

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 7  
5469190**

BETWEEN

LINDSEY WEBBER  
Applicant

AND

MIDLANDS HEALTH  
NETWORK LIMITED  
First Respondent

JOHN MACASKILL-SMITH  
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Andrea Twaddle, Counsel for Applicant  
Anthony Russell & Claire English, Counsel for First and  
Second Respondents

Investigation Meeting: On the papers

Submissions received: 12 December 2014 from Applicant  
21 November 2014 from First and Second Respondents

Determination: 9 January 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1] The Applicant, Ms Lindsey Webber, is claiming that the First Respondent, Midlands Health Network Limited (Midlands), and the Second Respondent, Mr John Macaskill-Smith, breached clause 4 of a Record of Settlement dated 19 March 2014 (the Settlement).

[2] The preliminary matter which is before the Authority for determination is whether or not Mr Macaskill-Smith should remain a party to the proceedings as the Second Respondent.

[3] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

**Key Facts**

[4] Ms Webber commenced employment with Midlands in 2010 and was employed as Director of Nursing. In February 2014 Ms Webber raised a complaint of bullying by the

Midlands CEO, Mr John Macaskill-Smith. The parties, being Midlands and Ms Webber, participated in mediation and entered into the Settlement as a result.

[5] The parties to the Settlement are Midlands and Ms Webber. Mr Macaskill-Smith is not a party to the Settlement, however his name appears in clause 4 of the Settlement which states:

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

[6] Ms Webber claims that Midlands breached clause 4 of the Settlement in an email sent by Mr Macaskill-Smith to the Chief Executive of Hauraki Public Health Organisation, which is Ms Webber's current employer. In the email dated 20 June 2014 Mr Macaskill-Smith had written:

*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*

[7] The Chief Executive of Hauraki Public Health Organisation subsequently asked for further details, but Mr Macaskill-Smith declined to make any further comment.

[8] Ms Webber is seeking a penalty order against Midlands and a compliance order against both Midlands and Mr Macaskill-Smith, and seeks to join Mr Macaskill-Smith as a party in the capacity of Second Respondent to the proceedings.

## **Determination**

### **Should Mr Macaskill-Smith be joined as the Second Respondent to the proceedings before the Authority?**

[9] A breach of the agreed terms of a record of settlement reached by the parties in accordance with s.149 of the Employment Relations Act 2000 (the Act) may be enforced by an order of the Authority for compliance pursuant to s 137 (1)(a)(iii) of the Act, in

circumstances in which: “... any person has not observed or complied with” the terms of a settlement.

[10] The Authority may also impose a penalty pursuant to s.149 (4) of the Act which states: “A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority”.

[11] Section 149 (3) states:

*Where... the agreed terms of settlement to which the request relates are signed by the person empowered to do so:-*

*(a) Those terms are final and binding on, and enforceable by the parties;*

[12] The parties to the Settlement are Midlands and Ms Webber. Mr Macaskill-Smith is not a party to the Settlement but is referred to in clause 4 of the Settlement which states: “Both parties, which include CEO John Macaskill-Smith”. Mr Macaskill-Smith, although not a director of Midlands, is the appointed CEO of Midlands and therefore considered to be an officer of that company.

[13] The board of a company has the power to delegate authority for the operational running of the company to a person who may be appointed as the CEO.

[14] The wording of clause 4 of the Settlement, specifically: “Both parties, which include CEO John Macaskill-Smith”, clearly indicates that there are only two parties to the Settlement and that the named person, CEO John Macaskill-Smith, is associated with one of the parties, in this case Midlands.

[15] Provided that Mr Macaskill-Smith acted within his delegated powers and in good faith during the performance of his duties as CEO I find that he would be acting on behalf of Midlands which would be vicariously responsible for his actions, including any alleged breach of the Settlement.

[16] Ms Twaddle for the Applicant submits that a person who has been served with an application lodged under regulations 5, 10 or 12 in accordance with clause 8(1) of the Employment Relations Authority Regulations 2000 and who files a reply or response becomes thereupon a respondent.

[17] It is not uncommon for applications filed with the Authority to name persons or parties as respondents, who may then file a response denying that he, she, or it, is properly named as a respondent. Such a response does not automatically result in the named person or party being joined or retained as a respondent. It is incumbent upon, and part of the duties of, the Authority Member dealing with the relevant application to ensure that the correct parties are named as respondents.

[18] I consider that in order that Mr Macaskill-Smith be properly joined as a respondent in this matter he must have been acting in a personal rather than a professional capacity acting on behalf of Midlands when he sent the email dated 20 June 2014 to the Chief Executive of Hauraki Public Health Organisation.

[19] The email was sent at 9.01 a.m. on Friday 20 June 2014, a work day. It was sent using Mr Macaskill-Smith's work email address (johnms@midlandshn.health.nz) and formed part of an email stream which included his email signature as the CEO of Midlands. Accordingly I find that the email was sent during work time in professional capacity acting on behalf of Midlands rather than a personal capacity.

[20] I determine that Mr Macaskill-Smith should not be joined as the Second Respondent to the proceedings before the Authority.

[21] Ms Webber is seeking a penalty against Midlands and compliance orders against both Midlands and Mr Macaskill-Smith. The non-joining of Mr Macaskill-Smith as a respondent in this matter will not prevent a compliance order, should the substantive matter result in a determination that Midlands breached the Settlement, being made to require Mr Macaskill-Smith to do, or desist from doing, any specified thing or activity pursuant to s 137(2) of the Act in circumstances in which: "... *any person has not observed or complied with*" the terms of a settlement, pursuant to s 137 (1) of the Act.

[22] Prior to imposing such an order against Mr Macaskill-Smith, he will be given an opportunity to appear or be represented in the substantive matter in accordance with s 138(2) of the Act which states: "*Before exercising its power under section 137(2) in relation to a person who is not a party to the matter, the Authority must give that person an opportunity to appear or be represented before the Authority*".

### **Costs**

[23] Costs are reserved pending the final resolution of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**