

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 394
3171822
3190479

BETWEEN TE MANAWA O TUHOE
 TRUST
 Applicant/Respondent

AND TANIA MCDONNELL
 Respondent/Applicant

Member of Authority: Eleanor Robinson

Representatives: Scott McKenna, counsel for the Applicant
 Stan Austin, advocate for the Respondent

Investigation Meeting: 7 July 2023 by Zoom

Submissions and/or 16 May 2023 from the Applicant
further evidence 9 May and 4 July 2023 from the Respondent

Determination: 25 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Te Manawa O Tuhoe Trust (TMOT), claims that Ms McDonnell has breached a s149 Record of Settlement (the ROS) by continuing to assert that she is still an employee, making demands for payment, and refusing to return equipment belonging to TMOT.

[2] Ms McDonnell claims that TMOT has breached the Record of Settlement by making disparaging remarks about her to the Police, namely by making a complaint regarding her conduct in refusing to return property.

[3] TMOT denies that it has disparaged Ms McDonnell and claims that she has retained property belonging to it in breach of her employment agreement, and with no lawful basis for so doing.

The Authority's investigation

[4] Mr McKenna and Mr Austin filed written submissions on behalf of the parties, and spoke to these orally in an investigation meeting held by Zoom.

[5] 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.

Issues

[6] The issues requiring investigation are whether or not there have been breaches of the ROS by:

- Ms McDonnell continuing to claim she is still employed by TMOT;
- TMOT making disparaging remarks about Ms McDonnell: specifically by the making of a complaint to the Police that she was unlawfully retaining property belonging to TMOT;
- Should a compliance order be made?
- Should penalties be issued in relation to a breach of the employment agreement or in relation to good faith?

Background

[7] Ms McDonnell was an employee of TMOT. On 14 May 2021 TMOT terminated Ms McDonnell's employment on the basis of redundancy.

[8] Ms McDonnell lodged a statement of problem on 3 June 2021 in the Authority (application 3141861) claiming that she had been unjustifiably dismissed by TMOT and seeking both interim and substantive reinstatement.

[9] Her claim for interim reinstatement was not successful in the Authority but she made a successful challenge before the Employment Court and on 2 December 2021 the Employment Court granted Ms McDonnell interim reinstatement pending further order of the Court

[10] The substantive application for permanent reinstatement, application 3141861, remained before the Authority.

[11] Following the judgment and prior to the Authority hearing the substantive claim, the parties entered into negotiations, and on 28 January 2022 the ROS was entered into pursuant to s 149 of the Act. The ROS was signed by the parties and by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[12] The ROS was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[13] The relevant clauses of the ROS in respect of this issue are:

2. Within 7 days of this Agreement the Respondent will pay:

- a. The Applicant the compensatory sum of \$25,000 under section 1234(1)(c)(i) of the Employment Relations Act 2000;
- b. Stan Austin upon receipt of an invoice the sum of \$10,000 (inclusive of GST if any) being contribution the Applicant's costs of representation in the Employment Relations Authority and Court
- c. SBM Legal upon receipt an invoice the sum of \$3,500 (plus GST) being contribution to the Applicant's costs of representation in the Court of Appeal.

3. Neither party will make disparaging remarks against each other.

4. ...

5. This is the full and final settlement of all matters between Tania McDonnell and Te Manawa o Tūhoe Trust arising out of their employment relationship.

[14] On 2 February 2022 TMOT paid to Ms McDonnell the settlement sum as set out in the ROS.

[15] On that same date, Mr Austin emailed the Authority in relation to claim 3141861 advising: “ This matter has been resolved between the parties. The application should be discontinued.”.

[16] The matter was accordingly withdrawn and discontinued in the Authority.

[17] On 6 May 2022 TMOT lodged a statement of problem in the Authority seeking a compliance order with the ROS, claiming that Ms McDonnell was asserting that she was still employed, and was sending timesheets and seeking weekly wage payments. In addition she was refusing to return property owned by TMOT.

Is Ms McDonnell still employed by TMOT?

[18] Ms McDonnell was reinstated to employment with TMOT by means of the interim order. That interim order remained in place pending resolution of the application for permanent reinstatement. That is the nature of an interim order: it maintains the status quo until the substantive matter is resolved.

[19] The ROS was entered into by the parties following a negotiation. Both parties have made submissions on whether or not Mr Austin, acting for Ms McDonnell, acted in good faith during that negotiation.

