



Innovation and Employment mediator certified their agreement under s 149 of the Act. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] The alleged breaches involve one client of Regent Realty transferring management of its property portfolio to Ms Ferguson's new workplace (TPPM) after the settlement agreement was in place.

[4] Regent Realty says that Ms Ferguson has breached the settlement agreement and seeks penalties in the sum of \$10,000 (to be paid to the Applicant) and costs.

[5] Ms Ferguson says this was a technical and minor breach with the restrictions on her dealing with clients from Regent Realty only having one month left to run and submits that the application should be dismissed, but if penalties are awarded a sum in the range of \$300 to \$1000 would be appropriate.

#### **The Authority's investigation**

[6] For the Authority's investigation written witness statements were lodged from Mary Ferguson, Geoffrey Clark (on behalf of Oniram Investments Limited (Oniram)), Kaine Wilson, director, James Cooper, general manager, and Kate Taylor, property management group leader, Regent Realty. All witnesses other than Mr Cooper answered questions under oath or affirmation from me and the parties' representatives. James Cooper was on leave but his written brief was accepted in evidence and Ms Taylor attended by telephone. The representatives provided written submissions.

[7] A written brief from Iain Bradley was filed on behalf of Ms Ferguson, however, after submissions on the day from both parties, it was not accepted or relied on by the Authority during this investigation.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

[9] The Authority needs to determine the following issues:

- (a) Has there been a breach of the settlement agreement?
- (b) If there has been a breach of the settlement agreement should the Authority award penalties?
- (c) Should there be an order for costs?

## **Has there been a breach of the settlement agreement?**

[10] Regent Realty says there has been a breach of clauses 2 and 3 of the settlement agreement. While the parties agreed their terms of settlement agreement were to be confidential, the following two terms had to be disclosed for the purposes of this determination. I prohibit from publication the balance of the settlement agreement.

[11] Clauses 2 and 3 provide:

2. Mary Ferguson agrees she will not, for a period of 6 months from the date of this agreement provide any services of the type she performed for Regent Realty Limited (property management services), directly or indirectly to any person or entity that Regent Realty or Mary Ferguson provided property management services to while Mary was employment Regent Realty Limited (Regent Realty's clients).
3. Mary Ferguson shall procure [sic] any entity that she works for and/or provides property management services to shall not provide any property management services to Regent Realty [sic] Limited's clients in the period.

[12] Clause 2 speaks for itself but clause 3 contains an error. Evidence was given that the word "procure" in clause 3 should appear instead of "precur". Despite the error, it was clearly designed to place an obligation on Ms Ferguson to inform any new employer that she could not provide any property management services to Regent Realty's clients in the six-month period.

[13] Mr Clark gave evidence on behalf of Oniram that he decided to leave Regent Realty in January 2021, before he met with Ms Ferguson (sometime in February 2021),

to discuss moving Oniram's management to TPPM. Ms Ferguson's evidence was that she told him she was unable to provide services to him due to an agreement that she had with Regent Realty. Mr Clark acknowledged she told him that at some point, however, he decided to move his business to TPPM regardless.

[14] After Oniram engaged TPPM and notified Regent Realty, TPPM wrote on 10 February 2021 giving Regent Realty 30 days' notice that management of Oniram's rental properties (approximately 12) would transfer to TPPM on 8 March 2021.

[15] The six-month period in the record of settlement expired on 12 May 2021. This means there was approximately two months left to run from the time of the proposed transfer from Regent Realty to TPPM and approximately three months from the time Regent Realty was notified of Oniram's decision.

[16] It is not in dispute that Ms Ferguson provided property management to Oniram when she worked at Regent Realty and Ms Ferguson conceded in her evidence at the investigation meeting, she was in breach of clause 2 by virtue of Oniram's property portfolio transferring to her new place of work.

[17] In terms of clause 3, her evidence was difficult to ascertain, however, she did clearly state that she did not tell her new employer about the restrictions (despite also saying at one point and then resiling from it, that she had shown TPPM a copy of her settlement agreement) which would confirm there was also a breach of clause 3.

[18] She was therefore liable to a penalty.

### **Penalties**

[19] In determining the quantum of penalties to be imposed, if any, s 133A of the Act sets out the relevant matters the Authority is to have regard to. I note that the breaches were not inadvertent as Ms Ferguson agreed that she knew that the terms of the settlement agreement prevented her from dealing with Oniram's property portfolio and told Mr Clark that.

### *Submissions*

[20] Regent Realty say the breach was serious, intentional and that Ms Ferguson gained personally through the breach. It asks that the Authority recognise the "sanctity

of the present record of settlement”, noting a compliance order is no longer sought because the period of the restraint has lapsed, and seeks a significant penalty.

[21] Regent Realty also says there are no mitigating circumstances and Ms Ferguson could have sought dispensation from it on a one-off basis. It also says there are two aggravating features in that Ms Ferguson has also breached the non-disparagement and confidentiality clauses of the settlement agreement.

[22] With reference to *Tibbits v EWP Sales Limited & Anor*,<sup>1</sup> a previous Authority determination, where breach of a settlement agreement was described as “flagrant and deliberate...” Regent Realty seeks the maximum penalty for an individual in the sum of \$10,000.

[23] Ms Ferguson’s evidence was that she had been naïve regarding the restrictions in the settlement agreement on dealing with Regent Realty’s clients and having informed Mr Clark of the restrictions she appeared to believe that her obligations under the settlement agreement were satisfied. She also said her stance was influenced by the fact that there had been no solicitation on her part, and she understood that Mr Clark was moving his business regardless of whether he came to TPPM or used another company.

[24] Ms Ferguson did not seek to hide the transfer evidenced by TPPM writing to Regent Realty to facilitate the move. The parties’ representatives corresponded regarding the breaches. Regent Realty was clear in its position that transfer of Oniram’s property management to TPPM was in breach of the settlement agreement.

[25] Ms Ferguson’s response to Regent Realty raising it with her was to deny any breach relying on the fact that Mr Clark made his own decision to leave Regent Realty. She also said the reasons for Oniram moving rested with Regent Realty itself which Regent Realty denied.

[26] While Ms Ferguson’s submissions queried whether these proceedings were necessary and urged the Authority to exercise its equity and good conscience jurisdiction, and not apply a penalty, the Authority could not take into account large amount of the evidence about the factual background said to be relevant. This was

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<sup>1</sup> *Tibbits v EWP Sales Limited & Anor* [2015] NZERA Auckland 196.

because one term of the settlement agreement they made in November 2021 was that all matters between them were fully and finally settled by that agreement.

[27] The context the Authority was being asked to consider relied heavily on matters that had occurred before Ms Ferguson left her employment at Regent Realty and was therefore covered by the terms of the settlement agreement and unable to be examined by the Authority.<sup>2</sup>

[28] The extent of the loss was not precisely identified but Mr Clark gave evidence that it was in the region “thousands” per month. In any event, it is not clear that the loss can be attributed to Ms Ferguson when Mr Clark’s evidence was that he made the decision to move prior to deciding to engage TPPM.

[29] No steps were taken to mitigate the potential adverse effects of those breaches and Ms Ferguson denied any breach until the investigation meeting. There was not information of similar prior conduct by Ms Ferguson.

[30] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.<sup>3</sup>

### *Conclusion*

[31] I find that Ms Ferguson was in breach of clauses 2 and 3 of the settlement agreement. In accordance with the settlement agreement Ms Ferguson was unable to provide services to Oniram until the six-month period had expired and she was to tell her new employer about that restriction.

[32] There were options available to Ms Ferguson. The parties were unable to resolve the matter between them largely because of the stance that Ms Ferguson took, that there was no breach. It was also open to her to seek a one-off dispensation and the period of the restriction left to run was not onerous although there were still approximately three months of the restraint to run (rather than one month) at the time Oniram had engaged TPPM and TPPM notified Regent Realty.

[33] Weighing the relevant factors, and the importance of parties being held to the terms of agreements certified under s 149 of the Act, a penalty of \$2000 was an

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<sup>2</sup> Employment Relations Act 2000, s 149(3)(b).

<sup>3</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

appropriate amount to impose for the breaches. That was proportionate to the harm done and within the range of penalties imposed in similar cases.

[34] There was insufficient evidence to be satisfied of the additional breaches raised related to the non-disparagement and confidentiality clauses of the settlement agreement.

### **Orders**

[35] Ms Ferguson is to pay a penalty of \$2,000.00 to the Employment Relations Authority within 28 days of this determination. In accordance with s136 of the Act, that amount must then be paid by the Authority into a Crown bank account.

### **Costs**

[36] Costs are reserved.

Sarah Kennedy  
Member of the Employment Relations Authority