

## Penalties awarded against employment advocates for breaches of confidentiality

### The Employment Court reinforces the importance of maintaining mediation confidentiality in *CultureSafe NZ Limited & Ors v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165.

*CultureSafe NZ Limited & Ors v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165 is an appeal of an earlier Employment Relations Authority (**Authority**) decision where the plaintiffs, CultureSafe NZ Limited (**CultureSafe**), Allan Halse (Director) and Tracey Simpson (Employment Advocate) (together, the **Plaintiffs**) were found to have breached the confidentiality provisions of a settlement agreement between their client, Ms Makea-Ruawhare and the defendant, her ex-employer, Turuki Healthcare Services Charitable Trust (**Turuki**).

CultureSafe acted as a representative for Ms Makea-Ruawhare, raising a personal grievance on her behalf to Turuki, and attending mediation where the grievance was settled. Turuki and Ms Makea-Ruawhare entered into a record of settlement (**ROS**) agreeing (among other things) that the terms of settlement were confidential, and no party – including CultureSafe specifically – was permitted to make derogatory or disparaging comments about the other parties, and no reference to the employment relationship problem could be published, including on social media. The ROS was signed by Turuki, Ms Makea-Ruawhare, and the mediator.

Following mediation, as part of the settlement, Turuki was to be provided with invoices from Ms Makea-Ruawhare's psychologist, general practitioner and counsellor for payment of their services. Turuki inadvertently failed to pay Ms Makea-Ruawhare's general practitioner's invoice.

Rather than following up non-payment with Turuki directly, Ms Simpson sent a letter to three Ministers, copied to other Members of Parliament, which had been drafted by Ms Simpson and Mr Halse without Ms Makea-Ruawhare's instructions. The letter contained commentary on the mediation, details from the confidential ROS, and criticism of Turuki. Once Turuki was informed that payment had been missed, it immediately remedied its failure to pay.

Despite contact from Mr Drake, Turuki's representative, requiring retraction of the letter, CultureSafe sent further correspondence to Ministers and other Members of Parliament, repeating its earlier claims and intimating that it would widely publicise allegations about Turuki.

Turuki applied for urgent ex parte orders from the Authority against the Plaintiffs, and received a determination later that same day. Orders were made against the Plaintiffs:

- (a) requiring compliance with the terms of the ROS;
- (b) banning any further breaches of confidentiality; and
- (c) prohibiting the publication of Turuki's name (or the names of any employees or representatives of Turuki) in any manner connected with the ROS or the proceedings.

Ms Simpson and Mr Halse continued to publicly criticise Turuki, including on CultureSafe's Facebook page. Ms Simpson and Mr Halse also extended their criticism to Authority Member Crichton, calling for his dismissal.

The Authority issued a second determination finalising the interim orders and suppressing any publication relating to the ROS, or Ms Makea-Ruawhare's employment with Turuki. The Authority also found that the Plaintiffs were in breach of the ROS and ordered, on a joint and several basis:

- a) \$30,000 to Turuki as a penalty under s 149(4) of the Employment Relations Act 2000 (**Act**); and
- b) \$3,000 to Turuki as general damages.

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Following the second determination Mr Halse continued to publicly post derogatory remarks on CultureSafe's Facebook page about Turuki, Member Crichton and also Mr Drake, alleging collusion between the Member and Mr Drake.

### Employment Court proceedings

The Plaintiffs appealed the Authority's decision to the Employment Court (**Court**). The key issues for the Court were:

- a) whether the Plaintiffs were bound by the terms of the ROS, and if so, whether their actions had breached the ROS;
- b) whether the Plaintiffs were liable for penalties and/or general damages; and
- c) if penalties and/or general damages were available against the Plaintiffs, what the proper level should be, and whether that would be on a joint and several basis.

Although CultureSafe was not a party to the ROS, and there was no employment relationship between the Plaintiffs and Turuki, the Court held that it had jurisdiction to make an order that the Plaintiffs had breached the ROS. The statutory wording of "person" as opposed to "party" broadened the ambit of the Act outside of the parties to the employment relationship.

The Court held that any person who knew settlement had been achieved, and of the relevant terms of settlement, could be liable if it breached an agreed term of settlement under section 149 of the Act. Otherwise, attendees at mediations (i.e. representatives, partners, and/or other support people) would be free to publish the confidential terms of settlement that the parties had entered into, and/or to make disparaging remarks about either party, without sanction. The Court considered Parliament would not have intended that result.

Justice Holden was critical of Ms Simpson and Mr Halse's positions as advocates for victims of bullying, while adopting derogatory and harmful behaviour themselves, of which neither party showed any regret or remorse. It was found that CultureSafe did not act in its client's best interests.

However, the Court reviewed the penalties awarded by the Authority, and determined that a reduction in penalties was required. Justice Holden found there was no basis for penalties to be awarded on a joint and several basis. The Court looked at Ms Simpson's and Mr Halse's individual culpability in terms of their personal breaches of confidentiality. Ms Simpson was found to have breached confidentiality on three occasions, and continued to stand by her actions without remorse. A penalty of \$3,000 was made against her.

Mr Halse breached confidentiality in respect of his involvement with correspondence to Ministers, and his post on Facebook. Given Mr Halse's experience, his role at CultureSafe, and his continued conduct (including his intention to repeat this behavior, or behavior like it), the Court considered a higher penalty was warranted against Mr Halse than against Ms Simpson. A penalty of \$5,000 was imposed.

As the entity through which Ms Simpson and Mr Halse operated, a penalty of \$2,000 was also made against CultureSafe.

In respect of damages, Holden J found that the Court did not have jurisdiction to award damages for breach of the ROS, and set aside the Authority's award of general damages.

### What should we learn from this case?

Mediations are an essential tool in the resolution of employment relationship problems. Under the Act any statement, admission or document created or made for the purposes of mediation, and any information that is

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disclosed during the course of mediation, is confidential (unless the parties authorise disclosure). It is paramount that all parties to a mediation, including the mediator, any representatives (including lawyers, advocates and otherwise) and those who are attending in support of a party, are bound by the confidentiality obligations that mediation imposes.

### Will the decision be upheld?

Mr Halse has filed judicial review proceedings of Holden J's Employment Court decision to the Court of Appeal. Mr Halse is seeking a determination on whether a penalty can legally be imposed against a third party to a settlement agreement. Watch this space.

### Want to know more?

If you have any questions about mediations, employment, or the resolution of employment relationship disputes, please contact our specialist [employment team](#).