

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 179
3042531

BETWEEN VERONICA BYRNE
 Applicant

AND THE NEW ZEALAND
 TRANSPORT AGENCY
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Richard Harrison, counsel for the Applicant
 Greg Cain and Renee Butler, counsel the Respondent

Investigation Meeting: 18 February 2019

Submissions and
additional documents 18 February 2019 from the Applicant
Received: 18 and 19 February 2019 from the Respondent

Date of Determination: 27 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Veronica Byrne alleges that the New Zealand Transport Agency (NZTA) has breached the terms of a record of settlement entered into with her on 15 September 2015 (the settlement agreement). It did so, she alleges, by making disparaging remarks about her. She seeks compliance orders pursuant to ss 137 and 151 of the Employment Relations Act 2000 (the Act) and the imposition of a penalty upon NZTA in relation to the alleged breaches of the settlement agreement.

[2] NZTA denies the allegations made by Ms Byrne. It pleads that it did not make disparaging remarks about Ms Byrne but, even if this were not the case, the remarks it made were necessary in order to meet its statutory health and safety obligations. It

relies on the duties set out in the Health and Safety at Work Act 2015 (the HSW Act) and the prohibition on contracting out of its provisions contained within s 28.

[3] 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

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

- a. Did NZTA breach Clause 9 of the settlement agreement by:
 - i. Asking WSP Opus to remove Ms Byrne from the Northland Bridges Project?
 - ii. Making statements or comments to other entities?
 - iii. Through the contents of its Memorandum to the Authority on 28 January 2019?
- b. If NZTA breached Clause 9, was NZTA entitled to do so under the provisions of the HSW Act?
- c. If not:
 - i. Should a compliance order be made under s 137 of the Act?
 - ii. Should the Authority order NZTA to pay a penalty to Ms Byrne?
- d. Should either party contribute towards the costs of representation of the other party?

Relevant background facts

[5] Ms Byrne was employed by NZTA as a Maintenance Contract Manager in Northland. Her employment with NZTA commenced on 12 January 2015.

[6] Within a few months of starting with NZTA, relationship issues began to develop between Ms Byrne and other staff members she worked with. These staff members provided sworn affidavits but were not required to appear at the

investigation meeting. With the consent of the parties I shall refer to the staff members as Ms H and Mr V.

[7] Ms Byrne considered the staff members to be acting aggressively towards her and vice versa. A facilitated team meeting on 31 July 2015 to discuss roles and responsibilities within the team did not resolve matters. By 24 August 2015 Ms Byrne's husband had become involved. He contacted Mr V that day asking him if he was going to stop his threatening behaviour towards Ms Byrne. When Mr V tried to respond, he was told to "stop acting like a snivelling child ... stop your threatening behaviour towards Veronica." Mr V reported this incident to his Manager and copied his email into Ms Byrne and Ms H. His email triggered a verbal complaint by Ms Byrne to the effect that Mr V was engaging in threatening behaviour towards her.

[8] NZTA responded the following day asking Ms Byrne for written details of the behaviour that had caused her to become concerned or distressed. Ms Byrne provided a detailed written complaint on 1 September 2015. This raised concerns about the conduct of her Manager, Mr V and Ms H. She alleged that the three individuals had behaved towards her in a bullying and threatening manner, had undermined her work, and had failed to follow NZTA procedures. She provided multiple examples and asked NZTA to resolve her complaint by terminating the employment of the three staff members.

[9] NZTA then commenced an investigation into the allegations. During this process Ms Byrne requested an exit package. Her requests were accompanied by several threatening emails.

The record of settlement

[10] On 15 September 2015, following confidential discussions between the parties, it was agreed that Ms Byrne's employment would terminate by way of resignation on 18 September 2015.

