IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 34
3129834

	BETWEEN	HAMILTON CITY COUNCIL LIMITED Applicant
	AND	ALLAN HALSE First Respondent
	AND	CULTURESAFE NZ LIMITED Second Respondent

Member of Authority:	Michele Ryan
Representatives:	Mark Hammond for the Applicant Allan Halse in person and for the Second Respondent
Investigation Meeting:	On the papers
Further information received:	Between the parties from 2-13 December 2021 Record of Settlement from the Ministry of Business, Innovation and Employment on 19 January 2022.
Submissions from the parties	27 July 2021 from the Applicant 18 August 2021 from the Respondents
Date of Determination:	9 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The employment relationship problem in this matter concerns whether or not compliance orders and penalties should be ordered against Allan Halse and/or CultureSafe NZ Ltd for alleged breaches of agreed terms contained in a Record of Settlement ("the settlement agreement").

Background information

[2] Mr Halse was employed by Hamilton City Council Ltd ("the Council") in 2008. An employment relationship problem emerged between the pair but was resolved on 14 February 2014 at the conclusion of mediation.

[3] The terms on which the parties agreed to settle their differences were recorded in a settlement agreement and certified by a Mediator in accordance with s 149(3) of the Employment Relations Act 2000 ("the Act").

[4] Clauses 1 and 7 of the settlement agreement set out the parties' arrangements at to confidentiality and non-disparagement (respectively), as follows:

> **Agreed Terms of Settlement to Employment Relationship Problems**
>
> 1. These terms of settlement and all matters discussed in mediation shall remain so far as the law allows, confidential to the parties. The only statement that will be made outside the mediation is that all matters have been resolved between the parties.
> ...
> 7. Neither party will make any disparaging comments about the other or about Hamilton City Council employees.

[5] The settlement agreement recorded also that the Council would pay Mr Halse a sum of money in wages and compensation.

[6] Several weeks after execution of the settlement agreement, Mr Halse founded CultureSafe NZ Ltd ("CultureSafe") for which he is sole director. CultureSafe provides advocacy services, largely to employees involved in employment disputes.

[7] In 2020 CultureSafe began acting for an employee of the Council.

The events leading to the claim

[8] On (or about) 12 December 2020, Mr Halse published a post on CultureSafe's social media page. The post was highly critical of the Council and its Chief Executive.

[9] Shortly thereafter, the Council wrote to Mr Halse advising the post breached the settlement agreement, and asked for its removal.

[10] The post was not taken down and remained on CultureSafe's social media pages.

[11] On 21 December 2020 another post, similar in tone to that of 12 December 2020, was placed on CultureSafe's media page by Mr Halse. The Council's letter detailing the contents of the non-disparagement provision, was attached to the post.

[12] On 23 December 2020 the Council lodged a statement of problem with the Authority seeking orders to have the respondents comply with the settlement agreement and to have penalties imposed for the breaches.

[13] The Council has since lodged an amended statement of problem regarding the two posts of December 2020, and in relation to the additional 11 posts placed on CultureSafe's media page by Mr Halse between 6 January 2021 and 30 January 2021 (inclusive), which are also at issue: 13 posts in total.[1] The Council seeks orders to have the respondents comply with the settlement agreement and penalties awarded against both of them for each breach.

[14] The respondents do not deny their involvement in the publishing of the 13 posts. I shall return to the various defences the respondents have asserted later in this determination.

The Authority's investigation

[15] The process by which the Authority intended to investigate the Council's application was recorded in a Notice of Direction sent to the parties following a scheduled case management call ("CMC").[2] The respondents had declined to attend the CMC, but in any event the parties were each given an opportunity to provide the Authority with any information considered relevant to the claim.

[16] The Council provided a copy of the first page of the settlement agreement containing the terms of settlement when it lodged its application. Two pages recording the Mediator's certification process pursuant to s 149(2) and (3) was not included, although there is no suggestion from either party that the settlement agreement had not been countersigned by the Mediator in the usual way. In any event, the Authority was able obtain a complete copy of the settlement agreement from MBIE's Mediation Services and a copy of the document was provided to both parties.