[20] Whilst noting that it is a legal requirement that parties engaged in mediation do so in good faith, I do not consider it necessary for me to consider the pre-ROS discussions between the parties in order to determine this issue.

[21] The ROS stated that it was a full and final settlement of all matters arising from the employment relationship. I find that matters between TMOT and Ms McDonnell included her redundancy termination in relation to which she had applied to the Authority for a remedy of both interim and permanent reinstatement.

[22] More significantly, following the signing of the ROS, Mr Austin withdrew the application for permanent reinstatement from the Authority.

[23] I find that withdrawal, having confirmed that Ms McDonnell was no longer seeking permanent reinstatement, ended the interim order maintaining the status quo.

[24] On that basis, once the ROS was signed and executed, and the application seeking reinstatement withdrawn from the Authority, I find that: “all matters between Tania McDonnell and Te Manawa o Tūhoe Trust arising out of their employment relationship” were concluded.

[25] I determine that Ms McDonnell is not still employed by TMOT.

Did TMOT breach the ROS by making disparaging comments to the Police about Ms McDonnell?

[26] The ROS stated at clause 3 that: “Neither party will make disparaging remarks against the other”.

[27] The Cambridge English Dictionary defines disparaging as: “criticising someone, in a way that shows you do not respect or value them.”¹ It also has a connotation of expressing negative, low remarks in order to lower someone’s reputation.

[28] I have found that Ms McDonnell was mistaken in continuing to believe she was still an employee after the signing of the ROS and withdrawal of her claim for permanent reinstatement. To that extent TMOT were correct in that after 2 February 2023, since Ms McDonnell was no longer an employee, she was required to return all property belonging to TMOT in accordance with clause 11.3 of the Employment Agreement which stated:

11.3 RETURN OF PROPERTY

Immediately upon termination you are required to return to us:

1. Any information or data that you have received, made or copied in the course of your employment with us.
2. Any equipment, clothing or other property belonging to us but held by you during your employment.

[29] The complaint to the Police was made by TMOT in accordance with its understanding that with the ending of the employment relationship, Ms McDonnell’s employment had ceased and clause 11.3 of the Employment Agreement became operative. It was only following attempts to engage with Ms McDonnell and have its

¹ [Cambridge Free English Dictionary and Thesaurus](#)

property returned which she resolutely refused to do so, that the complaint was made to the Police.

[30] I find that to the extent that TMOT was making a report to the Police based upon its reasonable belief that Ms McDonnell was improperly retaining its property in breach of both the ROS and her employment agreement, it cannot be held to have made disparaging comments about her actions to the Police.

[31] I determine that TMOT did not breach the ROS by making disparaging comments to the Police about Ms McDonnell.

Should a compliance order be issued?

[32] I have determined that Ms McDonnell's employment with TMOT ended upon the signing of the ROS and the withdrawal of her application for permanent reinstatement from the Authority. Following that, she should have complied with clause 11.3 of the Employment Agreement and returned all property to TMOT.

[33] I find that it is appropriate to issue a compliance order.

[34] **In order to effect compliance with clause 11.3 of the Employment Agreement, I therefore order Ms McDonnell to immediately return all information, data received, made or copied during her employment with TMOT, together with any equipment, clothing or other property to TMOT.**

Should penalties be awarded?

[35] Ms McDonnell has breached clause 11.3 of the Employment Agreement by failing to return its property to TMOT when her employment with it ceased. She also continued to send timesheets and demands for payment for wages after 2 February 2023 in breach of the Record of Settlement.

[36] There is no doubt that these actions caused TMOT concern and ongoing inconvenience.

[37] I accept that Ms McDonnell had a genuine, if mistaken, belief that she was justified in her view of what had occurred, however that does not minimise the fact that she was in error or the distress caused to TMOT.

[38] The purpose of penalties is to deter, not to compensate. However I accept that the continued submission of timesheets and demands for wages together with the failure of its property, were matters of concern to TMOT.

[39] In the circumstances I consider \$1,500.00 is an appropriate penalty for the two breaches.

[40] I order Ms McDonnell to pay a penalty in the sum of \$1,500.00 to TMOT. To be paid within 14 days.

Costs

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[42] If they are not able to do so and an Authority determination on costs is needed, TMOT may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms McDonnell 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.

[43] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].