

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 339  
3118613

BETWEEN ORX  
Applicant

AND LUY  
Respondent

Member of Authority: Philip Cheyne

Representatives: Jenna Riddle, for Applicant  
LUY the Respondent

Investigation Meeting: 21 July 2021 at Auckland

Determination: 2 August 2021

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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- A. Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000, I prohibit the publication of the names of the applicant, its director and the respondent. I further prohibit the publication of the contents of the statement of problem and annexures, the supporting affidavit and annexures, the statement in reply and all memoranda filed in the Employment Relations Authority in the course of these proceedings.**

- B. Pursuant to section 137 of the Employment Relations Act 2000, effective immediately, LUY must:**
- i. refrain from making any disparaging comments about ORX (and its director) to any third parties;**
  - ii. refrain from disseminating any of ORX's confidential information; and**
  - iii. comply with the record of settlement between him and ORX dated in November 2016.**
- C. By no later than 31 August 2021, LUY is to pay a penalty of \$250.00 to ORX.**
- D. By no later than 30 September, LUY is to pay a penalty of \$250.00 into the nominated Crown account.**
- E. I reserve costs, subject to the timetable set below for submissions.**

### **Employment relationship problem**

[1] LUY was employed by ORX. In November 2016, they agreed to terms that were then signed off in accordance with s 149(1) of the Employment Relations Act 2000. One term was LUY's resignation. He agreed not to make disparaging comments about ORX. LUY also agreed that the obligation not to use or disclose confidential information regarding ORX's business during his employment would continue indefinitely after the end of the employment.

[2] LUY posted tweets on a day in July 2020 about an unnamed work place. The same day he also posted a blog to his personal website, without identifying ORX. On a day in September 2020, LUY published online a blog naming his former employer and the principal of the business. The following day he included a link to that blog post in a series of tweets. Some social media comment and sharing by others followed. LUY added to the social media comment. Several days later he posted a series of further tweets. The following day, he posted another tweet. The next day, further comments were posted to twitter by LUY. LUY stopped on-line messaging soon after.

[3] ORX says that the messages breached the record of settlement as follows: term 1 requiring confidentiality of the settlement and all matters discussed in reaching it; term 6 requiring LUY not to make disparaging comments about ORX; and term 7 requiring LUY not to disclose ORX's confidential information. A compliance order, penalties and costs are sought.

[4] At an early point, LUY lodged a reply admitting to the allegations set out in the statement of problem and affidavit that had been lodged in support. Later, LUY instructed counsel. Leave was given to lodge an amended reply. Counsel suffered an accident, so matters were deferred. LUY later withdrew counsel's instructions and did not instruct other counsel.<sup>1</sup> In preparation for the investigation meeting, he lodged a statement of evidence and submissions but did not lodge an amended statement in reply. However, I treat the reply as impliedly amended to the extent necessary to have proper regard to LUY's evidence and submissions.<sup>2</sup>

[5] The circumstances in which this problem arose and came before the Authority are difficult. I acknowledge the efforts and co-operation of those involved, so that the problem can now be resolved by this determination. It is based on facts that are well understood by the parties, which only need general reference in this determination.

[6] On 24 September 2020 I made an order prohibiting the publication of the names of the applicant and its director, the content of the statement of problem, affidavit and annexures to both documents, counsel's memoranda and her emails to the Authority. On 19 October 2020 that order was replaced with an order prohibiting the publication of the parties' names (including the name of the applicant's director), and all pleadings, documents and correspondence lodged in the Authority by either party. The order was repeated on 20 November 2020. The temporary orders were made under clause 10 of Schedule 2 to the Employment Relations Act 2000.

[7] The orders were made to preserve confidentiality under the agreed record of settlement, to prevent further harm to ORX from publications at least arguably in breach of

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<sup>1</sup> LUY says he could not access legal aid and could not afford to engage any counsel to act for him. There is no reason to doubt this as the explanation for him no longer being represented.

