Attention is drawn to the
non-publication order
at paragraph [47]

**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2022] NZERA 89
3146601

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| | BETWEEN | OCEAN KEREAMA<br>First Applicant |
| | AND | ASHLEY KEREAMA<br>Second Applicant |
| | AND | BERRY TASTY (2008) LIMITED<br>Respondent |

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| Member of Authority: | Michael Loftus |
| Representatives: | Ira White, advocate for the Applicants<br>Lance Peterson, advocate for the Respondent |
| Investigation Meeting: | By telephone conference on 8 November 2021 and on the papers with input up to 20 December 2021 |
| Date of Determination: | 16 March 2022 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicants claim the respondent has breached a provision contained in a mediated settlement each applicant concluded with Berry Tasty on 8 Aril 2021. Both settlements were signed by a mediator in accordance with s 149 of the Employment Relations Act 2000 (the Act) on 14 April 2021.

[2] The applicants seek penalties for the contended breach and costs.

[3] Berry Tasty accepts the breach occurred but contends it does not warrant a penalty.

[4] The applicants also seek an order prohibiting the publication of anything that might identify them. Berry Tasty does not object but asks the same apply to it.

**Background**

[5] The applicants are sisters and each brought a personal grievance which, as already said, saw each enter into a settlement which was then confirmed by a mediator in accordance with s 149 of the Act.

[6] Each settlement required the payment of a sum of money along with a contribution toward costs. Pertinent to the current allegation was the fact the settlements also contained a provision which reads *Parties wish each other well and will not make disparaging statements about the other.*

[7] On 19 April the required payments were made, though both went to Ashley Kereama's account in accordance with an instruction given by their representative, Ms White, on their behalf. An issue, however, arose as Berry Tasty entered the words *dirty money* in the code box on the payment record and the applicants, or at least Ashley Kereama, considers that disparaging.

[8] The same day an e-mail was sent by Berry Tasty's sole director and shareholder, Wendy Mitchell, to Ms White, which reads:

> I have paid your invoices today, hopefully you don't have to deal with the likes of her again.
>
> I see Ocean's money is to go to Ashley, yet that is one of her lies at the beginning.
>
> This whole business is one of the most disgusting and dishonest things I have ever seen.

[9] The papers confirm that an issue in the original dispute was a debate over whose account Ocean Kereama's wages should have been paid to and the comments reflect Ms Mitchell's views about this and the propriety of Ashley Kereama receiving her sisters' money. Frankly that is not really Ms Mitchell's business and while both party's submission commented on it I will not as there is no need.

[10] On 20 April Ms White raised the purported breach with Berry Tasty which responded, the following day, with an apology. Nothing further occurred till some three months later when this application was lodged with the Authority.

**Discussion**

[11] The claim is a breach has occurred as one party failed to comply with the requirement it not make disparaging statements about the other. It is further said this occurred twice.

[12] The first question is therefore whether or not the comments are disparaging? The short answer is yes. The definition of disparage includes to ”speak slightingly of, belittle, bring discredit on.”[1] To suggest someone is receiving dirty money, that she lies and is dishonest clearly fits within that definition.

[13] That does not, however, mean there has necessarily have been a breach as the clauses in question require those comments be made by one party to the settlement about another. That they were made by a party to the settlement, namely Berry Tasty, is conceded but questions remain. That is because the papers make it clear the applicant parties consider the comments were aimed at, and about, Ashley and not Ocean.

[14] For example the statement of problem states “The comments … we assume are toward Ashley Kereama…”.[2] Further on there is advice “…these comments have been distressing and offensive to Ashley Kereama…”.[3] Similarly the e-mail of 20 April taking issue with the comments records “Please know that Ashley has taken offence to your comments”. There is no mention of Ocean taking offence – indeed the evidence is she did not know about this at that time.

[15] The theme continues in Ashley Kereama’s affidavit of evidence with the comment “Wendy disparaging me in an email to Ira White was appalling…” .[4]

[16] There is no allegation or evidence in any of the papers that Ocean Kereama was the subject of disparaging comment. It follows that while the provision in Ashley Kereama’s settlement has been breached, the same cannot be said for Ocean Kereama.

[17] Having established a breach, at least with respect to Ashley Kereama’s settlement, the next question is whether or not a penalty can be imposed. The answer is yes[5] though a further question remains – should it?

