

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 555
3287559

BETWEEN	ANALYTICA LABORATORIES LIMITED Applicant
AND	ALICE KNOWLES Respondent

Member of Authority:	Rowan Anderson
Representatives:	Russell Drake, advocate for the Applicant Respondent in person
Investigation Meeting:	9 August 2024 by audio visual link
Submissions and further information received:	13 August 2024 and 29 August 2024 from the Applicant 28 August 2024 from the Respondent
Determination:	16 September 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Knowles is a former employee of Analytica Laboratories Limited (Analytica). Analytica and Ms Knowles agreed to terms of settlement on 17 May 2022.

[2] Analytica says that Ms Knowles breached a non-disparagement provision in the terms of settlement by sending a message to Analytica's Business Manager that contained negative and disparaging comments. Analytica seeks a compliance order requiring Ms Knowles to comply with the terms of settlement. It also seeks the imposition of a penalty against Ms Knowles for the alleged breach.

[3] Ms Knowles appears to acknowledge she sent the message in question to Analytica's Business Manager. It is not clear from her limited response whether she

accepts that the sending of the message was in breach of the terms of settlement, nor is it clear whether she opposes the orders sought by Analytica.

The Authority's investigation

[4] The Authority held a case management conference (CMC) on 17 June 2024. Ms Knowles did not attend the CMC. The CMC proceeded notwithstanding Ms Knowles' non-attendance given I was satisfied that Ms Knowles had been served with the statement of problem and notice of the CMC.

[5] At the CMC, timetable directions were made for the provision of written witness statements and relevant documents. Despite Ms Knowles' lack of engagement, the directions included provision for any response from her. An investigation meeting, to take place via audio visual link (AVL), was also scheduled. Written directions were subsequently served on Ms Knowles, which included a timeframe within which she could raise any objection to the directions issued.

[6] An investigation meeting was held via AVL on 9 August 2024. Analytica's Business Manager gave evidence at the investigation meeting under affirmation. Ms Knowles did not attend the investigation meeting and it proceeded in her absence after allowing a short period in case of her late attendance.

[7] A timetable was put in place for the exchange of any written submissions to follow the investigation meeting.

[8] On 26 August 2024, the Authority received an email from Ms Knowles saying that she had been without a phone for six weeks and requesting the opportunity to provide a reply or response to Analytica's submissions. The Authority, while recording that Ms Knowles had been served relevant notice prior to the six weeks noted in her email, granted leave for Ms Knowles to lodge submissions. Ms Knowles did so on 28 August 2024. Analytica lodged submissions in reply on 29 August 2024.

Issues

[9] The issues identified for investigation and determination, are:

- (a) Has Ms Knowles breached clause 1(c)(iv) of the record of settlement dated 17 May 2022?

- (b) Should a compliance order, in terms of s 137 of the Act, be made requiring Ms Knowles to comply with clause 1(c)(iv) of the record of settlement?
- (c) If Ms Knowles has breached the record of settlement, should any penalties be imposed upon her in terms of ss 133 and 149(4) of the Act?
- (d) Should either party contribute to the costs of representation (if any) of the other party?

[10] 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.

Ms Knowles has not complied with the terms of settlement

[11] I am satisfied that the parties agreed on terms of settlement that were signed by them both on 17 May 2022. The terms of settlement were signed by a mediator on 18 May 2022 in terms of s 149 of the Act and are binding and enforceable.

[12] Clause 1(c)(iv) of the terms of settlement provides as follows:

The parties agree not to make negative or disparaging comments about each other, specifically Alice confirms that she will not contact any clients or suppliers of Analytica to make any comments regarding her employment with the company, the ending of that employment, company management and/or staff. Furthermore, Alice confirms that she will not seek to make contact with any current employee of Analytica without that employee's prior consent.

[13] The settlement was full and final in relations to all issues arising out of the employment and termination of the employment relationship.

[14] On 6 February 2024, Ms Knowles sent a message to Analytica's Business Manager on LinkedIn. It suggested that the Business Manager had been manipulated by former employees of Analytica, that they were an awful manager, that they had a small brain, and that they had bullied a person into resigning, and that she was happy to see the Wellington lab had closed.

[15] Analytica sent correspondence to Ms Knowles on 9 February 2024 alleging she had breached the terms of settlement by making negative and disparaging remarks. It was proposed that the matter be addressed by way of written apology.

[16] On 19 February 2024 Ms Knowles provided an apology of sorts by email. However, the content of the supposed apology was clearly unsatisfactory, and I find, for reasons including that the content suggested the Business Manager was wrong about historical matters relating to the business and implying fault as to the ending of the employment relationship, that the correspondence of 19 February 2024 compounded the breach rather than resolved it.

[17] The comments made by Ms Knowles were clearly critical of the Business Manager and Analytica and designed to be derogatory. Ms Knowles' sending of the message on 6 February 2024 also breached the settlement in that it required she obtain prior consent before contacting any current employee of Analytica.

[18] I am satisfied that Ms Knowles has breached clause 1(c)(iv) terms of settlement.

Should a compliance order be made?

[19] Ms Knowles has had the opportunity to comply with the terms of settlement but has not done so. It is also apparent from the evidence that several attempts have been made to try and ensure that Ms Knowles would comply. Ms Knowles' response to those measures indicates that Ms Knowles would not voluntarily comply with the terms of settlement that she freely entered into.

[20] In all the circumstances I am satisfied that a compliance order should be made requiring Ms Knowles to comply the terms of settlement.

Penalty

[21] Analytica seeks the imposition of a penalty against Ms Knowles in terms of s 149(4) of the Act. Referring to another determination of the Authority, it submitted a penalty of at least \$4,500 would be appropriate, with at least \$2,500 being payable to Analytica. Section 135(2)(a) of the Act provides that a penalty of up to \$10,000 may be imposed.

[22] I have carefully considered the matter of penalty and I decline, at this stage, to impose a penalty upon Ms Knowles. Ms Knowles is on clear notice that she is required to comply with the terms of the settlement agreement that she freely entered into. Any failure to adhere to the compliance order made may have serious consequences for Ms

Knowles, including in the event of any further or continued non-compliance, the imposition of financial penalties.

Costs

[23] Analytica claims a contribution to the costs of its representation in pursuing this matter of not less than \$2,500. It provided relevant evidence as to the costs it has incurred totalling \$3,350.22.

[24] Having regard to the Authority's tariff, I consider that Ms Knowles should pay \$2,250.00 towards Analytica's costs. That sum represents a half day investigation meeting and, in my view, appropriately accounts for the preparation and lodgement of submissions, including the necessary response relating to Ms Knowles' late engagement.

Warning to Ms Knowles

[25] Failure by Ms Knowles to comply with the Authority's compliance order may result in Analytica Laboratories Limited applying to the Employment Court for compliance, as permitted by s 138(6) of the Act, and for the Court to exercise its powers under s 140(6), which include a fine not exceeding \$40,000 or an order that the property of the person in default be sequestered.

Orders

[26] Pursuant to s 137(2) of the Act, Ms Knowles is ordered to immediately comply with the agreed terms of settlement by refraining from making any negative or disparaging comments about Analytica, and by refraining from contacting any current employee of Analytica without prior consent, including the Business Manager.

[27] Ms Knowles is ordered to pay Analytica Laboratories Limited, within 28 days, the sum of \$2,250 as a contribution towards the costs it has incurred.