[11] 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:

8. The terms of this Agreement, the fact that a settlement has been reached, and all discussions leading up to and surrounding the settlement, are strictly confidential to the parties and their legal representatives, except:

- a. As required by law, and the Agency's public reporting obligation; and
 - b. The employee may disclose the terms of settlement to her spouse, subject to them observing the confidentiality obligations in this clause.
9. Both parties agree that they will not make any disparaging remarks about the other to any third party.

The Northland Bridges Project

[12] In or about March 2016 NZTA, as head contractor, entered into a contract with WSP Opus (Opus) for the Northland Bridges Project (the Bridges Project). The Bridges Project involved the replacement of 10 one-way bridges on the State Highway network in Northland. NZTA, as the head contractor of the project, engaged Opus on three of the bridge sites. Opus was responsible for the Business Case, Procurement of Design and Construction, and Contract Management on these sites.

[13] Material to this investigation was an agreement between NZTA and Opus that:

The written approval of the client [NZTA] shall be obtained by the Consultant [Opus] before Key Personnel can be replaced or substituted.

If the Client decides for good reason that one of the Key Personnel is unsuitable:

- The Client can require the Consultant not to have that person perform the Services; and
- The Consultant shall then replace that person with someone acceptable to the Client; and
- The Client shall not bear any cost or liability arising from the replacement of that person.

[14] In November 2017 Opus employed Ms Byrne on a casual contract. Her role was to provide contract administration support to the Engineer's Representative on the Bridges Project. The Engineer's representative was NZTA's key contact person at Opus.

[15] In or about February 2018 Kevin Johnson was appointed by NZTA to manage the delivery of the Bridges Project on budget and time. His role required him to work closely with Opus and particularly the Engineer's Representative to ensure targets were met.

[16] During his initial briefing Mr Johnson became aware that Ms Byrne was working for Opus on the Bridges Project. He became concerned that personal issues he was having with Ms Byrne would impact on his ability to undertake his work as he may have to work closely with her. He said he was worried that, in the course of their work, Ms Byrne would behave in the same way she had been acting towards him outside of work and that her husband would find reasons to continue to threaten him and his family.

NZTA notified of potential health and safety risk

[17] Mr Johnson approached Jim Sephton, the Principal Project Manager at NZTA, with his concerns. Mr Johnson explained to Mr Sephton that he lived in an isolated and rural location near Ms Byrne and her family. He said that Ms Byrne and her husband had made threats to him and other neighbours. He talked about there being a number of disputes and provided details. This included an incident on 18 January 2018 where:

[16] On Saturday afternoon on 18 January 2018, I returned their stock (nine cows for the sixth time, that were on my lawn, and causing damage) to the Byrnes' paddock. As I was turning my ute around to come back, Veronica appeared near my window screaming abuse about my wife and threatening to shoot both her and me. This appeared to result from a conversation my wife had recently had with her, when my wife asked her to sort out her fences to prevent wandering stock. I am aware that she has an illegal firearm and has been seen by other neighbours of ours shooting at random across the public road and at wild birds.

[17] I returned to my property and shortly afterwards, Mr Byrne appeared in my drive way and squared up to me. He asked aggressively if I "want[ed] to have a fight about it?". Fiona my wife then appeared and he calmed down. I found this behaviour to be threatening and unnecessary in the circumstances.

[18] Mr Johnson told Mr Sephton he wanted him to know about the issues as they may impact on his ability to work with Ms Byrne on the Bridges Project. Mr Sephton expressed concern about Mr Johnson's health and safety and that of his family and other staff members involved on the Project.

[19] Thereafter Mr Sephton mentioned Mr Johnson's concerns to Ms H. Ms H told him that she would not feel comfortable working with Ms Byrne. She told him she had had issues with Ms Byrne when she had worked at NZTA and made clear that she would not feel safe working alone with Ms Byrne.

NZTA take steps to protect the safety of its staff

[20] Following these discussions Mr Sephton was concerned that he could be placing his staff members at significant risk if he required them to work with Ms Byrne. He said he was concerned that Mr Johnson's role would require him to have fortnightly meetings with Ms Byrne that would cause him a great deal of anxiety and stress. As his role was crucial to the Bridges Project, he needed him to feel safe at work and able to perform effectively. He was also aware Ms Byrne would be required to work from NZTA's offices from time to time to prepare for meetings and at other times to work closely with NZTA staff on the Project.

[21] Mr Sephton decided he would request Opus to remove Ms Byrne from the Bridges Project in accordance with the terms of the contract NZTA had entered into with Opus. However, before notifying Opus of his decision, he spoke with NZTA's human resources team to make sure they were aware of the concerns raised by Mr Johnson and Ms H, that he was following the correct process in terms of the contract with Opus, and that NZTA was doing what was reasonably practicable to ensure its staff were safe while at work.

The events on 22 February 2018

[22] A meeting took place on 22 February 2018. Present at this meeting was Mr Sephton, a representative from NZTA's People Team, its Lead HR Advisor, Mr Johnson and Ms H. At this meeting Mr Johnson outlined the issues that he had faced with Ms Byrne and her husband and expressed concern that she would not work with him constructively on the Bridges Project and would behave in a threatening manner towards him in the workplace. He was also concerned about his safety both at work and towards him and his family at home.

[23] Ms H also explained that because of Ms Byrne's behaviour towards her when she had been at NZTA, she would not feel safe being on her own with her. She also said she did not want to be in a position where she was subject to Ms Byrne's behaviour or her making further complaints about her. She expressed that she believed there was a significant risk to NZTA staff if they worked with Ms Byrne.

[24] Mr Sephton also communicated his concerns about ensuring staff safety. He asked HR for advice as to the best way forward and was told that NZTA, as the client, had the ability to say who was acceptable to work on the Project and did not have to provide a reason. It was up to him, as the Project Manager, to make the decision but if he decided to do so he must avoid making comments about Ms Byrne's previous employment and not provide any details as to why he wanted her to be removed.

NZTA requests Ms Byrne be removed from the Bridges Project

[25] Later that day Mr Sephton met with Opus' Project Manager to discuss the Bridges Project and changes in the personnel working on the Project. During this meeting he outlined his concerns about the Engineer's Representative, who he did not consider was working well with the rest of the team, and asked for his removal. He also asked for Ms Byrne to be removed from the Project but did not provide any reasons for that request. While not expressly stated, Opus understood that if Ms Byrne was not removed NZTA would take the Bridges Project away from it as the parties had not signed a contract.

[26] The following week Peter Houba, Opus' Business Manager in Whangarei, phoned Mr Sephton. He asked why Ms Byrne was to be removed. Mr Sephton would not provide a reason. Mr Houba then spoke with Ms H. In response to his queries, she confirmed NZTA required Ms Byrne to be removed and said she could not tell him anything further.

[27] On 9 March 2018, Mr Houba and WSP Opus' Project Manager met with Mr Johnson. The purpose of the meeting was for Mr Johnson to provide Opus with a briefing on how he saw his role and to discuss current issues on the Bridges Project. At the end of the meeting Mr Houba queried why Ms Byrne was being removed from the project. Mr Johnson said he was not able to elaborate further.

Ms Byrne is removed from the Bridges Project

[28] On the afternoon of 9 March 2018, Mr Houba and Opus' Project Manager met with Ms Byrne. An email sent by Mr Houba on 12 March 2018 confirmed the matters they discussed, namely:

1. NZTA advised that they cannot accept you working on their project.
2. They advised this is a confidentiality matter.

3. As you know you are on a casual contract specifically for the Northland Bridges Contract Administration.
4. This is immediately effective and you are not to attend work at Opus in Whangarei next week.
5. New Week [Opus' Project Manager] and myself will assess our workload for alternative work for you.
6. We realise this is a shock for you and will assist you as best we can, we provided Veronica with our Employee Assistance Programme number.

[29] Later that day, Ms Byrne asked Mr Houba what she would find if she did an Official Information Act request. He advised her that all communications with NZTA were verbal. Ms Byrne then told him she had a confidential employment settlement with NZTA in 2015. She said that she had been bound by confidentiality but those obligations had expired in late 2017. She did not provide him with any further detail.

[30] On 16 March 2018 Ms Byrne phoned Mr Houba asking for the names of the NZTA staff that had requested she be taken off the Bridges Project. He did not provide her with any names. He advised her that Opus would continue to look for alternative work for her and would be in touch if something came up. Ms Byrne remained a casual employee in their system until 20 August 2018 during which time no work became available for her.

[31] Since this time, Ms Byrne has applied for jobs but has been unsuccessful.

Issue One: Did NZTA breach Clause 9 of the settlement agreement by making disparaging remarks?

The Law

[32] 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.

[33] 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.¹

¹ *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [37].

Disparagement by NZTA's request to Opus to remove the Applicant from the Bridging Project?

[34] I am satisfied, in the present circumstances that NZTA's comments were not disparaging.

[35] Mr Sephton simply asked WSP Opus to remove Ms Byrne from the Bridges Project. He did not divulge any further information when making this request. When Ms H and Mr Johnson were questioned by Mr Houba, they too refused to provide any comment on the matter.

[36] NZTA's request was so vague that there could have been any number of reasons behind the request that did not necessarily reflect negatively on Ms Byrne or create an unfavourable or critical impression of her. For example, Mr Sephton said that at the time NZTA had concerns that Opus was over-resourced. The programme of work was initially envisaged to involve construction of 10 bridges but, by early 2018, construction had been limited to three bridges. At the point when NZTA requested Ms Byrne to be removed, NZTA had resolved to reduce the number of personnel to ensure that it had the right people doing the right tasks in order to meet its deadline. In accordance with the contract with Opus, it had already requested the removal of the Engineer's Representative and, during these discussions, raised its request for the removal of Ms Byrne.

[37] Mr Harrison for Ms Byrne submitted that the absence of explanation worsened the situation "as the recipient of the direction was left to speculate about what Ms Bryne may have done to bring about such a hostile response from NZTA". While there may have been some speculation as to why the removal request was being made, there is no evidence that the request led Opus to speculate in a negative way about Ms Bryne prior to Opus asking Ms Byrne to stop working on the Bridge Project.

[38] In an email dated 2 March 2018 from Opus' Project Manager to Opus' HR department he recorded:

The Client [NZTA] has come to me and said that we need to remove her from the contract.

When I pushed for a reason, he refused to tell me.

From our perspective, she has been performing well.

I believe that he wants to bring someone onto the contract from the Client side who has history with Veronica, but this is only my assumption.

[39] It was not until Ms Byrne told Mr Houba on 9 March 2018 that there was “a confidential employee dispute which had occurred between herself and NZTA” that Mr Houba speculated that “something substantial must have happened” in Ms Byrne’s employment with NZTA and that this was “negative”. This conclusion was due to the comments made by Ms Byrne and not as a result of NZTA’s request for her removal from the Bridges Project.

[40] For completeness I acknowledge the parties’ submissions and Ms Byrne’s reliance on *Lumsden v Skycity Management Limited*. However, I consider this case to be distinguishable on its facts. What is disparaging must be determined on the facts of each case applying the ordinary meaning of disparaging. The facts in the present case were markedly different than *Skycity* in two crucial respects. Firstly NZTA made no agreement to work with Ms Byrne in the future. Secondly no adverse comments were made by NZTA, or seen by Opus being the party to whom the allegedly disparaging comments were made.

Finding on first alleged defamatory comment

[41] NZTA’s request for Ms Byrne to be removed from the Bridges Project did not amount to a defamatory remark. I accordingly find NZTA did not breach Clause 9 of the Record of Settlement.