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1 In addition to the posts sent on 12 and 21 December 2020, the additional posts relevant to this claim were sent on the 6 January 2021, 17 January 2021, 19 January 2021, x 3 on 21 January 2021, 23 January 2021, 25 January 2021, 26 January 2021, 28 January 2021 and 30 January 2021.

2 As per the Authority's Notice of Direction, dated 29 June 2021.

[17] As permitted by s 174 of the Act the determination has not recorded all the information received by the parties but has expressed findings on fact and law so as to dispose of the matter and, where necessary made corresponding orders as a result.

Preliminary Matter

[18] I am unwilling to accept the respondents' assertion that the Council breached the settlement agreement when it attached a copy of the terms of settlement to its application to the Authority. The Act provides that where agreed terms of settlement under s 149 have been reached, those terms may not be brought before the Authority "*except for enforcement purposes*".[3] The Council's application for compliance and penalties is an application for enforcement. It is therefore permissible for the Council to furnish a copy of the terms of settlement to the Authority, and that action cannot be treated as a breach of the confidentiality provision in the settlement agreement.

The issues

[19] To determine the Council's claims I must examine:

(a) Whether the settlement agreement has in fact been breached and if so by who;

(b) If the settlement agreement was breached by the respondents, does the Authority have jurisdiction to order Mr Halse, and CultureSafe

(i) to comply with the settlement agreement executed under s 149 of the Act;

(ii) are any factors which should preclude orders for compliance being made;

(iii) should penalties be ordered.

Are the posts in breach of the settlement agreement?

[20] The terms which the Council alleges have been breached are recorded at para [4] of this determination.

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[3] Section 149(3)(b).

[21] It is neither helpful nor desirable to replicate of contents of each of the 13 posts that are at issue in this case. I will refer to a specific post only where it necessarily explains my findings.

Clause 7: The non-disparagement provision

[22] In a post uploaded on 6 January 2021 Mr Halse attached an email sent to the Council earlier that day, as follows:

> "As Director of CultureSafe NZ Ltd and the only ERA advocate who is fronting CultureSafe NZ Ltd's work place bullying cases, like ……'s who was experiencing suicidal ideation, it is obvious that I am going to make disparaging remarks against Hamilton City Council. …"

[23] By his own admission, Mr Halse does not deny the two posts loaded onto CultureSafe's media page in December 2020 were disparaging of the Council.

[24] The theme of the subsequent 11 posts sent over the course of January 2021 were similar in nature and content as those published previously.

[25] On any analysis, each post contained at least one comment (if not more) that, in accordance with the definition of the word "disparaging" as illustrated in *Lumsden*[4], disparaged the Council and/or the Chief Executive, and therefore breached the settlement agreement.

Clause 1: The confidentiality provision

[26] To determine whether there was a breach of confidentiality I need to determine first what information was covered by the confidentiality provision.

[27] In mid-January 2014 and prior to the parties' attendance at mediation, Mr Halse's dismissal from the Council was reported by several mainstream media outlets.[5]

[28] I am satisfied the fact of Mr Halse's dismissal was already in the public domain prior to the parties' execution of the settlement agreement, and I therefore am unwilling to find that those posts which make reference to his dismissal breached the settlement agreement.

[29] I must find however, that the existence of the settlement agreement itself is caught by the confidentiality provision, and there is no real dispute that at least seven of the posts make

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4 *Lumsden v Sky Management Limited* [2017] NZEmpC 30

5 Article published in the Waikato Times on 15 January 2016 and in *Stuff* on 16 January 2016 both refer to Mr Halse's dismissal from the Council.

specific reference to the settlement agreement,[6] (and in one instance attached correspondence setting out the contents of the non-disparagement provision within the settlement agreement).[7]

[30] Next, the Council points to several of the posts which are said to contain material that can only be based on Mr Halse's personal experience as an employee and says these references too are in breach of the confidentiality provision. The Council appears to take the view that cl 1 limits the parties communication to third parties to the words contained in the provision about any matters in which they have been involved.

