

[2] Water Mart Wairarapa 2017 Limited claims Mr Beal has breached the record of settlement and seeks compliance orders and the imposition of penalties.

[3] By consent this determination has been dealt with on the papers before the Authority which includes untested affidavit evidence.

[4] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Water Mart and Mr Beal 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.

Record of settlement

[5] The parties reached an agreed settlement of the employment relationship problems between them. The settlement was recorded in a record of settlement and signed by a Ministry of Business, Innovation and Employment Mediator pursuant to section 149 of the Employment Relations Act 2000 (the Act).

[6] The settlement agreement contained a non-disparaging clause in the following terms:

It is agreed that neither party will make any disparaging or negative comments about the other party of the Company's employees to any third party or person.

[7] Water Mart claims Mr Beal breached this term of the record of settlement. Mr Beal denies the claims.

Alleged breaches

[8] On 3 February 2019 Mr Beal made comments posted on his Facebook page which among other things denigrated Water Mart's website page and was negative about Mr McNaughton's experience in the plumbing industry. The post implied that the business was beginning to fail under Mr McNaughton's leadership and that he was not listening to the staff.

[9] Mr McNaughton became aware of the post on 4 February and immediately emailed Mr Beal to ask him to cease and desist from making disparaging comments and advised Mr Beal he considered the post to be a breach of the record of settlement.

[10] That same day Mr McNaughton instructed a firm of solicitors to write to Mr Beal making a number of demands including that the post be taken down, a written undertaking that he would comply with all of the provisions of the record of settlement, pay a sum of compensation and a sum for legal fees incurred by Water Mart.

[11] Later that same day Mr Beal emailed the law firm and advised that the post had been deleted but rejected the claim for compensation and payment of legal costs.

Conclusion

[12] The public interest in having terms of a settlement agreement, made and certified in mediation, honoured by the parties to that settlement agreement favours an order for compliance. I find the comments posted were disparaging and negative and therefore a breach of the record of settlement.

[13] The Act states that settlement agreements certified pursuant to section 149 are final, binding and enforceable. It is appropriate for the compliance order sought to be made.

[14] Pursuant to s 137 of the Act Mr Beal is ordered to comply with all aspects of the record of settlement.

Penalties

[15] Water Mart has asked the Authority to impose penalties on Mr Beal for his breach of the record of settlement. Mr Beal's post was in the public domain for about 24 hours or less. There is no evidence of what if any impact the post has had on Water Mart.

[16] I have concluded it is not appropriate to impose a penalty on Mr Beal and Water Mart's application for the imposition of a penalty is declined. After being alerted to the concerns held by Water Mart he took steps to remove the post meaning it was only visible for, at the most, 1 day. There is no evidence of any harm to Water

Mart, although in his untested affidavit Mr McNaughton told me employees who had been “tagged” into the post were unhappy with it.

Costs

[17] Water Mart has been successful to the extent that a compliance order has been issued to Mr Beal. The investigation and determination of this matter has been dealt with on the papers before the Authority.

[18] Taking all of the circumstances of this case into account I am of a mind to let costs lie where they fall. Both parties have had a modicum of success. However, Mr Beal is ordered to reimburse Water Mart the filing fee as a contribution to its costs. Payment is to be made within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority