New Zealand Employment Relations Authority Decisions

Supercity Rental Management Limited v Tse (Auckland) [2016] NZERA 638; [2016] NZERA Auckland 200 (17 June 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 200
5582801

BETWEEN SUPERCITY RENTAL MANAGEMENT LIMITED Applicant

AND KYLIE TSE Respondent

Member of Authority: Nicola Craig

Representatives: Michael Kyriak, Counsel for the Applicant

Jennifer Wickes, Counsel for the Respondent

Investigation Meeting: Submissions:

18 February 2016

At the investigation meeting and 1 and 15 March 2016 from the Respondent and 8 March 2016 from the Applicant

Determination: 17 June 2016

DETERMINATION OF THE AUTHORITY

A. **Both parties have breached the mediated settlement agreement between them.**
B. **Kylie Tse is ordered to comply with clause 7.03 of her former employment contract, as required by the settlement agreement.**

C. **Kylie Tse is ordered to pay a penalty of $3000 for breach of the settlement agreement. That sum is to be paid to Supercity.**

D. **Supercity is ordered to pay a penalty of $2000 for its breaches of the settlement agreement. That sum is to be paid to Ms Tse.**

E. **A timetable is set regarding costs in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] Supercity Rental Management Limited (Supercity or the company) is a rental property management company operating under a Ray White franchise. Kylie Tse (Ms Tse) previously worked for Supercity as a property manager.

[2] Supercity and Ms Tse entered into a settlement agreement dated 9 October

2015 (the settlement agreement). The settlement agreement is signed by a mediator under s 149(1) and (3) of the Employment Relations Act (the Act). Ms Tse left Supercity's employment.

[3] Supercity claims that since leaving its employment Ms Tse has not complied with terms of the settlement agreement. In particular, Supercity relies on clause 7 of that agreement, under which Ms Tse agreed to comply with terms of her employment agreement, originally with Supercity's predecessor, Chas Wilson Rentals Limited. The terms of the employment agreement which Supercity says were breached by Ms Tse include cl 7.03 (Non Solicitation), cl 7.04 (Confidential Information) and cl 7.10 (Security of Company Rent Rolls).

[4] Supercity seeks a compliance order against Ms Tse, a penalty against Ms Tse and an order for payment of that penalty to Supercity. An earlier claim by Supercity for damages was withdrawn.

[5] Ms Tse denies that she breached the settlement agreement. Ms Tse also counterclaims against Supercity that it breached the same settlement agreement. She claims that Supercity breached cl 5 (removal of her details from website and cancellation of email address), and cl 6 (emailing a statement to staff and clients regarding Ms Tse's departure).

[6] Ms Tse seeks a compliance order against Supercity, a penalty against it and an order for payment of that penalty to her.

[7] This case was filed by Supercity with an application for urgency. I granted that application. However, the hearing originally set for January 2016 was adjourned at Supercity's request due to a change in representative.

[8] An investigation meeting was held on 18 February 2016. I heard evidence from the director of Supercity Philip Horrobin (Mr Horrobin), Debbie Lyons (Ms Lyons) Supercity's General Manager of Property Management, and Ms Tse. Affidavits were also received by consent from two other witnesses. Additional written material was subsequently received from the parties, with the last arriving at the Authority on 15 March 2016.

[9] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[10] The issues for determination are:

(i) Did Ms Tse breach the settlement agreement by not complying with any of the provisions of the employment agreement?

(ii) If so, what remedies (if any) should be awarded?

(iii) Did Supercity breach the settlement agreement by not complying with any of its obligations under it?

(iv) If so, what remedies (if any) should be awarded?

(v) Should either party contribute to the costs of representation of the other?

Did Ms Tse breach the settlement agreement?

[11] Supercity's case is premised on the significant relationship which property managers can develop with property owners (clients), the considerable trust which property management companies place in their property managers and the protection which companies seek though their employment agreements with property managers.

[12] Mr Horrobin gave evidence that Supercity's contracts with clients constitute a "significant proprietary interest", the commercial value of which makes up the bulk of assets (and therefore value) of the company. Further, that Ms Tse had gained intimate and detailed knowledge of all aspects of the business, including owners, tenants, addresses, phone numbers, bank account details, and management authorities (fees).

[13] The employment agreement included cl 7:

7. Company Rules and Policy

...

7.03: Non Solicitation

You may not at any time, either on your own or in association with any other

person or entity, during the term of your employment or after the termination of your employment, for whatever reason, either on your own account or for any other person, firm, organisation, or company, solicit or endeavour to entice away from or discourage from being employed by or contracted to the Company any other employee or actual client / customer or prospective client / customer of the Company. For clarity, this refers most importantly to owners of apartments who have

management contracts with the Company. These management contracts are the Company's main asset and in signing this Employment Agreement, Kylie Tse agrees to the provisions of this clause 7.03 hereto.

