

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 530  
3059372

BETWEEN DANIEL SINGLE  
Applicant  
  
AND OJI FIBRE SOLUTIONS (NZ)  
LIMITED  
Respondent

Member of Authority: Jenni-Maree Trotman  
  
Representatives: Lawrence Anderson, for the Applicant  
David France, counsel the Respondent  
  
Investigation Meeting: On the papers  
  
Submissions and further Information received: 24 June 2019, 1 July 2019 and 30 July 2019 from the Applicant  
1 July 2019 and 25 July 2019 from the Respondent  
  
Date of Determination: 12 September 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Daniel Single was employed by Oji Fibre Solutions (New Zealand) Limited (Oji FS) from 1 October 2018. By agreement, his employment ended by way of resignation on 13 March 2019. The terms of his resignation were recorded in a record of settlement dated that same day (the record of settlement).

[2] Mr Single alleges that Oji FS has breached the record of settlement by making disparaging remarks about him via a video published on YouTube. In addition, by failing to provide him with a record of service. He seeks compliance orders pursuant to ss 137 and 151 of the Employment Relations Act 2000 (the Act) and the imposition of a penalty upon Oji FS in relation to the alleged breaches of the settlement agreement.

[3] Oji FS denies the allegations made by Mr Single. It maintains that it has not breached any terms in the record of settlement and therefore opposes the granting of the remedies sought by Mr Single.

### **The process**

[4] With the parties' consent this investigation was held on the papers. To assist with this process the Authority was provided with an affidavit from Mr Single and affidavits from Naveen Chugh and Maria McRae. Mr Chugh was the person who recorded and published the video at issue on YouTube. He was also Mr Single's supervisor at material times. Ms McRae is employed by Oji FS as the Business Support Manager and was the person responsible for sending the certificate of service to Mr Single. In addition, the parties each filed submissions.

[5] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **Issues**

[6] The issues identified for investigation and determination are:

- a. Did Oji FS breach clause 9 of the record of settlement by making disparaging comments about Mr Single to any third party? If so:
  - i. Should a compliance order be made under s 137 of the Act?
  - ii. Should the Authority order Oji FS to pay a penalty to Mr Single?
- b. Did Oji FS breach clause 5 of the record of settlement by failing to provide Mr Single with a record of service?
- c. Should a non-publication order be made?
- d. Should either party contribute towards the costs of representation of the other party?

## **Relevant background facts**

[7] On 13 March 2019, following confidential discussions between the parties, it was agreed that Mr Single's employment would end by way of resignation on 13 March 2019.

[8] The terms of settlement were recorded in a record of settlement that was signed by a mediator engaged by the Ministry of Business, Innovation and Employment. The material terms were these:

5. The employer will provide the employee with a Record of Service setting out the dates of employment, position held and that employment with Oji Fibre Solutions ended due to resignation.
9. Both parties agree that they will not make any disparaging remarks about the other to any third party.
10. The parties acknowledge that this Agreement evidences an accord and satisfaction and a resolution of all matters associated with the dispute and the cessation of the employment relationship between the employer and the employee. The employee further accepts this Agreement in full and final settlement and discharge of all claims, entitlements, rights or other actions, whether past, present, or future, and known or unknown, which the employee has, had, or might ever have, or take, against the employer relating to that employment or cessation.

[9] Following execution of the record of settlement Mr Single discovered a video on YouTube that he believed was about him. I have viewed this video. The content shows Mr Chugh eating a banana and singing words, and displaying actions, similar to that from the song "Bananas of the world unite".

### **Issue One: Did Oji FS breach clause 9 of the record of settlement by making disparaging comments about Mr Single to any third party?**

[10] Disparage is defined by the Shorter Oxford Dictionary as:

Bring discredit or reproach upon; dishonour; lower in esteem; degrade; lower in position or dignity; cast down in spirit; and speak of or treat slightly or critically; vilify; undervalue; depreciate.

[11] This definition was adopted by the Court in *Lumsden v Skycity Management Limited* who confirmed that there is no additional requirement for untruthfulness or fabrication in the definition of disparage.<sup>1</sup>

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<sup>1</sup> *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [37].

## *Analysis*

[12] Having watched the video I find that it does not make any disparaging comments about Mr Single. It does not identify him in any way so as to be capable of disparaging him. It is a far reach to connect the words “good bye banana” with Mr Single especially where the main body of the song Mr Chugh sang, and the actions he used, were similar to those widely published by various parties on the internet. In addition, the office where the video was recorded did not have any identifying features to evidence it as being Mr Single’s office.

[13] I am satisfied that the video was unconnected in any way to Mr Single and his employment with Oji FS. I find it more likely than not that the video was created for the reasons provided by Mr Chugh in his affidavit, namely that:

I made this video because at the time, my youngest nephew loved a song called “Bananas of the world unite” which he had learned at his local library during song time. My sister had sent a video of the song to me and my nephews would sing the song during our video chat sessions. In response to my nephews, I sent them a short video of me singing the song while I ate a banana.

[14] Mr Chugh’s evidence is supported by a screenshot of the video properties of the video that shows it was created on 1 September 2017 at 9.58 am. A screenshot of Mr Chugh’s family WhatsApp group chat also shows him sharing the “banana video” with his family on 1 September 2017. This was more than a year prior to when Mr Single’s employment with Oji FS commenced on 1 October 2018. I was not persuaded that a second banana video was recorded after this date.

