CEO; that he is not proud of the way the Board has handled the matter; that things have been said which should never have been said; that those people made their personal animosities obvious; that the Board will have to deal with fall out from staff questioning "if the Board cannot be loyal to the CEO, can it be loyal to the rest of us"; that it will not be the end of the matter and while he would vote for the recommendation he requested that his reservations and disappointment at the way the Board has conducted itself, as it tried to address the issues, be placed on record; ...

[30] The minutes record that the following resolution was passed with Mr

Solomon abstaining:

That the Chairman be authorised to enter into and complete negotiations for the resignation of the Chief Executive Officer within the following parameters:

1. that the CEO resigns forthwith and works out the period of notice until

31 July 2008;

2. that we agree to pay [a sum] under the Employment Relations Act for humiliation and injury to feelings but we do not admit liability;
3. that signature of the agreement will be a full and final settlement and the CEO will enter into no personal grievance or other action against the

Board for actions up to the date of signing of the agreement;

4. that we make payment of legal fees up to [a sum];

5. that we cover his reasonable training costs within the terms of his employment contract up to the time of his cessation of employment;

6. that we agree a media statement which shall be the only public

statement on this agreement;

7. that we authorise the chair to enter into and complete these negotiations without further reference to the Board provided it is within these

parameters;

8. that the terms of the settlement be confidential.

[31] There was, in evidence, some disagreement about what was meant by point 6 set out above. I conclude that the "we" referred to the Board and that the intention was that the Board, by its Chair, would agree with Mr Musa a media statement

which would be the only public statement to be made. I conclude that it was not contemplated by the Board members that it would have subsequently to approve the content of a media statement. I find that it resolved to leave the content of that statement to Mrs Joblin and Mr Musa. This was consistent with the way the Board's Chair had issued media statements over many years on a variety of matters.

[32] By letter dated 26 March 2008 Mr Musa tendered formally in writing his resignation as CEO with effect from 31 July 2008. By letter dated 26 March 2008 the Board Chair, Mrs Joblin, formally by letter acknowledged Mr Musa's resignation and "[w]ith reluctance, on behalf of the Board ..." accepted his resignation.

[33] By an e-mail sent to all board members on 26 March 2008 at 3.37 pm Mrs Joblin advised that Mr Musa had resigned, that staff had been briefed, and attached copies of still then embargoed press releases (two, apparently contrary to the proposal and resolution) about Mr Musa's resignation for members' information.

[34] What appears to be Mr Musa's press release recorded that Mr Musa was "leaving the position" of Chief Executive Officer and the heading to the statement was "Chief Executive Officer Resigns". It included substantial comment by him about his time in the position.

[35] There was also a draft media statement from the Chair of the Board about Mr Musa's resignation. This spoke of its acceptance by Mrs Joblin "with reluctance". This statement was complimentary of Mr Musa and said, among other things:

He remains until 31 July with my full support and will leave our employment with our very best wishes and with a strong positive endorsement of his skill and expertise.

I personally join many others in Wanganui who thank Memo Musa and his family for the very positive contribution they have made and continue to make to our community.

[36] In an e-mail sent to Mrs Joblin at 1.25 am on Thursday 27 March 2008 Mr Solomon disagreed strongly, indeed stridently, with the content of the press release and concluded: "I will certainly be distancing myself from your lies."

[37] Later on the morning of Thursday 27 March 2008 Mr Solomon was telephoned by a journalist asking him to comment on Mr Musa's resignation. There is no evidence, either from the journalist or otherwise, about what was said to whom and the journalist's notes, if any, are not in evidence. Nor is there any contradiction to Mr Solomon's evidence that he made comments expressly in his capacity as a surgeon and not either on behalf of the Board or as a board member. Those qualifications did not, however, appear in the following first news story published but Mr Solomon does not contend that the publication otherwise misrepresented what he said to the journalist.