7.04: Confidential Information

Confidential information, including business connections and technical information

or processes, including all Rent Rolls owned by the Company, Employment

Agreement details, customers or suppliers acquired by you in the course of your employment shall not be divulged to any individual, company or other entity, either during the course of employment or following the termination of your employment. Any breach of this requirement would be treated as serious misconduct and result in immediate dismissal and could be subject to legal prosecution undertaken by the Company.

...

7.10: Security of Company Rent Rolls

All Rent Rolls used in the Company are the Company's assets and have a

significant impact on the performance of the Company. Rent Rolls and all related data/information may not be copied in any manner whatsoever, lent, given, sold or

taken by any employee, to another business or for personal advantage of any kind,

during your employment or at any time after the termination of your employment. Any breach of this would mean instant dismissal and/or would be the subject of legal prosecution by the Company.

Non-solicitation – cl 7.03

[14] In determining the meaning of solicit in this context I take into account the context of the clause and the whole employment contract, and as the meaning is not entirely clear from the clause itself, I also consider the nature of the business and Ms Tse's duties and knowledge. I have already referred to Supercity's evidence regarding the nature of the relationship between the property manager and the client/landlord.

[15] I note that in addition to the restriction regarding "solicit", the clause also prevent an "endeavour to entice away from or discourage from being ... contracted to the Company".

[16] In *Deloitte & Touche Group-ICS Ltd v Halsall1* the Employment Court emphasised the need to analyse the substance of the exchanges between the parties, rather than focusing on the initiative for the contact. Reference was made to the Shorter Oxford Dictionary definition of "to seek assiduously to obtain" to ask earnestly or persistently for", and "request" or "invite".

[17] The High Court in *TAP (New Zealand) Pty Ltd v Origin Energy Resources NZ Ltd 2* considered that solicit had "connotations or impropriety or persistence".

Evidence regarding solicitation or enticement

[18] In about November 2015 Ms Tse began work for Mission Property Management Limited (Mission) as a business operations manager. Although this role involves training and mentoring other property managers, Ms Tse does still deal directly with some property owners.

[19] When Ms Tse worked at Supercity she dealt with around 150 clients, who owned around 170 properties.

[20] Supercity claims that Ms Tse had contact with a number of its clients after she left Supercity's employment, in breach of the employment agreement and thus the settlement agreement. Ms Tse's position was that she was aware of her obligations and did not breach them. She accepted that there were instances of contact, but mere contact is not enough.

[21] Supercity's evidence, gained through clients' transfer process, was that 12 former Supercity properties (including some carparks), belonging to seven former clients 3, had transferred to Mission, since Ms Tse started there. Of these seven, one

was Ms Tse's sister (Fifi Tse) and a pair were a mother and her adult daughter. Ms

1 Auckland AEC 4/97

2 HC Wellington, CIV 2005-485-1500, 14 February 2006

3 Including some joint owners.

Tse accepted that these landlords had moved to Mission but denied any inappropriate behaviour on her part.

[22] Ms Tse appears to have responded largely co-operatively to Supercity's concerns, through the Authority process by providing documents and detailed evidence regarding her interactions with various clients, including those about whom Supercity expressed concerns.

[23] Ms Tse's evidence was that a number of Supercity clients made contact with her after they received the advice from Supercity that Ms Tse had left, in some case because they were unsure of who they should be dealing with at Supercity. Ms Tse had used her personal cell phone number when working at Supercity until a few weeks before her departure when she was allocated a work phone. As a result many clients had her personal number.

[24] Ms Tse says when clients made contact with her through LinkedIn, or social media or by phone, that for the sake of her own reputation she could not just ignore those contacts. She says that she only provided her number or email when specifically asked for.

[25] Ms Tse redirected at least one of her former clients to the new Supercity property manager, and likewise forwarded some enquiries from tenants and a tenancy dispute issue to the new manager.

[26] The evidence was predominately that the owners approached Ms Tse, as a result of a personal connection with her (in some cases from before she worked at Ray White) and/or due to dissatisfaction with the Supercity service since Ms Tse's departure. Whilst the vast majority of Ms Tse's former clients have remained with Supercity, there was some evidence of unhappiness with Supercity's efforts in the process to get clients changed to another Supercity property manager.

