

## Employment Relations Authority sets the bar low for employer breaches of non-disparagement clauses

### In the recent decision of **Levchenko-Scott v Presbyterian Support Charitable Trust [2020] NZERA 452**, the Employment Relations Authority imposed a penalty on an employer for providing a verbal reference in breach of a Record of Settlement.

#### The facts

Timothy Levchenko-Scott claimed his former employer Presbyterian Support Central Charitable Trust (PSC) breached a Record of Settlement entered into by the parties. The agreement required the parties not to disparage the other. It also provided that when contacted by prospective employers of Levchenko-Scott, PSC would restrict its comments to those consistent with the agreed text of the written reference. This reference spoke to Levchenko-Scott's professionalism, analytic skills, process following and personnel management.

Levchenko-Scott received three provisional offers of employment, yet each was withdrawn following a reference check. He claimed this resulted from the following breaches by PSC:

1. When prospective employers asked PSC whether they would employ Levchenko-Scott again, they answered "no". He alleged this amounted to disparagement.
2. When asked by prospective employers why they would not employ Levchenko-Scott again, PSC referred to his failure to align with the organisation's values. Levchenko-Scott alleged this was inconsistent with the text of PSC's written reference.

Levchenko-Scott sought compliance and imposition of a penalty.

#### The issues for determination

1. Whether PSC breached the settlement agreement.
2. Whether compliance should be ordered.
3. Whether a penalty should be imposed.

#### **1. Did PSC breach their settlement agreement with Levchenko-Scott?**

The Authority found PSC committed both alleged breaches. Answering "no" to employing Levchenko-Scott in the future "introduced a negative and judgmental element" which was disparaging. It did not matter that the conversation was not initiated by the respondent. PSC, in referring to the organisation's values as the reason for this, also breached the settlement agreement because there was no mention of PSC's values in the written reference, nor was there any implication that Levchenko-Scott's behaviour or attitude did not align with those values.

#### **2. Should compliance be ordered?**

Compliance was ordered. It was "more likely than not" that the disparaging comments and inconsistencies with PSC's written reference played a significant part in the withdrawal of the three offers of employment. It did not matter there was no absolute evidence of this.

#### **3. Does PSC deserve a penalty?**

A penalty of \$3600 was imposed for each breach (\$10,800 in total). The provisional starting point was \$12,000 for each breach to recognise the severe financial pressure Levchenko-Scott was under as a

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result of the breaches. However, the penalty was reduced because of PSC's community role as a not-for-profit organisation and because they were running at a \$4.0 million deficit at the time.

Proportionality to penalties imposed in recent cases concerning non-disparagement clauses was also a factor in reducing the penalty.

### What are the options for employers?

Not agreeing to speak verbally to a written reference at all is one option. However, in today's world, this is not entirely practical – prospective employers more often than not will follow up on a written reference to hear from a past employer directly. This allows prospective employers to ask questions specifically tailored to their recruitment criteria.

Another option is the parties could agree that if the employer is asked anything not directly covered by the written reference, they will simply respond to the effect that company policy prohibits any additional comment.

In any case, we think it's best to front-foot this issue with the employee at the time of settlement, to avoid a possible breach and the subsequent penalties that could follow.

### Want to know more?

If you have any questions about breaches of non-disparaging clauses, please contact our specialist [Employment](#) Team.