

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 232
3000412

BETWEEN MARGARET JOYCE FREE
Applicant

AND SHELF COMPANY NO 5
LIMITED (FORMALLY GK
ACCOUNTING (COUNTIES)
LIMITED)
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: M Nutsford, Advocate for Applicant
K Gould, Counsel for Respondent

Investigation Meeting: 26 July 2017 and 2 August 2017 at Auckland

Submissions received: 2 August 2017 from Applicant
2 August 2017 from Respondent (Oral) and additional
documents 3 August 2017

Determination: 8 August 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The Respondent has breached the Record of Settlement dated 5 December 2012 by sending the letter of 4 March 2014 containing disparaging remarks about the Applicant.**
- B. The Respondent is ordered pursuant to s 137 (2) of the Employment Relations Act 2000 to comply with Clause 1(2) of the Record of Settlement.**

C. The Respondent is ordered to pay a penalty of \$5,000.00 for breaches of the Record of Settlement. I direct that 75% of that amount (\$3,750.00) is to be paid to the Applicant. The remaining 25% (\$1,250.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

D. Payment of the penalty is to be made by the Respondent within 28 days of the date of this determination.

E. Costs are reserved.

Employment relationship problem

[1] Ms Free and Shelf Company No 5 Limited (formally GK Accounting (Counties) Limited (GK Counties)) entered into a Record of Settlement on 5 December 2012. Ms Free contends that GK Counties has not complied with Clause 1(2) of the Record of Settlement relating to non-disparaging remarks. Ms Free's claim for breach of Clause 1(1) of the Record of Settlement relating to confidentiality was withdrawn. Ms Free seeks a compliance order and a penalty for the breach.

[2] GK Counties denies it breached the Record of Settlement. It says that at no time has it disparaged Ms Free. It says the statements it made recorded professional concerns as to Ms Free's practice as an accountant.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from Ms Free and GK Counties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[4] The issues to be determined are:

(a) Has there been a breach of the Record of Settlement?

(b) If so,

(i) Should a compliance order be made under s137 of the Act?

- (ii) Should a penalty be imposed under s 149(4) of the Act?

Background against which issues are to be determined

[5] Ms Free is the sole shareholder of Counties Tax Services Limited (Counties Tax). By an agreement dated 7 March 2011, Ms Free agreed to sell the business operated by Counties Tax to GK Counties.

[6] It was a term of the agreement for sale and purchase that GK Counties would employ Ms Free. Ms Free was employed by GK Counties from 7 March 2011.

[7] In December 2011, Ms Free resigned from her employment with GK Counties and raised a personal grievance. Following mediation, a Record of Settlement was executed by Ms Free, and Mr Khan on behalf of GK Counties on 5 December 2012. A mediator from the Ministry of Business, Innovation and Employment also signed the Record of Settlement pursuant to s 149 of the Act.

[8] The material terms of the Record of Settlement included:

1. Except as may be required by law:
 - (1) ...
 - (2) The parties agree that they will not make disparaging remarks about each other to any third party;
2. The respondent agrees that it will make all reasonable endeavours and do all things reasonably necessary to ensure that its directors, officers and employees comply with clause (2).

First Issue: Has there been a breach of the Settlement Agreement?

Letter of 4 March 2014

[9] Ms Free contends that Counties Tax breached Clause 1(2) of the Record of Settlement by providing a letter dated 4 March 2014 (the March letter) to Stonescapes Limited and/or Mr and Mrs Jenkins (the Jenkins' Group). It is alleged this letter contains disparaging remarks about Ms Free.

[10] GK Counties denies the comments made in the March letter are disparaging. During closing submissions GK Counties also raised an alternative defence. If the

comments were disparaging, it submitted it cannot be held responsible for the contents of the letter. This is because the March letter was written by Ms Reddy. Ms Reddy was a Senior Manager employed by GK Accounting (H.P.) Limited (GK HP). She was not employed by GK Counties.

Was GK Counties responsible for the writing of the March letter?

[11] After careful consideration of this issue, I find GK Counties was responsible for writing the March letter. My reasons for reaching this finding are:

- a) GK HP and GK Counties have the same shareholders and the same directors. A common director is Mr Khan who was also the signatory on the Record of Settlement.
- b) GK HP and GK Counties worked closely together. They both utilised the services of Ms Reddy although her salary was paid by GK HP.
- c) Mr Khan said that following the purchase of GK Counties, he directed Ms Reddy to attend the GK Counties' Office to check through the client files and to assist with the work. The evidence that was produced showed Ms Reddy was actively involved in working on the Jenkins' Group file at material times both before and after the execution of the Record of Settlement.
- d) Mr Khan said Ms Reddy spoke to him about the Jenkins' Group request for the March letter. He recalled being aware there was a dispute between Jenkins' Group and Counties Tax over payment of Counties Tax' fees. He also recalled speaking with Ms Reddy about the contents of the March letter before it was sent
- e) Mr Khan accepted that the letter was written by Ms Reddy with his authority and he was "ultimately responsible" for the contents of the letter.