[27] I will deal firstly with evidence regarding clients who moved to Mission:

(i) Mr Zheng was described as a close personal friend by Ms Tse. She recalled that they were friends before she started working for the Ray White franchise. Ms Tse says he contacted her after he got Supercity's notification that Ms Tse had left. Text and screenshot evidence

supported Mr Zheng making first contacts. He told Ms Tse that he did not want his property managed by Supercity after she left;

(ii) Ms Guo was Ms Tse's friend before she went to Ray White, according to Ms Tse. Ms Tse said that Ms Guo messaged her in November 2015 after she had had a few incidents which she was very unhappy with Supercity about and wanted to leave as soon as possible;

(iii) An email was filed from clients Mr and Mrs Wan advising of unhappiness about Ray White [Supercity] service after Ms Tse's departure. As at November 2015 they had not been advised that Ms Tse had resigned or about any new property manager. They say that they found Ms Tse's information from Ms Tse's Facebook advertising page and contacted her to become their manager;

(iv) Four of the properties were owned by a client Ms Chen and her mother (two properties each). Ms Tse had been dealing with Ms Chen prior to going to Chas Wilson. An email was filed from Ms Chen regarding her dealings with Ms Tse. The two ran into each other when out, and Ms Chen asked Ms Tse to add her as a Facebook friend. Ms Chen advised Supercity that she wanted to manage her properties herself due to dissatisfactions. The next day she became Facebook friends with Ms Tse. A few weeks later Ms Chen discovered on Facebook that Ms Tse had a new job. Some period later Ms Chen picked up her keys and contract from Supercity and then asked Ms Tse to meet about managing the properties; and

(v) The affidavit of Ms Tse's sister Fifi Tse was that she was with Ray White because Ms Tse worked there, that Ms Tse told her sister to stay with Ray White and never encouraged her to leave.

[28] I am satisfied that the evidence regarding those clients does not establish solicitation or endeavours to entice away. Although a family connection or pre- existing friendship would not on the face of it be an exception to the non-solicitation clause, it could help explain why an owner would move their property management when a property manager moves, even without any solicitation.

[29] In one instance of those seven properties, there is evidence of Ms Tse more actively encouraging contact from a Supercity client and the property later being moved to Mission. This concerns a property owned by Ms Chok and another person. Messaging evidence suggests that Ms Chok initiated contact with Ms Tse shortly after Supercity informed clients that Ms Tse had left. Ms Tse responded saying that she was not "allowed to contact landlords or encourage them to follow me...by law". Ms Chock asked for Ms Tse's personal email address, which Ms Tse refused, saying it was a "sensitive period", but adding:

I will be on the internet again once I find out what I will be doing in Early Nov.

[30] Ms Tse gave evidence that Ms Chok was persistent in phoning and messaging her. She said Ms Chock asked Ms Tse to contact her once Ms Tse had decided what she was doing. Once the Mission job was confirmed Ms Tse emailed Ms Chok.

[31] Although I accept that there was some persistence on Ms Chock's part, I find that the suggestion that the client keep an eye out for her on the internet at a particular time and then emailing the client once she was in her new job, was sufficient to amount to solicitation, or active involvement in taking the client's business.

[32] The overall impression I gained from the written material, albeit largely supplied by Ms Tse, was that Ms Tse was mostly complying with what she understood her obligations to be under the settlement and employment agreements.

[33] There were two other instances which I consider came close to solicitation, but which without further evidence of contact or persuasion, I am not satisfied meet the

test:

(i) In October 2015 client Mr Farnsworth appears to have initiated email contact shortly after Supercity informed clients of Ms Tse's departure. He says that he would gladly come to Ms Tse's company if she got back in the property managed business. Ms Tse sent a similar message to Ms Chok's, about being able to find her on the internet at a later stage; and

(ii) Ms Tse providing her email address and telephone number to the Thompsons. Ms Tse made contact with the Thompsons after an issue arose about her expense claim regarding the Thompsons' property. Ms Tse emailed Ms Lyons to say that she was happy to contact Ms Thompson if there was not a resolution on the issue. No reply was received so Ms Tse phoned Ms Thompson. During the call Ms Thompson asked for her contact details so they could stay in touch. Ms Tse emailed the Thompsons providing her mobile number and stating:

Please do not mention me to Ray White people, otherwise I will get in trouble.

[34] An email was filed from the Thompsons stating that they asked for Ms Tse's personal email address. They say that Ms Tse "did not ask or in any way encourage us to" leave Supercity.

[35] Some of the clients who contacted Ms Tse after her departure are still with Supercity. This includes Mr Farnsworth and the Thompsons, who Ms Tse referred on to a Supercity staff member. With at least one client, Ms Jones, Ms Tse did not respond to her message and request for Ms Tse to email her.

Security of Rent Rolls – cl 7.10

[36] Until the investigation meeting Supercity's case appeared to be focused on Ms Tse breaching cl 7 of the employment agreement by communicating with Supercity clients and soliciting business from them.

[37] Also, a letter from Supercity's current Authority representative (who was not involved in this proceeding at the time) to Ms Tse of 25 November 2015 focuses on the non-solicitation clause and seeks undertakings regarding not contacting clients and not using personal information regarding clients.

[38] However, at the investigation meeting during the questioning of Ms Tse, Supercity's representative raised an argument that Ms Tse had breached cl 7.10 of the employment agreement regarding security of company rent rolls. As a result both

parties were given the opportunity after the investigation meeting to provide submissions on this issue.

[39] Supercity's argument is that cl 7.10 prevents Ms Tse from taking on the any of the properties which Supercity had management contracts for (around 700). This is based on an interpretation of rent rolls meaning management contracts or "the income stream deriving from the management contracts".

[40] Supercity argued that its interpretation of rent rolls was in keeping with how the phrase was used in the property management industry and prior judicial interpretation4. Also, if rent rolls were lists then the confidential information clause would be sufficient to protect them, rather than cl 7.10 being needed.

[41] I took Supercity's submissions to indicate that it was the property which was the focus, rather than the client. Material in the submission also suggested that cl 7.10 covered all of Supercity's management contracts, not just those which Ms Tse was involved with or responsible for.

[42] Mr Horrobin's evidence focused on the commercial value of management contracts, rather than on the meaning of "rent roll". On Supercity's behalf some online advertisements for rent rolls for sale, were provided. There was no additional evidence provided to the Authority from Supercity regarding the industry usage of the term.

[43] Submissions on Ms Tse's behalf argued for an interpretation of rent roll/s as a list or register of rents and as Ms Tse did not take a list or register, she was not in breach of cl 7.10. Definitions from the Free Dictionary was presented, which covered both the register definition and a definition of total income arising from rented property. The financial definition in the Free Dictionary was of a list of tenants, usually including the lease expiration date and rental rate for each one.

[44] On Ms Tse's behalf it was submitted that cl 7.10 does not make sense and is unlikely to ever be breached, on Supercity's interpretation of rent roll. A management contract is an agreement between a property owner and a property manager

[presumably company]. A third party such as an employee cannot “copy”, “take”.

4 Reliance was placed on Ongley Wilson Real Estate Ltd t/a Manuwatu First National v Burrows

[1999] NZEmpC 17; [1999] 1 ERNZ 231 (Ongley)

“lend”, “give” or “sell” that contract, nor the income stream. For example, Ms Tse has not “taken” her sister’s contract with Supercity, nor the income stream that contract generates for Supercity.

[45] The submissions also outlined various actions of Supercity post-contract which it is contended can be used to determine interpretation5. This included asking Ms Tse to delete contact details, correspondence from her phone in Ms Lyons’ presence, and the letter from the Applicant’s representative seeking undertakings.

[46] Ms Tse (or at least Mission) did accept the business of the clients who had transferred from Supercity to Mission and in at least some of the cases Ms Tse was directly involved in managing those clients’ properties. Ms Tse did not see this as in breach of her obligations to Supercity.

[47] The employment agreement contains as number of features which support both definitions of rent roll. In support of the income stream definition for example are the following references:

(i) to rent rolls as a type of confidential information, mean that protection from confidential information could be seen as sufficient under cl 7.04 if it was a list or register, without needing cl 7.10; and

(ii) to “Rent Rolls and all related data/information” suggests that rent rolls are

broader than just data or information.

[48] In support of the list or register definition, supported by the Respondent, are:

(i) the reference to “...Rent Rolls **used** in the Company” (emphasis added) in cl

7.10, does not fit comfortably with the income stream definition;

(ii) the restrictions on copying, lending giving selling or taking of rent rolls support a list or register rather than an income stream;

(iii)the use of “security” may suggest that it is a physical list or document which is being referred to;

(iv)in cl 7.03 “management contracts” are referred to, including as the company’s main asset, which suggests that “rent roll” is not being used to mean management contract;

(v) the employee is responsible for obtaining a replacement management if “you

lose a management from your roll to another Property Management

5 Reliance on *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37

Company”6. Personalising a roll to the employee suggests a list or register rather than an income stream, as the employee does not directly receive the income stream, the company does; and

(vi)if cl 7.10 means that former employees can never take income from the management of their client’s properties then the non-solicitation provision regarding clients becomes purposeless.

[49] Unfortunately neither definition sits entirely well with aspects of the rest of the agreement and both definitions seem to make other parts of the agreement unnecessary.

[50] I do not consider that *Ongley* substantially assists the Applicant. That case concerned a property manager who made a list of clients whilst still employed and then approached them seeking their business after starting with another company. The Employment Court was not required to determine the meaning of the phrase “rent roll”. I do not consider that the use of that phrase in the judgment is entirely or substantially in keeping with the interpretation proffered for the Applicant7.

[51] I accept that management contracts have commercial value and may well be the main asset of a property management company. However, I do not accept that that requires “rent roll” in the employment agreement to mean management contract of income stream.

