IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 47
5469190

	BETWEEN	LINDSEY WEBBER Applicant
	AND	MIDLANDS HEALTH NETWORK LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Andrea Twaddle, Counsel for Applicant Mai Chen & Claire English, Counsel for Respondent
Investigation Meeting:	11 February 2015 at Hamilton
Submissions received:	11 February 2015 from Applicant and from Respondent
Determination:	13 February 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lindsey Webber, is claiming that the Respondent, Midlands Health Network Limited (MHN), breached clause 4 of a Record of Settlement dated 19 March 2014 (the Record of Settlement).

[2] MHN denies that it breached clause 4 of the Record of Settlement.

Issue

[3] The issue for determination is whether or not MHN breached clause 4 of the Record of Settlement.

Background Facts

[4] MHN is a primary health care company with the role of sustaining and assisting primary health care services with further development. It is owned by Pinnacle Incorporated and the group includes Midlands Regional Health Network Charitable Trust. Ms Webber

commenced employment with MHN in 2010 and was employed at the date of the termination of her employment on 19 March 2014 as Director of Nursing.

[5] Ms Tammy Hebditch, People and Performance Lead at MHN, said that on 14 February 2014 Ms Webber raised concerns with MHN, specifically allegations that the workplace was unsafe for her, which included that she had been bullied and harassed by the CEO, Mr John Macaskill-Smith, and that this was a safety concern.

[6] Ms Hebditch said that she and Mr Tony Hartevelt, Chairman of MHN, had undertaken an investigation into the allegations made by Ms Webber, and she had subsequently completed a report at the conclusion of the investigation, approved by Mr Hartevelt, which concluded that the allegations made by Ms Webber were unsubstantiated.

[7] A summary of the findings was included in a letter dated 4 March 2014 sent to Ms Webber and signed by Mr Tony Hartevelt, Chair of MHN.

[8] Ms Webber said that she had advised MHN that she wished to appeal the findings of the MHN investigation and in response Mr Hartevelt on behalf of MHN suggested that mediation via the Ministry of Business, Innovation and Employment would assist in the resolving her issues, in particular with a view to: "*how you might re-enter the workplace safely".*

[9] The mediation date of 19 March 2014 was confirmed to the parties on 13 March 2014.

[10] On 18 March 2014, the day prior to mediation, Ms Webber instructed her lawyer to raise a complaint with Worksafe New Zealand (Worksafe) about her concerns regarding workplace health and safety at MHN.

[11] She did not advise MHN prior to mediation that she issued instructions to her lawyer to lodge her complaint about MHN with Worksafe.

[12] The complaint about MHN from Ms Webber was lodged with Worksafe on 19 March 2014, the day of the mediation.

[13] During the mediation process on 19 March 2014 the parties reached a settlement, resulting in the Record of Settlement pursuant to s.149 of the Employment Relations Act 2000 (the Act).

[14] The Record of Settlement was signed by the parties and by the MBIE mediator. It included the following clauses:

1. *These terms of settlement and all matters discussed in mediation shall remain, as far as the law allows, confidential to the parties.*

4. *Both parties, which include CEO John Macaskill-Smith, agree not to make any disparaging or negative remarks about each other to any third party.*

12. *This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.*

[15] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted that they understood the agreed terms:

- were final, binding and enforceable; and
- could not be cancelled; and
- could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[16] Following the mediation Ms Webber said that she had been informed by her lawyer that she had an obligation to tell Worksafe of the Record of Settlement reached with MHN and she had done so on 26 March 2014.

[17] On 23 May 2014 Mr Chris MacFarlane, Chairman of Midlands Regional Health Network Charitable Trust, had been contacted by Mr Chris Floyd of Worksafe who advised him that Worksafe had received a complaint from Ms Webber relating to allegations of bullying at MHN, and that these did not just relate to the CEO. Mr MacFarlane made file notes of the conversation with Mr Floyd whom he recorded as commenting that: *" it is one of the most serious allegations of this nature he has had".*

[18] Mr MacFarlane recorded Mr Floyd's response when asked what the next steps or options were as being:

1. Lower level – negotiate/develop a written agreement between MHN and Worksafe

2. Mid level – Worksafe issue a formal improvement notice

3. Highest level – Worksafe investigates and prosecutes under Section 6 & 7 of the health and Safety in Employment Act 1992.

[19] Mr MacFarlane had informed Mr Floyd that he needed to contact Mr Hartevelt at MHN and subsequently contacted members of the senior management team at MHN himself to advise them of the conversation.

