

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 444
3165743
3171025

BETWEEN MARIHI LANGFORD
Applicant in 3165743 and Respondent
in 3171025

AND NGATI KAHU SOCIAL AND
HEALTH SERVICES
INCORPORATED
Respondent in 3165743 and Applicant
in 3171025

Member of Authority: Sarah Blick

Representatives: Rani Amaranathan, counsel for Marihi Langford
Michael Smyth, counsel for Ngati Kahu Social and Health
Services Inc

Investigation Meeting: 19 and 20 January 2023 in Auckland

Submissions and information received: 10 February, 3 March, 5 April and 9 May 2023
24 February and 17 April 2023

Determination: 14 August 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Marihi Langford claims her former employer Ngati Kahu Social and Health Services Incorporated (Ngati Kahu) breached a record of settlement (ROS) they entered, by making disparaging comments about her to third parties. Ms Langford applies for a compliance order that Ngati Kahu comply with the non-disparagement clause in the ROS, and for penalties to be imposed on it, payable to her.

[2] Ngati Kahu brings its own claims against Ms Langford, saying she breached the ROS by failing to return all Ngati Kahu property within the time agreed in the ROS. Ngati Kahu applies for a compliance order requiring Ms Langford to return property (or for damages for the cost of property if it is not returned).

[3] Ngati Kahu also claims a subsequent investigation revealed Ms Langford breached her employment agreement by taking steps including setting up her organisation Tuiata Mahi Ora (TMO) in breach of her duty of fidelity to Ngati Kahu. It says TMO became a competitor for government funding and similar services. It seeks penalties for the alleged breaches of the ROS and employment agreement.

Should non-publication orders be granted?

[4] Ms Langford has applied for orders that the following not be published:

- (a) Any parts of the evidence or pleadings identifying or containing allegations and/or aspersions and/or criticisms about non-parties, namely Jacqueline Brown, Robert Brown, Cera James and Cory James and the chief executives involved in the various Māori social service providers in Te Hiku, known as Te Kahu Oranga Whānau (“the Colab);
- (b) The contents of the Special Partnership Agreement (SPA) between the Colab and Oranga Tamariki, except to the extent necessary in this determination to explain the reasons for the determination;
- (c) The terms of the ROS which are not directly relevant to the issues in this proceeding;
- (d) Any parts of the evidence or pleadings relating to events leading up to the ROS being entered into, except to the extent necessary in this determination to explain the reasons for the determination.

[5] Ngati Kahu did not oppose the application on the terms sought, but later advised the orders were opposed in relation to Ms James in relation to [4](a). Having heard from the parties, I am satisfied it is appropriate to grant orders in relation to the non-parties except Cera James and Cory James who were witnesses. This is because the information relates to non-parties who did not give evidence, evidence about them is not central to the issues for determination, and any public interest in the information (if it exists) is outweighed by the potential prejudice of publication. It is also appropriate to grant an order in relation to the terms

of the ROS which are not directly relevant to the issues in this proceeding, which ought to remain confidential between the parties.

[6] The Authority does not consider it appropriate or necessary to grant orders in relation to [4](a) in relation to Cera James or Cory James and [4](d), due to the way in which this determination has been drafted. The application is declined in those respects.

Outcome of application for non-publication orders

[7] The Authority grants non-publication orders under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) on the terms sought in [4](a) above except in relation to Cera James and Cory James. Orders are also granted on the terms sought at [4](b) and [4](c) above.

What has the Authority's process been?

[8] The Authority heard evidence from Ms Langford, and former Ngati Kahu employees Cera James and Cory James (who are also Ms Langford's whānau), and two other former employees Trey Henry and Sasha Saies. I also heard evidence from Ngati Kahu Board Chair Lisa King, Board Member Lisa McNab and former employee and its IT Lead Dave Lasike. The Authority and the representatives had the opportunity to question each of the witnesses.

[9] Following the investigation meeting, the parties lodged submissions, and Ms Langford provided further email correspondence at the direction of the Authority. After reviewing that correspondence, Ngati Kahu lodged an application for penalties under s 134A of the Act against Ms Langford in relation to the information, which Ms Langford has responded to. Ngati Kahu also purported to apply for a penalty under s 134A against Ms James, which it has chosen not to pursue in the context of these applications.¹

[10] 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.² This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.³

¹ Ngati Kahu advised it did not propose commencing proceedings against Ms James but stated it "reserve[d] its position generally against Ms James in relation to potential breaches of her employment obligations ... and is mindful of the limitation period imposed by the Act."

