

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 550
3277019

BETWEEN

UQB
Applicant

AND

ACCIDENT
COMPENSATION
CORPORATION
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Barnaby Locke, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: Up to and including 22 July 2025

Determination: 4 September 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] UQB has raised an employment relationship problem relating to what they say is non-compliance with two signed records of settlement, from 2018 and 2019 respectively, by the Accident Compensation Corporation (ACC).

[2] UQB and ACC entered into a settlement agreement in 2018 (the “2018 settlement agreement”) which resolved an employment relationship problem. The 2018 settlement agreement included terms providing that an investigation into disciplinary allegations would cease and UQB’s personal file would be sealed, that UQB would resign from their employment, and that neither party would speak ill of the other.

[3] UQB and ACC entered into a further settlement agreement in 2019 (the “2019 settlement agreement”). The relevant context of that included that proceedings were commenced by UQB following the withdrawal of an offer of employment by ACC. The withdrawal of the offer occurred in circumstances where Yvonne Wood, ACC Team Leader, was alleged to have made disparaging comments about UQB, in the context of a reference check, in breach of the 2018 settlement agreement. That issue was resolved by the 2019 settlement agreement.

[4] The 2019 settlement agreement included terms that UQB would be able to apply for any role with ACC, that Ms Wood and two other specified ACC employees would be instructed to advise that they had no comment to make if approached regarding UQB, and that neither party would speak ill of the other.

[5] UQB applied for a further role with ACC in 2022 but was advised their application was unsuccessful. However, before being told of that the recruitment process had advanced positively. Having been concerned as to the treatment of their application by ACC, UQB requested further information relating to the recruitment process. UQB was provided information on 17 August 2022, which included an email of 30 August 2022 referencing Anna Reed, Senior Advisor – People & Culture, having been told something about UQB by a third party and a request by another ACC employee not to use names but to continue the discussion via Microsoft Teams.

[6] UQB subsequently made a request for the Microsoft Teams communications. ACC declined to release that information but then later disclosed, without identifying the individual, that a third party had approached Ms Reed and advised they would not recommend UQB be employed. That person was later identified as Ms Wood following a decision by the Privacy Commissioner as to the provision of the information sought by UQB.

[7] UQB applied, unsuccessfully, for at least four other vacancies with ACC through 2023 and 2024. On each occasion a standard form notification was provided.

[8] UQB seeks compliance orders and the imposition of penalties against ACC.

Non-publication

[9] Having regard to the subject matter of the proceedings and the terms of settlement, I sought further information from the parties as to the issue of non-publication. In doing so, I indicated that I was considering making non-publication orders, including as to the names and identities of the parties. UQB responded advising that they had no reservations about the information being published. ACC advised it had no issue as to the publication of the names of the parties but requested non-publication as to the names of its witnesses and other aspects of the records of settlement not central to the proceedings.

[10] I am not satisfied there is any compelling basis on which to make non-publication orders relating to the names of witnesses. No substantive grounds were put forward that might require a departure from the principle of open justice.

[11] In relation to UQB, while they did not seek non-publication and maintain that they have no reservation as to the publication of the relevant information, I consider the making of a non-publication order appropriate. This is in large part due to the nature of the terms in the settlement agreements and UQB having, in effect, contested decisions made not to offer UQB further employment. That is an issue at the heart of the current proceedings and a matter expressly dealt with in the 2019 settlement agreement. The naming or identification of UQB would in my view very likely defeat a purpose of that confidential settlement in that it seeks to prevent disparagement and to preserve an ability for UQB to apply for further employment with ACC. Further, the naming or identification of UQB would significantly impact the utility of the compliance orders sought.

[12] I order, pursuant to clause 10 of the second schedule of the Employment Relations Act 2000 (the Act) that UQB's name and any identifying details, other than appear in this determination, be prohibited from publication.

The Authority's investigation

[13] An initial case management conference was held on 24 June 2024. A number of preliminary matters were discussed, a direction to attend mediation was made, and an amended statement of problem was subsequently lodged by UQB. The amended statement of problem removed Mr Wood as a second respondent and some of the remedies initially sought were withdrawn.

[14] A further case management conference was held on 23 September 2024 at which it was agreed that the matter could be dealt with ‘on the papers’ without the need for an in-person investigation meeting. A summary of the relevant issues was provided and timetable directions issued.

