New Zealand Employment Relations Authority Decisions

Wanaka Sun (2003) Limited v Woodrow (Christchurch) [2017] NZERA 1003; [2017] NZERA Christchurch 3 (5 January 2017)

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Last Updated: 6 March 2017

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 3
5641100

BETWEEN WANAKA SUN (2003) LIMITED

Applicant

A N D BROOKE WOODROW Respondent

Member of Authority: David Appleton

Representatives: Nicola Heath, advocate for Applicant

Robert M Thompson, advocate for Respondent

Investigation Meeting: 20 December 2016 at Wanaka Submissions Received: 20 December 2016 from both parties. Date of Determination: 5 January 2017

DETERMINATION OF THE AUTHORITY

A. Ms Woodrow breached the terms of the settlement agreement in the manner found by this determination, and a

penalty of $250 is imposed upon her.

B. There is no order as to costs save for an order for Ms Woodrow to reimburse to the Applicant its lodgement fee of $71.56.

Prohibition from publication order

[1] During the course of the investigation meeting the Authority referred to evidence in the 4th, 5th and 6th paragraphs of the original brief of evidence of Ms Woodrow. Some of this evidence is of a personal nature, which turned out not to

be germane to the issues to be determined, and which could cause distress if it became public. I therefore prohibit from publication the evidence contained in those paragraphs.

Employment relationship problem

[2] The applicant seeks the imposition of a penalty against Ms Woodrow on the grounds that she allegedly breached the terms of a settlement agreement between the parties by making derogatory comments about the applicant company, the Wanaka Sun newspaper and/or Mr Aaron Heath, the sole director and shareholder of the applicant company.

[3] Ms Woodrow denies that she made any such comments.

Brief account of events leading to the application

[4] Ms Woodrow is a former employee of the applicant. The applicant owns and operates a free newspaper which circulates in the Wanaka area. It relies on advertising revenue.

[5] On 26 May 2016 the parties entered into a record of settlement (the agreement) pursuant to s 149 of the Employment Relations Act 2000 (the Act), which was countersigned by a mediator of the Ministry of Business, Innovation and Employment.

[6] The material term of the agreement was the following:

The parties agree they shall not make derogatory comments about each other to any other person or organisation.

[7] The applicant alleges that, after signing the agreement, Ms Woodrow made derogatory comments about the applicant company, the Wanaka Sun newspaper and/or Mr Aaron Heath to Ms Aimee Wilson, a free-lance journalist who also used to work for the applicant, whilst Ms Wilson was visiting a shop in which Ms Woodrow now works. The applicant's application was made entirely in reliance upon Ms Wilson's report to Mr Heath of what Ms Woodrow is alleged to have said.

[8] The alleged comments made to Ms Wilson by Ms Woodrow have been described in three different statements by Ms Wilson. The first statement was annexed to the statement of problem. It is undated and addressed to "to whom it may

concern". The material part of this statement1, which recounts Ms Wilson's meeting

Ms Woodrow at the shop, reports the following:

I never had any dealings with her at the newspaper but she proceeded to start slandering the owner Aaron Heath and his business – the Wanaka Sun.

When I tried to shut down the conversation and say that it was inappropriate in her workplace to be doing that, she continued to pursue my opinion on the matter.

[9] The Authority directed that Ms Wilson produce a further statement (the second statement) setting out in more detail what was alleged to have been said by Ms Woodrow. Ms Wilson accordingly sent an email to Mr Heath on 14 October 2016 which contained the following comments (again, irrelevant details have been omitted).

From memory (and this was several months ago now), Brooke asked me if I used to work at the Wanaka Sun. I said yes I had been the 'acting' editor. She told me how she was still getting over it and how stressful it was. Then she said something abusive about Aaron Heath but I can't remember exactly what it was, and that's when I told her it was inappropriate for her to be having this discussion in her (new) workplace.

When she continued to bad mouth Aaron I told her that I didn't believe he was the problem...

[10] Ms Wilson's third statement was seemingly sent to Mr Heath on 16 October. The material parts of this statement were as follows:

Brooke then told me that she used to work there [the Wanaka Sun], how stressful it was and how she was still getting over it.

She then made some abusive comments about Aaron Heath using expletives that included fuckwit, and that's when I told her it was inappropriate for her to be having this discussion in her (new)

workplace.

When she continued to bad mouth Aaron I told her that I didn't believe he was the problem...

[11] Ms Woodrow admits that she said that she found the workplace stressful but denies that she said anything insulting about Mr Heath, or anything insulting about the applicant, its newspaper or anyone else.

[12] When I questioned Ms Wilson, she could not remember what abusive comments Ms Woodrow had allegedly made to her about Mr Heath, including what

1 Ms Wilson's first statement also makes reference to another individual which is not relevant to the matters to be determined.

other expletives had been used. She also could not recall when the conversation had taken place.

[13] Ms Wilson also did not give a convincing explanation, in my view, why she had produced two different versions of her statement between 14 October and

16 October. She said that she had not wanted to be specific because she did not want to hurt anyone, nor get involved. She

said she had kept the statements deliberately vague. However, this does not explain why she had added more detail in her third statement about what Ms Woodrow had allegedly called Mr Heath.

[14] I infer that she did so because Mr Heath had asked her to. However, I cannot be sure that this was because Mr Heath knew that specifics were needed, and had asked her to add them as an accurate record, or whether he had suggested to her what to say.

Discussion

[15] The imposition of a statutory penalty upon a party is a serious matter, as it is intended primarily to punish and deter. I refer to the Employment Court judgement in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*2 , in which the Court discussed the objectives of the penalty regime at paragraph [61].