[31] I accept the sentence setting out the parties' agreed statement for use outside mediation may, on its own, be read as applying to all events or interactions that has passed between the parties. But the way in which the confidentiality clause (cl 1 at para [4] above) is drafted as a whole leads me to find the Council's interpretation goes beyond that what is provided for in the clause.

[32] It is plain from the wording of cl 1 that it was aimed towards limiting what each party could say about what was said, done, and agreed, between them "*in mediation*". The parties' agreement as to what may be said about their employment relationship follows immediately on from the parties' commitment to maintaining confidentiality as to what was communicated in mediation. It is this context that I find their agreement concerning statements said outside mediation must logically apply. If the agreed statement was intended to limit all statements made by either party about any event or issue separate to those matters discussed in mediation, it was open to the parties to expressly record that arrangement. I am not persuaded that every interaction occurring over the duration of the employment relationship between the parties became subject to the confidentiality provision as would be the effect of it if the Council's interpretation is applied. Subject then to the agreement to keep those matters discussed in mediation as confidential I am unwilling to conclude all statements made about the Council by Mr Halse were in and of themselves a breach of the confidentiality provision.

Summary

[33] I have found the 13 posts loaded onto CultureSafe's media page between 12 December 2019 and 30 January 2021 disparage the Council and/or refer to the existence of the settlement

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6 21 December 2020; 6 Jan 2021; all 3 posts of 21 January 2021; 23 January 2021 and; 26 January 2021.

7 On 21 December 2020.

agreement (or terms contained therein) such that I am satisfied the settlement agreement has been breached.

Does the Authority have jurisdiction to order compliance with the settlement agreement?

[34] Mr Halse asserts the Authority does not have jurisdiction to order the respondents to comply with the settlement agreement because:

(a) the settlement agreement is not a contract of employment between him and the Council;

(b) there was no employment agreement between CultureSafe and the Council.

[35] In the absence of either of the above circumstances Mr Halse says there is no basis on which the Authority may determine the Council's claims concerning the settlement agreement against either respondent.

[36] Section 161(1) of the Employment Relations Act 2000 (the Act) empowers the Authority to make determinations about employment relationship problems generally, including, as Mr Halse refers, to matters relating to a breach of an employment agreement, and any other action arising from or related to the employment relationship.[8] However, the Authority's jurisdiction is not confined to those two matters alone.

[37] Section 161(1)(n) expressly provides for the Authority to make compliance orders under s 137 of the Act. The provision allows the Authority to order compliance in respect of agreed terms of settlement. The power is reinforced by s 151 of the Act which provides for the enforcement of settlement terms certified by a mediator under s 149(3), and by s 137 which empowers the Authority to order compliance with terms of settlement (as referred to in s 151). These statutory provisions leave me more than satisfied the Authority has jurisdiction to order compliance with a settlement agreement certified under s 149(3) of the Act.

Who must comply?

[38] The next issue of contention concerns who the Authority may order to comply with a settlement agreement of this nature.

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[8] At s 161(1)(b) and (r) of the Act respectively.

[39] The respondents say CultureSafe was not in existence at the time the settlement agreement was entered into and not a party to the arrangement. CultureSafe submits it could therefore not be liable for a breach of the settlement agreement. The submission does not reflect the current law on this matter.

[40] Section 137(1)(a)(iii) of the Act provides where "*any person"* has not observed or complied with any term of a settlement that s 151 of the Act provides may be enforced by compliance order.

[41] Section 149(4) specifically concerns settlement agreements certified by a mediator and provides: "*Any person"* who breaches an agreed term of settlement … is liable to a penalty imposed by the Authority. [italic emphasis is by the Authority]

[42] The use of the phrase "*any person*" in both statutory provisions makes it sufficiently clear the obligation to comply with terms of settlement (agreed under s 149) is not limited to the parties cited in the settlement agreement but may extend to other persons, and a failure to do so may be imposed on a person for a breach.[9]

[43] In *CultureSafe NZ Limited v Turuki HealthCare Services*, a case which also concerned non-disparagement and confidentiality clauses in a settlement agreement, Judge Holden observed:[10]

> … A person who knows of the fact of the settlement having been achieved, and of the relevant terms of settlement, and who then breaches an agreed term of the settlement, can be liable for a penalty for breach of s 149.

[44] Further, the definition of a "person" (at the time in which the posts were published) is recorded at s 29 of the Interpretation Act 1999 and includes a corporation sole,[11] which includes CultureSafe as an incorporated company.

[45] It follows from all of the above that the Authority has jurisdiction to issue compliance orders and determine whether penalties be imposed in circumstances where a breach of a settlement agreement has occurred whether by an individual or a company.

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9 See *Musa v Whanganui District Health Board* [2010] ERNZ 236 at [55]-[57].

10 *CultureSafe NZ Ltd v Turuki HealthCare Services Charitable Trust* [2020] NZEmpC 165 at [53].

11 The Legislation Act 1999, s 13, which came into force on 28 October 2021 maintains the same definition as the Interpretation Act.

Are there factors which preclude the enforcement of the settlement agreement?

Bill of Rights Act

[46] Mr Halse submits that as long as the posts do not relate to any matter that arose out of the employment relationship problem between himself and the Council, he is free to make comments on the operation of the Council (as a public body) and this right is guaranteed by the New Zealand Bill of Rights Act 1990 Act.[12]

[47] Mr Halse is mistaken on this point.

[48] The first difficulty concerns Mr Halse's interpretation of the provisions at issue. For example, the parties' agreement at cl 7 to refrain from making "any disparaging comments about the other" is plain in its meaning.

[49] There is nothing in the wording of cl 7 which supports Mr Halse's view that the prohibition on what each party may say about the other is limited to those matters in dispute at the time the employment relationship ended. It was open to the parties to narrow the ambit of the non-disparagement provision, but they did not.

[50] Nor is there any evidence that Mr Halse's agreement to the terms of settlement including his agreement to refrain from disparaging the Council was anything other than freely given in exchange for a considerable sum of money.

[51] Further, the respondents are likely to be aware of a line of judgements from the Employment Court, (reported under the acronyms *ALA v ITI*[13]) which found that confidentiality and/or non-disparagement provisions voluntarily agreed by parties under s 149, were a justified limitation on freedom of expression under the Bill of Rights Act.

[52] On challenge, the Court of Appeal declined leave to hear the matter where is considered there was no merit to the claim.[14]

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12 Statement in Reply dated 11 January 2021 and Amended Statement in Reply dated 18 January 2021, at paragraphs [4] and [28].

13 *ALA v ITE* [2016] NZEmpC 42 at [56] and *ALA v ITE* [2017] NZEmpC 39 at [130]. The reasoning in both those cases was applied to a case in which both respondents were involved, in: *CultureSafe NZ Limited v Turuki HealthCare Services Charitable Trust* [2020] 165 at [65]

14 *B v ALA* [2016] NZCA 385 at [11].

[53] There is no basis on which I can find the settlement agreement is unenforceable under the Bill of Rights Act.

Disclosures made in the public interest

[54] Mr Halse's overarching response to the Council's claims of breach of confidentiality and non-disparagement provisions is that the provisions "*suppress evidence of wrongdoing*" and therefore "*unlawful*".[15] In effect, Mr Halse approach appears to rely on the principle that there can be "*no confidence in the disclosure of an iniquity*" ("the defence of iniquity").[16]

[55] The Employment Court in *Evolution E-business Ltd v Smith* described the defence in the following way:[17]

> It has long been recognised that the court will not restrain the disclosure of otherwise confidential information if such disclosure reveals illegal acts or other misconduct of such a nature that it ought in the public interest to be disclosed …

