This determination includes an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 116
3133135

	BETWEEN	THE CHIEF EXECUTIVE ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
	AND	GRAEME WIN Respondent
Member of Authority:	Helen Doyle	
Representatives:	Shaun Brookes, counsel for the Applicant Respondent in person	
Investigation Meeting:	16 March 2021 at Christchurch	
Submissions Received:	On the day from the Applicant On the day from the Respondent	
Date of Determination:	24 March 2021	

DETERMINATION OF THE AUTHORITY

A **Graeme Win is ordered to comply with clauses 5, 6, 7, 8 and 9 of the Record of Settlement between him and The Chief Executive Oranga Tamariki – Ministry for Children immediately on receipt of this determination.**

B **A timetable has been set for Mr Win to provide any information in response to the claim for penalties.**

C **Costs are reserved until after the issue of penalties has been determined.**

Prohibition from publication

[1] I prohibit from publication the name of any employee of Oranga Tamariki referred to in the evidence or documentation in this matter together with any information that may identify them.

Employment relationship problem

[2] The Chief Executive Oranga Tamariki – Ministry for Children (Oranga Tamariki) applies to the Authority for compliance orders because it says that Graeme Win has failed to comply with a Record of Settlement under s 149 of the Employment Relations Act 2000 (the Act).

[3] Oranga Tamariki requested urgency. This was on the basis that there have been unsuccessful requests of Mr Win in relation to his actions and he had, before proceedings were lodged, suggested the escalation of information provision including to the media. Oranga Tamariki seeks penalties if breaches are established and costs.

[4] Mr Win says that there were misrepresentations, breaches of good faith and withholding of information at mediation by Oranga Tamariki. He says that he raised his concerns using appropriate channels and is protected under the Protected Disclosures Act 2000 (PD Act) from this proceeding.

[5] For reasons discussed at a telephone conference with Mr Brookes and Mr Win the Authority granted the application by Oranga Tamariki urgency. An investigation meeting date was assigned promptly.

[6] The Authority advised Mr Brookes and Mr Win at the investigation meeting that it would initially determine whether there were breaches and, if so, whether Mr Win had the protections afforded under the PD Act. If orders for compliance are made there will be a further opportunity for provision of additional information before the Authority determines penalties.

The investigation

[7] The Authority heard evidence from D who is employed as an adviser with Oranga Tamariki and from Mr Win as part of its investigation.

[8] It was also provided with closing submissions.

The record of settlement

[9] A Record of Settlement between Oranga Tamariki and Mr Win was entered into under s 149 of the Act. The Record of Settlement was signed by both parties and certified by a mediator employed by the Chief Executive of the Ministry of Business Innovation and Employment under ss 149(1) and (3) on 31 July 2020.

[10] Both parties were represented at the time of entering into the Record of Settlement by experienced counsel.

[11] Once a mediator has affirmed with the parties the effect of ss 149 (1) and (3) and is satisfied that with knowledge of those provisions they affirm their request the parties ability to revisit a settlement agreement is restricted.

[12] Section 149 (3) provides about the terms of settlement when signed by the mediator as below:

> (a) those terms are final and binding on, and enforceable by, the parties: and
>
> (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and
>
> (b) except for enforcement purposes, no party may seek to bring these terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[13] Chief Judge Inglis said in *Lumsden v Skycity Management Limited* about the policy intention*:*

> The underlying policy intention is plain, namely to facilitate the full and final settlement of employment relationship issues at an early stage via a mediated process. That reflects the broader legislative scheme, which actively encourages parties to resolve such issues between themselves and without the intervention of the Authority and Court.[1]

[1] *David Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [11] with reference to Employment Relations Act 2000, s3(a)(v) as an example.

The Issues

[14] The Authority needs to determine the following issues with regard to the Record of Settlement:

(a) Was there a breach of the non-disparagement agreement in clause 5?

(b) Was there a breach of the confidentiality agreement in clauses 6 and 7?

(c) Was there a breach of the agreement that Mr Win would not make further information requests of Oranga Tamariki in clause 8?

(d) Was there a breach of the full and final settlement agreement in clause 9?

(e) If there are breaches were the disclosures of information the type and nature to which the PD Act applies?

(f) Does Mr Win have immunity from these proceedings under the PD Act?

(g) If there were breaches of the record of settlement and the protections of the PD Act do not apply to these should orders for compliance be made?

Was there a breach of the non-disparagement clause?

[15] Clause 5 provides amongst other matters that Mr Win will not make any disparaging comments about Oranga Tamariki or its current or past managers, officers or employees.

[16] Mr Win said that his comments about managers and employees as they appear in a large number of emails were not disparaging because they are true.

[17] Disparage is defined in the New Zealand Oxford Dictionary as:

1. speak slightingly of, depreciate.
2. bring discredit on.

[18] It was stated in *Lumsden* that the definitions of disparage make it clear there is no additional requirement for untruthfulness or fabrication.[2]

[19] I do not accept that the fact Mr Win regarded the statements as true means that they cannot be disparaging comments.

[2] N 1 at [36] and [37].

Has there been a breach of clause 5 of the record of settlement?

[20] Some emails that contained remarks that are said by Oranga Tamariki to be disparaging were forwarded or copied to the employees by Mr Win and others had been sent to third party organisations.

[21] Mr Win stated in some of the emails he sent that Oranga Tamariki employees/managers had lied. Mr Win sent an email dated 18 November 2020 to Oranga Tamariki's external solicitors in which he stated named employees/managers lied. There was another email sent by Mr Win on 9 December 2020 to Oranga Tamariki's external solicitors and copied to three employees/managers stating that they had been telling lies. To state that a person is lying or dishonest is disparaging.

[22] There is another email sent to an employee by Mr Win dated 11 January 2021. This employee who I shall call complainant X made a complaint about Mr Win before the agreed settlement. I will not go into any further detail about the nature of the complaint. The email stated amongst other matters "....for goodness sake do not tell anymore porkies, as this stuff will all come out…" To state that a person has lied or has or will be dishonest in the future is disparaging.

[23] There was other communication with the complainant X. In the evening of 18 January 2021 Mr Win sent her a text message that she forwarded onto her team leader the following day. Mr Win's message stated amongst other matters that it was time for her to "come clean." Mr Win wrote in the text message that if he went to her then employer with the information they could not keep her working there. She was asked to "do the right thing." Again it was suggested that complainant X had not been truthful.

[24] Mr Win sent an email to an employee at the place complainant X worked on 19 January 2021 early in the morning. That email was subsequently provided by the employee to the employer of complainant X. That email contained many comments that from any objective assessment could bring discredit on her. The comments were disparaging not only of complainant X but several other employees of Oranga Tamariki.

[25] To the extent Mr Win suggested that continued contact with complainant X after the record of settlement was not unwelcome the emails she sent to Oranga Tamariki in February

2021 confirm that is no longer the case. Although not a term in the record of settlement it would be inappropriate for Mr Win to have any further contact with complainant X by any means.

[26] Mr Win was not represented by National Union of Public Employees (NUPE) at the time the record of settlement was entered into. He sent an email to NUPE dated 15 February 2021. An employee of Oranga Tamariki was copied into the email. In the email he referred to Oranga Tamariki appearing to be struggling with their human resource staff and some managers and a lot of it "is around incompetency, integrity issues and honesty". These are disparaging comments about Oranga Tamariki's employees.

[27] In an email sent to senior employees of Oranga Tamariki dated 17 February 2021 Mr Win stated amongst other matters that the behaviour of some senior management and human resource staff was incompetent and "outright devious." That is disparaging of those employees.

[28] Comments made in some of the emails sent by Mr Win between late October 2020 and February 2021 of which some examples have been set out above were disparaging of employees of Oranga Tamariki and breached clause 5.

Was there a breach of the confidentiality provisions in clauses 6 and 7?

[29] Clause 6 provides that the facts and terms of settlement are confidential between the parties and their representatives. Clause 7 provides that the confidentiality obligations of Mr Win's employment that survive termination of employment will continue to apply.

[30] I have referred to the obvious breaches from the large volume of emails. In the email dated 19 January 2021 that Mr Win sent to an employee at the place where complainant X was working there was a statement made that a settlement had been agreed to and also disclosure about an important term of the settlement.

[31] There was also disclosure of a term of the settlement by Mr Win to NUPE in an email dated 2 December 2020. NUPE was not representing Mr Win at the time of the record of settlement or afterwards. Both of these emails breached clause 6.