[15] Issues arose in the course of receiving the timetabled information, including as to information said to be subject to mediation confidentiality. Those issues were resolved, with various material found to be inadmissible, by way of a Minute dated 18 March 2025. In that Minute, I noted that I did not consider that my limited dealing with any of the disputed material was such that it would impact my investigation of the substantive issues. I provided an opportunity for either party to raise any objection as to my continuing with the Authority’s investigation. Both parties confirmed there was no objection to my doing so and were content for me to proceed to determining the substantive issues on the papers.

[16] Affidavits were received from UQB in support of their claims. For ACC, affidavits were received from Joanna Freeman, Payroll Manager; Matthew Talamaivao, Senior Advisor People and Culture; Yvonne Wood, Team Leader; Anna Reed, Resolution Manager; and Merlyn Fernandez, Risk and Compliance Manager.

[17] As permitted by s 174E of 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

[18] The issues identified for investigation and determination relate to alleged breaches of the 2018 settlement agreement and 2019 settlement agreement. UQB seeks compliance orders and the imposition of penalties.

Has ACC failed to comply with the terms of settlement?

The provision of the 2018 Agreement to payroll

[19] UQB contends that ACC breached clause 1 of the 2018 settlement agreement by providing a copy of the 2018 settlement agreement to its payroll team. ACC submits that UQB is prevented from pursuing the claim because of the limitation period provided for at s 142 of the Act. It says that even if UQB could pursue that claim, that providing the 2018 settlement agreement to its payroll was not a breach of clause 1.

[20] The first issue to be addressed is whether UQB is precluded from bringing the claim based on the limitation period at s 142 of the Act. If UQB is not, the Authority then needs to consider whether there was a breach of clause 1 of the 2018 settlement agreement.

[21] The 2018 settlement agreement was given to payroll on 6 March 2018 as evidenced by an internal memorandum produced at the time. UQB first raised the alleged breach on 24 July 2024. ACC contend that UQB's claim is out of time based on the limitation period at s 142 of the Act, which provides for a 6 year limitation period for actions other than personal grievances.

[22] ACC submits, referring to *Haig v Edgewater Developers Ltd (No 5)*,¹ that it is immaterial when UQB became aware of the cause of action and that the limitation period at s 142 of the Act runs from the date of the employment relationship problem, and not from the date the claimant ascertains accrual of the cause of action.

[23] UQB contends that at the time they received the 6 March 2018 memorandum that the parties were not in an employment relationship and therefore that the limitation period at s 142 of the Act does not apply.

[24] First, while there may have not been an ongoing employment relationship at the time the memorandum was provided to UQB, the action UQB is seeking to commence does relate to an employment relationship problem. Sections 161(1)(m) and 161(1)(n) of the Act,² dealing respectively with the Authority's jurisdiction relating to actions for recovery of penalties and for compliance orders, makes that clear.

[25] A copy of the 6 March 2018 memorandum was provided to the Authority. The memorandum was sent by a principal advisor to a payroll officer and included the statement "a confidential settlement has been agreed with [UQB]. A copy of the settlement agreement is attached".

[26] UQB's evidence is that the 6 March 2018 memorandum was first released to UQB on 18 July 2018. The claim relating to clause 1 of the 2018 settlement agreement

¹ *Haig v Edgewater Developers Ltd (No 5)* [2012] NZEmpC 189 at [14]-[17].

² Refer also to the meaning of "employment relationship problem" at s 5 of the Act.

was first raised in UQB's amended statement of problem on 24 July 2024. There is no dispute about the relevant dates.

[27] The time from the date on which the cause of action arose to the date on which UQB made the claim in the Authority exceeds the 6 year limitation period. That is the case regardless of whether the commencement date of the relevant action is taken as being 6 March 2018 when payroll was provided the document, or 18 July 2018, being the date on which UQB was given the 6 March 2018 memorandum.

[28] I find that the limitation period provided for at s 142 of the Act applies and that UQB's claim is out of time.

Did ACC breach the non-disparagement clauses of the 2018 and/or 2019 settlement agreements?

[29] UQB contends that ACC breached clause 7 of the 2018 settlement agreement, and clauses 5 and 6 of the 2019 settlement agreement, through actions and comments said to have been made by Ms Wood in March 2022.