[20] Ms Hebditch said that following the contact by Worksafe in connection with Ms Webber's complaint in late May 2014, MHN had written to Ms Webber via her lawyer on 3 June 2014 advising that it believed her action in lodging the compliant to have been a breach of clause 12 of the Record of Settlement which stated:

> *This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.*

[21] Ms Webber's lawyer responded on her behalf claiming that there had been no breach of the Record of Settlement and stating:

> *There is no obligation on Lindsey to notify Worksafe of the agreement between the parties, which is confidential between them. However, in any event, Lindsey has informed Worksafe New Zealand that she has reached full and final settlement with her employer regarding matters relating to her employment relationship.*

[22] Mr Macaskill-Smith said that in August 2014 he had been contacted by email by Mr Hugh Kininmonth, CEO of the Hauraki Primary Health Organisation (the PHO). In the email dated 20 June 2014 Mr Kininmonth had advised that he was to be away until August 10: "*but if the Child Health meeting goes ahead before my return Lindsay Webber or Karen McKellar will represent Hauraki PHO."*

[23] Mr Macaskill-Smith said he had been concerned about the possibility of Ms Webber being present in the MHN workplace given the nature of her complaint and the on-going investigation by Worksafe. He had therefore discussed the matter at the regular senior team meeting.

[24] Following the meeting he had discussed the approach of the senior management team to the issue with Ms Hebditch who said she had advised that, as Ms Webber was no longer an employee, there was no obligation to allow her access to the MHN workplace.

[25] Mr Macaskill-Smith had responded to Mr Kininmonth by email dated 20 June 2014 (the 20 June 2014 email) stating:

> *Not sure what Lindsey has said to you but there remains ongoing legal claims that she has made about a range of staff and MHN. On that basis it is not safe for MHN staff to work with Lindsey and she would not be able to enter any MHN buildings or practices until those claims have been resolved*

[26] Mr Kininmonth said he had been concerned by Mr Macaskill-Smith's comments in the email, particularly the reference to safety, and that he had inferred from it that Mr Macaskill-Smith considered Ms Webber to be: "*a very untrustworthy person and MHN would not deal with her".*

[27] Mr Kininmonth responded to Mr Macaskill-Smith asking for further details, however Mr Macaskill-Smith declined to provide any further information in accordance with the confidentiality provision in clause 1 of the Record of Settlement.

[28] On 27 June 2014 in response to a letter from Ms Webber's lawyer, Mr Floyd of Worksafe clarified that that its investigation arose from Ms Webber's complaint about bullying and other psycho-social hazards as actual or potential workplace hazards at MHN.

[29] Mr Floyd further clarified that Ms Webber had informed Worksafe of the full and final settlement she had reached with MHN, and that this had been recorded on the Worksafe file on the matter on 26 March 2014.

[30] On 2 July 2014 MHN's lawyer had been advised that the Worksafe investigation had been closed.

[31] On 11 July 2014 Ms Webber filed a statement of problem with the Authority claiming a breach of the Record of Settlement.

Determination

Did MHN breach clause 4 of the Record of Settlement?

[32] Disparaging or negative statements are not defined in the Act and therefore are to be interpreted in line with the common or ordinary meaning attributed to the words. The Concise English Dictionary[1] defines 'disparage' as: "*bring discredit on; speak slightingly of, depreciate"* and ' negative' as: "*expressing or implying denial, prohibition, or refusal" "lacking, or consisting in the lack of positive attributes",*

[33] I consider that the email dated 20 June 2014 sent by Mr Macaskill-Smith to Mr Kininmonth must be viewed in context. At that date the Worksafe investigation was still in progress. The catalyst for the investigation was the complaint by Ms Webber identified in Mr Floyd's letter dated 27 June 2014 as " *bullying and other such psycho-social hazards*" constituting: "*actual/potential workplace hazards*".

[34] Mr MacFarlane had been informed by Mr Floyd that (i) the Worksafe investigation was into the complaint made by Ms Webber; and (ii) Worksafe viewed the complaint as very serious; and (ii) that prosecution was a possibility.

[35] I accept that Ms Webber had informed Worksafe that there had been a full and final settlement of her issues with MHN following the mediation, but this did not act as a brake on the process her complaint made immediately prior to, or on the same date as, the mediation had set in motion.

[36] MHN viewed the threat of prosecution pursuant to the provisions of the Health and Safety in Employment Act 1992 as a legal process. It was aware that the process had been as a result of a complaint by Ms Webber.