Disparagement through comments made to third parties?

[42] Ms Byrne alleged she was unsuccessful in securing employment with various entities due to disparaging remarks made by NZTA to these entities. She said her claim was based on her “suspicions”. She said she had never had trouble finding a job before she entered into the settlement agreement with NZTA. She was unable to provide the Authority with any evidence to support this claim.

Finding on second alleged defamatory remark

[43] In the absence of any evidence of disparaging comments this claim is dismissed.

Disparagement in the memorandum to the Authority dated 28 January 2019?

The Claim

[44] On 28 January 2019 NZTA, through its legal representative, filed a memorandum with the Authority within which it raised concerns about the safety of its witnesses at the Authority's investigation meeting. Ms Byrne alleges that the comments made in the memorandum constitute a breach of the settlement agreement by way of disparaging remarks about herself to a third party.

[45] NZTA denies this allegation. It submits the filing of its memorandum was:

...a necessary step for NZTA to take, both to ensure the safety of its employees, and to ensure that it was in a position to respond to the applicant's claim. The respondent's understanding is that if security were not to be provided, one or more of its witnesses would likely not have agreed to attend the Investigation Meeting (or cooperated in preparing briefs of evidence). This would have left the Agency in the position of having to obtain witness orders for its own employees, including the decision-maker, and having little idea as to what they might say.

[46] Mr Cain, on behalf of NZTA, submits that no breach can be found by the Authority for two reasons. Firstly, based on the well established immunity from suit for evidence and legal submissions prepared or produced in legal proceedings including necessary preliminaries to that. Secondly, NZTA's obligations under the HSW Act override any obligations under the settlement agreement to the extent they are inconsistent.

[47] For reasons that will become apparent, I agree with the NZTA.

Analysis

[48] The existence of immunity from suit was confirmed in *New Zealand Defence Force v Berryman* by the Court of Appeal.² In that case a bridge on land owned by the Berrymans collapsed when a worker was driving over it, leading to his death. There was a Coroner's Inquest, in the course of which there was evidence led and submissions made by the Army, which had constructed the bridge. The Berrymans later claimed that the Army acted improperly in not releasing an earlier report by an Army Court of Inquiry, and in evidence and submissions which were given and made

² [2008] NZCA 392.

to the Coroner. The Berrymans sued the Defence Force, claiming misfeasance in public office.

[49] The Court of Appeal held that:³

- a. Those who give evidence or make submissions to a court enjoy immunity from suit.

The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation.

- b. The immunity is confined to what is said in court and necessary preliminaries to that.
- c. The case fell squarely within the immunity. It involved an attempt to impose civil liability on a party in relation to evidence given and submissions made in the course of judicial proceedings.

[50] While the Authority is not a Court, I accept that the above principals apply to it.

[51] The Memorandum filed by NZTA was a submission made to the Authority supporting an application for security to be provided at the investigation meeting. The information provided therein was necessary in order for the Authority to assess and determine what reasonable steps needed to be put in place to safeguard the parties attending the investigation meeting. This information was also relevant to the Authority's substantive investigation and was later incorporated into affidavits filed by NZTA's witnesses.

Finding on third alleged defamatory remark

[52] I find NZTA has immunity against a claim by Ms Byrne for a breach of clause 9 of the Record of Settlement relating to its Memorandum of 28 January 2018.

³ At n 2 at [67]-[70].

Health and Safety Defence

[53] In light of my findings that NZTA did not breach Clause 9 of the settlement agreement it is unnecessary to consider NZTA's additional defences under the HSW Act.

Costs

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

[55] If they are not able to do so and an Authority determination on costs is needed NZTA 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. From the date of service of that memorandum Ms Byrne 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.

[56] 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.⁴

Outcome

[57] The overall outcome is:

- a. NZTA did not breach Clause 9 of the Record of Settlement.
- b. Costs are reserved pending receipt of memoranda from the parties.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].