

**Note: An order prohibiting publication of party and witness names applies to this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 414  
3065032

BETWEEN	RGS Applicant
AND	EVD Respondent

Member of Authority:	Robin Arthur
Representatives:	Aishleen Sluiters, counsel for the Applicant Scott Worthy and Meilun Chen, counsel for the Respondent
Investigation Meeting:	3 July 2019
Determination:	12 July 2019

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**DETERMINATION OF THE AUTHORITY**

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**Order prohibiting publication of party names**

[1] The Applicant sought an order prohibiting publication of some evidence and background details because this matter included a dispute over whether a non-disparagement term in a certified settlement agreement was properly observed. Necessary references in this determination to some of that evidence would have the effect of publicly airing critical comments or points of view about one or other party that, by the terms of confidentiality and non-disparagement agreed in their settlement, the parties had said they would not do.

[2] An order prohibiting publication of the names of the parties and witnesses was to the same practical effect but had the benefit of allowing the necessary detail of the evidence to be described more clearly.

[3] A complicating factor weighing against such an order regarding party names, or more particularly the respondent employer name, arose from the Applicant's request for a penalty against the Respondent. If such a penalty were awarded, non-publication of the Respondent's name would reduce the effect of punishment and deterrence that is part of the public interest rationale for such penalties. This is of particular importance in cases where such a penalty results from breach of a certified settlement agreement. Such agreements are stated to be full, final and binding and only capable of further legal action where a term has been breached. The Employment Relations Act 2000 (the Act) supports those finality provisions by allowing the Authority to impose a penalty (of up to \$20,000 for a company and up to \$10,000 for an individual) where an agreed term of settlement is breached. Given more than 11,000 employment relationship problems are fully and finally resolved each year through such settlement agreements, the risk of public penalties for breaching those agreements is an important measure to protect the integrity of that part of the dispute resolution system for all workers and employers who rely on the finality and enforceability of the agreed terms.

[4] On balance, weighing the relevant factors and particular circumstances favoured an order prohibiting publication of the names of the parties and the witnesses in relation to this matter and this determination. The order is made under clause 10 of Schedule 2 of the Act. The witnesses are referred to in this determination by an initial that will be understood by the parties but their whole names may not be published. For the remainder of this determination the Applicant is referred to as RGS and the Respondent is referred to as EVD.

### **Employment relationship problem**

[5] RGS sought a compliance order, a penalty and costs because he said his former employer, EVD, breached terms of a settlement agreement made on 28 May 2019. A Ministry of Business employment mediator certified the agreement under s 149 of the Act. This certification meant the terms of their agreement were final, binding and could only be brought before the Authority for enforcement of terms.

[6] One agreed term was that the parties' settlement terms would remain confidential "as far as the law allows". For the purposes of findings of fact and law necessary for this determination, some of those terms are disclosed in detail in this

determination but their confidentiality is preserved, in part, by the order made regarding publication of party names.

[7] EVD is a New Zealand registered company. It is wholly-owned by a company in the People's Republic of China (referred to in this determination as the parent company). The parent company is not incorporated in New Zealand or registered as an overseas company here.

[8] The settlement agreement included a term setting out the agreed wording, in Chinese and English, of two letters of apology to be signed by RGS. The term said EVD was entitled to publish both letters on its "company website", its "official WeChat page" and its "official Facebook page" but was "not entitled to publish the letters anywhere else". The agreement included this explanation about how publication of the letters related to other terms in the agreement (bold emphasis added):

For the sake of clarity, these two letters and their publication **on those three forums** will not be considered a breach of the confidentiality or non-disparagement provisions of this agreement.

[9] The confidentiality and non-disparagement provisions, set out as clauses 5 and 6, were:

5. Neither party is entitled to comment on or about the letters of apology referred to in clause 4 above with the exception of providing a response to the effect that they are not able to comment any further on the matter.

6. Neither party will make any disparaging comment about the other.

[10] In an application lodged in the Authority on 26 June 2019 RGS said EVD breached the agreement by including additional comments above the apology letters when they were published on the WeChat page referred to in their settlement agreement.

[11] WeChat is a Chinese multi-purpose messaging and social media application said to have more than one billion monthly active users. As with similar social media applications, users receive postings made on pages to which the user subscribes.