[56] The defence was more recently examined by the Employment Court in *ALA v ITE*.[18] The Court referred to the House of Lords' judgement in *Attorney General v Guardian Newspapers Ltd (No 2)*, (the "*Guardian* case") which canvassed whether an individual may, despite a duty to maintain confidentiality on a matter, disclose information about that matter on grounds that the information is in the public interest. In that case Lord Goff made the following statement.[19]

> …there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. … It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
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> Embraced within this limiting principle is … the defence of iniquity. …

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15 Amended Statement in Reply dated 18 January 2020, at para's [20]-[25]

16 The defence was articulated in *Gartside v Outram* (1857) 26 L.J.Ch. at 113 and is recognised in New Zealand courts.

17 *Evolution E-business Ltd v Smith* [2011] NZEmpC 109 at [59].

18 *ALA v ITE* [2017] NZEmpC 39.

19 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 282

[57] Mr Halse says the Council has sought to provoke the suicide of his client (and others).[20] He further says the Council failed to investigate his clients concerns and prevent bullying in its workplace. Mr Halse points to the phrase "*so far as the law allows*" (in the confidentiality provision of the settlement agreement) as providing authorisation to speak out on Council's unlawful behaviour (alleged by Mr Halse) including, but not limited to, breaches of the Health and Safety at Work Act 2015 ("HSWA").[21]

[58] As to the basis for a disclosure of confidential information, in the *Guardian* case[22] Lord Goff observed "…*a mere allegation on iniquity is not of itself sufficient to justify disclosure in the public interest*". He went on to note that the person intending to disclose the allegation should, as is reasonably open to him or her, make sufficient inquiry such that that the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source before disclosing it.

[59] No evidence (other than Mr Halse's assertions) was provided to establish a prima facie basis for the allegations he makes against the Council, and therefore I have no means to assess whether the allegations are reasonably held. In the absence of any evidence to demonstrate some substance to the allegations I am not satisfied Mr Halse has established any countervailing public interest factors to justify breaching the agreed obligations pursuant to the settlement agreement. But even if I were wrong on this point, the *Guardian* case makes it clear that if there are legitimate public interest grounds on which a disclosure of confidential information could be made, it does not follow that the disclosure should be placed in the public domain without limitations.[23]

[60] In *ALA* (and also in *Evolution E-business Ltd[24])* the Employment Court emphasised that for the disclosure of the confidential information to be justified, the disclosure should be made to a person "*who has a proper interest in receiving the information*". In support of this approach the judgement set out the following excerpt from the *Law of Torts*:[25]

> In some cases the public interest may favour publication, but not necessarily to the world at large. Often disclosure to an authority competent to deal with the

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20 Supplementary Statement in Reply dated 16 February 2020, at para's [13]-[14]; Affidavit of Allan Halse, 21 July 2021 at para 24C.

21 Respondents' supplementary statement in reply dated 16 February 2021 at [13].

22 Above at n13.

23 At n13 per Lord Goff.

24 Above at n17

25 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, Wellington, 2016) at 806 as quoted.

> matter will be sufficient, in which case wider publication will be a breach of confidence. So disclosure of an alleged financial wrongdoing solely to the Inland Revenue Department, and of photographs of a habitual shoplifter to local shopkeepers, of convictions for paedophilia of caravan dwellers to the site owner, and of statements by a registered nurse to the police when under caution to the regulatory body for nursing in each case was permissible.
>
> * footnotes not included

[61] The Court then cited the below passage from *Gurry on Breach of Confidence*:

> Making a restricted disclosure to a limited circle, in particular to a regulatory or other proper authority, is likely to be considered to be the most proportionate way to advance the public interest.[26]

[62] In contrast to CultureSafe's social media page, there were more appropriate avenues by which Mr Halse could advance the public interest if he has concerns. It was open to him to report his concerns to WorkSafe New Zealand (as the regulatory body of the HSWA). It is unclear why he did not do so given the nature of the allegations. Alternatively, an application to the Authority to have the settlement agreement provisions modified may have been made, albeit a public interest in which to do so would need to be established. Notably, there is an important distinction between a matter that may be interesting to the public due to curiosity, and matters of public interest in the sense of the matter affecting the public at large such that there is a legitimate and proper interest in the matter.

