

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 452
3094892

BETWEEN TIMOTHY LEVCHENKO-
SCOTT
Applicant

AND PRESBYTERIAN SUPPORT
CENTRAL CHARITABLE
TRUST
Respondent

Member of Authority: Trish MacKinnon

Representatives: Andy Bell, counsel for the Applicant
David Patten, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 12 May and 10 June 2020 from the Applicant
3 June 2020 from the Respondent

Date of Determination: 2 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Timothy Levchenko-Scott claims his former employer breached the terms agreed in a Record of Settlement and signed by a mediator employed by the Ministry of Business, Innovation & Employment (MBIE). He seeks an order for immediate compliance and the imposition of a penalty on the respondent.

[2] Presbyterian Support Central Charitable Trust (PSC) denies it has breached the terms of the Record of Settlement. It does not accept there is a need for the Authority to issue a compliance order and opposes the imposition of a penalty.

[3] In the course of a telephone conference with the parties it was agreed the Authority would determine this matter on the papers by way of affidavits and submissions. Mr Levchenko-Scott provided an affidavit and submissions. PSC provided submissions only.

[4] This determination has been issued outside the timeframe set out in s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

Background

[5] Mr Levchenko-Scott was a manager in one of the residential facilities operated by PSC.

[6] PSC is a charitable trust that is part of a group of seven regional organisations under the Presbyterian Support New Zealand banner. It provides health and social services and, through its Enliven arm, PSC operates aged care residential facilities and services for older people.

[7] The parties attended mediation on 10 April 2019 after Mr Levchenko-Scott had raised an employment relationship problem. They resolved the matter and signed a Record of Settlement that day. The MBIE mediator certified she had explained to the parties, before she signed the agreed terms of settlement, the effect of ss 148A, 149(1), and 149(3) of the Act and was satisfied they understood the effects of those statutory provisions before affirming their request that she sign the agreed terms.

[8] Section 148(A) applies to certain entitlements that may be the subject of mediation and agreed terms of settlement and need not be discussed further here. Section 149(1) concerns the confidentiality of mediation. Section 149(3) provides that the agreed terms of settlement are final, binding on, and enforceable by, the parties; may not be cancelled under specified provisions of the Contract and Commercial Law Act 2017; and may not, except for enforcement purposes, be sought by any party to be brought before the Authority.

[9] The terms of settlement agreed between Mr Levchenko-Scott and PSC included Mr Levchenko-Scott's resignation and the following terms pertinent to his current claim:

2. The parties agree that neither will disparage nor speak ill of the other and non-disparagement extends to all forms of social media.
6. PSC will provide a written reference to Tim on PSC letterhead by 19 April 2019, the text of which is contained in the addendum to this settlement agreement. If contacted by a third party, PSC will restrict its comments to those which are consistent with the text of the reference.

[10] The text of a written reference to be provided to Mr Levchenko-Scott was appended to the Record of Settlement. It outlined the role Mr Levchenko-Scott had fulfilled in PSC; the length of time he had been employed there; and the responsibilities he had in his managerial position. These included both fiscal and personnel responsibilities. The agreed text attested to Mr Levchenko-Scott's professionalism, analytical skills, process-following and personnel management.

[11] The signatories to the Record of Settlement were Mr Levchenko-Scott and a member of PSC's Senior Leadership Team (the SLT manager). The name below the signature panel of the reference text was that of an Enliven manager (the Enliven manager).

The alleged breaches

[12] After the mediation with PSC, Mr Levchenko-Scott moved to Australia and sought work there. He received three provisional offers of employment between July and December 2019, each of which was withdrawn after the prospective employers had reference checked him.

[13] Mr Levchenko-Scott's evidence is that, when prospective employers asked PSC referees whether they would employ him again, they had answered "no". They had referred to his failure to align with the organisation's values when asked "why not". Mr Levchenko-Scott attributes the withdrawal of offers of employment to the employer's responses.

[14] PSC, in its statement in reply and in submissions made on its behalf by Mr Patten, said the SLT manager completed "two positive verbal references" for Mr Levchenko-Scott to prospective employers. It acknowledged that, in answer to questions from them as to whether she would employ Mr Levchenko-Scott again, she answered truthfully "no" but said he was honest and reliable. When asked why she would not employ him again, PSC says the SLT manager responded that Mr Levchenko-Scott did not fit with, and align to, the values of PSC.