[38] On 27 March 2008 the following appeared under the heading "DAILY NEWS" on an electronic news media for doctors and other medical professionals which the evidence establishes is seen by staff of the Board among others:

The resignation of Whanganui DHB chief executive Memo Musa is a positive step but he should have left of his own accord, board member and whistleblowing surgeon Clive Solomon says.

“It’s just one step in repairing the damage...but in my view he should have resigned under his own steam,” Mr Solomon says.

Despite Mr Musa saying just over a month ago he had no plans to step down, this morning it was announced he’s resigned with mutual agreement from the board.

...

[Speaking of looking for a new Chief Executive Officer Mr Solomon was reported to have said:] “I think we need someone really special. We need

someone who is dynamic, someone who is open and honest,” ...

The new chief executive will also need to be open with the public, media and especially the medical community ... Mr Solomon says.

[39] Things moved rapidly after that publication. Mr Musa’s solicitors complained to the Board’s solicitors who, in turn, contacted the journalist requesting either that the article be removed from the website or that it be modified and emphasising that the views expressed were not those of the Board.

[40] After being alerted to the foregoing content of the electronic website by Mr Musa’s solicitors, the Board’s solicitors e-mailed the journalist concerned at 12.57 pm on Friday 28 March 2008 advising:

The quotes attributed to Mr Solomon in that article are a breach of an agreement reached between the WDHB & Mr Musa and the WDHB has been put on notice by Mr Musa’s lawyer that legal action could be pursued.

Although those statements are from a board member they are not the view of the board & should not have been made.

In those circumstances you are invited to immediately withdraw this article – or its offending parts – from your web-site & anywhere else it has been published.

[41] Later that day the following paragraph was added after the first paragraph originally set out on the website: “Mr Solomon, also a board member, but not speaking on the Board’s behalf, says it’s just one step in repairing the damage.”

[42] There was a further meeting of the Board scheduled to begin at 1 pm on Friday 28 March 2008 in its boardroom at Wanganui Hospital. The agenda for this meeting included: “4. Resignation of CEO – Record of Settlement attached, agreed press release sent via email”.

[43] Events leading up to that board meeting are crucial in determining this proceeding. Mr Musa’s case, and Mrs Joblin’s evidence, is that the agenda and board papers, including detail of the settlement that had recently been concluded between Mr Musa and the Board, were delivered to members including Mr Solomon on either 27 or 28 March 2008, that is either one or two days before the Board meeting on 29 March 2008. Mr Solomon’s case is that he did not receive these papers until he collected them at the start of the meeting at 1 pm on 29 March 2008 so that he was unaware of either the fact or detail of the settlement that had been reached on 26 March 2008, when he spoke to the Doctor Online journalist on 27

March 2008.

[44] For reasons set out in more detail later in this judgment, I am satisfied that it has not been established for the plaintiff that, when he spoke to the journalist on 27

March 2008, Mr Solomon knew of either the fact or more especially the detail of the settlement of Mr Musa's personal grievance concluded on 26 March 2008.

[45] On 7 July 2008 Mr Solomon, through his solicitors, gave Mr Musa a written undertaking (although not acknowledging any liability for what he had previously done) in the following form:

... pending further order of the Employment Relations Authority or the Employment Court, or agreement between the applicant and me, I will not discuss with any third party (particularly representatives of the news media) other than my wife, my professional advisers, other members of the first respondent [the Board], and any potential witnesses in this proceeding, or make any public statements or comments about, any of the following:

(a) The fact or terms of an agreement dated 26 March 2008 between the first respondent as employer and the applicant as employee;

(b) The applicant's performance during his period as the first respondent's Chief Executive Officer; or

(c) This proceeding commenced by the applicant against the first respondent and me.

The issues for decision

[46] It is important to define what Mr Solomon is alleged to have done that was unlawful. That is because, although there was a good deal of evidence called by the parties going to issues between them that were and still are in dispute, not all such evidence is relevant to the particularised allegations brought against Mr Solomon. These are determined by the pleadings, the latest statements of claim and defence.