[32] There was another email that was sent to Mr Brookes and other employees of Oranga Tamariki by Mr Win that appears to have also been sent to an Australian Retail Store dated

22 January 2021. It contained disparaging comments about the performance of an employee who was sent the email and also made reference to a "drug allegation."

[33] The sending of the email to the store breached the express confidentiality clause 3.3 in the Oranga Tamariki and NUPE collective agreement that covered Mr Win's work (July 2018 -11 January 2020). The obligations in the confidentiality provision in 3.3 were agreed to continue in clause 7. That included treating information about other employees, customers and clients with complete confidentiality. Even if sending the email to the retail store was a mistake it should not have occurred. It was at the least very careless.

[34] The above constitutes breaches of both clause 6 and clause 7 of the Record of Settlement.

Was there a breach of clause 8 of the Record of Settlement to not make new requests for information?

[35] Clause 8 of the Record of Settlement provides that Oranga Tamariki will not be required to respond further to any of Mr Win's information requests and Mr Win will not make any new requests in relation to matters arising out of his employment.

[36] Mr Win has made information requests of Oranga Tamariki on 11 and 13 November 2020 and 3 February and 8 March 2021. They have been treated as official information requests and the evidence supports that the requests were responded to. Clause 8 was not considered by Oranga Tamariki to be a reason under the Official Information Act 1982 to withhold the information. It does not appear that clause 8 is enforceable in that respect if a request is made.

[37] The Official Information Act 1982 does not appear to prevent parties agreeing as they did in this case to not to make information requests. In this case the record of settlement constitutes a full and final settlement of Mr Win's grievance and other claims relating to his employment. As part of that settlement Mr Win agreed not to make new requests for information in relation to matters arising out of his employment.

[38] He breached clause 8 in that respect when he made information requests about matters arising out of his employment with Oranga Tamariki following the signing of the Record of Settlement.

Was there a breach of the full and final settlement agreement in clause 9?

[39] Clause 9 of the Record of Settlement provides the agreement constituted a full and final settlement of the grievance and any claim and complaints that Mr Win may have arising from or relating to his employment with Oranga Tamariki.

[40] In many of his emails Mr Win has not treated the matter as fully settled. He has made allegations about Oranga Tamariki and revisited matters arising from or relating to his employment. He has engaged with complainant X about matters arising from or related to his employment. He has asked to be reinstated and asked that Oranga Tamariki enter into further settlements and mediation. He has referred to the settlement as invalid in an email dated 3 February 2021 to Mr Brookes and D and asked for a "valid and legally binding settlement."[3] There has been mention of further proceedings.

[41] Mr Win has not treated the Record of Settlement as being in full and final settlement of matters arising from or related to his employment with Oranga Tamariki.

[42] There has been a breach of clause 9 of the settlement agreement.

Were the disclosures the type and nature to which the PD Act applies?

[43] The purpose of the PD Act is set out in s 5.

[44] It is to promote the public interest:-

> (a) by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation and
>
> (b) by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation.

[45] Employee is defined in s 3 and includes a former employee such as Mr Win.

[46] Protective disclosure in s 6 applies to information about serious wrongdoing that the employee believes on reasonable grounds is likely to be true. It is information that the employee wishes to disclose so that the serious wrongdoing can be investigated and the employee wishes the disclosure to be protected.

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[3] Document B page 33.

[47] I have considered the large volume of emails. Mr Brookes has helpfully prepared a schedule of emails with key breaches.

[48] Mr Win alleges a number of matters in the emails however I accept Mr Brookes' submission that many fall short of serious wrongdoing.

[49] As stated by Mr Brookes in his submission Mr Win alleges the following wrongdoing:

(a) Drug use by employees and supply of class A drugs;

(b) Being misled in mediation;

(c) Complainant X lying during the investigation into his conduct;

(d) Nepotism within Oranga Tamariki;

(e) Lying and dishonesty;

(f) Incompetence;

(g) A cover-up in relation to his investigation.

[50] When the email disclosures are considered objectively many are not about serious wrongdoing but rather about Mr Win's view that he was misled in mediation and a sense of grievance about the way he was treated before he entered into the record of settlement. Several of the emails are directed to desired outcomes that Mr Win wants rather than about serious wrongdoing. He refers to negotiating another settlement with Oranga Tamariki in some. He wants further mediation and reinstatement in others

[51] In an email he sent to Mr Brookes on 5 November 2020 whilst referring to drug allegations he concludes with the comment:

> As I have said I will keep fighting this, until I believe a fair out-come has been reached. The preferred preference would be re-instatement.