[52] In conclusion I am not satisfied that the definition of “rent roll” in clause 7.10 of the employment agreement means income stream or managements contracts, such that it prevents Ms Tse from obtaining the business of managing what were Supercity the rental properties.

What remedies should be awarded to Supercity?

Compliance order

[53] I am satisfied that Ms Tse breached her non-solicitation obligations regarding

Ms Chok. I therefore order that Ms Tse complies with the settlement agreement as regards compliance with clause 7 of the employment agreement.

6 Appendix 1

7 For example, "...usually the position of a rent roll would generate other income..." (Ongley v

Burrows supra 248)

Penalty

[54] In *Xu v McIntosh*8 Chief Judge Goddard considered that the first question with penalty applications should be how much harm has the breach sustained? The next question was consideration of the perpetrator's culpability, namely technical and inadvertent, or flagrant and deliberate.

[55] In *Tan v Yang & Zhang9* Judge Inglis suggested a non-exhaustive list of relevant factors to be considered in penalty applications, which included:

• The seriousness of the breach;

• Whether the breach is one off or repeated;

• The impact, if any on the employee/prospective employee[10]

• The need for deterrence;

• Remorse shown by the party in breach; and

• The range of penalties in other comparable cases.

[56] Aggravating and mitigating factors also need to be considered, and the penalty should be proportionate to the breaches found.

[57] In this case Supercity provided evidence of the financial loss which it had suffered when clients moved to Mission. In most of those instances there was no evidence of solicitation of those clients by Ms Tse. However, as regards I have found that there was solicitation regarding Ms Chok. The annual value of Ms Chok's management fee was provided to the Authority, but in light of commercial sensitivity I will not refer to the figure.

[58] Ms Tse did not express remorse regarding Ms Chock. However, I accept from the evidence presented, that she generally attempted to stay within bounds of what was required of her. The scale of the breach compared to the number of clients whom Ms Tse was dealing with at Supercity, is small.

[59] I accept that there is a need for deterrence against former employees acting in breached of obligations which have continued after their employment, where the

former employer has legitimate interests to protect.

8 [2004] NZEmpC 125; [2004] 2 ERNZ 448

9 [2014] NZ EmpC 65 at [32]

10 Or in this case employer

[60] I order Ms Tse to pay $3000 as a penalty for her breach of the non-solicitation provision. Supercity has sought payment of that penalty to it. I accept that it has suffered financially from the breach and so order that all of the penalty be paid to Supercity.

Did Supercity breach cl 5 of the settlement agreement?

[61] Under clause 5 of the settlement agreement Supercity agreed to:

"...forthwith remove the Applicant [Ms Tse] from their website, cancel her e-mail address and company phone number."

[62] Ms Tse claims that Supercity has not removed her from their website nor had it cancelled her work email address. She

took no issue regarding the company phone, as she in fact had been using her own phone for Supercity business.

Removal of Ms Tse from Supercity's website

[63] Ms Tse claims that her name has not been removed from the Supercity website. She provided copies of property listings mentioning her name which she had obtained from the Supercity website in February 2016.

[64] Supercity accepted that ultimately it had not been able to successfully remove all references to Ms Tse from its website, despite efforts to do so.

[65] Ms Lyons gave initially responsibility for the removal to the Supercity staff member who managed their website. This was done on the afternoon or evening of the day that the settlement agreement was signed. That staff member was asked to remove all references to Ms Tse from the website. Ms Lyons got a report back on the same day that the job had been done, and she was satisfied at that point that all reference to Ms Tse were off the site.

[66] However, Ms Tse later discovered that that attempt at removal had not been entirely successful. Ms Lyons' evidence was that although Supercity had deactivated Ms Tse's name and all of her listings, that did not stop Ms Tse's name from popping

up on the site on occasions. This appears to relate to properties which are still on the Ray White's website database. Reference was made to cached information from previous searches which came up again when a later search was done.

[67] Mr Horrobin said that the company had made several attempts to remove Ms Tse's details from its website but that it had proved difficulty to completely remove all traces of her name. He said that that Supercity wanted to remove those references that there was no advantage to the company in having Ms Tse's name associated with it anymore.

[68] Supercity sought and received assistance from the Ray White New Zealand IT specialist in January 2016. The specialist made contact with the Ray White Head Office in Australia in an attempt to solve the problem. Supercity was advised by the specialist that problems were corrected when they were identified, but that there was nothing more that could be done generally to prevent similar things happening in the future.

[69] Mr Horrobin said in the investigation meeting that he was sorry and embarrassed, that Supercity had not been able to remove all Ms Tse's details.

[70] I accept that it was in Supercity's interests to remove references to Ms Tse's name from their site and that that proved difficult to achieve. It appears that Supercity took on a rather broader obligation that was readily practicable to fulfil. I find that Supercity breached its obligation remove Ms Tse from its website.