[47] Mr Musa's first cause of action against Mr Solomon claims a penalty for breach of the terms of the settlement of Mr Musa's personal grievance against the Board. Mr Musa asserts that as a member of the Board, Mr Solomon was bound by the terms of the settlement reached by it and, in particular, by the provisions of s 149 of the Employment Relations Act 2000 (the Act). Mr Solomon denies that is so. Next, Mr Musa says that Mr Solomon knew and understood the effect of the agreed terms of settlement and that the information that he had relating to Mr Musa could not lawfully be used by him. Mr Solomon denies this allegation also.

[48] The breach is said to have been the making of a statement by Mr Solomon to the New Zealand Doctor Online internet news media outlet that: "The resignation of the Whanganui DHB chief executive Memo Musa is a positive step but he should

have left of his own accord, ..." and "It's just one step in repairing the damage...but in my view he should have resigned under his own steam, ...".

[49] Mr Musa says that the foregoing words, in their ordinary meaning, would have been understood by readers of the website, and were intended by Mr Solomon to be understood by readers, to mean that the Board had forced him (Mr Musa) to resign. Further, the plaintiff says that the words used in their ordinary meaning were understood, and were intended to be understood, to mean that he had caused damage to the Board and to those using its services. These allegations are denied by Mr Solomon.

[50] Further, the following words said to have been a part of the statement that Mr Solomon made to the Doctor Online website were also actionable: “I think we need someone really special. We need someone who is dynamic, someone who is open and honest, ...”. The plaintiff says that the words used, and the context in which they were used, implied, and were intended to imply, that the qualities described were not qualities possessed by Mr Musa. Mr Solomon denies these allegations.

[51] Mr Musa asserts that in the ordinary and natural meaning of the word “published”, the publication reproducing Mr Solomon’s comments set out above conveys the following meanings:

• that Mr Musa was forced to resign from his position;

• that Mr Musa caused damage to the Board and those using its services;

• that Mr Musa failed to fulfil his obligations as an employee; and

- that Mr Musa failed to exhibit qualities of honest, openness and dynamism.

[52] The next cause of action pleaded by the plaintiff is in breach of contract. In support of this claim, Mr Musa alleges that Mr Solomon received information about him as a result of his confidential discussions with the Board and in consequence of

Mr Solomon’s membership of the Board. Mr Musa claims that Mr Solomon knew and understood the nature and extent of the general obligation of confidence that the Board owed to Mr Musa as its employee and the additional obligation of confidentiality by virtue of the settlement agreement by which his personal grievance was settled and which provided for the termination of his employment.

[53] Mr Musa alleges that Mr Solomon has deliberately and consistently belittled him, has accessed information in his role as a member of the Board and used it to publicly criticise and humiliate him, and has acted out of malice towards him. Mr Musa says that by reason of the aforesaid actions, Mr Solomon instigated a breach of the express and implied duties of confidence owed to the plaintiff as a term of his employment agreement with the Board.

Decision

[54] Mr Leggat submits first that no one other than a party to a settlement can breach s 149(4) of the Act and, as Mr Solomon was not a party to the settlement of Mr Musa’s personal grievance with the Board, the second defendant cannot be liable.

[55] To succeed with this argument, however, counsel must persuade the Court that the word “person” in subs (4) means a party to a settlement. I do not agree. To accede to the argument would be to read down the word used expressly and deliberately by Parliament. There is no support for interpreting very restrictively the word “person” as Mr Leggat contends. To do so would be to defeat the object of s 149 which is to preserve the confidentiality of settlements. To constrain only parties would, for example, mean, on Mr Leggat’s interpretation, that a journalist could broadcast or publish with impunity the confidential terms of a settlement reached under s 149 so defeating, without sanction, the statutory confidentiality of that settlement. That interpretation of the word “person” cannot have been intended by Parliament.

