

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 91
5410573

BETWEEN WORK OPPORTUNITIES
 TRUST
 Applicant

A N D ROBIN FITZPATRICK
 Respondent

Member of Authority: Helen Doyle

Representatives: Rachel Brazil, Counsel for Applicant
 Robin Fitzpatrick in person

Investigation Meeting: 7 May 2013 at Dunedin

Submissions Received: On the day of the investigation from Applicant
 17 May 2012 from Respondent

Date of Determination: 22 May 2013

DETERMINATION OF THE AUTHORITY

- A I have found a breach of clause 3 of the terms of settlement entered into between Work Opportunities Trust and Robin Fitzpatrick.**
- B I have found the payment of \$5000 in clause 3 to be a penalty and not enforceable.**
- C I have awarded a penalty under s 149(4) of the Employment Relations Act 2000 of \$1500 and directed under s 136(2) of the Act that the whole of the penalty be paid to the Trust.**
- D I have made an order requiring compliance immediately with clause 3 by Mr Fitzpatrick.**

- E Work Opportunities Trust has 14 days from the date of the determination to provide a record of employment if they have not already done so under clause 5 to Mr Fitzpatrick.**
- F I have ordered Robin Fitzpatrick pay to Work Opportunities Trust the sum of \$1821.56 being costs and disbursement of the filing fee.**

Employment relationship problem

[1] Work Opportunities Trust (“the Trust”) is situated in Dunedin. The purpose of the Trust is to support individuals with disability into meaningful open employment. The manager of the Trust is Stuart Ellwood

[2] The Trust and Robin Fitzpatrick entered into agreed terms of settlement on 14 June 2012 which were signed by a mediator employed by the Chief Executive of the then Department of Labour pursuant to section 149(1) and (3) of the Employment Relations Act 2000.

[3] The record of settlement provided in clause 1 that the terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties. Clause 2 provided for a compensatory payment to be made to Mr Fitzpatrick on a *no acceptance of liability* basis. Clause 4 provided that the last day of employment for Mr Fitzpatrick was 11 June 2012 and that he was to be paid to that date including holiday pay. Clause 5 provided that Mr Fitzpatrick is to receive a record of employment detailing his performed tasks. There was an acknowledgement in clause 6 that neither party had agreed to forgo minimum entitlements in reaching the agreement and in clause 7 that it was the full and final settlement of all matters between the parties.

[4] The Trust say that Mr Fitzpatrick breached clause 3 of the terms of settlement which provides:

Payment of compensation is made on the basis that the employee undertakes not to undermine the Employer’s clients, staff and general business in any way to any third party and should there be any evidence thereof, the employee shall immediately repay to the Employer the compensatory sum of \$5,000.00.

[5] The Trust seeks the following remedies:

- (a) A compliance order that Mr Fitzpatrick immediately cease any further negative statements that undermine the employer's clients, staff and general business in any way to any third party.
- (b) That Mr Fitzpatrick immediately repays the amount of \$5,000.
- (c) That a penalty be awarded under section 149(4) of the Employment Relations Act 2000 for the breach and that payment of the penalty be awarded to the Trust under section 136(2) of the Act.
- (d) An award of full costs.

[6] Mr Fitzpatrick does not accept that he breached the terms of settlement in clause 3 of his settlement agreement and further says that he has yet to receive his record of employment as set out in clause 5.

Issues

[7] The Authority needs to determine:

- (a) Was there a breach of clause 3 by Mr Fitzpatrick?
- (b) If there was a breach, then is the payment under clause 3 enforceable as a genuine pre-estimate of damages in the event of a breach, or is it a penalty clause?
- (c) Should a penalty under section 149(4) of the Employment Relations Act 2000 be awarded, and if so, should there be an order that it be paid to the Trust?
- (d) Should there be an order made for compliance with clause 3 of the settlement agreement?
- (e) What should be done about providing a record of employment?

Was there a breach of clause 3 of the settlement agreement by Mr Fitzpatrick?