Email address

[71] Ms Tse claims that her work email address was left active for some four months or more after the settlement agreement was entered into.

[72] At the investigation meeting on 18 February 2016 it became apparent that the email address was still active, despite Mr Horrobin initially believing that it was not. At the end of the investigation meeting Supercity agreed to terminate this website and this occurred.

[73] No automated "out of office" type message advising of Ms Tse's departure from the company and providing an alternative contact, was put in place by Supercity until around January 2016. There was no obligation in the settlement agreement for the company to put in place such a message, however, I accept that such a message would have significantly mitigated the negative effects which Ms Tse complains from the email address remaining active.

[74] In some situations former employees may not have an issue with their email address remaining open for an extended period after they leave. However, here the cancellation was something specifically provided for in the settlement agreement.

[75] Supercity provided its justification for not cancelling the email address sooner. Mr Horrobin spoke of a wish not to terminate the incoming communication line from landlords to Supercity until such time as the company could notify landlords regarding the new property manager, the new property manager could make contact with the landlord and set up a new communication line.

[76] Mr Horrobin regarded that as being the reason for the reference in the settlement agreement to "forthwith" rather than the possible use of "immediately". He considered that four weeks was sufficient for this new communication line to be established. Ms Tse also considered that one month was a reasonable time to leave the email address open.

[77] Supercity suggested that there was no timeframe on the requirement to cancel Ms Tse's email address. That view appeared to depend on whether the reference to "forthwith" in cl 5 is interpreted as covering all the requirements in clause 5 of the settlement agreement or only the first (removal from the website).

[78] In any event, I find that I do not need to decide that issue, as even if "forthwith" does not apply to this obligation, there would be a requirement on Supercity to undertake the action within a reasonable time. Both Mr Horrobin and Ms Tse agreed that a month was a reasonable time. Here the email address was not cancelled until after the investigation meeting, almost four and a half months after the settlement agreement date, several times over both witnesses considered reasonable.

[79] I find that Supercity breached its obligation under clause 5 of the settlement

agreement to cancel Ms Tse's email address.

Did Supercity breach clause 6 of the settlement agreement?

[80] Cl 6 of the settlement agreement provides that:

Supercity...agrees to email a statement to all their staff and the Applicants [Ms Tse's] clients to say "Kylie has resigned to setup on her own. We thank her for all her hard work and wish her well for the future." They will bcc11 the Applicant [Ms Tse] into the e-mail to e-mail address...[Ms Tse's personal email address specified].

[81] There is no timing specified for this obligation, so I consider that the obligation must be met within a reasonable time.

[82] The clause seems to me to contemplate one email being sent to staff and clients. This is not the approach which Supercity took, as it communicated separately to clients from staff. In any event as long as Supercity had met the various other requirements of the provision, I would not have had difficulty with separate communications to those two groups. However, Ms Tse alleges non-compliance with the other requirements.

Email to staff

[83] The email to staff was sent by Ms Lyons on 12 October 2015. This was the

Monday following the Friday when the settlement agreement was signed. The email read:

Hi All.,

Kylie has resigned as of Friday 9th October.

We wish her well in whatever she chooses to do. Regards

Debbie

[84] The wording in the email is not the same as the wording in quote marks in clause 6 of the settlement agreement. The email contains no reference to Ms Tse

11 Blindcopy

setting up on her own. There are no thanks to Ms Tse for all her hard work. Perhaps of less significance, the wishing of Ms Tse well refers in the email to "whatever she chooses to do", instead of "for the future" in the settlement agreement.

[85] Ms Lyons took responsibility for the error of the wording being different, saying that she knows now that she should have written word for word what was in the settlement agreement. She said that the wording in the settlement was not the way she talked or wrote, so she rewrote it [to reflect her style].

[86] Clause 6 states that Supercity will email staff and clients "to say "Kylie..." ". I find that that requires Supercity to use the wording in the quoted phrase. Supercity's representative submitted that these wording issues were no more than a technical breach. However, I do not agree.

[87] I find that the failure to mention what Ms Tse is going to do, leaves wider open the possibility of recipients thinking that Ms Tse has been encouraged or forced to leave the company. The failure to thank Ms Tse for her hard work is also more than a minor difference.

[88] Ms Tse also claims that she was not blind copied as she was supposed to be. However, this issue may have become confused as the settlement agreement seems to envisage one email going to staff and clients, rather than separate communications to the two groups.

[89] On the face of the 12 October email it went to Ms Tse at her Ray White email address, but she was no longer at work at this point. Ms Lyons included herself in the addressees of the email. At the investigation meeting Ms Lyons produced email evidence that minutes after sending the email to staff she had forwarded the copy which she had received to the email address for Ms Tse specified in clause 6 of the settlement agreement. Although technically this may not have amounted to blind copying Ms Tse, I do not find the difference to be of significance.