[30] Clause 7 of the 2018 settlement agreement provides:

7. The parties agree that neither will speak ill of the other whether verbally or in any medium including social media.

[31] Clauses 5 and 6 of the 2019 agreement provide as follows:

5. The parties agree that the Applicant is able to apply for any employment role with the Respondent. The Respondent will instruct [three specified employees] that if they are approached for comment regarding the Applicant, they must advise that that have no comment to make.
6. The parties agree that neither will speak ill of the other whether verbally or in any medium including social media.

[32] Ms Wood is employed as a Team Leader. Her evidence as to the interaction and comments made on 30 March 2022 is as follows:

On or about 30 March 2022, I received a call from Anna Reed. Ms Reed called me and explained that they had an individual, [UQB], whom they were thinking of hiring for a [specified role], but that [an ACC employee] had informed her that she should speak with me about [UQB] as [UQB] had previously reported to me. I was asked by Anna, in a very informal conversation, what I thought of [UQB], and I gave my honest opinion that I would not employ [UQB] but that I could not make further comment.

[33] She went on to say that she was conscious she may have been speaking out of turn but that she thought she was saying as much as she could. She further said that she

now accepts she should not have made any comment and that in doing so she was acting contrary to ACC's instructions.

[34] Ms Reed's evidence as to the call on 30 March 2022 is as follows:

On or around 30 March 2022, I had a conversation with Yvonne to seek her views regarding [UQB's] suitability for the [specified role]. Yvonne simply commented that she did not consider the Applicant to be a suitable candidate for the role but could not say why.

[35] ACC initially contested the ability of UQB to claim a breach of the non-disparagement provisions of the 2018 settlement agreement on the basis that those claims were settled on a full and final basis as a result of the 2019 settlement agreement. That issue was not pressed in submissions.

[36] ACC contends, while not disputing that the comments made could be considered disparaging, that the comments made do not give rise to breaches as Ms Wood was acting outside of the scope of her actual or apparent authority.

[37] Comments were made to the effect that Ms Wood would not employ UQB. While, at least on the evidence before the Authority, reasons for that statement were not provided at the time, that does not alleviate negative impacts of the comments. On one view it makes them worse. I find the statements made amounted to "speaking ill" of, and were disparaging of, UQB.

[38] I am satisfied that the comments made by Ms Wood on 30 March 2022 were, subject to those comments being attributable to ACC, in breach of clause 7 of the 2018 settlement agreement and of clause 6 of the 2019 settlement agreement.

[39] Clause 5 of the 2019 settlement agreement is of a different character. The plain words required ACC to provide an instruction to the specified employees, one of which was Ms Wood. I am satisfied that she was provided that instruction and in doing so that ACC complied with that requirement and that there was no breach of that provision.

[40] In relation to the disparaging comments made by Ms Wood, there is a question as to whether the comments are attributable to ACC such that it can be considered to have been responsible for the breaches. ACC submitted that the relevant actions, as a question of fact, cannot be attributed to ACC as Ms Wood was acting outside the scope

of her actual or apparent authority.³ In *Alkazaz* the court referred to s 142ZA of the Act in relation to liability for the conduct of certain other persons, including employees, and observed the following in relation to the factual assessment required:⁴

[123] It is a question of fact for the Court to determine whether, considered subjectively in terms of actual employment arrangements or objectively in terms of the reasonable perceptions of observers, an employee's action were an aspect of what they were employed to do. (footnote omitted).

[41] I am satisfied that Ms Wood had been instructed not to speak ill of UQB and that her actions were contrary to that instruction and that ACC complied with clause 5 of the 2019 settlement agreement.

[42] While Ms Wood was given an instruction not to speak ill of UQB, I consider her actions are attributable to ACC. Such as the relevant factual assessment concerns perception, I consider that the real issue goes to the reliance on the action as having been within authority. Based on the evidence provided as to the relevant interaction, I conclude that an objective observer would reasonably have perceived that the communication from Ms Wood was an aspect of what she was employed to do. Indeed, while she now has a different view, that is confirmed by Ms Wood's evidence to the effect that she thought she was saying as much as she could at the time.

[43] Ms Wood was a Team Leader at the time and has held other leadership roles. I have little doubt that inquiries of a similar nature, as to suitability of former team members for employment or other roles, would be made from time to time of Ms Wood. On the face of it, there was nothing exceptional in the communication that would give an observer cause to think Ms Wood's comments were made other than in the course of her role as Team Leader and that she was acting within her authority. While the relevant communications were internal and within ACC, I find that an objective observer would have perceived that Ms Wood's actions were an aspect of what she was employed to do.