[56] Mr Leggat submits that Judge Shaw’s decision in this case,[1] declining to strike out Mr Musa’s claim against Mr Solomon for breach of s 149(4), was wrong

in law. I agree, however, with the Judge that it is possible for someone such as Mr Solomon to breach s 149(4) although he was not a party to the settlement as was the Board. Whether Mr Solomon has done so in fact is, of course, another question

that will be dealt with subsequently in this judgment.

[57] To be liable for a penalty for breach of s 149 for breaching an agreed term of a settlement, Mr Solomon must have known both of the fact of a settlement having been achieved and of the relevant terms of that settlement. He denies having had knowledge of either of those matters at the date he is alleged to have been in breach,

27 March 2008, when he made comments to a Doctor Online journalist, which comments were later published by that media website.

[58] As already recorded, I am not satisfied that, on 27 March 2008, Mr Solomon was aware that a settlement had been reached under s 149 or that, even if he was so aware, he knew of its terms. His awareness that Mr Musa had resigned is clear from the comments he made to the journalist but that is not the same as being aware of the settlement that included this resignation, and the settlement's terms. This being a penalty action, the plaintiff must establish those essential elements of the breach to a sufficient standard of high probability if he is to put Mr Solomon at risk of a penal sanction.

[59] Although Mr Dewar argued strongly that, as from the time that he was aware that Mr Musa had given notice of his resignation, Mr Solomon must have known that a settlement had been achieved, I do not accept that this was necessarily so. Such was the pressure on Mr Musa at the time that it would not have been extraordinary or even surprising that he may have ended his employment by a resignation with the intention of pursuing the personal grievance for unjustified constructive dismissal that he had previously raised through his solicitors with the Board. Even although board members, including Mr Solomon, were aware of the negotiating parameters within which they hoped an agreement would be reached with Mr Musa for his resignation and on conditions including payments to him, it was a distinct possibility that negotiations could have broken down despite the best efforts of the Board's Chair to achieve a resolution.

[60] Mrs Joblin did not disclose either the details of the settlement reached on or about 26 February 2008, or even the fact that a settlement had been achieved at that time, to board members until these were attached to the agenda for part 3 of the Board's meeting scheduled for 1 pm on 29 March 2008. It is the plaintiff's case that this agenda, and the attached materials which would have confirmed to Mr Solomon both the fact and contents of a settlement agreement, must have come to his notice before he made statements to the Doctor Online journalist that are said to have breached that settlement.

[61] I am not satisfied that this has been established to the requisite standard. The evidence does not establish precisely when Mr Solomon spoke to the journalist although this was most probably on the morning of 27 March 2008. Although Mrs Joblin believed that the part 3 agenda and attachments were delivered by a member of her chartered accountancy practice staff to board members, it was not established in evidence when these materials were delivered to Mr Solomon. The second defendant was adamant in evidence that he did not see these materials until he collected them at the start of the meeting at 1 pm on 29 March 2008. There is some suggestion that someone, perhaps a board officer, received the agenda on 27 March

2008 but this is really no more than a suggestion and, in any event, no time of delivery is established by the notation the copy of the agenda adduced in evidence.

[62] In these circumstances I am not satisfied that it has been established that when he spoke to the Doctor Online journalist on the morning of 27 March 2008, Mr Solomon was aware either that an accord and satisfaction had been agreed or more particularly of the contents of this settlement that he is alleged to have breached.

[63] In these circumstances it follows that he cannot be liable as the plaintiff alleges and this cause of action must be dismissed.

[64] I turn next to the claim for penalty for breach by Mr Solomon of Mr Musa's employment agreement.

[65] The first difficulty facing Mr Musa is with s 134 of the Act on which he relies and is as follows:

134 Penalties for breach of employment agreement

(1) Every party to an employment agreement who breaches that

agreement is liable to a penalty under this Act.

