IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 26
3031137

	BETWEEN	MICHAEL NICOLLE Applicant
	AND	GOLEMAN WELLINGTON CLEANING LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Jonny Sanders, counsel for the Applicant Paul Pa'u, advocate for the Respondent
Investigation Meeting	5 October 2018 at Christchurch with further information received up to, and including, 19 October 2018
Date of the Determination	21 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Nicolle lodged a statement of problem in the Authority seeking compliance with a record of settlement entered into under s 149 of the Employment Relations Act 2000 (the Act). He also sought a penalty for breach of the agreement by his former employer Goleman Wellington Cleaning Limited, where he had performed the role of national training manager. Goleman said in reply it had complied with the terms of the agreement but had withheld $3000 due to what it described as "blatant breaches" of the same agreement by Mr Nicolle. Goleman also counterclaimed against Mr Nicolle alleging he breached a non-disparagement provision contained in the agreement. Goleman sought penalties against Mr Nicolle of $5000 for each of the two alleged breaches.

[2] Goleman would ultimately pay Mr Nicolle the amount payable under the agreement. Consequently, his claim proceeded in the Authority solely on the basis of seeking a penalty for breach of the agreement.

The Authority's investigation

[3] During the Authority's investigation meeting, I heard evidence from Mr Nicolle and former Goleman employees, Ian Watts and Aaron Plumridge. For Goleman, I heard evidence from human resources manager, David Fuimaono and current employees, Victoria Atherton and Brad Cattermole.

[4] Having regard to s 174E of the Act while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

Issues

[5] The issues that arose for determination during the Authority's investigation were:

(i) Claim: should a penalty be imposed on Goleman for breach of the agreement, if so in what amount and should any or all of this be made payable to Mr Nicolle;

(ii) Counterclaim: should a penalty be imposed on Mr Nicolle for breach of the agreement, if so in what amount and should any or all of this be made payable to Goleman;

(iii) Should either party contribute to the cost of representation of the other party?

What happened?

Breach of the agreement by Goleman

[6] Mr Nicolle and Goleman entered into the agreement on 18 May 2018. The agreement complied with the requirements of s 149 of the Act including being signed by a mediator.

[7] Mr Nicolle said Goleman failed to make two payments under the agreement. Goleman accepted its default in relation to the agreement. However, by the time the matter came to be investigated these payments had been made and the only "live" aspect of Mr Nicolle's case was his claim for a penalty as a result of those breaches.

Alleged breach of the agreement by Mr Nicolle

[8] On 29 May 2018, Mr Nicolle was assisting several Goleman staff to complete a written assessment for training he had previously conducted but for which the paperwork had been misplaced. During, or potentially after, this training Goleman says Mr Nicolle breached the settlement as a result of a conversation he had with several members of its staff including Ms Atherton and Mr Cattermole. Goleman alleged Mr Nicolle made disparaging remarks about it including that it was losing clients, losing key staff, was in a precarious financial position and encouraged Ms Atherton and Mr Cattermole to seek out alternative employment.

[9] Goleman said the matter came to light when Ms Atherton contacted its chief executive raising concerns about her employment and the company. In response, Mr Fuimaono became involved. He said he was tasked with reassuring Ms Atherton the company was viable and there was nothing to worry about and investigating what happened at the workshop.

[10] To gain a better understanding, Mr Fuimaono said he interviewed all employees in attendance. Two employees effectively said they had not heard Mr Nicolle making disparaging remarks about Goleman. Whereas, another employee, Mr Cattermole, tended to support Ms Atherton's version of events.

[11] On 1 June 2018, Mr Fuimaono emailed Mr Nicolle and advised him that Goleman had information he had breached the settlement and it would be filing proceedings in the Authority.

[12] Mr Nicolle said this was a real blow, which would cause anxiety and hardship. When he did not receive the money payable under the agreement, Mr Nicolle re-engaged his solicitors, who emailed Mr Fuimaono seeking compliance with the agreement.

[13] Also on 5 June 2018, Mr Fuimaono sent a letter to Mr Nicolle's solicitors setting out Goleman's concerns about Mr Nicolle's conduct at the workshop. This resulted in a further exchange of correspondence between the parties on 6 June 2018 and 11 June 2018.

[14] In that correspondence, both sides threatened the other with legal proceedings arising out of the alleged breaches by the other. Ultimately, Mr Nicolle issued his claim first and Goleman responded with its counterclaim.

The respective position of the parties on Mr Nicolle's claim for a penalty

Mr Nicolle

[15] Mr Nicolle set out the basis for his claim for a penalty and undertook an analysis of the amount of such with reference to the decision of the Court in *Borsboom v Preet PVT Limited*[1] and s 133A of the Act, which sets out the criteria to be taken into account when imposing penalties.

[16] Having undertaken this analysis, Mr Nicolle said $9000, in circumstances where the maximum penalty to be imposed on Goleman was $20,000, was an appropriate penalty. Mr Nicolle sought to have this penalty awarded to himself by reference to the Authority's discretion to do so under s 136(2) of the Act.

Goleman

[17] Goleman said Mr Nicolle's statement of problem did not contain an allegation of hardship but when it was raised during the investigation it was, in any event, "grossly exaggerated". Goleman also said Mr Nicolle did not have "clean hands" due to his own breaches of the settlement and its belief in the breaches was honestly held.

[18] Goleman submitted that it had no history of breaching settlement agreements and the most common penalty awarded for such breaches, based on its analysis of the Court's decision in *Lumsden v SkyCity Management Limited*[2], was between $500 and $2000.

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[1] [2016] NZEmpC 143
[2] [2017] NZEmpC 30

[19] Ultimately, Goleman said no penalty should be imposed on it but if the Authority was against it on that, then $500 was an appropriate amount. Based on its submissions, Goleman was neutral as to whether this should be paid to Mr Nicolle.

Evaluation

[20] The Court in *Nicholson v Ford*[3] set out guidance about the inter-relationship between *Preet*, s 133A of the Act and the other relevant factors to be taken into account when considering the imposition of penalties.

[21] Taking these factors into account after considering the parties' submissions, assessing the evidence and the admitted conduct by Goleman in breaching the settlement, I find that $3000 is an appropriate penalty to impose in all the circumstances of the case. As Goleman did not oppose the payment of this penalty to Mr Nicolle, and having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award the whole of the penalty to Mr Nicolle.

[22] Goleman must pay Mr Nicolle $3000 as a penalty for breaching the settlement within 14 days of the day of this determination.

Goleman's counterclaim

[23] Whilst counterclaims may be meritorious, the Court has urged caution in the assessment of such.[4] In the circumstances of this matter however I believe Goleman was motivated by a genuine belief Mr Nicolle had breached the settlement and its conduct in withholding payments under the agreement, while subject to criticism in this determination and ultimately resulting in the imposition of a penalty, is consistent with this belief.

[24] That said, having considered the submissions, and objectively assessing the evidence put before the Authority, I accept Mr Nicolle did not disparage Goleman in the way alleged and as a consequence did not breach the settlement. For these reasons, I decline to accept Goleman's counterclaim against him.

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[3] [2018] NZEmpC 132
[4] *George v Auckland Council* [2013] ERNZ 675 at [143]-[144]

Costs

[25] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Mr Nicolle has 28 days from the date of this determination in which to file and serve a memorandum on costs. Goleman has a further 14 days in which to file and serve a memorandum in reply.

[26] 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.[5]

Andrew Dallas
Member of the Employment Relations Authority

[5] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.