[44] Given Ms Wood's role, I find that ACC effectively held Ms Wood out as having authority to comment and provide critique on employees that were, or had previously been, members of her team. While on one view she may not have had actual authority, whether express or implied, her position within ACC held her out as having the relevant authority. I find that reliance was placed on that apparent authority.

³ *Alkazaz v Deloitte (No 3) Ltd* [2022] NZEmpC 171 at [122] and [123].

⁴ *Ibid* at [123].

[45] I conclude that Ms Wood's actions are attributable to ACC on the basis she was acting within the scope of her apparent authority. ACC has breached clause 7 of the 2018 settlement agreement and clause 6 of the 2019 settlement agreement.

[46] In the alternative, I would have found that Ms Wood had actual implied authority to make the comment on the basis that she did not understand the full scope of the instruction given as at the time of the comments being made.

The inclusion of a "consent provision" in ACC's application form

[47] UQB claims that ACC breached clause 6 of the 2018 settlement agreement, and clause 5 of the 2019 settlement agreement, by including a "consent provision" in its online job application form. UQB seeks compliance orders and the imposition of penalties.

[48] ACC submits that any compliance orders should be limited to those necessary to address compliance as to any breaches, and that no penalties should be imposed.

[49] Clause 6 of the 2018 settlement agreement provides:

6. The investigation into disciplinary allegations will cease and no further action will take place and [UQB's] personal file will be sealed.

[50] Clause 5 of the 2019 agreement provides:

5. The parties agree that the Applicant is able to apply for any employment role with the Respondent. The Respondent will instruct [three specified employees] that if they are approached for comment regarding the Applicant, they must advise that that have no comment to make.

[51] The relevant wording of the "consent provision" provides:

Have you ever been an ACC employee before? (Please note that we do check personnel records of prior employees and by continuing with your application you provide your consent for this to occur.)

[52] There is a question as to what clause 6 of the 2018 settlement agreement requires. Clause 6 of the 2018 settlement agreement, subject to otherwise being required by law, requires the personal file to be sealed.

[53] I consider it clear that the requirement to seal UQB's file, when read in the context of the full sentence dealing with the investigation of allegations being ceased, is to prevent prejudice arising from the accessing of any records relating to allegations relating to UQB. The clause could not reasonably be read as requiring the entirety of UQB's employment records to be permanently sealed or made inaccessible. Such an

approach would be inconsistent with other obligations including in relation to privacy and access to records required to be kept under the Act.

[54] I consider any access to the relevant records on UQB's file based on agreement to a "consent provision" would be impermissible and contrary to clause 6 of the 2018 settlement agreement. In other words, UQB agreeing to a check of the personnel records in terms of the "consent provision" would not absolve ACC of the obligation to keep their personal file sealed.

[55] Clause 5 of the 2019 settlement agreement must, in terms of the ability to apply for any role with ACC and when read in context, be more than just a statement of the obvious position that UQB could apply for a role. That clause must be read as having that ability without being encumbered by barriers being presented by matters that were resolved by the 2018 and 2019 settlement agreements, including the requirement that their personal file be sealed.

[56] While clause 5 of the 2019 settlement agreement does not require ACC to employ UQB, it is inconceivable that UQB would agree to such a clause if it were simply to have no practical effect. ACC is required in my view to deal with any such application in an appropriate way having regard to its obligations by ensuring that no potentially adverse material that is required to be sealed is considered, including by excluding the possibility of any adverse inference being drawn by records being identified as having been sealed, and by ensuring that UQB is not disparaged. I also consider it a necessary implication that the sealing of those records be actioned in such a way that the sealing itself does not identify to any relevant individual involved in such a recruitment process that the records have been sealed such as might lead to an adverse inference being drawn.

[57] Notwithstanding the above, I conclude that ACC has not breached clause 6 of the 2018 settlement agreement. There is no evidence before the Authority indicating that ACC has not sealed UQB's personal file, nor that it has otherwise allowed access to it, in contravention of clause 6. On that basis, UQB's claim that ACC has breached clause 6 of the 2018 settlement agreement is unsuccessful.