(2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the

Authority.

[66] Subsection (1) is inapplicable to Mr Musa's claim because Mr Solomon was not a party to Mr Musa's employment agreement. The plaintiff must, therefore, bring himself within subs (2) if he is to be liable. By its use of the words "incites, instigates, aids, or abets any breach of an employment agreement ..." the statute makes liable a non-party such as Mr Solomon but as a secondary breacher. For a "person" such as Mr Solomon is, to be liable as an inciter, instigator, aider, or abetter (that is a secondary party), there must be a breach of an employment agreement by a primary breacher, in this case a party to it, the Board.

[67] There was, however, no breach of its employment agreement with Mr Musa by the Board. Certainly none has been established as Mr Musa would have to have done in this case. Although the plaintiff's claims against the Board were settled and the terms of the settlement are known to the parties and to the Court in this case, these do not include any acknowledgement of breach by the Board.

[68] Dealing with each one of the elements of secondary liability in s 134(2) I conclude that Mr Solomon did not "incite" a breach by any other person (including by the Board) of Mr Musa's employment agreement. Nor did he "aid" another to breach that agreement. Next, Mr Solomon cannot be said to have abetted, that is encouraged or assisted, a breach by another.

[69] In these circumstances Mr Dewar argues that what Mr Solomon did amounted to a breach by the Board of which he was a member, thus making Mr Solomon in law the instigator of a breach of the employment agreement by a party to it. To succeed in this argument, Mr Dewar must persuade the Court that relevant legislative provisions mean that in these circumstances the acts or omissions of a single member of the Board are, by law, the acts or omissions of the Board itself.

[70] The relevant legislation includes the New Zealand Public Health and

Disability Act 2000 and the Crown Entities Act 2004. I am satisfied that there is

nothing in the legislation which would cause the acts or omissions of a single board member to be deemed to be the acts or omissions of the Board as a statutory entity and for which it may be liable.

[71] In his final submissions Mr Dewar appears to accept that there was no admission of a breach by the employer and in these circumstances it was incumbent on Mr Musa to establish this. Mr Dewar submits that the events of 2006 (recounted above), the acknowledgement of the existence of a grievance and an apology to the plaintiff at that time, the legal opinions obtained by the Board and their distribution to its members, and admissions by the Board in correspondence in March 2008, all put the existence of a breach by the Board beyond doubt. I disagree.

[72] The events of 2006, whether they amounted to a breach by the board of its employment agreement with Mr Musa, were nevertheless concluded by the settlement of his personal grievance at the time. They are, therefore, at best from the plaintiff's point of view, background events. The board's legal opinions are just that, advice to it from its solicitors and counsel as to the risks it faced in its dealings with Mr Musa. Without evidence that the Board acted contrary to that advice (which it did not), these opinions do not constitute evidence of a breach by the Board.

[73] Finally, the correspondence referred to includes, first, an e-mailed letter from the Board's solicitor to the Doctor on Line

website sent on early afternoon of Friday

28 March 2008 after publication of Mr Solomon's statement to the journalist. The solicitor's letter asserts that the quotations attributed to Mr Solomon were in breach of the settlement agreement. Importantly, however, the solicitor's correspondence included the following: "Although those statements are from a board member they are not the view of the Board and should not have been made."

[74] The second piece of correspondence relied on by Mr Dewar to establish a breach by the Board was the letter dated 31 March 2008 from the Board Chair to Mr Solomon which referred to Mr Musa's complaint about the statements attributed to Mr Solomon on the Doctor on Line website on 27 March 2008. The plaintiff would appear to place reliance upon the following sentences in the letter:

If the comments attributed to you are correct, then it would appear that you have put the Board at risk of suit by the CEO for breach of the agreement and you may even have exposed yourself to personal liability.

...

