ACC requests and non-disparagement provisions

Employers are required to manage psychosocial risks at work. The Health and Safety at Work Act 2015 defines '*health*' as physical *and* mental health.

Psychosocial hazards are factors at work that may cause psychological and physical harm. They can arise from how work is designed, social factors at work (such as workplace interactions or behaviours), or the work environment (including equipment and hazardous tasks).

Exposure to psychosocial hazards can lead to serious health impacts such as mental illness, anxiety, depression, fatigue and burnout.

Workplace bullying or harassment is one example of a psychosocial hazard. An employer's failure to respond appropriately to workplace bullying can give rise to personal grievance and breach of contract claims. It is an implied term of every employment relationship that the employer will comply with its obligations under the Health and Safety at Work Act.

In some instances the employee will, in addition to notifying a personal grievance, also make a claim with ACC for compensation. Such claims are generally made when the employee suffers significantly, such as diagnosed Post-Traumatic Stress Disorder.

In order to assess the claim, ACC often writes to the employer requesting information about the event or events that allegedly caused mental injury to the employee. ACC first obtains the claimant's consent to collect the relevant information. The consent is generally limited to information about the specific event or events claimed to have caused the injury.

Employers need to carefully consider the nature and extent of the consent given by the employee, so that when they are providing information to ACC they do not breach the employee's privacy.

Section 309 of the Accident Compensation Act 2001 provides that an employer of a claimant must provide ACC with any information or statement, when requested to do so, for the provision of facilitating decisions about cover and the timely and appropriate provision of entitlements, or detecting fraud. It is an offence if the employer refuses or fails to supply, without reasonable excuse, the information or statement requested.

In some instances, the personal grievance claim may have been settled by way of a confidential Record of Settlement prior to the employee making its claim with ACC. The standard provisions of a Record of Settlement include confidentiality, full and final settlement of all matters arising from the employment relationship and often include a non-disparagement provision.

Non-disparagement provisions prevent both employer and employee from disparaging each other. To 'disparage' is to bring into discredit, degrade or speak of critically. There is no need for the comment to be untruthful or fabricated. A disparaging statement can be expressly stated or implied.

The recent case of Quartermain v FOMHT Health Services Limited [1] dealt with an alleged breach of a non-disparagement provision in the context of the former employer providing requested information to ACC.

The clause in question stated:

> "*Neither party will make disparaging and/or defamatory reference to, or comments about,*

[1] [2026] NZERA 762 3469724

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ACC requests and non-disparagement provisions (Continued)

the other party to any third party, in any forum, including but not limited to social media."

Whether or not an employer breaches a non-disparagement provision involves consideration of the scope of the clause in the particular context and whether the particular facts amount to a breach.

Ms Quarterman made a claim with ACC that she had suffered a mental injury as a result of a workplace incident. She signed an Authority authorising ACC to collect:

- *Medical and other records which are or may be relevant to my claim;*
- *Details of my accident;*
- *Tax records, employment details and history which are or may be relevant to my claim;*
- *The holders of such information to provide it to ACC;*
- *The treatment provider to lodge this claim for me.*

Ms Quartermain had already notified a personal grievance, attended mediation and settled her grievance by way of a confidential Record of Settlement signed-off by a Mediator by MBIE. The signatory to the Record of Settlement was the former employer's Chief Executive. The Chief Executive also assumed responsibility for responding to ACC's request for information.

The Chief Executive provided ACC with comments on the workplace incident, denying that it had caused mental injury to Ms Quartermain. Included in the information provided to ACC were three witness statements to the incident which portrayed Ms Quartermain in an unfavourable light. However, the Chief Executive failed to provide a fourth witness statement in her possession which was more favourable to Ms Quartermain.

In addition, she provided ACC with a number of newspaper articles which cast Ms Quartermain in a poor light and included reference to a conviction in 2010. At the time she provided those documents, the Chief Executive was aware that the conviction had not shown in a Police check of Ms Quartermain (as part of the recruitment process) because it had been removed from her Police record in accordance with the Criminal Record (Clean Slate) Act 2024.

Ms Quartermain subsequently discovered that her former employer had provided this information to ACC. She was shocked and alarmed by this and said that it made her feel small again and caused her to re-experience the pain of the original workplace incident that she was trying to overcome. She also said that the disclosure was particularly distressing because she denied material allegations in the witness statements and in the newspaper articles, including the fact that her 2010 conviction was no longer current.

Ms Quartermain applied to the Employment Relations Authority asking that it impose a penalty on her former employer for breaching the non-disparagement provision in the Record of Settlement.

The Authority found that the newspapers articles disclosed to ACC were plainly disparaging of Ms Quartermain. It also found that the witness statements were disparaging of Ms Quartermain. As a consequence, the Authority found that unless there was any legal duty or justification, the disclosure of the information was disparaging and amounted to a breach of the Record of Settlement.

The former employer argued that it was required to provide the information by s 309 of the Accident Compensation Act. The Authority found that the requirement was to provide *relevant* information about the workplace incident to ACC. However here, the former employer disclosed disparaging information that was unrelated and irrelevant to the workplace incident and to Ms Quartermain's claim. The Authority also found that the consent Ms Quartermain gave to ACC did not justify the former employer sending the information.

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ACC requests and non-disparagement provisions (Continued)

In deciding to impose a penalty of $10,000, the Authority noted that it is crucial to uphold the integrity of a mediated Record of Settlement and maintain parties' confidence in using the mediation process to resolve employment relationship problems.

The Authority found that the former employer had deliberately disclosed information to ACC that advanced its position that Ms Quartermain did not suffer a mental injury and was not bullied at work. No attempts were made to contact Ms Quartermain or her representative to seek her view about the disclosure of the information before it was sent to ACC. No steps were taken to verify the information in the newspaper articles. Overall, the disclosure was one-sided and exceeded what was necessary to respond to ACC's request. The Authority found that the disclosure was deliberate and was influenced by ill-will towards Ms Quartermain.

Ms Quartermain was able to establish that she had suffered personal harm and had been deprived of the benefit of her settlement bargain. As there was no other meaningful avenue for redress through the personal grievance procedure, the Authority awarded 75% of the penalty be paid to Ms Quartermain.

There are a number of lessons to be learned from this case. When receiving a request for information from ACC about an employee or former employee, the employer needs to carefully consider privacy issues and the extent of the information being requested.

Records of Settlement signed-off by an MBIE Mediator are confidential and amount to a full and final settlement of all matters arising out of the employment relationship. The terms of the Record of Settlement are binding and enforceable in the Employment Relations Authority. Parties that breach the terms of those Records of Settlement may be liable for a penalty.

It is entirely possible to comply with privacy obligations, obligations to ACC and the obligations pursuant to a Record of Settlement. However, in this case, as the Authority found, this did not occur because the disclosure was influenced by ill-will.

Want to know more?

If you have any questions about ACC requirements, Records of Settlement terms or non-disparagement provisions, please contact our specialist Employment Team

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