Did the March Letter contain disparaging comments?

[12] I also find the March letter contained disparaging comments. It is not necessary for me to repeat the disparaging comments contained in the March letter. I am satisfied the comments are disparaging and fall within the Shorter Oxford Dictionary definition of "Disparaging":

- a) to bring discredit or reproach upon; lower in esteem;
- b) degrade, lower in position or dignity; cast down in spirit; and
- c) speak of or treat slightly or critically; vilify; undervalue, depreciate.

[13] I agree with Judge Inglis in *David Lumsden v Skycity Management Limited* [2017] NZEmpC 30 where she said there is no requirement for comments to be untrue or fabricated to be disparaging. The comments made in the March letter clearly discredited Ms Free and were critical of her performance.

[14] Even if I had taken a different view, based on my review of the documentation provided to me, I have serious doubts that the errors identified in the March letter are true. The errors were in large part based on self-reporting and information supplied by the Jenkins' Group. The Jenkins' Group used the allegations as a means to avoid payment of not only the accounting fees owed to Ms Free/Counties Tax but also to reduce arrears and penalties owing to the Inland Revenue Tax. These amounted to \$80,000.00 for Mr Jenkins and \$47,000.00 for Ms Jenkins.

[15] For completeness, I record I considered but gave no weight to GK Counties' submission that it was professionally bound to provide information to clients about their accounting records. GK Counties was aware of the professional obligations it had to its clients when it entered into the Record of Settlement. It was also aware of the Jenkins' Group alleged errors. Notwithstanding this, GK Counties chose not to limit the Record of Settlement. It is bound by the terms it agreed and it breached those terms.

Provision of letter of 4 March 2014 to third parties

[16] Ms Free contends copies of the March letter were provided by GK Counties to at least four of her major ex-clients. During questioning she confirmed she did not know if two of those witnesses had actually seen the letter. The remaining two were associated parties (the Beazley Group).

[17] Ms Free said Counties Tax had issued civil proceedings against the Beazley Group for recovery of accounting fees. She said that during a Judicial Settlement Conference the lawyer representing the Beazley Group relied on excerpts from the March letter. No discussions on these matters took place outside of this conference.

[18] Section 57 of the Evidence Act 2006 creates a privilege for settlement negotiations or mediation. This privilege can only be waived by all the persons who have that privilege (s 65(5)). Ms Free confirmed she was advised by the Judge that matters discussed at the Judicial Settlement Conference were confidential. She acknowledged that the purpose of the Judicial Settlement Conference was to discuss matters in dispute. She said the Beazley Group had not waived its privilege as to what was discussed at the Judicial Settlement Conference.

[19] I conclude that Ms Free's evidence as to what occurred at the Judicial Settlement Conference with the Beazley Group is privileged.

[20] Even if I had taken a different view I would not have found a breach of the Record of Settlement. Ms Free said the Beazley Group had used the same lawyer who represented the Jenkins' Group. She said this may have been the reason for its knowledge of the March letter as opposed to GK Counties disclosing the letter to them.

[21] I find there is no evidence that GK Counties provided the letter to third parties other than the Jenkins' Group.

Disparaging Comments made to former clients

[22] Ms Free says she understood GK Counties had verbally conveyed the contents of the March letter to the majority of her ex-clients. Under questioning she clarified these clients were told she had made accounting errors and owed money to the Inland Revenue Department.

[23] Ms Free said the clients were told of these matters by Ms Reddy. She said this was while Ms Free was still employed by Counties Tax and before the Record of Settlement was signed.

[24] Ms Free said she knew Ms Reddy was meeting with these clients before Ms Free's employment ended. She knew these meetings were about the clients' accounts but she did not find out what was said to these clients until after she had signed the Record of Settlement. She said her exclusion from these meetings formed part of the personal grievance she brought against the Respondent and which was settled in the Record of Settlement. She was not aware of Ms Reddy speaking with anyone else regarding the contents of the letter other than whilst Ms Free was an employee.

[25] Ms Free's evidence that Ms Reddy defamed her during meetings with clients prior to her employment ending is unchallenged. However, even if disparaging comments were made by Ms Reddy, the meetings with clients all took place prior to the Record of Settlement being executed. This is relevant because firstly the non-disparagement clause did not apply. Secondly, any claim which Ms Free may have had against GK Counties for matters arising prior to the Record of Settlement being signed were settled when the parties executed the Record of Settlement. Paragraph G provides:

“The applicant and respondent have agreed to resolve all issues arising out of the employment relationship and wish to record the terms of their settlement below.”

[26] I find there is no evidence that GK Counties breached the Record of Settlement by making disparaging comments to former clients.

Issue 2: Should a compliance order be made under s137 of the Act?

[27] GK Counties has breached Clause 1(2) of the Record of Settlement. A compliance order is therefore necessary. I make an order pursuant to s 137 (2) of the Act that GK Counties comply with Clause 1(2) of the Record of Settlement.

