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THE ADVOCATE

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Don't 'Dis' me!

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According to a recent decision, there are some 11,000 Employment Relationship Problems resolved each year through '*full and final*' mediated settlements under s.149 of the Employment Relations Act. Such settlements routinely contain non-disparaging clauses purporting to restrict the ability of both parties to talk negatively about each other once a settlement has been reached.

A recent Employment Relations Authority decision, albeit with an unusual factual basis, considered the consequences of a breach of such provisions.

The case, ***RGS v. EVD*** (July 2019), unsurprisingly began with the issue of suppression. The employee claimed that his prior employer had made derogatory comments about him on the internet, in itself an interesting reversal of a more common norm. In dealing with the claim he sought an order prohibiting the publication of some of the evidence on the basis that publication would have the effect of publicly airing the very comments that he considered to be derogatory. The Authority considered the alternative option of suppression of the names of the parties. While allowing a fuller discussion on the nature of the alleged breach would, the Authority considered, diminish the potential effect of a penalty, if ultimately awarded. That is because the Authority considered that publication of the name of a party in breach acts as a deterrent and is part of the public interest rationale for such penalties.

On balance, and as is apparent by the name of the case, the Authority decided to prohibit the publication of the party names rather than the evidence surrounding the alleged breach.

RGS was employed by EVD, a New Zealand registered company wholly owned by a Chinese parent company. The employment relationship problem. This resulted in a Section 149 Mediated Record of Settlement which, as above, included a confidentiality and non-disparaging agreement. It also included two letters of apology from RGS (one in English and one in Chinese) which, in accordance with the Record of Settlement, EVD was entitled to publish on its '*company website*', '*official WeChat page*' and '*official Facebook page*' but nowhere else. WeChat is a Chinese messaging and social media application which users receive postings made on pages to which they subscribe. The settlement included the following provisions:

"5. Neither party is entitled to comment on or about the letters of apology referred to in clause 4 above with the exception of providing a response to the effect that they are not able to comment any further on the matter.

6. Neither party will make any disparaging comment about the other."

and

"For the sake of clarity, these two letters and their publication ***on those three forums*** *will not be considered a breach of the confidentiality or non-disparagement provisions of this agreement."*

RGS claimed that EVD had breached the settlement because they had, when publishing the apology letter, published additional comments and, additionally, that the comments were disparaging.

EVD's parent company had published the Chinese version of the apology on WeChat with the following additional comments:

"Based on [RGS]'s damage to his employer's interest and his breach of his employment agreement during his employment with [EVD] and especially considering the damage of his words and deed to the company's interest and right after his resignation, [EVD] has filed a lawsuit with an NZ local court and sued [RGS].

The problem has been settled, [RGS] has admitted the mistakes he made during his employment. He also wrote an apology letter and apologised sincerely to the company. [EVD] has forgiven the mistake he made and promised it won't pursue him for responsibility in the future."

The letters and comments were subsequently reposted on a media website in China that specialised in news about the industry in which EVD operated.

EVD initially argued that the posting was published by its parent company and that EVD did not prepare and did not know who had written and published the additional comments. This technical argument was not accepted by the Authority:

"The liability of EVD not to breach the agreement was not diminished or removed by the notion that the authorship of the additional comments was unknown. The signed letters had, by some act of human agency, been transferred from the control of EVD in New Zealand to someone in the parent company in China. It does not matter who did this. EVD had possession and control of the signed letters of apology. It was, by dint of the agreed term, entitled to have the letters published on the WeChat page of the parent company. It was what the parties to the agreement had understood and intended would happen."

The Authority held that EVD also had an obligation under the agreement not to have the letters published in that forum with any additional comment:

"As a result EVD, and all its responsible personnel, had an obligation to control how the letters were published and used. There were clear parameters for what it could do in publishing them."

In publishing the letters on WeChat the parent company was *"for the purpose of carrying out the terms of the agreement, the agent of EVD."*

"EVD's breach of clause five, not to comment on or about the letters of apology, occurred not by the fact of the additional comments being posted on the WeChat page but in the fact of not having taken enough care to ensure that the publication of the letters was carried out in a way that was entirely consistent with the terms of the agreement, not different from it."

Publication in China did not negate the liability because the post could be read by anyone who subscribed to the page.

Having found for the first breach, the Authority then went on to consider whether or not the additional comments were in fact disparaging:

"For the purposes of this determination, the term about neither party making disparaging comments is interpreted on the plain meaning of its words. To "disparage" is to suggest someone is of little worth or to speak scornfully about the person. It has also been defined as speaking slightingly or critically of the person. [2] Disparaging comments are the kind of remarks (in spoken or written form) that would lower the esteem or reputation of someone in the eyes of other people."

EVD argued that the additional comments were not disparaging because they '*went no further . . . than the content of the letter of apology*'. The Authority did not accept this because, firstly, the comments referred to a '*lawsuit*' having been filed whereas the letter only referred to there being a '*dispute*' between the parties. Moreover, the comments about RGS having damaged the interests and rights of the company and having been '*forgiven*' were held to be '*critical and slighting of RGS*'.

The Authority therefore went on to conclude that EVD had '*by its acts or omissions*' breached both clauses 5 and 6 of the Record of Settlement, with a maximum possible penalty of $20,000.00 per breach; $40,000.00 in total. Adopting the accepted methodology to determine remedies (Refer The Advocate 264) the Authority imposed a penalty of $4,000.00 plus costs of $2,250.00; $3,000.00 of the penalty to be paid to RGS and $1,000.00 to the Crown.

While this was in all likelihood a pyrrhic victory for RGS, as actual costs would, in all probability have taken all or most of the sum awarded by the Authority, it is a salutary lesson for all parties to such settlements. Firstly, the provisions of these agreements are enforceable, and will be enforced by the Authority. Secondly, and in these times of high access to the social media, the parties may be responsible not only for their own actions, but also for the actions of others. Having, reasonably, provided the letter of apology to the parent company the employer, EVD, became responsible for their actions and statements.

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