[8] The Trust says that the breach occurred during a conversation between Mr Fitzpatrick and its employees, Susan Dawson and Megan McLay at a Dunedin Chamber of Commerce BA5 (Business After Five event) on 22 November 2012.

[9] The Authority heard evidence about the conversation from Mr Fitzpatrick, Ms Dawson and Ms McLay. There is no dispute that the conversation took place and Mr Fitzpatrick accepts that certain statements were made by him during the conversation although says in response to others, he refused to comment. He maintains that within the definition of clause 3, he did not breach the terms of settlement during his conversation that evening.

[10] It is helpful to set out the nature of the conversation before then turning to the reasons Mr Fitzpatrick says that there has been no breach of clause 3.

[11] Ms McLay and Ms Dawson commenced their employment with the Trust on 15 October 2012. They were both employed in the role of facilitator and they attended the BA5 event which was an opportunity to meet others in business in Dunedin.

[12] There was no dispute that Ms McLay approached Mr Fitzpatrick at the function. She readily agreed that she had made the first approach and a change was required in this respect to her written evidence. I have no reason not to accept Ms McLay's evidence that she had no idea that she was talking to a person who used to work at the Trust. It is also common ground that whilst Ms McLay was talking to Mr Fitzpatrick, they were approached by Ms Dawson. Ms Dawson had taken over the clients Mr Fitzpatrick had been managing. She realised that Mr Fitzpatrick was a previous employee of the Trust and made an introduction to Ms McLay along those lines.

[13] Both Ms Dawson and Ms McLay say that Mr Fitzpatrick then commenced making comments that they similarly recalled as:

*I'll tell anyone who will listen.
I want the place shut down.
I don't care if I've been paid to shut up.
I could have got rid of a whole lot of clients before I left.
I got assaulted at work by a staff member and that person never got disciplined.*

I could tell MSD about the clients and they could come and look at the botched numbers, the clients just don't need the service.

[14] Part of the conversation that Ms Dawson and Ms McLay recalled was about Mr Ellwood. They both referred to comments made by Mr Fitzpatrick about Mr Ellwood as being derogatory in nature and that these comments in particular had remained with them after the end of the conversation. I do not intend to set those comments out in their entirety. If it is found that conversation was in breach of terms of settlement the Authority does not want to add to the affect of any such breach. One of the matters however that I will set out is that Ms Dawson and Ms McLay say that Mr Fitzpatrick referred to Mr Ellwood as *Stu Flannelwood*. They said that Mr Fitzpatrick advised them:

Don't believe anything he says at face value, it's all wrapped in cotton and flannel. He even had the mediator from the Department of Labour come round to his way of thinking he is so manipulative.

[15] Mr Fitzpatrick agreed that he might have stated some *home truths*. He said that the comments, I'll tell anyone who will listen; I want the place shut down; I don't care if I've been paid to shut up; I could have got rid of a whole lot of clients before I left; were puffery and jocular in nature and that he would never follow through with them.

[16] He said that some of the other comments came not from him but from Ms Dawson and Ms McLay and that he was in effect *egged* on to respond to them. He said in relation to some statements he answered with words *no comment* or laughed them off. He said that the name *Stu Flannelwood* had been used jokingly within the sector for many years and it was used again in a light hearted and tongue in cheek way. Ms McLay said that she had never heard it before or since. Mr Fitzpatrick said that the conversation or at least his part was overheard by a close friend at the BA5 event who complimented him on the handling of what he observed to be a *challenging ten minutes* for him from the women. He said that the compliment was after his responses *I'm sorry but I have a gagging order and you can reach your own conclusion on that*.