[12] The posted comments of concern to RGS, written in Chinese, were translated by him as follows:

Based on [RGS]'s damage to his employer's interest and his breach of his employment agreement during his employment with [EVD] and especially considering the damage of his words and deed to the company's interest and right after his resignation, [EVD] has filed a lawsuit with an NZ local court and sued [RGS].

The problem has been settled, [RGS] has admitted the mistakes he made during his employment. He also wrote an apology letter and apologised sincerely to the company. [EVD] has forgiven the mistake he made and promised it won't pursue him for responsibility in the future."

[13] He said the WeChat post breached clause 5 because it was further comment on the matter, which the parties agreed they would not make.

[14] He also said those written comments breached clause 6 because the description of him as damaging EVD's interests, breaching his employment agreement and doing damage by "his word and deeds" were disparaging comments.

[15] Counsel for RGS wrote to EVD's legal representative on 21 June asking for removal of the WeChat post by close of business 24 June. On the morning of 24 June EVD's legal representative advised he would take instructions but the post remained in place at the end of that day.

[16] RGS provided the Authority with a screenshot of the post taken at 6.46am on 26 June 2019.

### **Authority investigation**

[17] An Authority investigation meeting was scheduled, on an abridged timetable, for 2pm on 3 July. Directions were made that EVD was not required to lodge a statement in reply and that any necessary evidence would be taken orally from witnesses at the meeting.

[18] On the morning of 3 July EVD, through counsel, advised that the WeChat post had been removed the previous evening. It requested adjournment of that afternoon's investigation meeting. RGS opposed adjournment. His counsel referred to a media website in China that specialised in news about the industry in which EVD operated. The media website carried a story, reposting the comments and letters from the WeChat page, underneath some commentary also critical of RGS. I declined the adjournment request.

[19] At the investigation meeting RGS, EVD's marketing officer Mr L and EVD's finance manager Ms W each gave oral evidence, under oath or affirmation, in answer to questions from me and counsel for the parties. Mr L and Ms W had attended the mediation at which the settlement agreement was made and certified.

[20] Counsel also gave closing submission on the issues for resolution. Those issues, broadly, were:

- (i) Had there been a breach of terms of settlement prohibiting further comment and disparaging comment?
- (ii) If so, should a compliance order be made?
- (iii) Should any penalty be imposed if a breach was established?
- (iv) Costs.

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

### **Breach of terms of settlement**

[22] EVD's riposte to the accusation that it had breached the terms of the settlement agreement had, broadly, two elements. Firstly, it denied it was responsible or liable for the additional comments included in the WeChat posting. Secondly, it denied those comments were disparaging.

#### *Liability for posting additional comments?*

[23] The first point concerned a technical distinction between EVD and its parent company as separate legal entities and a jurisdictional issue of where the event of publication had occurred, that is on a WeChat page said to be entirely controlled by the parent company in China, not EVD in New Zealand.

[24] Mr L explained in his oral evidence that EVD did not have its own WeChat page. The reference in the settlement agreement to EVD's "official WeChat page", as a forum for publication of the apology letter, was known and understood by the parties, when they made the agreement, to be the WeChat page of the parent company in China.

[25] RGS had, soon after the settlement agreement was made, provided the signed letters of apology. The copies of the letters, in English and Chinese, published soon after on the WeChat page were those signed letters.

[26] Neither Mr L nor Ms W were able to explain how those letters were sent from EVD's New Zealand office and were published by the parent company in China. Both said they did not know who wrote the comment that accompanied it.

[27] Mr L said he was involved in the process that resulted in the WeChat post being removed on 2 July. He said he had spoken to EVD's general manager, Mr P, who was in China on business. He understood Mr P then spoke to a representative of the parent company about having the post removed. Mr P then instructed Mr L to send an email to a representative of the parent company in China, requesting removal of the post. The post was then removed in its entirety – both the additional comment and the letters of apology.

[28] The liability of EVD not to breach the agreement was not diminished or removed by the notion that the authorship of the additional comments was unknown. The signed letters had, by some act of human agency, been transferred from the control of EVD in New Zealand to someone in the parent company in China. It does not matter who did this. EVD had possession and control of the signed letters of apology. It was, by dint of the agreed term, entitled to have the letters published on the WeChat page of the parent company. It was what the parties to the agreement had understood and intended would happen.