Should any compliance orders be made?

[58] UQB seeks compliance orders in terms of s 137 of the Act requiring ACC to comply with:

- (a) clause 7 of the 2018 settlement agreement and clause 6 of the 2019 settlement agreement by taking “reasonable practical” steps to ensure that the staff involved or aware of the employment relationship problems...” in 2018 and 2019 do not speak ill of UQB;
- (b) clauses 5 and 6 of the 2019 settlement agreement by taking “reasonable practical steps” to ensure the three named individuals, including Ms Wood, comply with ACC’s expectations and do not speak ill of, nor provide any comment if requested of them, UQB; and
- (c) clause 6 of the 2018 settlement and clause 5 of the 2019 settlement agreement by requiring ACC to remove the “consent provision” on their website to enable UQB to apply for roles with ACC and to keep UQB’s personal file sealed.

[59] ACC submits that any compliance orders should be limited to those necessary to address compliance as to any breaches, and that no penalties should be imposed.

[60] I have found that UQB is unable to progress their claim as to breach of clause 1 of the 2018 settlement agreement. No compliance order is therefore available.

[61] I decline to issue the compliance order sought in relation to [58](a) above. I consider the compliance order sought goes beyond the scope of the relevant obligations, including by effectively purporting to require that ACC notify unspecified persons of a requirement in circumstances where those persons may or may not be known to ACC, may or may not remain in the employment of ACC, and where the form of compliance sought is incapable of being actioned.

[62] I also decline to make any compliance order requiring the removal of the “consent provision”. I am not satisfied that any relevant breach has occurred, nor that ACC have prevented UQB from applying for roles with them.

[63] While I decline to make the orders in the form sought by UQB, I consider the established breaches warrant the making of practical compliance orders in order to ensure compliance with the relevant provisions that protect UQB’s interests in relation to non-disparagement.

[64] I order that ACC, including Ms Wood in her capacity as an employee of ACC, comply with clauses 7 of the 2018 settlement agreement and clause 6 of the 2019 settlement agreement, with immediate effect, by refraining from speaking ill of UQB.

Penalty

[65] UQB seeks the imposition of a penalties against ACC in relation to the claimed breaches of the 2018 settlement agreement and 2019 settlement agreement.

[66] Having regard to the significance of the breaches I am satisfied that the imposition of a penalty is appropriate. Section 135(2)(b) of the Act provides that a penalty of up to \$20,000 may be imposed in relation to each breach.

[67] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*⁵ and had regard to the mandatory considerations at s 133A of the Act.

[68] I have found there are two breaches of the relevant settlement agreements. Having regard to the nature of the breaches and the relevant conduct, I consider that they should be treated as a single breach for the purposes of applying a penalty in this case. On that basis, I take the revised starting point as being a maximum of \$20,000.

[69] Compliance with agreed terms of settlements is of paramount importance. The facts of this case in my view demonstrate that importance and the considerable reliance that parties place on such agreements in resolving their employment relationship problems. Actions that undermine such reliance also undermine the resolution of employment relationship problems within the scheme of the Act and the confidence that the public can have in that system. In that context, I consider both general and specific deterrence to be relevant considerations in terms of penalty.

[70] I am satisfied that the relevant actions were deliberate in that Ms Wood made the comments when she knew she ought not to. While conscious that the comments were made by an individual in circumstances where ACC had issued an instruction not to make such comments, ACC is nonetheless liable for the comments.

[71] I am of the view that the evidence does not clearly establish that there were no impact caused by the relevant actions. While other reasons were noted as being

⁵ [2016] NZEmpC 143.

causative of UQB being unsuccessful in their application for employment, I find that the comments were damaging, at the least resulted in a loss of a chance of being successful, and caused loss which UQB is not otherwise able to recover.

[72] I order that ACC make payment, within 28 days, of a total penalty of \$5,000. \$4,000 of that sum is to be paid directly to UQB. \$1,000 is to be paid to the Authority via the Crown account.

Costs

[73] Given UQB was self-represented there is unlikely to be any issue as to the costs of representation. However, costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If there is an issue as to costs, and the parties are unable to resolve costs, and an Authority determination on costs is needed, UQB may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum ACC will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[75] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis on the basis of a half day unless circumstances or factors, require an adjustment upwards or downwards.⁶

Rowan Anderson
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1