[90] In summary I find that although staff were emailed and this occurred within a reasonable time, Supercity breached

clause 6 of the settlement agreement by failing to use the wording in quotation marks in the clause.

Email to clients

[91] Ms Tse claims that what was sent to clients also did not contain the wording in the clause and that she was not blind copied into this email.

[92] Ms Lyons' evidence was that clients were emailed with a standard letter attached, personalised with their name and contact details. Supercity provided the Authority with one example of a letter to clients dated 12 October 2015. The emails were sent on evening of 12 October 2015 using Supercity's database, by ticking a box for those who were Ms Tse's clients. Another staff member did this mail merge. Ms Lyons said that with a mail merge there was no report which itemised all of those who the letter was sent to.

[93] Ms Tse said that she received no emailed blind copy of correspondence to clients, nor other advice from Supercity of what had been done regarding clients. Mr Horrobin said that he expected that Ms Tse did get a copy of the client letters or emails attaching the letter, and that there was no reason not to copy her in.

[94] Ms Lyons thought that she had not blind copied Ms Tse in. Ms Lyons acknowledged that the staff member who had sent out the letters did not have a copy of the settlement agreement and Ms Lyons had not asked her to send anything to Ms Tse. Ms Lyons accepted this was probably her error.

[95] Ms Tse had some awareness of what was happening, as her sister was one of her Supercity clients, and had sent through the email which she had received from Supercity. However, Ms Tse got nothing directly from Supercity.

[96] The evidence of Ms Tse was that at least two clients (Ms Guo and Ms Wan) had not received correspondence from Supercity advising of Ms Tse's resignation. Ms Lyons acknowledged that some of the Supercity emails could have bounced back.

[97] Supercity also had someone come in and make phone contact with clients within a week or so of Ms Tse leaving.

[98] In terms of the content of the letters to clients, Ms Tse considered that Supercity had not met its obligations. She identified the letter referring to "all the work she did with us" as different from the settlement agreement phrase "all her hard work". She also identified the letter's reference to "resigned to pursue her own

interests" as more general than the settlement agreement which referred to "resigned to set up on her own".

[99] I find that due to the differences in wording and the failure to blind copy Ms

Tse into the emails, Supercity breached cl 6 of the settlement agreement.

What remedies should be awarded to Ms Tse?

[100] I have found Supercity in breach of clauses 5 and 6 of the settlement agreement. Before looking specifically at the two remedies sought I refer to evidence regarding the accidental or deliberate nature of Supercity's breaches, the effects of them and Supercity's response when questions were raised.

[101] Ms Lyons' evidence was that she never intentionally set out to act contrarily to Supercity's obligations in the settlement agreement. At the investigation meeting she accepted that some errors were hers due to inexperience with such processes before.

[102] Mr Horrobin apologised at the investigation meeting for the difficulties in

getting Ms Tse's name removed from the website.

[103] In submissions an apology was made on behalf of Supercity for the failure to use the exact wording in the settlement agreement in the notification to staff. The failure to use the exact wording in the notification to staff and to clients, was described as accidental rather than intentional.

[104] Supercity described the efforts which it had gone to comply with the obligation to remove references to Ms Tse from its website, as significant. Supercity argued that it had taken all reasonable steps and the difficulties were not anticipated and were outside its control.

[105] Ms Tse said that the differences in the wording of the email to staff announcing her departure really upset her. She felt that Supercity was not saying thank you and expressing its appreciation for the work which she had done. She said that she felt like she had been fired and was really depressed by the email.

[106] Ms Tse's evidence was that the effects of Supercity's various failures clients

was that she received texts and phone calls from her former clients and tenants

frustrated that they did not know with whom they should now be dealing, and sending

emails to Ms Tse's work email address that were neither answered nor bounced back.

[107] Ms Tse says that it is damaging to her reputation that Supercity had not taken down her email address and phone number from the website, nor advised some clients and tenants that she had resigned and provided details of the new property manager. She considers that references to her on-line lead to confusion about who she is working for and that she does not want her details to be linked with Supercity anymore.

[108] In response Supercity point out that Ms Tse has used her previous experience with Supercity and her awards from Ray White to promote herself on Linkedin. Ms Tse accepted that an internet search undertaken on the day of the investigation meeting showed the first seven references to her as relating to either Mission or her own personal Facebook pages

[109] Submissions on behalf of Ms Tse emphasised the difficulties which she had in getting her concerns responded to. Having followed up herself on the email address issue, her lawyer then wrote twice to Supercity's representative without response. The breaches are described as deliberate and continued after Supercity was put on notice.