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[1] The Pocket Oxford Dictionary, Clarendon Press, Oxford
[2] Statement of Problem at [2(c)(i)]
[3] Above n 2 at [2(f)]
[4] Affidavit of Ashley Kereama dated 14 November 2021

[18] Berry Tasty says no on the grounds the intent of a non-disparagement clause is to maintain the reputation of the parties from those not involved in the employment relationship problem. While not expressly stated the argument appears to be that as the e-mail went no further than people present at the mediation disparagement has not occurred.

[19] I cannot agree. I know of nothing in either the Act or caselaw that supports this contention, but more importantly the clause in question is clear. It says neither party shall make disparaging statements about the other. That is absolute and there are no caveats to, or restrictions on, that undertaking. The issue is simply – is there a breach and as I have already concluded the answer is yes.

[20] The bulk of the submission then focuses on the circumstances in which the breach arose and Ms Mitchell's disquiet with the fact payment was being made to Ashley Kereama. As already said this is, in my view, largely irrelevant and none of Ms Mitchell's business though there is one legal issue that has been raised and about which comment should be made.

[21] It is an argument Ms Mitchell was correct in raising the issue of the payments destination given s150A of the Act. That section states payments required under a s149 settlement must go directly to the recipient party and not their representative unless that representative is a solicitor.

[22] That argument faces two problems in this instance. The first is the payment did not go to Ms White so it appears there was no breach in respect of the mischief the section was designed to prevent. Secondly the payment was made as instructed and while the evidence suggest Ms Mitchell was annoyed about it, nothing suggests she was concerned at that time – it is a line of argument developed after the event.

[23] The simple fact remains that in an enforcement/compliance setting the question is simple - has there been a breach? As already said more than once the answer is yes – the prohibition on disparagement has been breached by Berry Tasty and nothing raised by Berry Tasty in its submission gets around that fact.

[24] That then raises the question of how big a penalty should be imposed?

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[5] Section 149(4) of the Employment Relations Act 2000

[25] The law in respect to quantification of penalties is well established given s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited,*[6] *A Labour Inspector v Prabh*[7] and *A Labour Inspector v Daleson Investment*.[8]

[26] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach, vulnerability of the victims and, finally, previous conduct.

[27] With respect to the number of breaches I notice the claim said two breaches occurred. Ocean Kereama's claim has failed ([16] above) leaving one breach for which the maximum penalty is $20,000.

[28] I turn to intention, which is generally required before a penalty is awarded. The requirement of intention is not necessarily about whether the party in breach was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question,[9] or failed to take reasonable steps to fulfil their legal obligations.[10] Here the evidence strongly supports a conclusion Ms Mitchell acted intentionally – indeed the papers make it clear she was expressing dissatisfaction with the payments destination and her view of Ashley Kereama's behaviour with respect to the original grievance.

[29] With respect to the breaches' severity I note there was no wide dissemination and there is no evidence the applicants suffered any pecuniary loss. When the breach was first raised an apologetic response was quickly offered.

[30] There is no evidence or suggestion of similar previous conduct by Ms Mitchell and while the applicants allege there may have been other similar behaviours around the same time they concede they can offer no evidence.

[31] Perhaps the most important issue in determining an appropriate penalty in this matter is that of consistency and proportionality. Here I am cognisant of the penalties imposed on another company for similar behaviour by both the Authority and the

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[6] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[7] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[8] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[9] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[10] *El-Agez v Comprede Limited,* TT 4121553, at para 18

Court in recent times. The company concerned and its personification can only be described as repeat offenders who deliberately transgress despite being told it is wrong.[11] Furthermore their audience potentially numbers in the thousands yet the most recent penalty imposed on the company was $9,000.[12] By comparison this was a one-off event with no external audience though that will now change as a result of this challenge but that is as a result of the applicant's decision. All this suggests a relatively modest penalty and I consider $1,500 appropriate.

[32] There is now the issue of whether part or all of the penalty should be paid to the applicants.

[33] In the papers there is frequent reference to Ashley Kereama's distress and the statement of problem characterises an "appropriate penalty" as "determine[ing] the quantum of compensation due to the Applicant's."[13] The suggestion passing the penalty to the applicants acts as a form of compensation is the only apparent rationale for the request. That means the answer must be no for a number of reasons.

[34] First it is well established a penalty's size relates to the breach and its severity; they are not to be used to compensate unless there is no other way of doing so.[14]

[35] Second there was no pecuniary loss and the Court has previously ruled that is a ground for overturning an order a penalty be paid to an applicant.[15] There is also the fact costs remain available to address the public service performed by the applicants bringing the claim.

[36] Third I note the overriding rationale in most recent cases where an applicant has shared in the proceeds of a penalty is the nature of the issues involved and the extent to which they engage public, as opposed to private, interests.[16] A more recent application of that approach is *Kazemi v RightWay Ltd*[17] but again the relevant factors are missing here. There is no broader public good addressed by this claim, nor benefit to other employees.

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[11] *Hamilton City Council v Halse and Anor* [2022] NZERA 34 at [85] and [86]
[12] Above n 11 at [92]
[13] Above n 2 at [2(j)]
[14] Above n 6 at [150]
[15] *G L Freeman Holdings v Livingston* [2015] NZEmpC 120 at [53]
[16] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [90]
[17] *Kazemi v RightWay Ltd* [2019] NZEmpC 59 at [124]

[37] Fourth, and if the penalty could be used to compensate in this instance, there is no actual evidence of harm or non-pecuniary loss. Ocean Kereama's claim failed and given the points above I conclude Ashley Kereama has failed to establish any valid ground for passing the penalty to her.

**Costs**

[38] While the applicants addressed costs in their submission I have to say I have concerns about the way this has been done. I am also concerned costs, as initially sought, were in the order of $500[18] while the submission now refers to the Authority's daily tariff of $4,500 and seeks approximately that amount.[19] I also note the respondent did not address costs and simply asked they be reserved. Given my concerns that is also my inclination.

**Non publication**

[39] The applicants seek an order prohibiting the publication of anything that might identify them. Berry Tasty does not oppose this but asks they too be subject to a similar order.

[40] In what is probably New Zealand's leading case on prohibition orders the Supreme Court confirmed the importance of the principle of open justice.[20] That said, and while open justice was the fundamental rule, parties could seek a departure but that had to be justified and the threshold is high.

[41] In applying that in the employment jurisdiction the Court has said:

> The starting point when considering an application for non-publication orders is that such orders are a departure from the fundamental principle of open justice. The person applying for non-publication orders must establish sound reasons for the presumption favouring publication to be displaced, showing that, if non-publication is not granted, there will be specific adverse consequences that are sufficient to justify an exception to the fundamental principle.[21]

[42] The applicants' rationale is each is young and will remain in the region they live for some time and they do not, therefore, want to be judged or criticised in their local community for pursing their grievance or challenging Ms Mitchell's breach.

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[18] Above n 2 at [2(k)] repeated at [3(3)]
[19] Applicant's submission at [9(b)]
[20] *Erceg v Erceg* [2016] NZSC 135 at [2]

Unfortunately I must say that it is a rationale about which there is little that can be considered unusual or special and neither is it particularly specific as to the nature or extent of the alleged adverse consequences.

[43] I also note there is another potentially valid rationale and that is to maintain the confidentiality the parties originally envisaged, and this was alluded to. The problem with that is the enforcement action is a new and separate proceedings to which the previous confidentiality does not necessarily extend.[22]

[44] Berry Tasty's rationale for a similar order is that the business has been sold and this might reflect badly on the new owners who played no part in these events. This is essentially an embarrassment argument but as was noted in *Erceg* that is an inadequate rationale[23] and the fact the sale is now mentioned means anyone reading this determination will know the new owners are not involved. Given that issue is therefore adequately addressed I have to once again conclude there is no reason to depart from the principal of open justice.

[45] Having declined this application, I note the parties have a statutory right of challenge. Instant publication will, however, undermine any possible challenge and effectively deprive the parties of a legal right. I therefore order a temporary prohibition on publishing anything that might identify the parties. Unless altered by either the Authority or Court this order will cease to apply after Tuesday 19 April 2022.

**Conclusion and Orders**

[46] Given the above I order the respondent, Berry Tasty (2008) Limited, pay to the Crown via the Authority a penalty of $1,500 (one thousand, five hundred dollars). Payment is to be made no later than Tuesday 12 April 2022.

[47] I also order a temporary prohibition on the publication of anything which might identify the parties. Unless amended this order will cease to apply after Tuesday 19 April 2022.

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[21] *FVB v XEY* [2020] at [9] with the words *specific adverse consequences* quoting *Erceg* at [13]
[22] Section 149(3)(b) of the Employment Relations Act 2000
[23] *Erceg* at [14] citing *John Fairfax Group v Local Court of New South Wakes* (1991) 26 NSWLR 131 (NSWCA)

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, the applicants may lodge, and then should serve, a memorandum on costs within 14 days of the issue of this determination. From the date of service of that memorandum Berry Tasty (2008) Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Michael Loftus
Member of the Employment Relations Authority