MGZ | mcphail gibson & zwart ltd

THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart
ISSUE 266
May 2017

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Not So Settled

A recent Employment Court decision, ***Lumsden v. Skycity Management Limited*** (March 2017) looked at the enforceability of mediated settlement provisions. Mr Lumsden was employed in a restaurant at Skycity. In September 2015 he wrote a letter to his employer raising three separate concerns. The parties agreed to attend mediation. Before these concerns could be resolved a formal customer complaint was raised against him and a meeting to investigate was set for a date a few days after the arranged mediation. At mediation, concerned that Skycity was intent on terminating his employment, Mr Lumsden resigned as part of a settlement. That settlement contained common terms setting out compensation, confidentiality, non-admission of liability etc. It also included:

*"**Non Disparagement***
6. Sky City Food & Beverage and David Lumsden agree that no disparaging comments will be made by either party about the other party. This includes no disparaging comments to past, existing or prospective staff, prospective employers, internal & external stakeholders or to the general public. For purposes of clarification this includes no disparaging comments on social media sites."

and

*"**Full & Final Settlement***
11. This is the full and final settlement of all matters between the [sic] David Lumsden and Sky City Food & Beverage arising out of their employment relationship including the termination thereof."

The settlement also included a provision allowing Mr Lumsden to re-apply for employment at the Casino:

*"**Miscellaneous***
…
10. David is welcome to apply for any future employment opportunities that may arise at Sky City."

And a provision recording the intended resignation:

*"**Resignation***

3. David Lumsden resigns from employment and Sky City Food & Beverage accepts David Lumsden's resignation. The parties agree that resignation is effective as of end of business day, today, Tuesday; 25th November; 2014. The recorded reason for the end of the employment relationship by Sky City Food & Beverage, for the purposes of seeking new employment, shall be that of resignation by David Lumsden."

Mr Lumsden applied unsuccessfully four times for positions at Skycity. He ultimately found out that on his personnel file, his manager (who had signed the settlement on behalf of Skycity) had, in a tick box entitled *"Would you re-employ?"* inserted *"No"*. It was subsequently determined at the hearing that the employer had further in the same form under the heading *"Manager Termination Comments"* written:

"Outstanding performance issues, staff and customer complaints. Not a team player, major attitude change, became very difficult to manage as he wouldn't follow management's directions."

Mr Lumsden pursed several causes of action against Skycity. He claimed that the employer had breached terms regarding non-disparagement, future employment and full and final settlement. The last being a claim that the statement written in the form related to the customer complaints which had been resolved as part of the settlement.

MGZ | mcphail gibson & zwart ltd

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

Contact Details:

Ground Floor

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Neil McPhail
Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson
Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart
Email peter@mgz.co.nz
Mobile 0274 367 757

In addition he claimed a penalty for breach of good faith (relating to the reference in the file). This was unsuccessful because at the time the comments were written he was no longer an employee and the good faith provisions therefore did not apply.

He also claimed to have been constructively dismissed. This was based on the premise that the settlement could be reviewed because he only agreed to it under the misapprehension that he could re-apply for a position.

While the Court accepted that there were situations where a settlement can be revisited, for example one signed under duress, in this case *"there was no evidence to suggest that Mr Lumsden had been forced into signing the agreement or anything of that ilk."*

The Court was therefore left to consider whether or not there had been a breach of the Terms of Settlement.

The Court accepted the Shorter Oxford Dictionary definition of disparage:

"(a) bring discredit or reproach upon; dishonour; lower in esteem;

(b) degrade, lower in position or dignity; cast down in spirit; and

(c) speak of or treat slightingly or critically; vilify; undervalue, depreciate."

The Court went on to hold that it was difficult to:

"characterise the "no" to rehire and the management comments as anything other than critical. They were plainly directed at recording Mr Lumsden's perceived deficiencies for future reference by Skycity and to inform recruitment decisions, and I was not drawn to attempts to suggest otherwise."

The Casino had attempted to argue that this reference and the comments regarding '*Outstanding performance issues'* were not disparaging because they were truthful. The Court held firstly that this could not be a defence to the latter comments because they were based on untested allegations. More significantly the Court appeared to challenge a defence to the comments on the basis of truth; the fact that something is truthful does not mean it is not disparaging.

As to the claim that Skycity had breached clause 10 of the settlement *"Welcome to apply for further employment"*, the employer argued that there was no breach because Mr Lumsden had been allowed to apply. The Court did not accept such a narrow interpretation of the provision:

"[47] While Mr Lumsden was physically able to fill in and submit an application, more was required of Skycity on receipt of it. Ms Dunn was right in saying that cl 10 did not require Skycity to re-employ Mr Lumsden. Plainly that is so. However, the difficulty for Skycity is that cl 10 must be interpreted in light of other relevant provisions of the agreement, including Skycity's self-restrictive undertakings to record the reason for termination simply as a resignation and not to disparage Mr Lumsden. It follows that the only management comment that ought to have been recorded was "resignation", and that any subsequent application would have needed to be treated fairly and on its merits. The "no" to rehire and negative manager comments that were made undermined the applications that the parties had agreed Mr Lumsden was entitled to make. While the witnesses for the defendant emphasised that each application fell to be decided by the relevant manager, a reasonable inference can readily be drawn that they were effectively doomed from inception."

The Court further found that the employer had failed to treat matters as finally settled (clause 11) because of the references to the complaints that had been made:

"[52] The broader wording of cl 11 lends weight to Mr Lumsden's argument that the company failed to treat all matters as settled because of the notations made on the system and the way in which his applications were subsequently dealt with. I consider that the steps Skycity took in relation to Mr Lumsden's applications necessarily meant that it had failed to treat matters as finally settled."

In conclusion, the Court found that:

"[56] The company breached the agreement as soon as it was signed and immediately after Mr Lumsden's resignation had taken effect. The notations were intended to impact on recruitment decisions and did so."

A penalty of $7,500.00 was set with the stated intention of sending a message *"to parties to settlement agreements of the need to comply with the terms they have agreed to."*

The message is clear. If you don't intend to comply with the terms of an agreement, don't agree to it in the first place. The relevance of this with regards non-disparaging provisions is also clear. All employers are (or should be) cognisant of the '*would you re-employ this person?'* question. If, as the result of a settlement you agree to a non-disparaging clause and you allow yourself to act as a referee there is a foreseeable problem if you answer '*no'* to the question.