[15] With regard to the Enliven manager, PSC says she had a number of enquiries from prospective employers of Mr Levchenko-Scott and she was always positive about him. It acknowledges that, in respect of one enquiry, and in answer to the question whether PSC would employ him again, the manager responded truthfully that she would not. When asked the

reason, the Enliven manager said, without elaboration, that he did not fit with the values of PSC.

Issues

[16] The issues for determination are:

- (a) Whether PSC breached the settlement agreement;
- (b) Whether compliance should be ordered; and
- (c) Whether a penalty should be imposed.

Breaches and compliance

[17] Mr Bell submits that PSC breached clauses 2 and 6 of the settlement agreement and made disparaging comments critical of Mr Levchenko-Scott to prospective employers. It did this on three occasions to three different prospective employers when it told them PSC would not employ Mr Levchenko-Scott again, stating he did not align with its values. Mr Bell cites the Employment Court's judgment in *Lumsden v Skycity Management Ltd*, where the Court adopted the Shorter Oxford Dictionary definition of "*disparage*" which is to:

- a. bring discredit or reproach upon; dishonour; 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.¹

[18] In *Lumsden*, Judge Inglis, as she was then, went on to observe that, as the definitions made clear, there was "*no additional requirement for untruthfulness or fabrication.*" Mr Bell submits the *Lumsden* case has similarities with Mr Levchenko-Scott's situation as it also involved a prospective employer being told by a referee employed by Mr Lumsden's former employer that it would not rehire him. The (now) Chief Judge said it was "*...difficult ...to characterise the "no" to rehire and the management comments as anything other than critical.*"²

[19] Mr Bell submits that, on its face, answering "*no*" to rehiring Mr Levchenko-Scott is inherently critical of him as it implies his performance in the role was not up to standard. In his submission, the comment that he did not align with PSC's values was critical of him as it

¹ [2017] NZEmpC 30 at [36].

² N1 at [37].

implied he was unsuitable for a position in aged care, which was the area in which his quest for work in Australia was centred.

[20] Mr Bell notes the values of PSC, as listed on its website, are:

- Respect: We have respect for all people.
- Compassion: We have compassion for those in need.
- Selflessness: We put our clients' interests before our own.
- Holistic: We are dedicated to meeting our clients' spiritual, physical and social needs.
- Passionate: We have passion for our purpose.
- Professional: We are professional, honest and have integrity in our actions.
- Active: We are resourceful and responsive.
- Excellence: We strive to continuously improve.

[21] In his submission, exemplifying the values listed above is essential in the whole aged care industry: it is not unique to PSC as an organisation. Stating that Mr Levchenko-Scott does not align with those values was highly critical of him and represented him as being unsuitable to work in aged care.

[22] Mr Patten submits the managers' responses were factual and truthful and should be seen in the context of a positive written reference from PSC and positive verbal references from the two managers. He also submits Mr Levchenko-Scott has provided no evidence any prospective employers withdrew their offers of employment because of the responses they received from either the SLT manager or the Enliven manager.

[23] Mr Patten points to a communication from the third of the prospective employers to Mr Levchenko-Scott following its decision not to offer him employment. The communication indicated that it was not just PSC's comments regarding organisational values that influenced its decision and that there were a number of other considerations that factored into that prospective employer's decision.

[24] The managers' references to "*fit*" and "*alignment*" as reasons for not employing Mr Levchenko-Scott again could not, in Mr Patten's submission, reasonably be construed as

critical of him at a personal or professional level, given the overall positivity of their written and verbal references.

[25] He submits *Lumsden* is clearly distinguishable from the current claim, firstly, on the basis that PSC does not accept any critical comments were made about Mr Levchenko-Scott and, secondly, on the facts of each case. One clause of Mr Lumsden's settlement agreement with Skycity was that he was welcome to apply for any future employment opportunities that might arise with that organisation. Despite that, as noted by the Employment Court, immediately after the agreement was signed and Mr Lumsden's resignation had taken effect, a note was entered on Skycity's human resources computer system indicating that Mr Lumsden would not be rehired.

[26] Additionally, under the heading "*Manager Termination Comments*", negative comments were made about Mr Lumsden, which the Court found to be disparaging and which concerned allegations against the employee that had not been investigated at that time.