[52] Mr Win is disparaging in some emails about employees who had been involved in an investigation when he was still employed. His criticism extended to those involved at the mediation process and senior employees at Oranga Tamariki. It included the person who had made a complaint about him. There was a flavour of retaliation in some emails. An example

was the email to complainant X's place of work with a number of disparaging comments about her and other employees.

[53] Many of the emails are inconsistent with Mr Win wanting to disclose information so that serious wrongdoing can be investigated.

[54] Information was furthermore not disclosed in a manner provided by Oranga Tamariki's internal procedures.[4] There were emails sent directly to persons accused of wrongdoing by Mr Win with accusations that they had lied or were incompetent. That is not consistent with the internal protected disclosure procedure of Oranga Tamariki. It is not consistent with disclosure for the purpose of investigating serious wrongdoing.

[55] I accept Mr Brookes' submission that the information requests and confidentiality breaches are not protected disclosures. The information requests sought rather than provided information so that serious wrongdoing could be investigated.

[56] The breaches of confidentiality in the emails referred to did not disclose information about serious wrongdoing in Oranga Tamariki so that it could be investigated. The disclosures made were not in accordance with internal procedures and the breaches of confidentiality were not necessary.

[57] On a generous assessment there may be a handful of initial emails to the CEO of Oranga Tamariki, the Minister for Children and the Prime Minister that contained disclosures to which the PD Act applies. These emails have not been relied on in concluding breaches of the record of settlement.

[58] Continuing however to send a considerable amount of correspondence that was disparaging of Oranga Tamariki employees including directly to some of those employees and a complainant over an extended period of time is indicative of bad faith under s 20 of the PD Act.

[59] For all of these reasons I do not find that the disclosures made by Mr Win in breach of the agreed terms of settlement are disclosures to which the PD Act applies.

[4] As required in section 7 of the Protected Disclosures Act 2000.

Does Mr Win have immunity from these proceedings under the PD Act?

[60] I have not found that the disclosures that breach the record of settlement are those to which the PD Act applies.

[61] Accordingly Mr Win is not afforded the protection from these proceedings that would otherwise have been available under the PD Act.

Should the Authority make a compliance order?

[62] Section 151 of the Act provides that agreed terms of settlement under s 149(3) may be enforced by a compliance order under s 137 of the Act. Section 137(1) (iii) of the Act empowers the Authority to order compliance of any terms of settlement in accordance with s 151.

[63] Oranga Tamariki was hopeful that Mr Win would cease breaching the record of settlement of his own accord and held off from lodging these proceedings. There were at least four occasions that it wrote to Mr Win that it considered he had breached the record of settlement. This correspondence was in November 2020, January and February 2021.

[64] Mr Win continued his communications. The Authority cannot be satisfied having heard from him that he will stop without a compliance order. D in her evidence said that significant distress has been caused to employees who have been the target of the disparaging comments. There were occasions where multiple emails were sent in a day.

[65] I consider in the circumstances a compliance order is necessary to compel Mr Win to comply with the Record of Settlement and stop making disparaging comments about employees and prevent further breaches of confidentiality and information requests.

[66] If Mr Win, as the Authority understands he has, raises concern with an external organisation such as Police or the Ombudsman then he should leave it to them to undertake their own investigation rather than continuing to communicate with Oranga Tamariki or its advisers himself.[5] Failure to do this may result in him breaching the Record of Settlement further.

[5] Oranga Tamariki has previously advised Mr Win to take his concerns to the Police.

[67] Graeme Win is ordered to comply with clauses 5, 6, 7, 8 and 9 of the Record of Settlement immediately from the date that he receives this determination.

Penalties

[68] Oranga Tamariki is seeking significant penalties. Mr Win has until 7 April 2021 to make any response to that claim that he wishes including any relevant financial information.

[69] Mr Brookes has a further week until 14 April 2021 if he wishes to make any response.

Costs

[70] Costs are reserved until after the issue of penalties has been determined.

Helen Doyle
Member of the Employment Relations Authority