<sup>2</sup> Employment Relations Authority Regulations 2000, reg 4 and Employment Relations Act 2000, s 157(1).

the record of settlement and in light of LUY's health circumstances. These concerns remain persuasive. Together, they now justify a permanent non-publication order, despite the principle of open justice.

[8] I will make a broad non-publication order. In this determination, I have needed to refer to matters that are subject to the non-publication order. That does not authorise publication of information otherwise covered by the non-publication order.

[9] The difficult issue for determination concerns what if any penalty should now be imposed, in light of admitted breaches. Section 133A of the Employment Relations Act 2000 requires me to have regard to all relevant matters, including those specifically identified in the section, in determining an appropriate penalty for a breach. My conclusions on these matters are set out below. However, I first deal with the application for a compliance order.

### **Compliance order**

[10] As explained below, I find that LUY has not observed or complied with obligations under the record of settlement. These obligations may be enforced by compliance order. Section 137 of the Employment Relations Act 2000 applies. Under s 137(2), I have power to order LUY to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance or non-compliance with the record of settlement.

[11] As set out below, LUY has taken steps to take down the on-line messages. This appears to have been effective and there is no evidence to show that LUY is still in breach of the record of settlement obligations. However, ORX seeks a compliance order. LUY did not oppose a compliance order. ORX is entitled to the added assurance that LUY will observe the obligations under the record of settlement in the future that is provided by a compliance order. I include a compliance order as part of making this determination, in equity and good conscience. A general form of order will be sufficient now, given developments since the application was lodged.

[12] I will make an order requiring LUY to refrain from making any further disparaging comments about ORX (and its director) to any third parties; to refrain from disseminating any

of ORX's confidential information; and to comply with the record of settlement between him and ORX dated in November 2016. LUY must comply with this order immediately.

### **Penalty**

[13] LUY accepts that he breached the record of settlement. I find that he is liable under s 149(4) of the Employment Relations Act 2000. In determining an appropriate penalty, I am required to apply s 133A of the Act.

### **The object of the Act<sup>3</sup>**

[14] Mediation is the primary problem-solving mechanism. The employment relationship problem between LUY and ORX was fully and finally resolved in 2016 and they used mediation services to record their settlement. It is important that parties retain confidence in the durability of their records of settlement.

### **The nature and extent of the breaches**

[15] I refer to the affidavit Annexure "B". Parts of the tweets and the thread when read together would have breached clause 6 (disparaging comments), but ORX was not identifiable at that point.

[16] Annexure "B" includes some general references to events that lead to the record of settlement, although ORX was not identifiable. The references, could be regarded as a breach of the agreed confidentiality (clause 1). However, they do not add anything of significance to the point about a breach of clause 6.

[17] I refer to the affidavit Annexure "C". Parts of the blog would have breached clause 6 (disparaging comments), but ORX was not identifiable at that point. Parts of the blog breached clause 1 (confidentiality), as LUY disclosed information about the record of settlement.

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<sup>3</sup> Employment Relations Act 2000, s 3.

[18] I refer to the affidavit Annexure “D”. It was an updated blog of the earlier blog shown in Annexure “C”. It identified ORX. The blog included disparaging comments. In part and when read overall, it breached clause 6.

[19] There is a submission that its contents included information covered by the contractual term prohibiting the disclosure of ORX’s confidential information. The contractual term was incorporated into the record of settlement by clause 7. Clause 7 described “confidential information” to include information about any projects, activities or other operations of the Applicant’s business. Not every piece of information about projects, activities and operations of a business can be regarded as confidential so as to fall within a restrictive covenant such as set out at clause 9.1 of the employment agreement, incorporated into the record of settlement by clause 7. The law supports protection of information that is confidential, but not otherwise. I do not accept that LUY’s job description and details of his remuneration, summaries of performance discussions, details of a proposed performance improvement plan, communications between LUY and the director and details about the settlement agreement could be regarded as “confidential information” protected by clause 9.1 of the employment agreement and clause 7 of the record of settlement. The disclosure of some of the information however, would constitute a breach of clause 1 of the record of settlement.

[20] Included in the blog post (Annexure “D”) is a memo dated 2020 from the director to then current staff. It must have come into LUY’s possession more than three years after the end of his employment. Clause 9.1 of the employment agreement covers confidential information acquired by LUY during the employment. The contractual term did not apply to information acquired many years later. Equally, clause 7 of the record of settlement did not apply to the later acquired information. Its inclusion in the blog post was not a breach of the record of settlement.

[21] I refer to the affidavit Annexure “E”. The tweets included disparaging comments and identified ORX, in breach of clause 6.

[22] I refer to the affidavit Annexure “G”. LUY made disparaging comments to a social media site. ORX was identified. The comments breached clause 6.

[23] I refer to the affidavit Annexure “H”. Tweets included disparaging comments, in breach of clause 6.

[24] I refer to counsel’s submissions concerning “Breach 7”. LUY posted a tweet referring to the proceedings recently commenced by ORX. I accept that the tweet reinforced the disparaging nature of earlier breaches. On its own it was a breach of the record of settlement (clause 6).

[25] I refer to counsel’s submissions concerning “Breach 8”. The additional tweets included disparaging comments, again in breach of clause 6. Some parts of the tweets also breached clause 1.

[26] Applying *Borsboom v Preet*,<sup>4</sup> the interrelated breaches were either materially similar or identical. They occurred over a short period of time, especially once ORX was identifiable. I treat the disparaging comments referring only to the director by name without specific mention of ORX as being part of the disparagement of ORX, for current purposes. The breaches arose from a single course of conduct and can properly be globalised and treated as one breach of the statutory obligation to comply with agreed terms of settlement.<sup>5</sup> Although globalised as one breach, the above outline of events adds to the serious nature of the breach. This approach acknowledges the significance of LUY’s breach of the record of settlement, as a penalty of up to \$10,000.00 is a serious sanction.

### **Whether the breach was intentional, inadvertent or negligent**

[27] I agree that LUY’s breaches were couched as a “moral crusade” against ORX and the director. The initial messages included statements that show LUY understood he would be in breach of the record of settlement. Later, when identifying ORX and the director, statements indicate that LUY knew he was breaching the record of settlement. The conduct was not inadvertent or negligent, so must be regarded as intentional. This needs to be understood in the context of the circumstances mentioned later.

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<sup>4</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143 at [139].

<sup>5</sup> Employment Relations Act 2000, s 149(4).

### **Nature and extent of loss/damage**

[28] There is no evidence of pecuniary loss or damage suffered by ORX, although I accept that the director would have been concerned about the potential for such loss flowing from the on-line messaging, in light of reputational factors that might influence business relationships and decisions. Messages also attributed LUY's health crisis to events prior to the record of settlement. I accept this added to the director's concerns. I accept that the sense of hurt felt by the director can properly be regarded as amounting to loss or damage suffered by ORX as a result of the breaches.

[29] There are assertions, but no direct evidence, that other employees were hurt as a result of the disparaging things said about ORX, including the reference to ORX as a cause of LUY's health crisis. I put this factor aside, although note that it would have added little to the outcome.

[30] LUY did not achieve or avoid any pecuniary gains or losses through his conduct. I mention elsewhere the sense of crusade that accompanied the comments.

### **Steps taken to avoid or mitigate adverse effects**

[31] LUY's evidence is that he made every effort to remove all references he had made on-line after he was discharged. LUY sent an email to ORX's lawyer on 15 September 2020 advising that he had removed all material, but asking them to let him know if something had not been removed. ORX has not identified any material still accessible. In a memorandum lodged on 18 November 2020, then counsel for LUY described the steps she had taken to check whether any of the electronic messages remained accessible. Counsel could not locate any of the messages.

[32] As at the date of the statement of problem, ORX said that the conversation thread had been removed from the social media platform. The director's evidence is that LUY posted a tweet saying that he would delete the thread, and did so. There is no evidence that LUY's messages that breached the record of settlement remain available on any on-line platform.

[33] I find that LUY took steps to limit the adverse consequences of his breach, as soon as he was able to, following his discharge.