[27] Mr Patten submits the Court did not determine that a factual comment such as "*no*" to re-employment could amount to disparagement: it was Skycity's post-employment actions, including the making of statements without proper investigation, that caused the Court to find the employer had breached the non-disparagement clause of its settlement agreement with Mr Lumsden.

[28] In PSC's submission a more analogous case is *Jane Evans-Walsh v Southern District Health Board*³ where, following a settlement agreement, the Southern District Health Board (SDHB) wrote to the Nursing Council of New Zealand notifying Ms Evans-Walsh's resignation before an investigation into complaints about her had been concluded. Ms Evans-Walsh claimed, among other matters, the letter was in breach of the non-disparagement clause of the settlement agreement. The Employment Court found the letter contained "*simple statements of fact*" and that sending the letter did not breach the record of settlement by making disparaging remarks about her.

[29] PSC submits that answering questions from prospective employers honestly and factually as to whether it would employ Mr Levchenko-Scott again cannot amount to

³ [2018] NZEmpC 46.

disparagement, particularly when those answers were prefaced by PSC making positive comments about Mr Levchenko-Scott both in writing and orally.

[30] I do not accept that submission. The Court dealt with a similar argument from Skycity in *Lumsden*, when Skycity stated that its “no” to rehire and its comments on Mr Lumsden on the company’s human resources computer system were not disparaging of him because they were factual and/or truthful in nature as they represented the views at the time of the manager who made them. The Court rejected that view and noted:

“As Mr Lumsden pointed out, if Skycity’s interpretation of the disparagement clause in the settlement agreement was correct, he would be entitled to publicly air his personal views (perceived to be true) relating to the company’s employment practices.”⁴

[31] Neither am I persuaded that the *SDHB* case is analogous to that of Mr Levchenko-Scott. The context of the two cases is quite different in that the circumstances of Ms Evans-Walsh’s resignation imposed a statutory duty on the employer to report it to the Nursing Council.⁵ It did so in terms that were found by the Employment Court to be factual. In the current situation PSC was bound by the settlement agreement to provide Mr Levchenko-Scott a written reference containing an agreed text and to restrict its comments to those which were consistent with that text if contacted by a third party.

[32] The agreed text contained no statement about the values of PSC and made no allusion to Mr Levchenko-Scott being out of step with its values. It contained factual statements about his role and responsibilities, and gave a positive evaluation of the professionalism and skills he demonstrated in carrying out his duties.

[33] I consider that, when PSC informed prospective employers it would not re-employ Mr Levchenko-Scott, and explained that the reason was his non-alignment to, or fit with, its values, PSC stepped well outside the agreed text of the reference.

[34] The answers of the two managers regarding re-employment, and the reasons they gave for their answers, were not consistent with the factual and positive text of the reference. They introduced a negative and judgmental element that I find was disparaging of Mr Levchenko-Scott.

⁴ N1 at [35].

⁵ Section 34(3) Health Practitioners Competency Assurance Act 2003.

[35] Describing him as not fitting with its values could not reasonably be perceived in any other way when those values include respect, compassion, putting clients' interests first, striving for improvement and the other positive qualities listed at paragraph [20] above. Such comments could only reflect adversely on Mr Levchenko-Scott to a prospective employer, particularly if it checked PSC's website to read the list of its organisational values.

[36] I accept Mr Levchenko-Scott's claim that PSC breached clauses 2 and clause 6 of the settlement agreement when its managers made those comments to prospective employers who were reference-checking him.

[37] In the circumstances I find it appropriate that compliance be ordered to ensure immediate and ongoing compliance with the Record of Settlement.

Penalty considerations

[38] PSC is liable to a penalty for breaching the 10 April 2019 mediated settlement agreement.⁶ Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.⁷

[39] Section 133A of the Act sets out factors the Authority and Court are to take into account when considering penalties. They are (summarised):

- (a) the object of the Act; and
- (b) the nature and extent of the breach; and
- (c) whether it was intentional, inadvertent, or negligent; and
- (d) the nature and extent of loss or damage suffered by any person, or gains made or losses avoided by the person in breach, due to the breach; and
- (e) whether the person in breach⁸ has paid any compensation, reparation or restitution or taken other steps to mitigate any adverse effects, actual or potential; and
- (f) the circumstances in which the breach occurred, including the vulnerability of the employee; and
- (g) whether the person in breach has been found by the Authority or court, in proceedings under this or any other Act, to have previously engaged in similar conduct.