[15] It is also noteworthy that the video was published on YouTube prior to the record of settlement being executed by the parties. That being the case, even if the video was disparaging, it could not have constituted a breach of the record of settlement. The parties expressly agreed at Clause 10 of the record of settlement that the agreement was (emphasis added):

in full and final settlement and discharge of all claims, entitlements, rights or other actions, whether past, present, or future, and known **or unknown** which the employee has, had, or might ever have, or take, against the employer relating to that employment or cessation (emphasis added).

## *Finding on Issue 1*

[16] I find Oji FS did not breach Clause 9 of the Record of Settlement.

**Issue Two: Did Oji FS breach clause 5 of the record of settlement by failing to provide Mr Single with a record of service?**

[17] The record of settlement does not provide a timeframe for the provision of a record of service. However, I accept it was implied that this would be provided within a reasonable time following the execution of the record of settlement.

[18] Having reviewed the affidavit evidence of Mr Single and Ms McRae, and the documentary evidence provided, I find it more likely than not that a record of service was posted to Mr Single on 28 March 2018, being a reasonable time following execution of the record of settlement. However, this certificate was lost between the time it was posted and the date Mr Single's redirection of mail service commenced on 1 April 2019. A further copy of this certificate of service has now been provided to Mr Single. I find Oji FS did not breach the record of settlement on the grounds pleaded.

[19] For completeness I note that in reply submissions filed on 30 July 2019 Mr Single raised for the first time that the wording of the record of service was not compliant with the Record of Settlement. No explanation was provided as to why this matter could not have been raised in an amended statement of problem, after receipt of the statement in reply attaching the certificate. Nor why it was only raised in reply submissions, meaning Oji FS has not had an opportunity to respond. In these circumstances it is not appropriate that the Authority consider this issue. However, I recommend that Oji FS review the terms of the record of settlement and, if it deems the wording of that record of service to be non-compliant, that it re-issue the record of service.

**Issue Three: Non-Publication order**

[20] The Statement of Problem pleads:

The applicant seeks orders preventing publication of the names or other identifying particulars of the parties as the applicant does not want to further publicise these matters.

[21] Evidence supporting Mr Single's application for non-publication was not provided in his affidavit. However, in response to queries from the Authority, a supplementary affidavit was filed in which he raised the following concerns:

- a. That he didn't want his past work issues being the subject for conversation.

- b. He was concerned that the publicity would have adverse consequences on his current role.
- c. Having his name published would draw media attention to his employer and could potentially put his new job at serious risk.
- d. Any attention arising from the Authority's determination could affect his mental health.

### *The law*

[22] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of the Court's discretionary powers has been traversed by a full Court in *H v A*<sup>2</sup> and addressed by Judge Inglis in *XYZ v ABC* where she considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*.<sup>3</sup>

[23] In *XYZ*, Judge Inglis held that the approach advocated by the majority of the Employment Court in *H v A Ltd*; namely that an applicant does not need to make out to a high standard the existence of exceptional circumstances such that a non-publication order is warranted, has been superseded by the recent Supreme Court decision in *Erceg*.

[24] In *Erceg*, the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. While broad discretionary power exists in relation to non-publication orders, that does not mean it is unfettered or can be exercised at the whim of the decision maker.<sup>4</sup>

[25] The Court held that a stringent approach to applications for non-publication orders is required because of the fundamental importance of the principle of open justice. The Court cited the observations of Kirby J in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131, which was cited with approval by the Supreme Court in *Erceg*.<sup>5</sup>

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<sup>2</sup> *H v A Ltd* [2014] ERNZ 38 at [78].

<sup>3</sup> *XYZ v ABC* [2017] NZEmpC 40; *Erceg v Erceg* [2016] NZSC 135.

<sup>4</sup> At [65] and [69].

<sup>5</sup> At [71].

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of the courts, or the issue of suppression orders in their various alternative forms: ... A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[26] In the particular circumstances of XYZ, the Court held the plaintiff had demonstrated the requisite high standard such that the interests of justice required a departure from the usual principle of open justice. There was evidence, including a medical report, of the potential serious impact of publication on the plaintiff's mental state. Publication was also likely to significantly add to the relentless harassment the plaintiff was suffering from her ex-partner. The plaintiff's status as a regulated professional did not of itself operate in favour of non-publication. Her Honour noting that "it seems to me to be wrong as a matter of basic principle and to differentiate between classes of employees based on professional status."<sup>6</sup>

#### *Analysis*

[27] I am not satisfied that Mr Single has proper or sufficient grounds to satisfy the high standard required to depart from the normal principles of open justice.

[28] Mr Single's concern that publication will draw attention to his employer, put his job at serious risk, and affect his mental health is not supported by evidence. As the Supreme Court said in Erceg, an unfortunate incident of the open administration of justice is that embarrassing or damaging facts occasionally come to light. Such considerations have never been regarded as a reason for suppression orders in their various alternative forms.

[29] In addition, I am not persuaded that Mr Single will be in breach of the clause he relies upon in the Institution of Engineering Technology's Rules of Conduct. That clause relates to members advertising and writing articles for publication that are derogatory to the Institution. Mr Single has certainly not published anything derogatory, nor has he authorised the Authority to do so.

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<sup>6</sup> At [75],76 and [79].

## **Costs**

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[31] If they are not able to do so and an Authority determination on costs is needed Oji FS may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. This memorandum should include a copy of its Solicitors' invoice/s and a breakdown of the time they have spent on this matter.

[32] From the date of service of that memorandum Mr Single will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[33] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>7</sup>

## **Outcome**

[34] The overall outcome is:

- a. Oji Fibre Solutions (NZ) Limited did not breach Clause 5 or 9 of the Record of Settlement.
- b. Costs are reserved pending receipt of memoranda from the parties.
- c. This determination is not to be published for 28 days following the date it is issued.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>7</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].