ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 194
3133135

	BETWEEN	THE CHIEF EXECUTIVE ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
	AND	SLU Respondent

Member of Authority:	Helen Doyle
Representatives:	Shaun Brookes, counsel for the Applicant SLU in person
Investigation Meeting:	On the papers
Submissions Received:	9 April 2021 from the Applicant 16 March 2021 and 16 April 2021 from the Respondent
Date of Determination:	10 May 2021

DETERMINATION OF THE AUTHORITY

A **The application for a non-publication order by SLU is declined. There is an interim non-publication order for 28 days to enable a challenge.**

B **SLU is ordered to either pay a penalty of $6000 for breaching a Record of Settlement in accordance with paragraph 33(a) and (b) of this determination.**

C **SLU is ordered to pay costs in the sum of $2,250.**

D **Leave is reserved for either party to return to the Authority if issues arise about payment by instalment of the penalty or costs.**

Prohibition from publication

[1] In an earlier determination involving the parties, the Authority prohibited from publication the names of employees who were referred to in the evidence or documentation together with any information that may identify them. The respondent did not make an application for non-publication.

[2] The Authority found in that earlier determination the respondent had breached clauses of a Record of Settlement entered into with the Chief Executive of Oranga Tamariki – Ministry for Children (Oranga Tamariki). An order for compliance was made and further information requested before the issue of penalties was considered.

[3] In a submission dated 9 April 2021 the respondent asked for confidentiality "if that is accorded to other employees of Oranga Tamariki."

[4] I have treated that submission as an application for non-publication.

[5] There were no further grounds advanced in support of the application for non-publication. The Supreme Court in *Erceg v Erceg* emphasised the starting point is a principle of open justice, and that a high standard must be met before that principle can appropriately be departed from.[1]

[6] The basis of the application appears to be that if other employees have their names prohibited from publication SLU should as well. The employees' situation is different to that of the respondent. Employees were mentioned in a series of communications from the respondent some of which have been found to have breached the Record of Settlement. The employees whose names have been prohibited from publication were not parties to the Record of Settlement. The respondent on the other hand was a party and the respondent was found to have breached the Record of Settlement.

[7] I am not satisfied that there are grounds to prohibit from publication the name of the respondent. An interim non-publication order will be made for a period of 28 days from the date of this determination to enable the respondent to challenge if he wishes. In the interim the respondent will be referred to by three letters that have been randomly generated.

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1 *Ercerg v Erceg* [2016] NZSC 135

[8] The non-publication order made in the earlier determination with respect to employees' names is made permanent. I further prohibit from publication the financial information that has been provided by SLU except to the limited extent that it is referred to in this determination.

Employment relationship problem

[9] In an earlier determination I found that SLU breached five clauses in a Record of Settlement entered into with Oranga Tamariki and compliance orders were made.

[10] Oranga Tamariki seeks penalties for the breaches.

Should penalties be awarded?

[11] Section 149 of the Employment Relations Act 2000 (the Act) allows the Authority to impose a penalty on a person who breaches an agreed term of a settlement.

[12] Section 135(2)(a) of the Act provides that an individual is liable for a penalty of up to $10,000 for each breach.

[13] Section 133A of the Act sets out factors that the Authority must have regard to in determining penalties. These factors include:

> (a) the object stated in section 3; and
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> (b) the nature and extent of the breach or involvement in the breach; and
>
> (c) whether the breach was intentional, inadvertent, or negligent; and
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> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
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> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
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> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
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> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[14] I have also had regard to the four stage process in an earlier full Court judgment in assessing the amount of a penalty.[2]

[15] The parties in this matter entered into a settlement agreement under s 149 of the Act. After a period of time SLU formed strong views about how he had been treated. He engaged in a significant amount of communication sometimes sending up to five emails per day. Some of those communications have been found to have breached the Record of Settlement.

[16] On several occasions Oranga Tamariki raised with SLU the possibility of a breach action. His response was to essentially call Oranga Tamariki's bluff. I am satisfied that each of these occasions presented an opportunity for SLU to reflect on his actions and take steps to prevent repetition. Had that occurred then it is very likely that Oranga Tamariki would not have lodged proceedings alleging breach and seeking a penalty. SLU did not stop the communications.

[17] I have considered the purpose of a penalty. Oranga Tamariki and SLU entered into a binding agreement under s 149 of the Act. The agreement constituted a full and final settlement of matters between the parties relating to SLU's employment. It was agreed SLU would receive certain benefits under the settlement agreement and in turn he agreed not to do certain things. This included not making any disparaging comments about Oranga Tamariki and its employees, maintaining confidentiality and not making new requests for information in relation to matters arising out of his employment. It is important for the parties and from a public interest perspective that s 149 agreements are adhered to by both parties. If they are not then there is a need for a step that indicates that Authority's disapproval which also acts as a deterrence to prevent repetition of the breaches.

[18] I am of the view that this is a case where a penalty should be imposed.