⁶ Section 149(4) of the Act.

⁷ *Xu v McIntosh* [2004] 2ERNZ 448 at 464.

⁸ References in s 133 A to a "person in breach" also ref to a person involved in a breach.

[40] A full court of the Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited*⁹ and further refinements have been subsequently made by the Court, including in *Nicholson and Ford*.¹⁰

Is a penalty warranted?

[41] PSC, which resists the imposition of a penalty, asks that, if the Authority finds it has breached the settlement agreement, which it denies, it should have regard to the equities of the situation as the Employment Court did in *Byrne v New Zealand Transport Agency* and make a compliance order but not award any form of monetary penalty.¹¹

[42] I decline that request and consider a penalty is warranted in this situation for three reasons. Firstly, to bring home to PSC the unacceptability of breaching terms of a mediated settlement agreement. Secondly as a general deterrent to others and, thirdly, because of the harm I find the breaches were likely to have caused to Mr Levchenko-Scott.

[43] The settlement agreement imposed parameters around the communications PSC could have with prospective employers of Mr Levchenko-Scott who contacted it. Any comments PSC made were to be consistent with the text of the reference. PSC failed to keep its communications within those limits and acknowledged making comments to prospective employers, which I have found to be disparaging of Mr Levchenko-Scott, on three occasions.

[44] PSC did this after it had confirmed its full understanding that, once the mediator signed the agreed terms of settlement, the settlement was final, binding and enforceable; and that PSC would be liable to a penalty if it breached a term of the settlement agreement.

[45] There is no absolute evidence Mr Levchenko-Scott would have obtained employment from one of the three prospective employers that withdrew offers of employment after making enquiries of PSC. However, I find it more likely than not that the disparaging comments, and the inconsistency of those comments with Mr Levchenko-Scott's written reference, played a significant part in the withdrawal of the offers of employment and contributed to the length of time it took for him to find employment in aged care facility management.

⁹ [2016] NZEmpC Christchurch 143.

¹⁰ [2018] NZEmpC 132.

¹¹ [2019] NZEmpC 187.

[46] Applying the *Preet* principles and taking the statutory factors into account, I find each of the three occasions on which a PSC manager disparaged Mr Levchenko-Scott to a prospective employer to have been a separate breach of the mediated settlement agreement. Each breach renders PSC liable for a penalty under s 149(4) of the Act.

[47] I consider each breach was a deliberate action by each of the PSC managers, and each was more likely than not to have had the adverse consequence for Mr Levchenko-Scott of having a provisional indication of employment being withdrawn. The maximum penalty is therefore \$60,000.¹²

[48] Mr Bell submits the penalties should not be globalised as each breach was a separate event for which separate penalties should be awarded. While PSC opposes that submission, I accept it on the basis that each breach was serious and led to a separate loss of an employment opportunity for Mr Levchenko-Scott. This distinguishes his case from *Lumsden* where the Court, in taking a global approach, considered there was a degree of overlap between each of the breaches.¹³

[49] I am also cognisant of the Chief Judge's observation in *Nicholson* that globalisation "*effectively reduces the maximum penalty threshold that might otherwise be available and may, if too rigorously applied, lead to an artificially low penalty, depending on the particular circumstances.*"¹⁴ That observation is pertinent to Mr Levchenko-Scott's situation.

[50] Mr Bell submits PSC's breaches were serious and undermined the problem-solving mechanisms promoted by the Act. Mr Patten rejects the characterisation of the managers' actions as deliberate in that they did not initiate conversations with prospective employers and their comments were positive, not intemperate. He submits that, if PSC breached the settlement agreement, it was inadvertent.

[51] I accept PSC did not initiate the conversations but, having entered into conversations or correspondence with prospective employers, its officers were obliged to comply with the settlement agreement provisions. Any comments they made about Mr Levchenko-Scott were

¹² Section 135(2) of the Act.

¹³ N1 at [60].

¹⁴ N10 at [20(b)].

to be consistent with the agreed text of the reference and they were not to be disparaging of him.