[63] There is a further matter which Mr Halse considers should be disclosed to the public. He says the settlement agreement recorded a payment as " "*salary" being payment for services it knew it did not intend to receive*." Mr Halse further says "*false accounting is contrary to s 260 of the Crimes Act 1961"*.[27]

[64] This allegation does not raise a defence of iniquity which I am prepared to allow. Noting firstly that when a personal grievance is established, the Act requires the Authority to order the employer to pay the employee a sum equal to the remuneration (including wages or salary) he or she lost as a consequence of the grievance.[28] It is therefore not uncommon for employment relationship problems to be settled (in least in part) by the payment of wages for a period of time after the employment relationship has ended. Further, there is no statutory

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26 Tanya Aplin and others in *Gurry on Breach of Confidence: The Protection of Confidential Information*. (2nd ed, Oxford University Press, Oxford, 2012) as quoted.

27 Amended Statement in Reply at para [14]

28 At s 128 of the Act.

requirement that service must be provided in exchange for wages. This submission is dismissed.

Disclosure is already in the public domain

[65] As already noted Mr Halse's dismissal from the Council was published by several media outlets prior to the signing of the settlement agreement. Mr Halse's reference to his dismissal in several of the posts was not a breach of the confidentiality provision where that information was already in the public domain. But a disclosure of this limited nature does not provide a complete defence to the Council's claims, and Mr Halse's response to this aspect of the Council's application is misconstrued.

[66] I do not understand the Council is seeking to restrict publication of the fact Mr Halse was dismissed. Rather, it is seeking to enforce the terms of the settlement at cl 1, namely, to keep confidential the existence of the settlement agreement itself, the content of the discussions in mediation resulting in the settlement agreement, and the terms of that settlement. There is no evidence that the settlement agreement and its terms were in the public domain.

Limitation periods

[67] In Mr Halse's amended statement of problem, he states the settlement agreement "*is unenforceable because it is out of limitation."*[29]

[68] I consider it likely Mr Halse is referring to s 142 of the Act which provides:

> No action may be commenced in the Authority … in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of the action arose.

[69] Mr Halse appears to construe s 142 as preventing the Council from commencing enforcement action in respect of the settlement agreement because it was agreed more than 6 years ago. However, in this case the cause of action did not arise when the settlement agreement was signed but rather, when the alleged breaches to the settlement agreement occurred. The Council's claim in this matter was commenced within the statutory time frame.

[70] Alternatively, submissions on behalf of Mr Halse allege the existence and the content of the settlement agreement are unlawful. However, there is no evidence that Mr Halse took

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[29] Amended Statement in Reply, para [7]

issue with the settlement agreement and its terms before the Council lodged its application for compliance and no action has been commenced in the Authority on either of those issues.

[71] Mr Halse is precluded under s 142 from commencing action in respect of the settlement agreement where more than 6 years have passed since the parties' agreement to it.

[72] In any event there is nothing in the settlement agreement which limits the timeframe over which the terms apply, and I must find the settlement agreement continues to bind the parties.

Duress

[73] In the post of 26 January 2021 Mr Halse alleged he had been "*forced into signing a record of settlement at MBIE mediation that contained a non - disparagement clause*". However this claim was not pursued in the Authority, and there is nothing in the material provided to suggest that the way in which the negotiations and agreement to the settlement agreement was exceptional or unfair.

[74] I note Mr Halse was represented by a specialist employment law firm during mediation in which the settlement agreement was negotiated. The agreement was signed by a mediator who certified she had explained the effect of s 149(3) to both parties it was finalised, and that she was satisfied they each understood the effect of that provision. The settlement agreement records the terms of settlement are final and binding on the parties and is reinforced by s 149(3) which reiterates those provisions and are enforceable. Moreover, both parties performed in accordance with the terms of the agreement for almost 6 years.

[75] On balance I am satisfied Mr Halse understood and agreed to the terms of the settlement agreement at the time it was executed.

Summary

[76] No good reasons have been identified which as to why the settlement agreement should not be enforced against either respondent. It is appropriate in the circumstances of this matter to order both respondents to comply with the terms of the settlement agreement between the parties.[30]

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[30] Section 137(2) of the Act

Should penalties be imposed?

[77] 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. For each breach by an individual the Act provides a maximum potential liability of $10,000. In the case of a company a maximum potential liability for each breach is $20,000.[31] Although the Authority's power to impose penalties is discretionary, the power must be exercised on a principled basis.

[78] I find this case is one that warrants an award of penalties being made. In assessing the appropriate quantum of a penalty order against each respondent I have taken into account the factors recorded at 133A of the Act as developed by the Employment Court[32] and, where relevant to my assessment, the particular circumstances of this matter.

Mr Halse

[79] I have already found cl 1 and cl 7 of the settlement agreement were repeatedly breached. The obligation to not disparage the Council was breached in each of the 13 posts. Mr Halse referred to the settlement agreement in no less than 7 of the material posts.[33]

[80] Liability for the breaches if treated individually carries a potential maximum liability of $210,000. However, the conduct that caused the multiple breaches is so materially similar that the behaviour is best viewed as a single on-going breach. The maximum penalty, as it concerns Mr Halse, is therefore $10,000.

[81] This is not a case where the settlement agreement was inadvertently breached. Mr Halse was well aware the terms of settlement and that all matters discussed at mediation were confidential. It is also clear he understood he was obliged to not speak disparagingly about the Council.

[82] In various ways Mr Halse says he had a moral/ethical obligation to call out bullying behaviour, and did so. However, as already noted CultureSafe's media page, the platform by

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31 Section 135(2) of the Act

32 See *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143 at [138]-[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18]

33 Detailed at n6.

which it markets itself, is not a forum that Mr Halse may properly use to justify the breach(es) of the settlement agreement.

[83] I am further persuaded the posts were published with an intention to discredit the Council and cause it reputational harm. Those actions cannot be regarded as insignificant or inconsequential.

[84] The Act requires the Authority to consider whether a person involved in a breach, has been found to have engaged in any prior similar conduct.[34]

[85] Notably Mr Halse has, on two previous occasions, breached terms of a settlement agreement certified by a mediator under s 149. I have not cited the first of these as a non-publication order exists.

[86] The second case, *CultureSafe NZ Limited, Halse and anor v Turuki Healthcare Services Charitable Trust*[35] also involved breaches provisions concerning confidentiality and non-disparagement. Each case was decided before the breaches at issue in this case occurred. Both cases expressed concerns as to Mr Halse's unrepentant flouting of of the law as it concerns s 149 settlement agreements and his contractual arrangements.

[87] Mr Halse's approach to his legal obligations in this case has not altered.

[88] No evidence was presented to the Authority tto mitigate against imposing a substantial penalty. Nor was information provided at to Mr Halse's ability to pay. Given Mr Halse's experience and his conduct in the particular circumstances this matter a substantial penalty is warranted.

CultureSafe

[89] The posts that occasioned the breaches were made on CultureSafe's media page. The posts were a mechanism by the company to reinforce its brand, and, presumably, to tout for business. CultureSafe is also responsible for the breaches and a penalty against it is appropriate.

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34 Section 133A(g)

35 *CultureSafe NZ Limited, Allan Halse and another v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165

Orders

[90] Allan Halse and CultureSafe NZ Limited must immediately comply with cl 1 and cl 7 of the settlement agreement certified by an MBIE Mediator and dated 14 February 2014.

[91] Mr Halse is to pay a penalty of $9,000 to the Crown within 14 days of the date of this determination.

[92] CultureSafe NZ Limited is to pay a penalty of $9,000 to the Crown within 14 days of the date of this determination.

Costs

[93] Costs are reserved

Michele Ryan
Member of the Employment Relations Authority