Amount of the penalty

[19] I have found five clauses in the Record of Settlement were breached. One clause breached was a non-disparagement clause. Two clauses relate to confidentiality obligations and these were found to have been breached. Another clause breached was the full and final

[2] *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [141] – [148]

nature of the settlement. That breach often overlapped with other breaches. A fifth breach was that of a clause related to requests for information.

[20] It is appropriate to globalise the breaches. I treat the breaches of the two confidentiality clauses as one. The breaches of the non-disparagement and further information requests clauses are to be treated as two separate breaches. I do not treat the full and final settlement clause as a separate breach but rather one that overlaps with the other breaches. The treatment of that clause where there is some overlap with other breaches accords with the approach taken by the Employment Court in *Lumsden v Skycity Management Limited.* That was also a case about a breach of a Record of Settlement.[3]

[21] The starting point for an assessment of a penalty is three breaches at a maximum of $10,000 each which is $30,000.

[22] The breaches were serious, intentional and extensive. The Authority heard evidence of distress having been caused to those employees who were disparaged in the numerous communications from SLU.

[23] There were limited matters advanced in mitigation and no real remorse shown about the breaches. The communications from SLU suggest the breaches started in whole or part because he was unhappy about the way another employee was treated by Oranga Tamariki and reflection on, and unhappiness about, what was said at mediation. The communications that were in breach of the Record of Settlement were unrelenting and sent by SLU to a number of employees of Oranga Tamariki, other persons and organisations for some months.

[24] I acknowledge SLU has strong views and he refers to a measure of frustration being behind his actions in submissions. He justifies his actions on the basis that he can prove what he has said.

[25] Whilst SLU has focused on the perceived wrong doing of others he has shown no appreciation of the harm his own actions have caused when he breached the Record of Settlement. He has caused distress by his continued disparagement of employees of Oranga Tamariki including a complainant in a serious and sustained manner.

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[3] *David Lumsden v Skycity Management Limited* [2017] NZEmpC 30.

[26] SLU has not been previously involved in breaches in the Authority or Employment Court. He has provided information that supports he will struggle to pay a penalty.

[27] Oranga Tamariki having regard to the financial position seeks a penalty of $6000 which is less than the original penalty claimed in the statement of problem of $25,000. I agree adjustment is required for SLU's financial position.

[28] I have considered two Authority cases where there were breaches of the non-disparagement clause of a Record of Settlement. The first involved an ex-employee sending text messages to a current employee.[4] The penalty imposed in that case was $2,500. The number and extent of breaches was less than in this case. The second case involved an employee sending five emails in breach of the non-disparagement clause.[5] The penalty imposed in that case was $8,500. The breaches in that case were also serious but not as extensive as in this matter.

[29] As well as considering penalties awarded in other cases I have weighed the difficult financial position of SLU. That was not a feature in the case where there was the $8,500 penalty imposed. I consider a penalty of $6000 to be appropriate in all the circumstances.

[30] Under s 136 (2) of the Act the Authority may order that the whole or any part of the penalty recovered be paid to any person.

[31] It is clear that SLU's actions caused distress to a number of employees. I consider it appropriate to award 80% of the penalty to Oranga Tamariki for the use of those employees. The balance of the penalty is to be paid to the Crown to reflect the public interest in adherence to settlement agreements under s 149.

[32] It is likely that the penalty will need to be paid by instalments and SLU should advise Oranga Tamariki of a payment plan with supporting information. If agreement cannot be reached either party may return to the Authority who can set an amount to be paid by instalment.

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[4] *Jacks Hardware and Timber Limited t/a Mitre 10 Mega (Mosgiel and Dunedin) v Beentjes* [2015] NZERA Christchurch 29.
[5] *The Vice-Chancellor of Victoria University of Wellington v Caroline Sawyer* [2017] NZERA Wellington 106.

[33] Within 28 days of the date of this determination SLU is ordered to either pay or enter into a payment plan acceptable to Oranga Tamariki the following penalty for breaches of the settlement agreement:

(a) The sum of $4,800 to Oranga Tamariki for the use of the employees directly impacted by the breaches.

(b) The sum of $1,200 to be paid to the Authority for payment to the Crown.

Costs

[34] Mr Brookes seeks the sum of $4,500 for an award of costs.

[35] The matter took a little over a half a day however there was a delay in starting the meeting that should not be attributed to either party. It was an Authority administrative issue.

[36] Oranga Tamariki was the successful party. It is entitled to an assessment of costs.

[37] Looking at the mater in the round and taking into account the delay at the start of the meeting I conclude it is appropriate to assess costs on the basis of half of the daily tariff.

[38] I order SLU to pay to Oranga Tamariki the sum of $2,250 being costs. If there is to be a payment plan then SLU should advise Oranga Tamariki what his intentions are as soon as possible. Either party may return to the Authority if an order is required.

Helen Doyle
Member of the Employment Relations Authority