[29] However EVD bore an additional responsibility, under the letter and spirit of that agreed term, not to have the letters published in that forum with any additional comment. That too was a clearly agreed term. Mr L and Ms W had attended the mediation at which the terms were negotiated and agreed. Mr L, in his oral evidence, said EVD's general manager Mr P and its chief executive officer also "knew everything" about the terms because he and Ms W had spoken with them during the mediation that ended with those terms being agreed.

[30] As a result EVD, and all its responsible personnel, had an obligation to control how the letters were published and used. There were clear parameters for what it could do in publishing them.

[31] EVD, as seen from the additional comments included above the letters on the WeChat page, had failed to exercise the care and diligence it was obliged to exercise in how those letters were published. It was not credible to suggest that its liability was any less because, on the evidence of Mr L and Ms W, there was no explanation as to how the letters got from being on the server of EVD's New Zealand office into the hands of whoever in the parent company in China published those letters, with the additional comments, on the WeChat page.

[32] It mattered nothing that the comment may have been authored by someone in the parent company and that deed was carried in China, not New Zealand, and possibly by someone who was an employee of the parent company, that is a separate legal entity, and in a different jurisdiction. In publishing the letters the parent company was, for the purpose of carrying out the terms of the agreement, the agent of EVD. This was so even if those responsible in the parent company were nominally superior to the employees of its New Zealand subsidiary, EVD.

[33] EVD's breach of clause five, not to comment on or about the letters of apology, occurred not by the fact of the additional comments being posted on the WeChat page but in the fact of not having taken enough care to ensure that the publication of the letters was carried out in a way that was entirely consistent with the terms of the agreement, not different from it.

[34] The fact of the physical initiation of the WeChat post, with the additional comments, occurring in China did not negate that liability. The post could be read by anyone in New Zealand who subscribed to the public page of the parent company. This was how RGS became aware of the post himself. As a subscriber the post, as he put it, just "popped up" on his mobile phone on 15 June 2019. All other subscribers to that WeChat page would have been alerted to the same posting. EVD was liable for having allowed that situation to occur.

[35] This was not diminished by Mr L's evidence that he and other employees of EVD were not able to decide what was or was not published on the WeChat page of the parent company. The successful efforts of Mr P and then Mr L to have the posting removed, albeit belatedly, on 2 July showed EVD did have a degree of control and influence that it could exercise to ensure its legal obligations in New Zealand were met, if it needed to do so.

*Were the comments disparaging?*

[36] The second element of EVD's defence to RGS's allegations was that the comments, if EVD was responsible for them, were nevertheless not disparaging.

[37] For the purposes of this determination, the term about neither party making disparaging comments is interpreted on the plain meaning of its words. To 'disparage' is to suggest someone is of little worth or to speak scornfully about the person.<sup>1</sup> It has also been defined as speaking slightly or critically of the person.<sup>2</sup> Disparaging comments are the kind of remarks (in spoken or written form) that would lower the esteem or reputation of someone in the eyes of other people.

[38] EVD's submission that no disparaging comments were made relied on the notion that the words used in the additional comments went no further, in substance, than the content of the letter of apology.

[39] The strongest example in favour of that proposition was the comment that RGS had breached his employment agreement during his employment by EVD. This was, as EVD submitted, to the same effect as the wording of the apology letter. In that letter RGS said he "had engaged in conduct that was not in accordance with my employment agreement".

[40] Similarly it was not untrue that EVD had "filed a law suit" against RGS, even if the description of that being done in a "local court" was not an accurate description of proceedings in the Authority. However the agreed wording of the letter of apology made no reference to legal proceedings. It referred only to a "dispute" between the parties.

[41] However the comments made about RGS damaging the company's interests and rights and being "forgiven" by the company were, in the context of the carefully crafted parameters of the agreed terms about the wording of the letter of apology, critical and slighting of RGS. Those comments would, as they had to be read as intending to do, lower him in the esteem of others. Because EVD was responsible for the letters of apology being published in a way that complied with the agreed terms, it

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<sup>1</sup> Concise Oxford Dictionary (11<sup>th</sup> edition, 2004).

<sup>2</sup> See Shorter Oxford Dictionary definition referred to in *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [36].

was responsible for those disparaging comments that clearly breached the scope and nature of their agreement with RGS.

