BREACHING A RECORD OF SETTLEMENT

Reaching a settlement involves making compromises—like agreeing not to make disparaging comments about the other party. So what happens when someone breaches a record of settlement? Paul Robertson checks out the penalty awarded in a recent case.

PERSONAL GRIEVANCES ARE usually resolved by the parties reaching a negotiated settlement and then signing a record of settlement. The parties are warned that any breach of the record of settlement will have serious consequences.

What happens then when an employee breaches an agreement not to make disparaging comments about the employer?

THE CASE

On 1 November 2017, the Employment Relations Authority considered a claim by Victoria University against a former employee, Dr Sawyer. Dr Sawyer alleged that she had been bullied during her employment with the university.

That claim was resolved with a record of settlement being signed off. Dr Sawyer unsuccessfully challenged the validity of the settlement. She also sent five emails to staff and related parties accusing staff members of dishonesty, professional incapability and professional impropriety.

The record of settlement required that Dr Sawyer would not make disparaging comments about the staff members, so the university brought a claim for breach of the record of settlement. The university sought $50,000, being $10,000 for each breach.

THE LAW

Section 133A of the Employment Relations Act lists the factors to be taken into account when determining whether a penalty is warranted. Decisions of the Employment Court have also emphasised the need to deter parties from breaching the record of settlement.

Extent and severity of breaches: Here there were five breaches involving emails sent to approximately eight people. The breaches were intentional. An aggravating feature was that the settlement agreement specifically prohibited any disparaging comments about the two named individuals.

Dr Sawyer argued that she was entitled to make the comments pursuant to the Protected Disclosures Act 2000, the purpose of which is to facilitate the investigation of "serious wrong doing". The Authority termed this defence disingenuous as most of the recipients were members of a book club.

Means to pay and proportionality: Dr Sawyer had not given any evidence regarding her income. The amounts awarded for breaches of non-disparagement and confidentiality provisions in records of settlement historically range between $250 and $7500 out of a maximum of $10,000.

Taking into account the limited extent of the breach (the five emails) and the short timeframe (one month), the Authority awarded one penalty of $8500.

Who gets the money? Penalties are normally payable to the Crown, but there is some flexibility. Here, the Authority agreed to pay the majority of the $8500 to the individuals named in the emails.

THE LESSON IS...

Reaching a settlement involves making compromises. A strong incentive is the knowledge that the settlement will be confidential, and that the other party will not make any more disparaging comments about you in the future.

This decision confirms that the terms of such a settlement are enforceable and the Authority will take action when parties disregard its terms.

Whether the $8500 the Authority awarded is sufficient to punish such a flagrant breach of the record of settlement is open to debate.

We wish all readers a Merry Christmas and a happy New Year.

The Vice Chancellor of Victoria Wellington of Wellington v Sawyer [2017] NZERA Wellington 106

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