[34] LUY's evidence is that he has taken steps to demonstrate his remorse by offering a written apology, by way of reparation or restitution. Counsel characterises LUY's expression of remorse as being focussed on what he has put his family through, rather than being focussed on the consequences for ORX. LUY's peer support person's response was to say that LUY's work to gain a fuller understanding about the effects of his actions on others, is still in progress. I take from this that LUY's remorse and his efforts to express this to ORX are sincere, but incomplete.

### **Circumstances in which the breach took place**

[35] I need not canvass the details, but I accept that the conduct in 2020, in breach of the 2016 record of settlement, arose in the context of a health crisis.

[36] There is no reason to doubt the peer support worker's statement that LUY's intention at the time of his conduct was to protect others, not to cause harm to ORX.

[37] The peer support worker describes LUY's thought processes, leading to him forming that intention. There is no reason to doubt that accurately describes LUY's thought processes. The difficulty is that LUY agreed at the time to fully and finally resolve the 2016 matters, but they still formed part of the 2020 thought processes. Society requires fair and effective legal mechanisms for resolving civil disputes (including employment relationship problems). Without it there would be anarchy and conflict from resort to self-help remedies.<sup>6</sup> Finality is an important aspect. The Authority must treat the record of settlement as final and binding,<sup>7</sup> as a matter of principle and because that is what the Employment Relations Act states. LUY should also have treated those matters as having been fully and finally resolved, as a matter of principle and because that is what the Employment Relations Act states.

[38] LUY's health crisis is the context for what his peer support worker describes as an inability to control the compulsion to commit a breach. However, there is not specialist evidence to support a finding that LUY was not culpable for his conduct.

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<sup>6</sup> *Faloon v Planning Tribunal* [2020] NZCA 170.

<sup>7</sup> Except if set aside on grounds such as *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12.

## **Previous findings of similar conduct**

[39] There are no findings in other proceedings about similar conduct by LUY.

## **The need for deterrence**

[40] The circumstances in which the breach took place were exceptional. I am not aware of another similar case. My assessment is that LUY is better deterred from engaging in similar conduct in the future by continued focus on the resolution of health issues, than by the imposition of a substantial penalty.

[41] Part of this assessment is that there will be a compliance order to prevent a further any further breach. I explained to LUY the very serious consequences that are likely to follow any breach of the compliance order.

[42] A penalty need not be set by reference to the need to deter LUY.

[43] The need to deter others remains as an important factor in setting the level of a penalty, before assessing the factors specific to this case.

## **Severity**

[44] Counsel referred me to *ITE v ALA*<sup>8</sup> as part of her submissions directed to the severity. In that case, the employee breached a record of settlement by creating a video setting out his explanation about matters that had earlier resulted in criminal charges against him on the employer's complaint to police. The criminal charges had been withdrawn. The ex-employee then posted the video to his website and sent emails containing the link to employees of the employer and to others, encouraging them to view it. A penalty of \$6,000.00 was fixed. My assessment is that LUY's conduct, while serious and with some similar features, was not as serious as the breaches by ITE.

[45] I am also referred to *Levchenko-Scott v Presbyterian Support Charitable Trust*.<sup>9</sup> In that case, the record of settlement included a promise not to disparage or speak ill of either

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<sup>8</sup> *ITE v ALA* [2016] NZEmpC 42. It was identified as *P v Q* at an earlier stage: *P v Q* [2015] NZERA Auckland 181. Subsequent developments in the litigation underline the seriousness of the employee's breach.

<sup>9</sup> *Levchenko-Scott v Presbyterian Support Charitable Trust* [2020] NZERA 452.

party and for the employer to restrict its comments if contacted by third parties to comments consistent with the text of an agreed reference. The employer told three potential employers that they would not re-employ the employee, as he did not fit with or align with the employer's values. Three separate employment offers, each subject to reference-checking, were withdrawn after the reference checking, so there were serious effects. The responses breached the record of settlement, especially in light of the employer's publicised value statements, consistent with industry employer expectations. These were regarded as three discrete intentional breaches and were not globalised. I should also be mindful that the maximum penalty for a corporate entity is twice that for an individual. There were significant consequences for the employee. A penalty of \$12,000.00 for each breach (60% of the maximum) was set as the starting point.