[17] Ms McLay and Ms Dawson said in their oral evidence that the effect of the conversation on them was quite dramatic. They both left the function immediately and talked for a while about it together. Ms Dawson said that she questioned what she

had done working for an organisation where the Manager was the sort of person that Mr Fitzpatrick had spoken about. She said that she felt unable to raise the matter with Mr Ellwood immediately after the function because she was still within her 90 trial period. She said that she would have left the organisation but for the rapport that she had built with her clients. Until the conversation she said that she was not aware that Mr Fitzpatrick had entered into a settlement with the Trust and only became aware when he referred to a *gagging order* and being paid to shut up. She said that the way Mr Fitzpatrick had talked about Mr Ellwood was so derogatory that it was difficult for her to continue. Ms Dawson did not accept that she had been inquisitive in the way that Mr Fitzpatrick said she had been. She raised the conversation with Mr Ellwood during her employment review at the end of her 90 day trial period in January 2013 having thought about it over the Christmas holidays. Mr Ellwood asked her to put the comments in writing.

[18] Ms McLay said that Mr Fitzpatrick seemed angry at the whole organisation and she had formed the view that he wanted to bring the Trust down. The most memorable part of the conversation for her was the description of Mr Ellwood as *Flannelwood*. She said that Mr Fitzpatrick was quite dynamic at that point in the conversation describing Mr Ellwood as manipulative and wrapping things up like a flannel. Ms McLay said that she did not think Mr Fitzpatrick appreciated the damage he had done. She said that she sat outside with Ms Dawson in the car after the conversation and both of them asked what they had done. They did not know if they could continue to trust Mr Ellwood.

[19] Ms McLay agreed that she may have asked a question about what Mr Ellwood did following Mr Fitzpatrick advising of the assault and possibly one about another employee but did not accept that she was unduly inquisitive. Ms McLay said that she believed Mr Fitzpatrick and his comments during the conversation and she wondered what Mr Ellwood had done so that a gagging order was required. Ms McLay also raised the issue with Mr Ellwood during her employment review toward the end of the 90 day trial period.

[20] Both Ms McLay and Ms Dawson requested extra supervision from the Trust to deal with issues resulting from the conversation.

[21] I accept that it is unlikely the conversation was entirely one sided and that there would have been some questions asked of Mr Fitzpatrick. Ms Dawson had had

an earlier conversation with an employee before 22 November 2012 in which the other employee had been critical of Mr Ellwood. Ms Dawson emailed Mr Ellwood on 15 January 2013 details of that conversation. Mr Fitzpatrick produced that email.

[22] I prefer the evidence of Ms Dawson and Ms McLay as to what was said, and how it was said at the BA5 event. Whilst Mr Fitzpatrick may have considered the comments jocular or puffery I am not satisfied that most of them came across in that way. On the contrary Mr Fitzpatrick and his views about Mr Ellwood were taken seriously.

[23] Mr Fitzpatrick submits that whatever was said during the conversation there was no breach of clause 3 of the terms of settlement because he understood the two staff members not to be third parties but part of the Trust who is the first party in this action. Mr Fitzpatrick says that as a small and close knit organisation the Board, management and employees are all considered to be the Trust. He submits that the wording in clause 3 separates employer's clients, staff and general business and a third party into two different groups. There could therefore only be undermining of the first group to someone who was not part of that group. Mr Fitzpatrick maintains that he did not undermine the Trust or its staff and business to any third party.

[24] Mr Fitzpatrick refers the Authority to a definition of third party in the New Zealand Law Dictionary as *one who is a stranger to a proceeding between two other persons*. I have consulted the Oxford dictionary which has one definition of third party as *a person or group besides the two primarily involved in a situation*. I find that there is strength in Mr Fitzpatrick's submission that on the plain words of clause 3 there could only be undermining of the first group to someone who was not part of the group, a third party. It is unclear whether the wording in the settlement agreement includes future staff of the Trust or indeed future clients. Ms Dawson and Ms McLay were not staff of the Trust at the time the settlement was entered into however they were at the time of the conversation. I find therefore that they fall into the first group within the definition of staff and if a breach is to be found, it could only be on the basis that staff, were undermined to another party not to each other. I do not however find that that is the end of the matter.