² As permitted by section 174E of the Employment Relations Act 2000.

³ Employment Relations Act 2000, section 174C(4).

What are the issues?

[11] The following are the issues for investigation and determination:

- (a) Has Ngati Kahu breached clause 8 of the ROS dated 12 January 2021?
- (b) If so, should remedies be granted, including:
 - i. A compliance order requiring Ngati Kahu to comply with clause 8;
 - ii. Penalties for breaches of the ROS, payable to Ms Langford?
- (c) Has Ms Langford breached her employment agreement and/or the ROS by:
 - i. Acting contrary to the interests of Ngati Kahu and seeking to encourage employees to resign;
 - ii. Using confidential information to advance the interests of TMO;
 - iii. Failing to return property and thereby causing loss to Ngati Kahu?
- (d) If Ms Langford has breached her employment agreement and/or the ROS, should remedies be awarded, including:
 - i. A compliance order against Ms Langford;
 - ii. Reimbursement or damages relating to property not returned to Ngati Kahu?
 - iii. Penalties for any breaches (paid wholly or in part to Ngati Kahu)?
- (e) Has Ms Langford obstructed the Authority's investigation and if so should a penalty be imposed pursuant s 134A of the Act?
- (f) Should any costs be awarded to either party?

What is the background?

Parties

[12] Ngati Kahu is a mental health and addiction service based in Northland. Ngati Kahu has contracts with government agencies to deliver services on their behalf, including the Ministry of Social Development, Northland District Health Board (now Health New Zealand Te Whatu Ora) and Oranga Tamariki. Ms Langford was employed by Ngati Kahu in the role of chief executive officer (CEO) from May 2011 until January 2021 under a written employment agreement.

Employment relationship problems arose in 2020

[13] Ms King was appointed as Board Chair on 11 February 2020. Issues arose in the employment relationship in 2020 between the Board and Ms Langford which ultimately

resulted in the parties attending a mediation on 12 January 2021. The parties entered into an ROS pursuant to s 149 of the Act, which included the following relevant terms:

1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.
2. The parties agree that the employment of Marihi Langford with Ngati Kahu Social & Health Services Incorporated shall end by way of resignation on Friday 15 January 2021 by which time the parties agree:
 - (a) Marihi shall have met with two members of the Board of Ngati Kahu Social & Health Services Incorporated for a handover.
...
 - (c) Marihi shall have returned all property of Ngati Kahu Social & Health Services Incorporated and collected her personal property...
8. Neither party shall make disparaging remarks about each other.
...
11. This is a full and final settlement of all matters between the parties arising out of their employment relationship and the ending of that relationship.

[14] Before leaving Ngati Kahu, Ms Langford and/or her husband took preparatory steps in relation to setting up TMO. Ms Langford says she did not begin operating TMO or take any steps to obtain work for TMO or otherwise compete with Ngati Kahu, before her resignation from it. Ms Langford says it was only after her resignation that she began to operate TMO as its CEO. She subsequently employed both Mr James and Ms James within TMO. She says TMO works with rangatahi and their whanau in the Far North to help them reach their full potential. Ms Langford says TMO's first contract was the provision of training for real estate business, and its first income was in May 2021, a number of months after her employment with Ngati Kahu ended.

[15] Ngati Kahu was part of the collaboration of various Māori social service providers known as the Colab. The members of the Colab had a Memorandum of Understanding (MOU) between themselves and an MOU with Oranga Tamariki. During 2020-2021 the Colab was working on signing an SPA between them and Oranga Tamariki. Ms Langford's evidence was that prior to her resignation she was not aware of when the SPA would be signed. Ms King's oral evidence was that Ngati Kahu knew it would be signed "soon" but did not know when.

[16] After Ms Langford's final day of employment on 15 January 2021, for around three weeks Ms McNab operated in a kaitiaki role for Ngati Kahu from Ms Langford's former office. Another Ngati Kahu employee headed operations during that period.

[17] After Ms Langford had entered into the ROS and resigned from Ngati Kahu, her husband sent a letter to the Colab asking for TMO to be considered for membership. Ms Langford was invited to the Colab's hui on 19 January 2021. Ms Langford attended the Colab hui and was invited to join its executive group. The Colab's Minutes record that "Membership was by way of invitation to CEO's to join". Ms Langford's evidence was that governance (Board members) were not allowed at the Colab table, and says this meant Ngati Kahu could not attend the hui at the time. Ngati Kahu did not have a CEO (or interim CEO) at the time, apart from a Board member in a kaitiaki role).

[18] Oranga Tamariki notes of the meeting record "formally invited Marihi..." and "waiting to see who is newly appointed CE. Question to whether Ngati kahu should be at table. Concerns around behaviour and the impact on Colab. Who's on Colab executive decision. MOU – remove Ngati kahu. Include Tuhiata Mahi OraSPA to reflect changes". Ms Langford submits this did not rule Ngati Kahu out from the Colab – they were "waiting to see who is newly appointed CE". The notes record that the Colab "will revisit the inclusion of Ngati Kahu Social and Health Services as a member once the CE has been appointed".

Ms King's 26 February 2021 email

[19] On 26 February 2021 Ms Langford was at the powhiri for the hui where the SPA was signed, when she was shown an email sent that day from Ms King to the CEOs of the Colab, the Chair of Te Runanga o te Rarawa iwi and Ngati Kahu Board members. It included the following remarks:

This initiative is from a joint MOU between Waitomo Papakainga, Ngati Kahu Social & Health Services, Te Rarawa & Te Whare Ruruhau o Meri. NKSHS previous CE was involved in those relationships on behalf of NKSHS. We would also expect this MOU to be honoured beyond any one individual. Why has NKSHS been left out of this event and the signing of this document.

We are investigating forensically the 'theft/destruction/'loss' of both intellectual property and physical assets from our organisation, some of which relates to Te Kahu Oranga Whanau/the colab. We have discussed matters with the police and our lawyer is engaged. I will also be following up with Oranga Tamariki.

Ms King's 11 March 2021 email

[20] On 9 November 2021 Ms Langford found out through an Official Information Act 1983 (OIA) request that Ms King had sent a further email on 11 March 2021 on behalf of Ngati Kahu to Oranga Tamariki referring to Ms Langford as follows:

In early January this year Ngati Kahu Social and Health Services accepted the resignation of our ex-ceo Marihi Langford. Two of her family members subsequently resigned also. We are currently investigating the destruction/theft of our Intellectual Property and theft of some of our physical assets. We therefore have very little information regarding our dealings with your organisation. The theft and destruction of our Intellectual Property/records/physical assets is mischievous to say the least.

Ms King's 9 May 2021 letter

[21] On 9 May 2021 Ms King emailed the Chairpersons of Te Runanga o Te Rarawa and Te Whare Ruruhau o Meri, referring to the MOU and the "ex CEO", advising an OIA request had been made to Oranga Tamariki about the Colab and a relationship agreement Ngati Kahu had signed with it saying:

We have had to do this due to the theft/destruction/ loss of both intellectual property and physical assets discovered post the resignation of employees from our organisation. We are also forensically investigating electronic equipment that has been wiped. We intend to follow legal processes to resolve matters, but we may not be able to recover all that was stolen, destroyed and/or lost.

Has Ngati Kahu breached clause 8 of the ROS dated 12 January 2021?

[22] The wording of a settlement agreement will generally be interpreted as limited to claims the existence of which both parties were aware of and to claims of the nature they were discussing, and a settlement cannot reasonably be taken to extend to preclude a party from making claims coming to light later out of unrelated events during the employment.⁴ If parties have had discussions about an issue prior to a ROS being entered into and the ROS says it is a full and final settlement of all matters arising out of the employment relationship and its termination, the parties will generally be barred from seeking redress in relation to that issue.

⁴ *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 2006 (EmpC).

Board raised concerns prior to ROS being entered

[23] Before the ROS was entered into, as noted by Ms Langford's counsel by way of submissions, the Board had concerns about Ms Langford and her performance including to the following:

- (a) Ngati Kahu finances;
- (b) Transparency and reporting to the Board;
- (c) Whether the Board had seen the MOU with the Colab and what it said;
- (d) Failure to disclose information;
- (e) Other inferences of dishonesty;
- (f) Her willingness to share important information with the Board.

[24] The Authority is satisfied that the parties wanted to achieve finality and that their ROS was intended to cover all issues arising out of the employment. It seems apparent the provision for a handover between Ms Langford and two Board members was intended to address the very concerns Ngati Kahu had about the transparency of Ngati Kahu's operations under Ms Langford's leadership, and ensure relevant information was disclosed and handed over. These concerns clearly formed part of the employment relationship problems between the parties, and I am satisfied that by entering into the ROS, Ngati Kahu chose not to pursue the issues above and had agreed that all issues were fully and finally settled. It is against that context which the comments made by Ms King to third parties must be considered.

Ms King's comments were disparaging

[25] Whether remarks are disparaging is determined by the ordinary meaning of disparagement.⁵ Any statement having a negative meaning could be disparaging in a general sense, and it can be expressly stated or implied.

[26] The three instances in which Ms King made statements to third parties either named Ms Langford or referred to the departing CEO in charge of Ngati Kahu. The allegations of theft, destruction or loss of both intellectual property and physical assets clearly connected Ms Langford as associated with those allegations. I find the remarks Ngati Kahu made in emails dated 26 February 2021, 11 March 2021 and the letter of 9 May 2021 were disparaging because they were negative, conveying that there were grounds to investigate Ms Langford as the

⁵ *Byrne v New Zealand Transport Agency* [2019] NZEmpC 187 at [80].

former CEO for activities that could amount to inappropriate, “mischievous” or potentially criminal behaviour.

[27] As I am satisfied the performance and employment relationship problems discussed between the parties leading up to the ROS being entered into were intended to be fully and finally settled in the ROS, it is clear the disparaging statements constituted a breach of the non-disparagement at clause 8 of the ROS.

Should remedies be granted to Ms Langford?

Compliance order to be issued against Ngati Kahu

[28] In the circumstances I find it appropriate that compliance be ordered to ensure Ngati Kahu complies with the ROS in future.

Penalty to be imposed on Ngati Kahu

[29] An action for the recovery of a penalty under the Act must be commenced within 12 months after the earlier of:⁶

- (a) The date when the causes of action first became known to the person bringing the action; or
- (b) The date when the cause of action should reasonably have become known to the person bringing the action.

[30] The Authority accepted Ms Langford’s application for lodgement on 28 February 2022. She commenced the penalty causes of action within 12 months of them first becoming known to her. She was clearly within time to bring an action for the recovery of a penalty for each of the breaches.

[31] It is appropriate to impose a penalty on Ngati Kahu under s 149(4) of the Act. Ms Langford seeks a \$15,000 penalty for each of the three breaches, totalling \$45,000, and that they be made payable to her. The maximum penalty available for the three breaches is \$60,000 (being a maximum of \$20,000 per breach).

[32] Having regard to the matters in s133A of the Act, I have taken into account the fact Ms King’s comments were made to a number of people in a number of organisations and repeated

⁶ Employment Relations Act 2000, section 135(5).

on more than one occasion; the comments were particularly negative and of a serious nature; they were deliberate and made without having attempted to raise the relevant issues with Ms Langford following the ROS; Ms Langford has suffered stress as a result of them; Ngati Kahu has expressed no remorse nor did it take any mitigating actions when the breaches were drawn to its attention. Finally, I accept Ms Langford was in a somewhat vulnerable situation in that she felt unable to defend herself because she believed she may breach the ROS by doing so.

[33] It is not appropriate to globalise the breaches as each of the disparaging comments were separate and distinct from each other. I find an appropriate provisional starting point for each penalty to be to 50 percent of the maximum penalty, being \$10,000 per breach or \$30,000 in total.

[34] There is no financial information before the Authority in support of a reduction being made. However, Ngati Kahu is a longstanding charitable trust working in the not-for-profit sector, which provides valuable social services to the Far North community and relies on government funding. I discount the penalty by 10 percent to account for that factor, reducing it to \$27,000.

[35] Taking into account proportionality, I consider a further reduction to this amount is required, which would result in a penalty of \$15,000. In the circumstances, it is just that 75 percent of the penalty amount be payable to Ms Langford, and 25 percent payable to the Crown.

Has Ms Langford breached her employment agreement and/or the ROS?

[36] This issue arises from Ngati Kahu's counterclaim. That counterclaim was first referenced by Ngati Kahu in its statement in reply to Ms Langford's application in the Authority received on 28 March 2022. In the statement in reply Ngati Kahu advised it was raising the counterclaim against Ms Langford in relation to her allegedly breaching her employment agreement and the ROS, and sought the orders now before the Authority.

[37] As noted, Ngati Kahu alleges Ms Langford breach her employment agreement and the ROS by:

- (a) Acting contrary to the interests of Ngati Kahu and seeking to encourage employees to resign;
- (b) Using confidential information to advance the interests of TMO;

- (c) Failing to return property and thereby causing loss to Ngati Kahu.

[38] By way of remedies, Ngati Kahu sought:

- (a) A compliance order with clause 2 c) of the ROS, which stated, by 15 January 2021, Ms Langford “shall have returned all property” of Ngati Kahu.
- (b) If Ms Langford did not comply with clause 2 c) by returning Ngati Kahu’s physical assets, it sought an order that Ms Langford reimburse the cost of the items totalling \$9,249.44 (subsequently revised to \$9,057.46).
- (c) A penalty for each alleged breach by Ms Langford of her employment agreement and the ROS, claiming she had “potentially failed to return hundreds of digital documents belonging to [Ngati Kahu] in addition to physical assets”.

[39] The Authority required Ngati Kahu to lodge its own application by way of statement of problem for the counterclaim, which was received by the Authority on 7 April 2022.

Evidence does not support the making of a compliance order or damages claim

[40] Having heard the evidence from the parties, I am not satisfied Ngati Kahu’s application for a compliance order is made out. The evidence simply does not establish on the balance of probabilities that Ms Langford failed to return the property alleged. In relation to the physical items, apart from Ms Langford, no one gave first hand evidence of what she returned on her last day or subsequently. By the time the issues were raised with her some eight months later, she could also not fairly defend herself. The Authority declines to issue a compliance order in relation to clause 2 c) of the ROS requiring Ms Langford to return property.

[41] For the same reasons, setting aside whether the Authority is able to order damages in the circumstances, the application for reimbursement of the cost of physical assets is not made out.

Ngati Kahu’s penalty claims not brought in time

[42] I accept some of the circumstances around Ngati Kahu’s removal from the Colab were revealed over time, including by the receipt of information from Oranga Tamariki and additional information during the Authority’s investigation. However, in all the circumstances I find the matters giving rise to Ngati Kahu’s penalty claims should reasonably have become

known to it earlier, had it taken timely and reasonable steps to understand and/or investigate the various matters it now raises, including in relation to TMO.

[43] By way of example, the evidence of Ngati Kahu's witnesses shows Ngati Kahu became aware of alleged missing contracts and the Colab MOU, the return of property issues and staff resignations within the days and weeks following Ms Langford's departure. Ms Langford notes Ms King's first email containing disparaging comments was sent to the Colab and Oranga Tamariki on 26 February 2021 about alleged theft and taking of information, within six weeks of Ms Langford's departure. Despite its apparent concerns around the handover and documents, Ngati Kahu failed to address them in a timely way with Ms Langford, staff members who may have assisted, the Colab, Oranga Tamariki, or the Authority by way of an enforcement application.

[44] Even if the lodging of Ngati Kahu's counterclaim within its statement in reply is taken as the date the action was brought, being 28 March 2022, the penalty claims were brought out of time. I therefore find the claims were not commenced within 12 months after the earlier of the date when the penalty causes of action first became known to Ngati Kahu or the date when the cause of action should reasonably have become known to it.

[45] It certainly appears Ngati Kahu's counterclaim has largely been brought in reaction to Ms Langford bringing a claim in the Authority, having sat on its rights in relation to the alleged breaches. The penalty claims are declined.

Has Ms Langford obstructed the Authority's investigation and if so should a penalty be imposed pursuant s 134A of the Act?

[46] At the conclusion of the investigation meeting, Ms Langford was directed to provide email correspondence she had forwarded to herself during her employment using Ngati Kahu's email system. Ngati Kahu says Ms Langford obstructed the Authority's investigation by giving "false testimony" by failing to disclose Ms James sent her one of the emails, and instead saying she had emailed it to herself. For her part, Ms Langford says she was mistaken in her recollection at the investigation meeting, which I accept. Ngati Kahu's claim for a penalty under s 134A of the Act is not made out on the evidence, nor was the Authority's investigation made more difficult by Ms Langford's mistaken recollection. The penalty claim under s 134A of the Act is declined.

What are the Authority's orders?

[47] Ngati Kahu Social and Health Services Incorporated is to comply with clause 8 of its record of settlement entered into with Ms Langford on 12 January 2021. That obligation is an on-going obligation.

[48] Ngati Kahu Social and Health Services Incorporated is to pay a penalty of \$15,000 within 21 days of the date of this determination. It is to pay 75 percent of the penalty amount to Ms Langford, and 25 percent of the penalty to the Authority for transfer to the relevant Crown Bank account.

Costs

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

[50] If they are not able to do so and an Authority determination on costs is needed, Ms Langford 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 Ngati Kahu 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. Submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[51] 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.

Sarah Blick
Member of the Employment Relations Authority