[16] In *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc3* the Employment Court considered in some detail the standard of proof to be applied in penalty actions. At paragraph [98] it summarised its conclusion as follows:

Attempting to synthesise these cases, I conclude that where a person faces an application for a statutory penalty in addition to a claim for damages arising out of the same breach, the civil standard of proof (balance of probabilities) is to be approached by applying a higher than simple requirement of probability over improbability. To support a claim for penalties in these circumstances, the Court will require convincing evidence of the probability of a defendant's breach of a statutory provision, or one of an employment agreement, before it can be satisfied, on the balance of probabilities, that such a breach has been proven for penalty purposes.

[17] Whilst the Court referred to a claim for a penalty in addition to a claim for damages, and also did not refer expressly to the imposition of a penalty in response to

2 [2016] NZempC 143

3 [2016] NZEmpC 112

a breach of a mediated record of settlement, I am satisfied that the same standard of proof is relevant in this case, given that a statutory penalty is being sought.

[18] For that reason, I need to be satisfied that there is convincing evidence of the probability that Ms Woodrow breached the terms of the settlement agreement. The vague references in the first two of Ms Wilson's statements certainly do not give that level of evidence. The change to a slightly more detailed account in the third statement without sufficient explanation does not give me comfort to the required standard that Ms Woodrow did use abusive comments and expletives, including the term "f*ckwit" about Mr Heath. This uncertainty is exacerbated because Ms Wilson had written in her second statement that she could not remember exactly what abusive comments Ms Woodrow had made about Mr Heath, but then did apparently do so two days later.

[19] For this reason, on a balance of probabilities, I prefer the evidence of Ms Woodrow that she did not use abusive comments and expletives, including the term "f*ckwit", about Mr Heath.

[20] However, Ms Woodrow does concede that she referred to her job being too stressful for her, and to the Wanaka Sun being "a stressful place to work". Does this breach the terms of the agreement?

[21] The New Zealand Oxford Dictionary4 defines derogatory as “involving disparagement or discredit; insulting, depreciatory”. I do not find Ms Woodrow saying her job was too stressful for her is clearly derogatory, as that could be seen equally as a disparaging comment about herself, and her capacity to handle stress.

[22] However, saying Wanaka Sun was “a stressful place to work” is potentially derogatory in my view. This is because it is possible to infer disparagement of a workplace by describing it as stressful, as that usage could imply mismanagement, overloading of work, understaffing, bullying, and so forth. Some workplaces are inherently stressful, such as the emergency room of a hospital. I am not convinced that selling advertising for a free newspaper is inherently stressful, and so there is likely to be negative inferences drawn from the comment.

[23] I also find that there is a sufficient connection between making a disparaging remark about a company’s main product or service, and the company itself, for the remark to be seen as a negative criticism of the company. So, criticising the Wanaka Sun, which in the context in which it was used, was a criticism of the applicant’s business, is also a criticism of the applicant.

[24] Did Ms Woodrow breach the agreement? I believe she did, because she did make a derogatory remark about the applicant when she said that the Wanaka Sun was a stressful place to work.

[25] Should a penalty be imposed, and if so, in what amount? Section 149(4) of the Act provides that a person who breaches an agreed term of a qualifying settlement is liable to a penalty imposed by the Authority. As I have stated above, the principal purposes of the imposition of a penalty is to punish and deter. Having found there was a breach of the settlement agreement, the appropriate approach is to apply the principles set out in the recent Employment Court case of *Preet*, referred to above.

[26] This requires a four step approach. The first is to identify the number of breaches and the maximum penalty applicable. There was one breach, and as Ms Woodrow is an individual, the maximum penalty applicable is $10,0005.

[27] Next, it is necessary to consider the severity of the breach. I consider that the severity of the breach that I have found occurred was minimal. It was a one off comment to a single person (who was already familiar with the applicant) in a private conversation (which, although it occurred in a public place, I find was not overheard by anyone). In addition, the comment was no more than a mild criticism. To say that a place of work is stressful could have a range of meanings, only some of which is derogatory. Also, I am satisfied that Ms Woodrow meant no harm or malice towards the applicant in what she said. I fix the degree of severity at 10%. This makes a potential penalty of $1,000.

[28] I then have to consider whether there were any mitigating circumstances. Ms Woodrow has admitted what she said. Also, as Mr Heath accepted in his evidence, no damage has been done to the applicant arising from what Ms Woodrow said. I believe that mitigating circumstances justify reducing the penalty by 50%. This gives a penalty of $500.

[29] I next turn to the means and ability of Ms Woodrow to pay $500. No evidence was given about that. I am therefore unable to take that into account.

[30] The final step is the totality or proportionality principle. This requires the Authority to consider whether the provisional penalty reached after the first 3 steps is proportionate to the seriousness of the breach, and the harm occasioned by it. This step is to ensure that the imposition of a penalty, and the amount of it, is just in all the circumstances.

[31] I believe that the breach was of a very mild character, with no discernible harm occasioned. I also believe that Ms Woodrow now has a very clear understanding of the requirement to be careful as to how she complies with the settlement

agreement.

[32] Taking all the circumstances into account, whilst I cannot reduce the penalty to nil, I reduce it to $250 to reflect the minimal nature of the breach. This penalty is to be paid to the Crown.

Order

[33] I order Ms Woodrow to pay to the Authority the sum of $250, which the

Authority will then pay into a Crown bank account.

[34] I also order Ms Woodrow to pay to the applicant the sum of $71.56, being the

Authority's lodgement fee incurred by it.

Costs

[35] The successful applicant was not professionally represented, and so will not have incurred any further costs. I therefore make no further order as to costs.

David Appleton

Member of the Employment Relations Authority