Could you also let me have your prompt response, it is important for me to take steps as soon as possible to minimize the risk to the Board arising from this incident.

[75] Neither piece of correspondence either establishes a breach of the settlement agreement by the Board or even an acknowledgement by it that it had done so.

[76] It follows that there was no breach of Mr Musa's employment agreement by his employer, the Board, to which Mr Solomon may have been a secondary party under s 134(2).

[77] The position is not saved for the plaintiff by judgments such as *Peacock v NZ Performance etc Union.*[2] In that case the Court of Appeal found that the receiver of a company might be liable personally for a penalty for breach of an award pursuant to s 202 of the Labour Relations Act 1987. The essential finding by the Labour Court and the Court of Appeal in *Peacock* was that a person who was the "mind" of the company may be guilty of aiding and abetting it in the commission of an offence constituted or brought about by the act or conduct of that person. The role of receiver of a company in receivership is very different to that of a single board

member of 10 or 11 other board members a majority of whom, at properly constituted meetings and by constitutionally defined processes, act as the Board.

[78] Irrespective of the merits or otherwise of Mr Solomon's statements, the making of them could not have caused the second defendant to have been an inciter, instigator, aider, or abetter of a breach by the Board of its employment agreement with Mr Musa. There are, nevertheless, other arguments for liability that I should address.

[79] The agreement made between Mr Musa and the Board on or about 26 March

2008, settling his personal grievance, was not an employment agreement as that is defined in the legislation. Some of its provisions may have amounted to variations

of Mr Musa's employment agreement with the Board and, in particular, the provision by which his employment would end on 31 July 2008. But the settlement agreement was a separate contract, an accord and satisfaction as the law sometimes terms it. Not only was it not an employment agreement but in some respects it was the antithesis of an employment agreement. It is an agreement that provided for the end of employment on terms. In return for not pursuing the personal grievance that he had raised with the Board alleging that he had been unjustifiably dismissed constructively, the Board agreed to make a number of payments to Mr Musa and also to compensate him non-monetarily including by providing him with a favourable reference and giving an undertaking that it (in reality its representatives) would not speak ill of him in future. The terms said

to have been breached by Mr Solomon were not terms that were limited to the balance of the employment period. What became known at the hearing as the non-disparagement clause applied not only to the remaining four months of Mr Musa's employment but, potentially, indefinitely.

[80] The provisions of the accord and satisfaction which Mr Solomon is alleged to have breached could not have been, and did not become, terms or conditions of Mr Musa's employment agreement with the Board. It follows that these could not have been breached by the Board as employer, nor *a fortiori*, by Mr Solomon as a board member. Nor were Mr Solomon's remarks to the journalist at Doctor on Line the instigation by him of a breach by the Board of its implied obligations of trust and confidence towards Mr Musa. The non-disparagement term of the settlement was not a term or condition of Mr Musa's employment by the Board: rather it was a term of the accord and satisfaction or settlement of Mr Musa's personal grievance. That cause of action for instigation of a breach of employment agreement must therefore fail and is dismissed.

[81] The plaintiff's claims for penalties do not succeed and are dismissed.

Costs

[82] I asked for and received submissions on the matter of costs before the hearing concluded. Although Mr Leggat made submissions to me in support of the second defendant's claim for costs, Mr Dewar for the plaintiff said that he had not received

my memorandum asking that the parties address this issue on 6 September and told me that, in any event, there were communications between counsel on the question of costs that should not be disclosed appropriately until after the case has been decided substantively. In reliance on that assurance by counsel, I reserve questions of costs. Mr Leggat has already made his costs submissions at the hearing. Mr Dewar may have the period of 10 days from the date of this judgment to file and serve submissions on costs with Mr Leggat having seven days thereafter to reply if he wishes.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Friday 10 September 2010

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[1] WC 20/08, 18 November 2008.

[2] (1990) ERNZ Sel Cas 761; [1990] 2 NZILR 257.