[110] I find that there was some response when Ms Tse herself raised the email

address issue. Supercity's then representative did respond by way of email on 19

October 2015, to Ms Tse raising the issue of her email address. The response in summary was that the emails were being dealt with by other staff and that the company would continue to act in its own interests regarding the email address. The settlement agreement was not referred to.

[111] Ms Tse's representative then wrote to Supercity's representative seeking cancellation of the email address "forthwith" and asked for the blind copy of the email to staff and clients. A couple of weeks later a follow up request was made. Neither letter was responded to.

[112] For completeness I note that the issue regarding the difficulties with removal of Ms Tse from Supercity's website appears to have only been raised initially in a very limited way in Ms Tse's first affidavit for this proceeding, filed in December

2015, and in a more substantial way in her further affidavit filed on 11 January 2016. Supercity then consulted the Ray White head office IT specialist. I therefore do not accept that arguments regarding deliberate and continued breach when on notice, apply to the website issue.

Compliance orders

[113] I have found that Supercity did not comply with its obligations under the settlement agreement to:

(i) Remove Ms Tse from their website forthwith (clause 5); (ii) Cancel her email address (clause 5);

(i) Use the wording in quote marks in clause 6; and

(ii) Blind copy, or otherwise provide, Ms Tse the email (or letter) to clients.

[114] In terms of the website I accept that references to Ms Tse are still coming up on Supercity's website. However, I am not satisfied that there is evidence that any further correction of that problem in a systemic way is possible or practicable. I therefore do not make a compliance order regarding the website.

[115] I take into account in this decision, Supercity's undertaking to refrain from taking any steps that result in any new publication on the internet that may feature Ms Tse as a Ray White property manager.

[116] As Supercity has now cancelled Ms Tse's email address a compliance order in

that regard is no longer necessary.

[117] In submissions on behalf of Ms Tse a compliance order was sought requiring the sending of fresh complying emails to staff and clients, blind copied to Ms Tse. However, compliance orders are discretionary. I am not satisfied that at this point in mid 2016 that an order requiring a further email to be sent saying that Ms Tse has resigned and incorporating some of the same material as already sent in October 2015, is appropriate. It is likely to confuse clients and cause more speculation regarding Ms Tse's departure from Supercity.

Penalties

[118] Ms Tse has sought penalties regarding Supercity's breaches of the settlement agreement. The law on penalties is

outlined above in relation to Supercity's penalty claims.

[119] In terms of harm arising from the breaches I am satisfied that Ms Tse was genuinely concerned about the negative effect on her reputation that emails not being answered promptly or there being no indication that the emails were not getting to Ms Tse. I also accept that Ms Tse was upset at the possibility of a more negative impression by Supercity staff and clients being generated by the wording in the emails notifications than would have been the case from the agreement wording. It was clearly frustrating for Ms Tse not to get her details removed from the Supercity website and she was concerned about the impact on her current employment.

[120] My impression was that Supercity was much more focused on pursuing what it saw as the consequences of Ms Tse's actions to it, rather than dealing with issues regarding whether it had complied with its obligations under the settlement agreement. It was put on notice, particularly regarding the email address issue, and yet did not provide a response and only cancelled the address after the investigation meeting.

[121] I do consider that there is a need for deterrence. It is not acceptable for parties to settlements to consider that they can vary their obligations to suit themselves, or not carry out their obligations within a reasonable time. It is also important that when issues are raised regarding whether compliance that they are responded to.

[122] There was some genuine remorse shown, although this was not apparent until the investigation meeting and related more to some breaches than others.

[123] I do not consider that a penalty should be imposed on Supercity regarding the removal of Ms Tse's details from their website. I am satisfied that they took action promptly on settlement and did what they thought they needed to do to action this matter. Subsequently it became apparent that they had not met their obligation but when this matter was clearly brought to their attention by way of Ms Tse's affidavit of

11 January 2016, I am satisfied that Supercity took further appropriate action, contacting the IT specialist at head office.

[124] I am satisfied on the balance of probabilities that a penalty should be awarded against Supercity regarding the email address cancellation delay and the failure to use the correct wording in the emails to staff and clients, and blind copy Ms Tse into the client email. On a totality approach I impose a penalty of $2000 on Supercity for those breaches of the settlement agreement.

[125] Ms Tse has sought payment of any penalty to herself. This is a case concerning breaches of an agreement, rather than statutory obligations12. Ms Tse has not received anything in the way of compensation for the breaches and I consider it is appropriate for all of the penalty to be paid to her.

Costs

[126] Costs are reserved. The parties are invited to resolve the matter. Both sides have had some degree of success in this case and I would anticipate that being reflected in the costs outcome in the event that I need to make a decision on it.

[127] If the parties are unable to agree they shall both have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Either or both parties in receipt of a memorandum shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority

12 *Credit Consultants Debt Services NZ Ltd v Wilson* EC, WC 31/07, 3 December 2007