

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 457  
3296619

BETWEEN

ATAMIRA DANCE  
COLLECTIVE  
CHARITABLE TRUST  
Applicant

AND

JACK GRAY (AKA TIAKI  
KEREI)  
Respondent

Member of Authority: Sarah Blick

Representatives: Richard Harrison, counsel for the applicant  
Applicant not represented

Investigation Meeting: On the papers

Submissions and information received: 1 July 2024 from the applicant  
None for the respondent

Determination: 29 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Atamira Dance Collective Charitable Trust (Atamira) was originally formed as a collective of Māori dance artists in 2000 and later formalised as a charitable trust. Jack Gray (also known as Tiaki Kerei) was the catalyst to the establishment of the dance company and integral to its whakapapa. Mr Gray is a well-known dancer and choreographer and was employed by Atamira as Artistic Director.

[2] After an employment relationship problem arose between the parties, Atamira and Mr Gray used mediation resulting in a signed settlement agreement (the agreement) in July 2023. It was also signed by a mediator from the Ministry of Business,

Innovation and Employment (MBIE) pursuant to s 149 of the Employment Relations Act 2000 (the Act). Mr Gray's employment ended at this point.

[3] Atamira says Mr Gray has since breached a non-disparagement provision in the agreement on numerous occasions. It also says its confidentiality provision has been breached. It seeks compliance orders requiring Mr Gray to comply with the agreement, a penalty, and a contribution towards its legal costs in this application.

### **The Authority's process**

[4] Mr Gray has not participated in the Authority's investigation.

[5] The statement of problem was served on 17 May 2024, but no statement in reply has been received. A case management conference was set up for 21 June 2024 which Mr Gray did not attend. The Authority's directions, issued the same date, were also served at his address. The directions timetabled the provision of affidavit evidence and submissions by Atamira.

[6] Dolina Wehipeihana, founding member and co-chair of the board of trustees of Atamira, has provided a sworn affidavit including exhibits. Submissions have been received from Atamira. These have also been served on Mr Gray. An allowance for a response from him was included in the timetabling directions, but no response has been received.

[7] The Authority has also included Mr Gray's email address in its communications with the parties, but these have not elicited any response to date.

[8] Atamira consents to this matter being determined on the papers. Accordingly, the Authority proceeds to determine it.<sup>1</sup>

[9] I have considered all the material provided by Atamira. Given the existence of the agreement where the parties attempted to resolve all the issues between themselves in a confidential manner, I have limited the material referred to in this determination to the extent feasible.

[10] As permitted by s 174E of the Act this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and

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<sup>1</sup> Employment Relations Act 200, Schedule 2, clause 12.

specified orders made as a result. Not all evidence or submissions are referred to but have been considered.

### **The issues**

[11] The issues requiring investigation and determination are:

- (a) Whether Mr Gray has breached the agreement;
- (b) Whether a compliance order should be issued directing him to comply with the agreement;
- (c) Whether a penalty should be imposed on Mr Gray for breaching the agreement; and
- (d) Whether costs should be awarded to Atamira.

### **Background**

[12] The parties attended mediation and entered into the agreed terms of settlement in the agreement. The agreement holds Ms Wehipeihana's signature dated 4 July 2023 and Mr Gray's signature dated 5 July 2023.

[13] The confidentiality clause, clause 1, includes a requirement that "the terms of settlement and all matters discussed in mediation" shall remain confidential to the parties, so far as the law allows.

[14] Clause 9 of the settlement provides as follows:

Neither party, including the trustees of the employer or any other individuals with knowledge of settlement terms will speak disparagingly of the other to a third party including on social media.

[15] The agreement was signed by an MBIE mediator on 5 July 2023. It states the parties fully understand that once the mediator signs the agreement, the settlement is final, binding and enforceable. Both parties were represented by counsel during the mediation process.

[16] Atamira says it complied with the agreement and continues to do so. Ms Wehipeihana says a reference to social media was sought to be included in the agreement because it is a medium which many within the creative arts community engage. Atamira says the non-disparagement clause in the agreement was important to Atamira being able to move forward.

[17] Ms Wehipeihana says she was first made aware of a social media post by Mr Gray on 10 November 2023 which was disparaging about Atamira and referenced issues related to his departure from it. Atamira says it contacted the mediator who signed the agreement, who then liaised with Mr Gray, and the post was taken down.

[18] Atamira was subsequently contacted by individuals who were concerned about comments being made by Mr Gray about Atamira and further social media posts in which he made comments about the dynamics of Atamira and his employment situation.

[19] Atamira instructed its counsel to write to Mr Gray's counsel, setting out the breaches of the agreement and requesting that he cease from further breaches and give an assurance there will be no further posts on social media or communications with individuals that breach the non-disparagement provision. This letter was sent on 15 December 2023. Mr Gray's counsel responded on 20 December 2023 saying that while he was not instructed in the matter, he had sent the communication on to Mr Gray.

[20] Atamira says the comments did not stop. On 12 April 2024 Ms Wehipeihana was approached in person by a third party who expressed concern about statements made by Mr Gray about Atamira.

[21] On 20, 21 and 22 April 2024 and 6 and 11 May 2024, Mr Gray further posted comments on a social media platform critical of Atamira and/or its trustees in relation to his employment situation.

[22] Atamira made the decision to apply to the Authority and did so on 12 May 2024. The statement of problem was then served on Mr Gray on 17 May 2024. The statement of problem outlined its concerns and alleged breaches in some detail and made clear it was seeking a compliance order and penalties.