Issue 3: Should a penalty be imposed under s 149(4) of the Act?

[28] Section 149 (4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority. For a Company that penalty is not to exceed \$20,000.00 (s 135 (2)(b)).

[29] Section 133A of the Act sets out a number of factors the Authority should consider when determining the approximate penalty. These factors include:

- a) The object stated in s 3 of the Act;
- b) The nature and extent of the breach;
- c) Whether the breach was intentional, inadvertent or negligent;
- d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach, because of the breach;

- e) Whether the person in breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- f) The circumstances in which the breach took place, including the vulnerability of the employee;
- g) Whether the person in breach has been previously found to be engaged in similar conduct.

[30] These factors were considered in *Lumsden*. In that case Judge Inglis concluded that two further factors were relevant. Firstly, the need for general and particular deterrence. Secondly, the desirability of broad consistency with other penalties in similar cases.

[31] For the reasons set out below, I find the breach of the Record of Settlement was a significant breach.

- a) The March 2012 letter contained a number of disparaging comments which called into question Ms Free's competency to act as an Accountant. The purpose of the letter was for use by the Jenkins' Group to support a claim of negligence against Ms Free/Counties Tax and to claim monetary relief.
- b) Ms Free said her personal grievance included concerns over conversations that GK Counties was having with her former clients. Her unchallenged evidence was that these conversations involved clients being told she had made errors on their files. The alleged errors identified in the March letter were known to Counties Tax by the time it signed the Record of Settlement. GK Counties and Ms Free were aware of their professional obligations of disclosure to clients. With this knowledge the parties negotiated and agreed to the non-disparaging clause. GK Counties' decision to then write a letter setting out the alleged errors was blatant and deliberate.
- c) The letter resulted in Ms Free suffering an "*insurmountable amount of stress and grief*". She said that "*lifelong friends have stopped talking to me...my reputation has been damaged and it is something someone working in this area of work dealing with peoples financial affairs seldom*

survives...the overall effect on me has been substantial. I have found myself often drawn to tears and have suffered sleepless nights worrying about the effect of the letter”.

[32] I am satisfied that a breach of this nature cannot be condoned. A penalty should be imposed based upon the nature of the breach, and the need for general and specific deterrence.

Quantum of Penalty

[33] Having decided that a penalty is appropriate, I must now determine the quantum. This is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

Step 1

[34] Step one is to identify the number of breaches and the maximum penalty applicable. In this case there has only been one breach of the Record of Settlement. This means GK Counties is liable to a maximum penalty of and pursuant \$20,000.00.

Step 2

[35] Step 2 involves the consideration of the severity of the breach. This requires a consideration of the nature and extent of the breach, whether the breach was intentional, the nature of any loss suffered and whether there have been any previous breaches. I have already stated that I consider this a significant breach. I consider it was blatant and deliberate. I consider it was designed to cause harm to Ms Free.

[36] Ms Free was unable to address the settlement reached with the Jenkins' Group following the March letter. To do so would have breached the confidentiality provisions of the agreement with the Jenkins Group. I therefore have no knowledge of any loss caused to Ms Free by the breach of the Record of Settlement. She has however provided undisputed evidence that her reputation has been damaged. I assess the degree of severity at 50%, a potential penalty of \$10,000.00.

[37] The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or some steps taken to mitigate the effect of the breach, and the personal circumstances of GK Counties. In this case I know of no

mitigating circumstances or steps having been taken. GK Counties continues to maintain that it has done nothing wrong by providing the March letter to third parties. I have no confidence that it will not make further disparaging comments about Ms Free. The need for deterrence remains an important balance against any mitigating factor. I conclude that this stage has a neutral effect on my calculation.

Step 3

[38] Step 3 is an assessment of GK Counties' ability to pay. Mr Khan's evidence is that GK Counties has not traded for some years and it has no assets. The Company was required to be reinstated to the Company Register. I therefore reduce the potential penalty under this stage to \$5,000.00.

Step 4

[39] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties for breach of non-disparagement provisions and confidentiality provisions I conclude an appropriate penalty is \$5,000.00.

Conclusion on Quantum

[40] Adopting the approach applied by Judge Inglis in *Lumsden* I consider it appropriate that part of the penalty be paid to Ms Free as she has suffered the impact of the breach and has been obliged to take steps to enforce her rights. I apply the same ratio of payment as Judge Inglis to reflect this.

[41] GK Counties is ordered to pay \$5,000.00 by way of penalty for breaches of the Record of Settlement. I direct that 75% of that amount (\$3,750.00) is to be paid to Ms Free. The remaining 25% (\$1,250.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[42] Payment of the penalty is to be paid within 28 days of the date of this determination.

Costs

[43] The parties are encouraged to resolve costs by agreement. If that is not possible, then Ms Free has seven days to file a costs memorandum. GK Counties has a further seven days to file its costs memorandum. Ms Free then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

Jenni-Maree Trotman
Member of the Employment Relations Authority