[52] In three instances, I have found their comments breached those obligations and I do not believe the breaches could be described as inadvertent, or negligent. The managers also made positive comments about Mr Levchenko-Scott's performance in his role with PSC but must have understood that, in advising prospective employers PSC would not employ him again and that he did not fit with the values of the organisation, they were going outside the parameters of the agreed text and undermining the positive nature of the reference.

[53] Mr Bell submits Mr Levchenko-Scott was denied the opportunity to receive the full value of the bargain reached in the settlement agreement because of PSC's actions. He had three roles withdrawn from him and was put under severe financial pressure in the period following his resignation from PSC.

[54] Mr Patten submits the honest and factual nature of the comments made by the PSC managers to prospective employers are clear mitigating factors, as are the other positive comments they made both in writing and verbally.

[55] There is no evidence PSC has previously engaged in similar conduct. There is, however, no acknowledgement of breaches by the organisation. I have found the comments of the managers to prospective employers to be deliberate, and to have contributed to the length of time it took Mr Levchenko-Scott to find employment. I find an appropriate provisional starting point for each penalty to be to 60 percent of the maximum penalty, being \$12,000 per breach or \$36,000 in total.

[56] The means and ability to pay a penalty must be considered. Mr Patten submits PSC is currently running at a \$4.0 million deficit, although he has provided no documentation or affidavit from PSC to support that statement. A check of the latest annual return from the organisation on the Charities register supports his submission, however, and I accept the financial status of the organisation should be taken into account in considering the quantum of a penalty.

[57] In this context I also accept PSC is a longstanding charitable trust working in the not-for-profit sector, which provides valuable social services to the community. Accordingly, I

reduce the provisional figure by 50 percent which brings it to \$6,000 per breach or \$18,000 in total.

[58] Finally I turn to the proportionality of any penalty. Recent cases concerning breaches of non-disparagement provisions have resulted in penalties ranging from \$800 to \$8,000 in the Authority. The Court in *Lumsden* imposed a \$7,500 penalty on Skycity. Clearly an overall penalty of \$18,000 is out of step with these amounts. Given the serious nature of the breaches and the effect I have found each breach likely to have had on Mr Levchenko-Scott's employment prospects, and taking proportionality into account, I consider the provisional sum should be subject to a further reduction of 40 percent for each breach, resulting in a penalty of \$3,600 for each breach or \$10,800 in total.

[59] Mr Levchenko-Scott asks that payment of the majority of any penalty imposed should be awarded to him as he has suffered financial pressure and embarrassment through the length of his search for employment being elongated unnecessarily due to PSC's response to prospective employers. I accept his submission and find it just that 75 percent of the penalty be awarded to Mr Levchenko-Scott.

Orders

[60] PSC is ordered to comply, from the date of this determination, and with ongoing effect, with clauses 2 and 6 of the agreed terms of settlement.

[61] PSC is ordered to pay a penalty of \$10,800, within 28 days of the date of this determination, as follows:

\$8,100 is to be paid Timothy Levchenko-Scott; and

\$2,700 is to be paid to the Employment Relations Authority, via the Ministry of Business, Innovation and Employment's Crown bank account.

Costs

[62] Mr Levchenko-Scott asks the Authority to award costs in his favour. Mr Patten requests that costs be reserved. In the interests of dealing with the issue efficiently I will give the parties an indication of my view of how costs are likely to be treated.

[63] Had there been a one day investigation meeting, I would have applied the Authority's notional daily tariff, and awarded the successful party \$4,500. As the matter has been determined on the papers, the cost of attendance at an investigation meeting has been avoided, although costs have clearly been incurred in the preparation of submissions and, for Mr Levchenko-Scott, an affidavit. Additionally there has been the cost of preparing the statement of problem. I would have considered an award of one third of the daily tariff to be appropriate, being \$1,500, together with reimbursement of the Authority's filing fee of \$71.56. This would have been payable within 28 days.

[64] As PSC has requested costs be reserved, and may wish to make submissions on the matter, I will not, at this point, make an order that it pay that amount to Mr Levchenko-Scott. If PSC does wish to make submissions, it must do so within 14 days of the date of this determination, following which Mr Levchenko-Scott will have 14 days to respond. It is my hope, however, that the parties will resolve the matter having been given an indication of my views of how costs are likely to be treated.

Trish MacKinnon
Member of the Employment Relations Authority