[23] Atamira has provided evidence that Mr Gray continues to post statements on social media. Mr Gray appears to have posted comments about Atamira trustees and individual staff on 24 May 2024 and between 26 and 31 May 2024 regarding its organisational values, adherence to tikanga Māori dispute resolution, and what Atamira says is an inaccurate timeline of events.

[24] A letter was also posted online by Jack Gray about Atamira, which was critical of Atamira and called for signatories.

[25] On 6 June 2024 Mr Gray published an article on an arts website referencing the name of an upcoming Atamira production. While the article did not mention Atamira, it says the timing of the article and the content may be seen as derogatory.

[26] The Authority's case management conference was subsequently held on 21 June 2024.

[27] Atamira says the various statements are negative and uncomplimentary of Atamira, its trustees and young dancers. It says the various statements are manifestly disparaging and is causing harm to Atamira's reputation and identified individuals associated with Atamira. It also says the breaches are becoming increasingly egregious.

### **Discussion**

[28] Although Mr Gray has chosen not to take part in this matter, it is clear to the Authority from the various comments that he was upset by the circumstances which led to the end of his employment. However, he has entered into a legally binding and enforceable agreement with Atamira in which both parties agreed to resolve all employment matters.

[29] To disparage is to bring into discredit, degrade or speak of critically. There is no need for the comment to be untruthful or fabricated.<sup>2</sup> Although I do not repeat them here, the comments Atamira complains of are plainly disparaging of Atamira, its trustees and individuals involved with it, in breach of clause 9 of the agreement.

[30] There are also instances in which Mr Gray appears to have likely breached confidentiality around the mediation process, in breach of clause 1 of the agreement.

### **Remedies**

#### *Compliance order*

[31] Having found that there have been breaches of the agreement I conclude that a compliance order should be issued to prevent recurrence. An order pursuant to s 137(2) of the Act directing Mr Gray to comply with the agreement is to issue.

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<sup>2</sup> *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [37]-[38].

## *Penalty*

[32] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to the imposition of a penalty. Section 135(2)(a) provides that under the Act an individual is liable to a penalty up to \$10,000. Atamira asks that a penalty of \$6,000 to \$8,000 be imposed on Mr Gray for the non-disparagement breaches.

[33] In deciding whether to impose a penalty and in what quantum, I need to consider the factors in s133A of the Act and guidance from the Employment Court.<sup>3</sup>

[34] Atamira does not make a case for seeking penalties for individual breaches, although the evidence shows Mr Gray has breached the agreement on several occasions. The Authority considers it appropriate in the circumstances to globalise the breaches such that one penalty up to a maximum of \$10,000 is available.

[35] Mr Gray's conduct has been deliberate. He was represented by experienced counsel during the mediation process, and in signing the agreement confirmed he understood its contents and the fact it is binding and enforceable on him.

[36] Deterrence is clearly required in the circumstances. Atamira's attempts at resolving this matter with Mr Gray have been unsuccessful. Mr Gray has failed to engage with Atamira or comply, and engage in this process. Mr Gray has continued to post and otherwise make statements disparaging of Atamira trustees and its staff.

[37] There is evidence at this stage that at least reputational harm is being caused to Atamira. It says it continues to honour its side of the agreement, and this leaves it exposed and disadvantaged by not being able to respond with its side of the story. This harm comes from acting lawfully by honouring the terms of the agreement. I agree with the submission that the transgressor here should not be able to benefit from breaching the agreement while the compliant party is harmed from the breaches.

[38] As Mr Gray has chosen not to engage in the present matter, the Authority has no information about his financial circumstances. No discount is available on that front.

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<sup>3</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143; *A Labour Inspector v Prabh Limited* [2018] NZEmpC; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[39] Finally, I have regard to the need to uphold the integrity of mediated agreements and parties' confidence in using the mediation process to resolve employment relationship problems. Taking the factors into account including other Authority penalty awards, I consider it appropriate to impose a penalty of \$4,500 on Mr Gray.

[40] Although Atamira has not made any submission that any part of the penalty amount be paid to it, it is appropriate to order a portion should be paid to it.

### **Outcome**

[41] Mr Gray has breached the agreement. Pursuant to section 137 (2) of the Act Jack Gray must immediately comply with the record of settlement dated 5 July 2023, including by ceasing any further statements to any third party which are disparaging of Atamira Dance Collective Charitable Trust including its trustees.

[42] Pursuant to s 149(4) of the Act, within 21 days of the date of this determination Jack Gray is to pay:

- (a) \$2,500 as a penalty to Atamira Dance Collective Charitable Trust; and
- (b) \$2,000 into the Authority payable to the Crown Bank Account.

### **Costs**

[43] Atamira is entitled to a contribution to its costs as it has been successful in its application. It says it has expended \$15,000 plus GST and disbursements, and seeks 50% of the costs incurred, being \$8,625 (inclusive of GST). Although I acknowledge Atamira has expended costs in dealing with this matter, I am not satisfied such an award is reasonable in the circumstances. This matter was undefended and heard on the papers. A portion of the daily tariff is awarded.

[44] Within 21 days of the date of this determination Jack Gray is ordered to pay Atamira \$2,500 in costs and reimburse the Authority application of fee of \$71.55.

Sarah Blick  
Member of the Employment Relations Authority