[42] Accordingly RGS had established that EVD's actions or omissions had breached its obligations under clauses 5 and 6 of their settlement agreement.

### **Compliance order**

[43] The removal of the WeChat post on 2 July raised the question of whether any compliance order need be made.

[44] There was one reason that favoured an order. When the WeChat post was removed on 2 July, following a request to the parent company from Mr L, the entire post was removed, that is both the additional comment and the letters of apology. Under the terms of the agreement EVD was entitled to have those letters published on the WeChat page. It could, at any stage, have the letters posted again. There was then, in light of what had already happened, some risk that further or different comments might also be posted as part of doing so. It was appropriate therefore to direct EVD, in whatever actions it might take to publish those letters in that forum, to comply with its agreed terms.

[45] Accordingly, under s 137(1)(a)(iii) and s 137(3) of the Act, EVD must comply from the time of issue of this determination with its obligations not to comment about the letters of apology and not to make disparaging comments about RGS.

### **Penalty**

[46] RGS's claim for a penalty had to be determined because EVD has been found, by its actions or omissions, to have breached both clauses 5 and 6 of the settlement agreement. Its maximum liability, at the rate of up to \$20,000 a breach, was \$40,000.

[47] In setting a penalty I have had regard to the factors set out in s 133A of the Act and been guided by the case law for their application but have described the reasons for the penalty figure reached in summary form only.<sup>3</sup> For the following reasons I have concluded that a penalty of \$4,000 must be imposed on EVD under s 149(3) of the Act.

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<sup>3</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

[48] *Objects of the Act:* The Act promotes mediation as the primary problem-solving mechanism. Other provisions establish that settlement agreements are agreements made to be kept and measures should be taken to punish and deter parties from breaching their agreed terms.<sup>4</sup> Those factors favour imposition of a penalty in this case.

[49] *Nature and extent of the breaches and involvement in them:* EVD's actions and omissions resulted in breaches of two clauses of the agreement. As a single course of conduct, this could be treated as a single breach giving rise to a provisional liability to a penalty of up to \$20,000.

[50] EVD was on notice about the breaches from 21 June, through correspondence from RGS's counsel, but the offending material was not removed until 2 July. Mr L reported this was due to difficulties getting hold of Mr P, the general manager, who was away on business in China and the time then taken for Mr P to make arrangements with the parent company to have the post removed. This was a factor relating to the nature of EVD's business, how it was arranged and the risk it ran in not putting in place sufficient safeguards to ensure any publication was carried out within the agreed parameters. No downward adjustment of the provision penalty was warranted on that ground.

[51] *Whether the breach was intentional, inadvertent or negligent:* Posting the letters and writing an additional comment were intentional acts. EVD was, at the least, careless in not ensuring the publication was carried out in accordance with the agreed parameters.

[52] *The nature of losses, damages or gains resulting for either party:* RGS said in his evidence that the additional comments was posted by a particular date calculated to embarrass him in his new employment. He now works for a business in the same industry as EVD and his new employer was sponsoring an industry event in China on the same day that the post was made. This was an entirely speculative connection. RGS accepted the timing could be coincidental. No gains resulting for EVD were demonstrated.

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<sup>4</sup> Employment Relations Act 2000, s 149(3).

[53] Other aspects of RGS's evidence about loss or damage to him as a result of the breaches were also speculative. He said he was concerned family members in China might read the comments but not talk to him about the situation. He also feared his new employer might not extend his current employment agreement when it came up for renewal. It was unclear whether any doubt his new employer might have would result from the content of the letters of apology, which EVD was entitled to publish, or from the additional comments published in breach of the agreed terms. RGS said his new employer knew about the letters before they were signed. On that basis no actual or highly probable loss or damage to his future employment prospects was established.

[54] However RGS's evidence did establish that more than 700 people had seen pages on which the disparaging additional comments about him had been published. The WeChat page showed more than 400 users had viewed the posting. The industry media website that reposted the comment and letters of apology, beneath its own critical editorial comment, showed more 300 people had viewed the story. Those users and viewers were people likely to have a special interest in the industry in which EVD operated and RGS, with a new employer, still worked. Although some loss or damage to RGS's reputation might have resulted in any event from his letters of apology being posted, as he had agreed could happen, the additional comments would more likely than not have increased that damage. A penalty was warranted for that likely additional damage to whatever level of esteem he would otherwise be held.

[55] *Any steps to compensate or mitigate any actual or potential adverse effects of the breach:* EVD had not compensated RGS for any effects. Mitigation of the breach, by having the WeChat post removed, occurred more than a week after being asked to do so by RGS. Meanwhile the media web site had reprinted the disparaging additional comment, with further critical comments. The website story remained in place. Its effects were therefore not mitigated by removal of those comments from the WeChat page.

[56] Although RGS suggested EVD could exercise its influence in the industry to have the media website remove the comments, there was nothing to show that could be achieved even if EVD attempted to do so. The result was that the effect of that ongoing publication, caused by EVD's initial breach, continued to have actual or potential adverse effects without mitigation.

[57] *Circumstances of the breach:* This breach arose from a settlement agreement where all issues in the employment relationship were declared resolved. RGS should have been able to move on with his life without the problems caused by EVD's breach of their agreed terms.

[58] *Previous conduct:* There was no evidence EVD had previously breached an agreement of this type.

[59] *Deterrence, both particular and general:* A penalty was necessary to deter EVD, in this particular case, and, in general, any employer or employee who is party to a certified settlement agreement from breaching its terms.

[60] *Culpability:* For reasons already given EVD was culpable for the breaches.

[61] *Consistency of penalty awards in similar cases:* A penalty of \$4,000 was within the relatively wide range of penalties awarded in other cases where there has been a breach of non-disparagement clauses.<sup>5</sup> Cases of higher awards appear to have a more clearly established degree of damage to the person who has lost the protection of the agreed non-disparagement clause.

[62] *Ability to pay:* There was no information to suggest that EVD would have any difficulty paying a penalty of that level.

[63] *Proportionality of outcome to breach:* As a final cross check, a penalty of \$4,000 appeared proportionate to the nature of the breach and what evidence there was regarding the actual or potential level of damage or loss resulting. At 20 per cent of the maximum liability for a single breach, it was a relatively moderate amount while also meeting the public policy requirements of upholding the solemnity, finality and enforceability of these agreements. Such agreements are made to be kept. As the Act allows, there is a price for not doing so.

[64] *Application of penalty:* RGS sought an order for all of any penalty to be awarded to him.<sup>6</sup> As submitted by his counsel, the final nature of the settlement agreement meant RGS could not be compensated for the breach apart from the

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<sup>5</sup> See for example *X & Y v Z* [2017] NZERA Auckland 244 (\$6,000), *Free v Shelf Company No 5 Limited* [2017] NZERA Auckland 232 (\$5,000) and *Duggan v Armaan Dev Enterprises Limited* [2019] NZERA 238 (\$3,000).

<sup>6</sup> Employment Relations Act 2000, s 136.

penalty. He had sought to resolve the matter promptly with EVD on a voluntary basis but its lack of engagement led him to believe proceedings were required to have the terms enforced. In those circumstances, an order for three quarters of the penalty to be paid to RGS was appropriate.<sup>7</sup>

[65] EVD must pay the penalty of \$4,000 to the Authority within 28 days of the date of this determination. Once the amount of \$4,000 is recovered by the Authority, \$3,000 is to be paid to RGS and the remaining \$1,000 is to be transferred to the Crown Account.

### **Costs**

[66] RGS sought an order for costs if he was successful. He has been and costs are appropriately assessed in this case from the starting point of the Authority's usual daily tariff. For this investigation meeting requiring an entire afternoon, the tariff amounted to \$2,250. There were no factors requiring an upward or downward adjustment. Within 28 days of the date of this determination EVD must pay RGS the sum of \$2,250 as a contribution to his costs of representation in this matter.

### **Summary of orders**

[67] EVD must:

- (i) From the time of issue of this determination, comply with the obligations of its settlement agreement with RGS not to comment about the letters of apology and not to make disparaging comments about him.
- (ii) Within 28 days from the date of this determination, pay \$4,000 to the Authority as a penalty for a breach of an agreed term of settlement.
- (iii) Within 28 days from the date of issue of this determination, pay RGS \$2,250 as a contribution to his costs of representation in this matter.

[68] On recovery of the penalty the Authority must pay \$3,000 to RGS and transfer \$1,000 to the Crown Account.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>7</sup> *Nicholson*, above n 3, at [46].