New Zealand Employment Relations Authority Decisions

Turuki Health Care Services v Makea-Ruawhare [2018] NZERA 95 (23 March 2018)

Last Updated: 19 October 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 95
3026572

BETWEEN TURUKI HEALTHCARE SERVICES

Applicant

A N D REPETA MAKEA-RUAWHARE First Respondent

A N D [C]

Second Respondent

A N D [TS]

Third Respondent

A N D [H]

Fourth Respondent

Member of Authority: James Crichton

Representatives: Anthony Drake, Counsel for Applicant

Investigation Meeting: on the papers

Date of Determination: 23 March 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant (Turuki) seeks urgent interim orders on an ex parte basis to prevent further breaches of the settlement agreement between these parties and also seeks a non-publication order to preclude the further publication of the applicant's name or that of the applicant's professional advisers or the applicant's staff.

[2] The first point to address is the question of urgency. Urgency is a discretionary procedure available in this Authority where the Member considering the application is satisfied that the matter is indeed urgent and needs to be dealt with on that footing. As a consequence, this matter was considered by me on the day it was filed, and I determined to accord it urgency and advised the applicant's counsel of that fact.

[3] Next, I must consider the application for this matter to proceed on ex parte basis. That is a rather more unusual claim to be made in this Authority. However, the fact that an application for a matter to be dealt with ex parte is unusual does not of itself make it impossible for the Authority to consider or indeed to grant such an application.

[4] In the particular circumstances of this case, I am satisfied that ex parte proceedings are appropriate because I am satisfied that if the matter proceeded in the usual way with the proceedings from Turuki being served on the respondents, further breaches of the respondents' obligations would likely result and that negatives the whole point of the application for compliance which is before me.

[5] Indeed, as the documentation filed by counsel for the applicant discloses, even when the respondent parties were put on notice that they were in breach of their obligations by counsel for the applicant, far from desisting with their breaches of their obligations, they repeated the breaches and even spread the network of persons to whom the original breach or breaches was made.

[6] It follows from the foregoing analysis that I am satisfied that it is appropriate in the particular circumstances of this case, given the documents filed in support of the application by Turuki, that this matter ought to be dealt with on an ex parte basis so as to prevent further breaches.

[7] The context in which this application comes before the Authority can be briefly sketched. Makea-Ruawhare was employed by Turuki. Unhappy differences came between Ms Makea-Ruawhare and Turuki. By a record of settlement dated

30 November 2017, Ms Makea-Ruawhare's employment with Turuki came to an end by her resignation on that date and without any admission of liability, certain payments were agreed to be made by Turuki to Ms Makea-Ruawhare.

[8] Critically for our purposes, the record of settlement contained the standard confidentiality provision binding the parties to the mediation to keep its terms confidential, save for enforcement purposes.

[9] In addition there was a clear and explicit non-disparagement clause, which because it is pertinent to the present proceeding I now set out in full:

11. Neither party, including [C], shall make derogatory remarks or disparaging comments about the other. Further, [C] shall not make any reference whatsoever to this employment relationship problem in any publication, including social media.

[10] All the payments required of Turuki, save one, were made in accordance with the terms of settlement. One payment was an invoice which Turuki was to pay, went astray in Turuki's system.

[11] Based on the material before me, it would seem that the respondent parties have used Turuki's failure to make that payment as a justification for a range of statements about Turuki, its staff and its professional advisers to certain Members of Parliament and Ministers of the Crown.

[12] As part of that process, the claimed about material was copied to Turuki and as soon as they were aware that they were in default in respect to one of the payments in the mediated settlement they effected payment. Notwithstanding that, the respondent parties continued to make objectionable, derogatory and disparaging observations about Turuki in breach of their obligations in the settlement agreement.

Discussion

[13] It is self-evident that Turuki failed to make one of the payments that they were bound to make under the record of settlement. The reason that payment was not made was because of an inadvertent error. As soon as the failure to pay was identified, the payment was promptly made, thus completing and fulfilling Turuki's obligations under the settlement agreement.

[14] Despite statements in the voluminous correspondence generated in this matter by [C] and its director or agent that proper steps have been made by that entity to seek payment, that is denied by Turuki who maintain there is no evidence whatever that any proper steps were made by any of the respondent parties

to seek payment of the outstanding amount. Certainly, I think it likely given the behaviour of [C] that if there were an email trail supporting their contention that they had been seeking payment for some time, that would have been disclosed in their correspondence to Members of Parliament and Ministers of the Crown. But it was not.

[15] Moreover, it seems to me more likely than not that no proper contact was made between any of the respondents and Turuki prior to the generation of the offending correspondence because as soon as Turuki became aware, by being copied into [C]'s correspondence to Ministers and Members of Parliament, that the payment had not been made, they immediately took steps to establish the amount owed and to pay it at once.

[16] It should not be necessary for me to set out for the benefit of [C] what they should do in the event there is a short payment in a mediated settlement; [C] hold themselves out as being an employment advocacy firm, and they ought to know how to protect and promote their client's interests. The proper course of action, of course, is to approach the defaulting party in writing and seek compliance. Failing that, an application to this Authority for an order for compliance with the terms of the settlement can be made. I am satisfied on the material before me that neither of those courses of action were taken by [C

]and that instead, they used Turuki's default (for a default it was) to make a series of objectionable, disparaging and derogatory claims about Turuki, its staff and its professional advisers, to Members of Parliament and Ministers of the Crown.

[17] As the Chief of the Employment Relations Authority, I should not have to say to representatives appearing in this jurisdiction that a default by one party in the fulfilling of its obligations under a settlement agreement does not entitle the other party and its agents to breach their obligations and the obligations of their own client in the settlement agreement.

[18] It is as plain as can be that the material provided to me by the applicant party discloses that [C], via its director or agent, wrote to Ministers and Members of Parliament and made derogatory remarks and/or disparaging comments about Turuki which are a flagrant breach of the obligations the respondent parties have under clause 11 of the settlement agreement.

Determination

[19] Having considered the material before me, in particular the application from Turuki and the supporting affidavit of Te Puea Winiata together with the memorandum of senior counsel, Mr Drake, the Authority makes the following interim orders on urgent basis:

(a) The first, second, third and fourth respondents:

(i) are each required to comply with the terms of the mediated settlement agreement dated 13 November 2017; and

(ii) are each ordered not to make any further breaches of the confidentiality provisions contained within the terms of the mediated settlement agreement; and

(iii) are ordered not to publish the name of the applicant or the names of any employees or representatives of the applicant in any manner connected or associated with the mediated settlement agreement or the extant proceedings; and

(iv) those orders are to be complied with immediately in terms of s.137(3) of the Employment Relations Act 2000.

[20] The statement of problem and associated documents are now to be served on the respondents. A statement in reply to the substantive proceeding will need to filed and served and once that is to hand, I shall convene a case management conference to timetable the investigation meeting of the substantive claim.

Costs

[21] Costs are reserved.

James Crichton

Chief of the Employment Relations Authority

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