

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 473
3062313

BETWEEN SOUTHERN MILK
 TRANSPORT LIMITED
 Applicant

A N D KERRY DUNCAN
 Respondent

Member of Authority: Peter van Keulen

Representatives: Janet Copeland, counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 9 August 2019

Submissions Received: 9 August 2019 for the Applicant

Date of Determination: 14 August 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Duncan has breached the record of settlement dated 5 April 2019 between himself and Southern Milk Transport Limited by discussing the terms of a record of settlement and by making disparaging remarks about Southern Milk Transport Limited.**
- B. Mr Duncan must comply with the record of settlement dated 5 April 2019 between himself and Southern Milk Transport Limited. In particular Mr Duncan should not disparage Southern Milk Transport Limited and he must keep the terms of the record of settlement confidential.**

C. Mr Duncan must pay a penalty of \$3,000.00. \$2,250.00 is to be paid to Southern Milk Transport Limited. The remaining \$750.00 is to be paid to the Authority and the Authority will then pay it into a Crown bank account.

D. Mr Duncan is to pay Southern Milk Transport Limited \$1,800.00 as a contribution to its legal costs and \$71.56 for the filing fee in this matter.

Employment relationship problem

[1] Kerry Duncan and Southern Milk Transport Limited signed a record of settlement (the “Record of Settlement”) on 5 April 2019. A mediator from the Mediation Services of the Ministry of Business Innovation and Employment signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the “Act”).

[2] Southern Milk contends that Mr Duncan has not complied with clause 1 of the Record of Settlement relating to confidentiality and non-disparagement.

[3] Southern Milk seeks a compliance order and a penalty for the breaches by Mr Duncan.

Preliminary matter

[4] The statement of problem in this matter was served on Mr Duncan on 28 May 2019. Mr Duncan has not filed a statement in reply, he did however acknowledge receiving the statement of problem as he contacted the Authority Officer on 29 May 2019 and advised that he did not want to be involved and he would not engage in the Authority’s process.

[5] Despite this advice the Authority advised Mr Duncan of the time and date for the case management conference that it subsequently scheduled and invited him to attend. Mr Duncan chose not to participate in the case management conference.

[6] In that case management conference I made directions for the investigation of this matter, including setting it down for an investigation meeting. Mr Duncan was then served with a notice of direction and notice of investigation meeting advising him of the date, time and venue for the investigation meeting. The notice of investigation meeting advised that *“If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.”*

[7] On 8 August 2019 the Authority reminded Mr Duncan of the investigation meeting.

[8] I am satisfied that Mr Duncan was aware of this matter and in particular of the date, time and place for the investigation meeting. There was no apparent reason why this matter could not continue in his absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

Background facts

[9] Mr Duncan was employed by Southern Milk between July 2015 and August 2017. In the course of Mr Duncan's employment coming to an end an employment relationship problem arose.

[10] In order to attempt to resolve the employment relationship problem, the parties attended mediation on 5 April 2019. The parties reached an agreement in full and final settlement, which was recorded in the Record of Settlement.

[11] The operative clause of the Record of Settlement is:

1. These terms of settlement so far as the law allows, are confidential to the parties. The parties undertake not to make any disparaging comments about each other to any third parties.

[12] Almost immediately after 5 April 2019, Southern Milk discovered that Mr Duncan had told at least one person and possibly others that he had won (in a reference to his claim against Southern Milk) and Southern Milk had paid him a substantial sum of money.

[13] Southern Milk responded to this by contacting Mr Duncan's lawyer at the time, through their own lawyer, advising her of the apparent breach of the Record of Settlement. In response, Mr Duncan's lawyer advised that she had reminded Mr Duncan that the terms of the Record of Settlement are confidential.

[14] About one month later, in what appears to be an angry outburst, Mr Duncan made loud and very clear comments about employees and Southern Milk generally. This was in a public space and there were several people around who would have heard what was said and would have known the individuals Mr Duncan was referring to as well as knowing of and about Southern Milk.

[15] The comments were derogatory, critical and undermining of the individuals and Southern Milk and if people who heard these comments believed them to be true that would be harmful to individuals and Southern Milk.¹

[16] These events were not contested by Mr Duncan as he chose not to participate in my investigation. And, in any event I found the witnesses to be credible and accurate in their recollection of what occurred. I am satisfied that the two incidences complained of occurred.

The issues

[17] Based on the findings of what occurred, I must determine the following issues:

- (a) Has Mr Duncan breached the Record of Settlement – were the comments he made disparaging of Southern Milk and/or were the statements he made about winning and receiving a payment from southern Milk, disclosure of information about the terms of the Record of Settlement; and
- (b) If there has been a breach of the Record of Settlement, is a compliance order required and is a penalty appropriate?

Has Mr Duncan breached the record of settlement?

[18] Clause 1 of the Record of Settlement is straightforward; it requires the parties to keep the terms of the Record of Settlement confidential and not to make disparaging comments about the other party.

[19] I am satisfied that Mr Duncan has breach the confidentiality obligation in the Record of Settlement and the comments he made are disparaging of Southern Milk.

[20] Mr Duncan has breached clause 1 of the Record of Settlement.

Is it appropriate to make a compliance order?

[21] As Mr Duncan has breached the Record of Settlement a compliance order is necessary. I will make an order for compliance pursuant to s 137(2) of the Act.

¹ I consider it unnecessary to name the individuals Mr Duncan spoke about or to repeat the statements in detail as it might only serve to cause further harm to those people and Southern Milk. But in doing so I do not suggest in any way that what Mr Duncan said about anyone or about Southern Milk was correct.

Is it appropriate to impose a penalty against Mr Duncan for the breach of the Record of Settlement?

[22] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement in a record of settlement signed pursuant to s 149 of the Act, is liable to a penalty imposed by the Authority.

[23] Section 135(2)(a) of the Act provides that an individual who is liable for a breach of a record of settlement is liable to a penalty not exceeding \$10,000.00.

[24] Section 133A of the Act lists the factors relevant to my assessment of the quantum of any penalty. In addition, in *Borsboom v Preet PVT Limited*² the Employment Court set out the considerations for awarding penalties, in the form of a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards.

[25] More recently, in *Allan Nicholson v Matthew Ford*³ Chief Judge Inglis analysed s 133A of the Act and *Preet* and set out guidance on applying the principles to the imposition of penalties. In particular Her Honour stated:

[18] Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);

² [2016] NZEmpC 143

³ [2018] NZEmpC 132

7. previous conduct (mandatory statutory consideration 7);
8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4);
and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

[26] I will apply this approach to my assessment of the claim for a penalty.

What is the number of breaches for penalty-setting purposes in this case?

[27] There are two known breaches of the Record of Settlement, which occurred against a backdrop of possibly more breaches.

Mandatory statutory consideration 1: the object stated in s 3

[28] In terms of an employment relationship that has come to an end, three parts of the object of the Act are relevant; protecting the integrity of individual choice, promoting mediation as the primary problem solving mechanism and reducing the need for judicial intervention.

[29] In my view therefore, protecting and upholding agreements made through mediation, which represent individual choice and avoid the need for judicial intervention, is a consideration impacting on my assessment of any penalty. A breach of a record of settlement is to be treated seriously in order to uphold these things.

Mandatory statutory consideration 2: the nature and extent of the breach

[30] The breaches are reasonably serious and go the heart of the protection Southern Milk sought in the Record of Settlement. I am satisfied that the breaches undermined Southern Milk's reputation and this is particularly relevant as the industry that Southern Milk operates in is highly competitive.

[31] The breaches also indicate that Mr Duncan was not prepared to take the settlement and move on – he had to boast about his perceived success and then let what appears to be anger

at Southern Milk spill over into a public display, which was unnecessary and unacceptable in the circumstances.

[32] The nature and extent of the breaches are serious and are aggravating features.

Mandatory statutory consideration 3: whether Mr Duncan's breaches were intentional, inadvertent or negligent

[33] I infer from the circumstances of the breaches and because of the language used that Mr Duncan's breaches were intentional. This is also an aggravating feature.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered

[34] It is difficult to measure the extent of any damage suffered by Southern Milk, but in the circumstances I am satisfied that damage to its reputation, as a result of Mr Duncan's actions, was likely.

[35] I put less weight on the loss suffered by Southern Milk as there is no direct evidence of actual loss but I accept some loss and damage to its reputation was likely.

Mandatory statutory consideration 5: whether Mr Duncan has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[36] Mr Duncan has not taken any steps to remedy or rectify his behaviour. He has ignored the Authority process and outside of that there is no evidence that he has attempted to apologise for his behaviour and/or make any statements to retract anything he may have said which breached the Record of Settlement.

Mandatory statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place

[37] There are a few factors which I consider relevant in terms of the circumstances of the breach. The first breach happened almost immediately after the Record of Settlement had been signed and Southern Milk chose not to enforce its rights at that point but simply remind Mr Duncan of his obligations. The second breach happened after this reminder and in a public place with no apparent mitigating circumstances for Mr Duncan, which might explain his actions.

[38] Overall, both breaches appear to be blatant and vindictive and this is another aggravating feature.

Mandatory statutory consideration 7: whether Mr Duncan has previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

[39] There was no evidence that Mr Duncan had engaged in similar conduct prior to these events. This is a mitigating circumstance for Mr Duncan.

Preet additional mandatory consideration 1: deterrence, having regard to the particular person to be penalised and the wider community of employers

[40] While there is nothing to suggest that Mr Duncan has engaged in similar conduct before, there is a need for him to understand that he should respect the terms of the agreements he enters into. The confidentiality and non-disparagement were key issues for Southern Milk and Mr Duncan cannot simply ignore his obligations because he wishes to boast about his perceived success or because of some residual anger at Southern Milk.

Preet additional mandatory consideration 2: degree of culpability

[41] In my view, Mr Duncan's culpability is high. These were deliberate breaches and the second occurred after he was reminded of his obligations.

Preet additional mandatory consideration 3: the general desirability of consistency in decisions on penalties

[42] Counsel referred me to recent Authority determinations dealing with breaches of records of settlement – these were cases dealing with breaches of confidentiality or non-disparagement (or both) and involved a single breach or two or three breaches. A review of these cases indicates that penalties range from \$2,000.00 to \$6,000.00. I note however that the two determinations where the higher amounts were awarded were imposed against companies, which have a higher maximum penalty of double that for an individual. So in the context of considering what I might impose against Mr Duncan the value of the higher end penalty is \$3,000.00

[43] I am persuaded in this case that the factors I have considered above align with the higher penalties awarded.

Preet additional mandatory consideration 4: ability to pay

[44] I have no evidence on this aspect and it has no impact on my assessment of the penalty to award.

Preet additional mandatory consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

[45] Based on all of the factors assessed above, many of which are aggravating, I believe I should impose a penalty of \$3,000.00. Standing back and assessing this outcome against the breach I am satisfied that that is appropriate and proportionate.

Conclusion

[46] I will impose a penalty on Mr Duncan and given the circumstances of the breach and all of the factors outlined in my assessment I set the penalty at \$3,000.00.

[47] Adopting the approach applied by Judge Inglis (as she was then) in *David Lumsden v Skycity Management Limited*⁴ I also consider it appropriate that part of the penalty be paid to Southern Milk as it suffered the impact of the breach and it has been obliged to take steps to enforce its rights.

[48] Mr Duncan must pay \$2,250.00 of the penalty to Southern Milk and the balance to the Authority.

Orders

[49] Mr Duncan has breached the Record of Settlement.

[50] Mr Duncan must comply with the Record of Settlement. In particular, Mr Duncan should not make any disparaging comments about Southern Milk.

[51] Mr Duncan must pay a penalty of \$3,000.00. I direct that \$2,250.00 is to be paid to Southern Milk. The remaining \$750.00 is to be paid to the Authority and the Authority will then pay it into a Crown bank account.

⁴ [2017] NZEmpC 30

Costs

[52] Southern Milk sought costs on the basis of the daily tariff. Counsel submits that an uplift to the daily tariff is appropriate to reflect the work done.

[53] Costs should follow the event and it is appropriate for me to make an assessment based on the daily tariff, applying it to part of one day. The actual time of the investigation meeting was closer to one fifth of a normal hearing day. However, I do not think a reduction of the daily tariff by 80% accurately reflects the work involved in preparing and lodging the statement of problem, attending on the case management conference, preparing witness evidence, preparing for the investigation meeting including preparing any cross-examination (in case Mr Duncan did attend the investigation meeting) and submissions and attending the investigation meeting.

[54] I consider 40% of the daily tariff to be an appropriate reflection of the work involved. The applicable daily tariff is \$4,500.00 so I order Mr Duncan to pay \$1,800.00 as a contribution to Southern Milk's costs. Mr Duncan must also pay \$71.56 for the filing fee on the statement of problem.

Peter van Keulen
Member of the Employment Relations Authority