[46] Taking account of the several open channels used to publish the messages, the disparaging nature of the comments, the crusade aspect of attempting to reopen settled matters, the effect on ORX and to reinforce the continuing effectiveness of records of settlement as a general deterrence, I would fix a penalty at \$5,000.00 as appropriate.

[47] Various factors need to be accounted for by way of mitigation. LUY's conduct resulted from a health crisis. He had until then complied with the record of settlement. Once he was able to do so, LUY did all that he could to take down the comments. These steps appear to have been effective. LUY formally admitted liability at an early stage and now accepts that he should not have posted the messages. LUY receives continuing professional support to help him understand and acknowledge the harm his actions caused to ORX. The acceptance, understanding and acknowledgement followed the commencement of the litigation, but were not just the result of the litigation. Each factor should draw a significant reduction to the penalty otherwise payable. Together, they cause me to reduce the penalty to \$1,000.00.

[48] LUY says that he does not have the financial resources to pay a significant penalty. LUY is unable to work, has minimal assets and no savings. LUY's wife is not able to work fulltime, given the need for her to care for LUY. If LUY had financial resources to any extent, he would have retained legal representation. There is a submission that a significant penalty would prevent LUY from accessing the necessary therapeutic support.

[49] LUY is a director of a company, along with his brother. It was incorporated in 2017. LUY, his brother and their mother are the holders of most of the shares, while his mother is the sole holder of a second share allocation. An accountant, responding to LUY's mother's request, sent an email confirming that LUY holds the share allocation jointly as a trustee. LUY is a final beneficiary of the trust, but it would need to be wound up for there to be any distribution. LUY's mother says she would be entitled first to recover her advances to the company or trust, in the event of any income. The accountant confirms that LUY receives no payment for his role as a director or as a trustee. This information does not cast any doubt on LUY's description of his financial circumstances.

[50] There is a submission that I should fix a penalty without accounting for LUY's financial circumstances, on the basis that ORX might elect not to enforce a penalty if it was payable to ORX. I do not accept that would be an appropriate approach. Ability to pay is specifically noted as a factor to take account of when fixing penalties.<sup>10</sup> Additionally, in light of all the circumstances, this matter is best finally resolved, without leaving the effective level of penalty to one party's discretion.

[51] Taking into account LUY's inability to pay a significant penalty, I would reduce the penalty payable to \$500.00

[52] I should have regard to whether this level of penalty is proportionate to the breach. A penalty of \$500.00 is a very modest outcome in the context of a serious breach of obligations under a record of settlement entered into some years earlier, even having regard to the limited effect on ORX. The level of penalty particularly reflects the exceptional circumstances which resulted in the breach occurring. It is amongst the lowest of penalty outcomes in cases involving breaches of a record of settlement. Again, that reflects the exceptional circumstances of the matter.

[53] There will be a penalty of \$500.00.

### **Who should the penalty be payable to?**

[54] I am asked to direct that the whole penalty be payable to ORX.

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<sup>10</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[55] A penalty is required here as a response to the broader interest in ensuring ongoing compliance with records of settlement. However, ORX's private interests have also been affected. The harm to ORX cannot be addressed, except by ordering the penalty payable (at least in part) to ORX.

[56] I will order half the penalty payable to ORX and the other half payable to the crown, there being no obvious reason to distinguish the proportions between the recipients. I will allow a longer time for the payment to the crown, as a result of LUY's financial circumstances.

### **Costs**

[57] I am asked to reserve costs and will do so. If a party is claiming costs, they should lodge a supporting memorandum within 28 days of this determination. The other party may lodge a memorandum in reply. The party lodging the memorandum should also copy it to the other party at the same time.

Philip Cheyne  
Member of the Employment Relations Authority