MGZ | employment law

THE ADVOCATE

ISSUE
308

November 2020

a regular newsletter for clients of
mcphail gibson & zwart ltd

"Don't Dis Me"

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

A recent Employment Relations Authority decision ***Levchenko-Scott v. Presbyterian Support Central Charitable Trust*** [2020] NZERA 452 reconsiders and confirms an issue that we have reviewed in the past [The Advocate Issue 266]; the effect of breaching the non-disparagement provisions in a Mediated Record of Settlement.

Timothy Levchenko-Scott was a Manager in a residential facility operated by Presbyterian Support Central (PSC). In April 2019 Mr Levchenko-Scott raised an employment relationship problem with PSC. The parties attended mediation on 19 April 2019 and resolved all matters between them. The Record of Settlement was duly signed by a Mediator and included the following terms:

"2. The parties agree that neither will disparage nor speak ill of the other and non-disparagement extends to all forms of social media.

6. PSC will provide a written reference to Tim on PSC letterhead by 19 April 2019, the text of which is contained in the addendum to this settlement agreement. If contacted by a third party, PSC will restrict its comments to those which are consistent with the text of the reference."

both of which are common terms in settlements.

The Record of Settlement appended the text of the written reference attesting to Mr Levchenko-Scott's professionalism, analytical skills, process-following and personnel management. Mr Levchenko-Scott subsequently moved to Australia and sought employment there. He received three provisional offers of employment between July and December 2019, all of which were subsequently withdrawn.

Mr Levchenko-Scott attested that this was because when prospective employers talked to PSC they were advised in response to specific questions that '*No*', PSC would not employ Mr Levchenko-Scott again and that this was because he failed "*to align with the organisation's values*".

Those values were:

"• *Respect: We have respect for all people.*
- *Compassion: We have compassion for those in need.*
- *Selflessness: We put our clients' interests before our own.*
- *Holistic: We are dedicated to meeting our clients' spiritual, physical and social needs.*
- *Passionate: We have passion for our purpose.*
- *Professional: We are professional, honest and have integrity in our actions.*
- *Active: We are resourceful and responsive.*
- *Excellence: We strive to continuously improve."*

The Employment Relations Authority accepted the Employment Court's definition of disparaging in the *Lumsden* case:

"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 in that case went on to find that there was "*no additional requirement for untruthfulness or fabrication*" and that it was "*difficult . . . to characterise the 'no' to rehire . . . as anything other than critical*".

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 **Peter Zwart, Dean Kilpatrick, Jane Taylor or David Appleton.**

Contact Details:

Level 2

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Peter Zwart
E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

Jane Taylor
E: jane@mgz.co.nz
M: 021 1539 147

David Appleton
E: David@mgz.co.nz
M: 027 247 4274

Mr Levchenko-Scott stressed that the statement that he did not align with the values of the organization was *"highly critical of him and represented him as being unsuitable to work in aged care".*

PSC argued that the comments were truthful and should be seen in the context of the positive reference. They also argued that there was no evidence that the offers of employment were withdrawn because of the statements. They argued that "*answering questions from prospective employers honestly and factually . . .cannot amount to disparagement, particularly when those answers were prefaced by the positive (reference) comments."*

These arguments were, unsurprisingly, not accepted by the Employment Relations Authority. The Authority held that the agreed reference did not refer to the values of the organisation:

"[W]hen PSC informed prospective employers it would not re-employ Mr Levchenko-Scott, and explained that the reason was his non-alignment to, or fit with, its values, PSC stepped well outside the agreed text of the reference."

The Authority therefore concluded that PSC had breached terms 2 and 6 of the Record of Settlement.

The Authority declined PCS's request not to award a penalty for three reasons:

"Firstly, to bring home to PSC the unacceptability of breaching terms of a mediated settlement agreement. Secondly as a general deterrent to others and, thirdly, because of the harm I find the breaches were likely to have caused to Mr Levchenko-Scott."

Accordingly, the Authority awarded a penalty and considered the normal factors for quantification of such awards.

They found that each of the three occasions when a PSC Manager disparaged Mr Levchenko-Scott was a separate incident worthy of penalty. Therefore total maximum penalties of $60,000.00 applied. They found that on each count the Manager *"must have understood that in advising prospective employers PSC would not employ him again and that he did not fit the values of the organization, (the Managers) were going outside the parameters of the agreed text and undermining the positive nature of the reference."*

The conduct was deliberate and "*contributed to the length of time it took Mr Levchenko-Scott to find employment*". The starting point for each penalty was determined to be 60%, or $36,000.00. This sum was reduced by a further 50% in recognition of PSC's ability to pay; they were a Charitable Trust currently running at a $4million deficit. It was reduced by a further 40% in consideration of other relevant awards, to a total of $10,800.00: $8,200.00 to Mr Levchenko-Scott and $2,700.00 to the Crown.

This case re-emphasises the importance of such provisions in Records of Settlement. Employers who agree to such terms must be prepared for the consequences that may follow a breach.

MGZ | employment law

Privacy Act Amendments

The Privacy Act has been amended and all changes will come into effect from 1 December 2020. Issues that come to be considered from an employment perspective include:

Notification of Privacy Breaches
A business or organisation that has a privacy breach that it believes has caused (or is likely to cause) serious harm must notify the Privacy Commission and affected individuals as soon as possible. Although 'serious harm' is not of itself defined, the Act provides that when determining whether a breach is likely to cause serious harm the agency must consider:

a. Actions taken to reduce the harm following breach.
b. Whether the information is sensitive.
c. The nature of the harm that could be caused.
d. Who had obtained or may obtain the information.
e. Whether the information is protected by a security measure.

A failure to notify will of itself be actionable with a fine of up to $10,000.00.

Purposes of the Collection of Personal Information
All staff must be advised of the purposes for which information on them is collected and stored and of the type of information that may be collected and held.

Employers are advised that they should create or review Privacy Policies to ensure that they comply with these new requirements.