[25] I find on the balance of probabilities that at least one other person, a third party, also overheard the conversation. I do not accept that Mr Fitzpatrick was only answering questions in a careful and guarded manner. I prefer Ms Dawson's and

Ms McLay's evidence that they did not widely question Mr Fitzpatrick and that he told them information they were previously unaware of. Mr Fitzpatrick said in oral evidence that it was only one person at the function who overheard him advising he did not want to breach his agreement in answer to the various questions. In his written statement in reply he says *I didn't go slagging anyone. I answered essentially their questions and didn't volunteer, but responded, as I guessed early on that they were setting me up and I played along, at the same time aware I didn't want to breach my agreement. This was also overheard by others present, one of whom commented that they seemed to be "egging me on" and was rather amused when I responded with "I'm sorry but I have a gagging order" and "you can reach your own conclusion on that.* I prefer the written statement as more reliable that the conversation was overheard by others. I find that the conversation with Ms Dawson and Ms McLay was overheard by at least one other third party.

[26] The next basis on which Mr Fitzpatrick maintains there was no breach of clause 3 is that he did not undermine the Trusts clients, staff and general business in any way. Mr Fitzpatrick provided a definition of undermining to the Authority. I have little difficulty in this instance in concluding that Mr Fitzpatrick did undermine the manager Mr Ellwood as he made comments I find that were damaging or caused injury to his reputation. Mr Fitzpatrick also made comments that were damaging to the business in suggesting that not all was right with how it operated and whether all the clients needed the service.

[27] I find that Mr Fitzpatrick did, in his conversation with Ms Dawson and Ms McLay which was overheard by at least one other party, breach clause 3 of the settlement agreement by undermining during the conversation the Trust's business and Mr Ellwood.

Is the payment of \$5000 under clause 3 enforceable?

[28] I directed both parties to the Employment Court judgment of *Ozturk v Gultekin T/A Halikainas Restaurant* [2004] 1 ERNZ 572 for guidance as to whether clause 3 imposes a penalty in which case it is not enforceable or is an agreed amount of damages payable in the event of a particular breach in which case it is recoverable.

[29] I find having considered the wording in clause 3 and the evidence of Mr Ellwood that the amount in clause 3 being the full amount of compensation paid to

Mr Fitzpatrick was reached as an attempt to compel performance rather than a genuine estimate of loss. The amount of \$5000 is therefore a penalty.

[30] I do not find in conclusion that the payment of \$5000 under clause 3 is enforceable.

Should a penalty under section 149(4) of the Employment Relations Act 2000 be awarded, and if so, should there be an order that it be paid to the Trust?

[31] I find that Mr Fitzpatrick deliberately breached clause 3 of his settlement agreement by undermining Mr Ellwood and the Trust's business in his conversation with Ms Dawson and Ms McLay which was overheard at least in part by a third party. Clause 3 of the record of settlement contained important and serious obligations and the imposition of a penalty is because of a breach of those obligations.

[32] I find that it is appropriate to impose a penalty in the sum of \$1500. I direct under s 136(2) of the Act that the whole of the penalty be paid to the Trust.

Compliance order

[33] It is appropriate I find to make the following order:

Mr Fitzpatrick is to immediately comply with clause 3 of the terms of settlement and not undermine the Trust's clients, staff and general business in any way to any third party.

[34] The Trust has 14 days from the date of this determination to provide a record of employment to Mr Fitzpatrick under clause 5 if they have not already done so. I reserve leave for Mr Fitzpatrick to return to the Authority if there is any further issue about that matter.

Costs

[35] Mr Ellwood gave evidence that the Trust incurred legal costs as at the time of the investigation meeting in the sum of \$2793 plus GST. This was on the basis of 12.25 hours at \$228.00 plus GST per hour. I find that it is appropriate in this matter to assess costs on the basis of the daily tariff adjusted to reflect that the meeting only took three hours and not a full day for which the daily tariff would be \$3500. I find

that there should be an award of \$1750 together with the sum of \$71.56 being the filing fee.

[36] I order Robin Fitzpatrick to pay to Work Opportunities Trust the sum of \$1821.56 being costs and disbursements.

Helen Doyle
Member of the Employment Relations Authority