[37] Accordingly I find the statement in the email that: "*there remains ongoing legal claims that she has made"* to be factually correct in that the claims referred to were those made in the complaint from Ms Webber, the nature of which was ongoing in the form of the Worksafe investigation.

[38] Whilst Ms Webber may have informed Worksafe of the full and final nature of her agreement with MHN, this could not prevent the consequences of her actions resulting from the initiation of the complaint, namely the ongoing Worksafe investigation impacting upon MHN.

[1] Seventh Edition, Oxford at the Clarendon Press

[39] The second comment made by Mr Macaskill-Smith in the email was that: "*On that basis it is not safe for MHN staff to work with Lindsey and she would not be able to enter any MHN buildings or practices until those claims have been resolved"*.

[40] The Worksafe investigation into Ms Webber's complaint had not been resolved on 20 June 2014. The issues raised by Ms Webber were serious and concerned the claims she had raised about the safety of the MHN workplace. The complaint as investigated by Worksafe involved not just Mr Macaskill-Smith but the MHN organisation as a whole.

[41] I find that it was reasonable in this context for MHN to wish to protect its employees from further claims given the nature of the initiating complaint made by Ms Webber, and to refuse to allow Ms Webber to enter its workplace which it understood from Worksafe that Ms Webber considered to be unsafe, until such time as the Workplace investigation was resolved.

[42] Accordingly I do not find that the wording in the 20 June 2014 email to be either disparaging or negative such as to breach the Record of Settlement.

Estoppel

[43] Ms English submits on behalf of MHN that in any event Ms Webber is estopped from making the claim that MHN has breached the Record of Settlement by the comments in the email dated 20 June 2014.

[44] Ms English submits that Ms Webber made a complaint to Worksafe on 18 or 19 March 2014, either before, or on, the date of mediation.

[45] Upon becoming aware of this complaint and making enquiries of Ms Webber's lawyer, MHN were advised by them on 5 June 2014 that the Worksafe complaint was a matter outside the Record of Settlement: "*There is no obligation on Lindsey to notify Worksafe of the agreement between the parties, which is confidential between them."*

[46] The principles of equitable estoppel as defined in The Laws of New Zealand state:[2]

> *Promissory or equitable estoppel. The principle of promissory or equitable estoppels is applicable when one party has, by words or conduct, made to the other a clear and unequivocal promise or assurance intended to affect relations between them and to be acted upon accordingly. Once the other party has taken the promisor or assurer at his or her word and acted upon it, the promisor or assurer is bound by that promise or assurance unless and until he or she has given the promisor a reasonable opportunity of resuming his or her position. The principle is not limited to dealings between parties who have prior contractual rights inter se. Any suggestion that promissory*

[2] Laws of New Zealand Equity (online ed) at [199]

> *estoppels is available only as a shield has disappeared. Silence or failure to respond may amount to a qualifying assurance.*

[47] Ms English submits that Ms Webber cannot now seek to rely upon MHN's reporting of the complaint made to Worksafe to a third party as constituting a breach of the Record of Settlement.

[48] In *Armstrong v Attorney-General*[3] the Employment Court set out three relevant requirements to establishing an equitable estoppel:

i. The creation or encouragement of a belief or expectation;

ii. Reliance by the other party; and

iii. Detriment as result of the reliance.

[49] Ms English submits the following applying these criteria :

i. By stating to MHN that the Worksafe complaint was not subject to the Record of Settlement, Ms Webber created a belief or expectation in MHN that any further comments by it about the Worksafe complaint would not constitute a breach of the settlement agreement;

ii. In stating to the Hauraki PHO that it was not possible for Ms Webber to return to its workplace given her ongoing complaint, MHN relied upon the past assurances by Ms Webber that such comments would not be in breach of the Record of Settlement.

iii. Given Ms Webber's claim before the Authority, MHN has relied upon these past assurances of Ms Webber to its detriment.

[50] In these circumstances Ms English submits that it would be unconscionable for Ms Webber to continue the claim of breach of the Record of Settlement given her past assurances to MHN, and that she is stopped from so doing.

[51] Whilst I accept that there is significant merit in the argument regarding estoppel in this case, I have already found the 20 June 2014 email not to have constituted a breach of the Record of Settlement without the necessity to apply the doctrine of estoppel.

---

[3] [1995] 1 ERNZ 43

[52] I determine that MHN did not breach clause 4 of the Record of Settlement.

Costs

[53] The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority