IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 95
WRC 24/08

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	MEMO MUSA Plaintiff
AND	WHANGANUI DISTRICT HEALTH BOARD First Defendant
AND	CLIVE SOLOMON Second Defendant

Hearing: 23 July 2010
(Heard at Wellington-Auckland by video conference call)

Appearances: Gerard Dewar, Counsel for Plaintiff
No appearance for First Defendant
Michael Leggat, Counsel for Second Defendant

Judgment: 23 July 2010

Reasons: 26 July 2010

REASONS FOR
INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Before the hearing at Whanganui on 4 and 5 August 2010 of the plaintiff's claims for statutory penalties against the second defendant, there is a challenge to the relevance, and therefore admissibility, of some of the plaintiff's intended evidence. This needs to be decided promptly because the second defendant needs to know the extent of the case he has to answer.

[2] The determiner of relevance in any proceedings is the pleadings. Although similar causes of action against the Whanganui District Health Board (the Board) have now been settled with Mr Musa, its former Chief Executive Officer (CEO),

claims for penalties for breach of a settlement agreement and for breach of his employment contract are still for hearing against the second defendant who is and was at all material times a member of the Board.

[3] As the current statements of claim and defence between these two parties now stand, there are three causes of action. The first is for a penalty under s 134 of the Employment Relations Act 2000. This claim relates to the time when Mr Musa was still employed by the Board. Mr Musa says that in contravention of his employment agreement with the Board, Mr Solomon, as its agent and as a Board member, breached the following provision: "… the Board shall not do or say anything which causes, or is likely to cause harm to the employee, or bring the employee into disrepute …". The breach is said to have been the publication by Mr Solomon to an electronic media outlet (New Zealand Doctors Online) on or about 27 March 2008 of a statement or statements disparaging Mr Musa.

[4] The plaintiff's second cause of action relates to the settlement of a personal grievance that Mr Musa raised and then settled with the Board in connection with his employment and which provided, among other things, for his resignation from his position as CEO. Mr Musa says that the publication of the same information by Mr Solomon to New Zealand Doctors Online (and then its republication electronically by New Zealand Doctors Online) was in breach of a settlement made pursuant to s 149 of the Act, the details of which were expressly confidential to the parties including the Board of which Mr Solomon was a member and an agent. A penalty under
s 149(4) is claimed against Mr Solomon.

[5] There is a third cause of action which is inter-related with the first two. The plaintiff says that after the second defendant had breached the confidentiality of the settlement agreement, the Board of which the second defendant was a member undertook to comply with the terms of the settlement agreement whilst Mr Musa remained employed by it and that the terms of the settlement between the plaintiff and the first defendant formed thereby a term or condition of Mr Musa's employment agreement. The plaintiff says that Mr Solomon further breached the

employment agreement by publishing additional remarks that were derogatory of him.

[6] The remedies claimed by Mr Musa include penalties for each of the breaches as provided for in the statute (which penalties he says should be paid to him as permitted by law in recognition of the harm suffered by him), a compliance order requiring the second defendant to comply with the original terms of the settlement agreement of 26 March 2008, and costs.

[7] The penalties claimed are civil penal sanctions for a breach of contractual and statutory obligations. I do not think the claims can be fairly described as they were by Mr Leggat as "quasi criminal". That is because it is not appropriate to describe the breach of an employment agreement or of the statute as a criminal act. Although an appropriately high standard of proof is required, that has never been held to be the usual criminal standard of proof of the commission of an offence, that is beyond reasonable doubt. Not to be forgotten also is the remedy of compliance which is in the nature of a civil injunction and is not penal.

[8] If not to determine whether there has been a breach, then certainly to determine whether that should be the subject of a penalty and, if so, the amount of that penalty, circumstances leading to the breach and relating to the consequences of the breach will be relevant. So, too, will be the degree of culpability of the party in breach which will in turn include an analysis of that person's knowledge and motivation.

[9] In the case of compliance orders too, the Court must take a broad view not only of the breach or breaches but also of the likelihood of a repetition and the consequences of that. Compliance is an order in the nature of a positive injunction requiring a person to behave in a certain way and/or restraining that person from specified behaviour.

[10] It is too narrow an approach to admit evidence that only establishes whether or not there was a breach of the settlement agreement and/or of the employment agreement. The Court must not only have relevant background information to place

in context the events alleged to be the breach or breaches, but needs to know about these events and the parties to them to determine the most just outcome of the case.

[11] The second defendant is, however, correct that it is unnecessary and irrelevant to revisit the merits of the events that led to the settlement of Mr Musa's personal grievance and of his ending his employment relationship with the Board. Those are matters that have occurred and have been determined. It is the consequences of them that are for decision. So, for example, it is not relevant to the proceeding whether Mr Musa was or was not, as CEO of the Board, responsible for incidents or situations about which Mr Solomon held strong views and, among others, expressed these.

[12] To the extent that background evidence may need to touch upon these issues for reasons set out above, the Court will nevertheless not determine them. So it will be unnecessary for the second defendant to address the merits of those issues in the comprehensive fashion that Mr Solomon is concerned that he may have to.

[13] In this regard, and if a breach or breaches are established, it will be relevant, as the plaintiff intends to establish by evidence, whether Mr Solomon was advised of his obligations as a Board member and warned of the consequences of any possible breach by the Board or others. The existence or absence of such advice and/or warnings will clearly be relevant to the degree of any culpability that Mr Solomon may bear; to whether a penalty should be imposed; and, if so, how much. Finally if the question arises, such evidence will be relevant to the proportion of this that may be payable to Mr Musa directly rather than to the Crown as the plaintiff has claimed.

[14] For these reasons the following were my directions on evidence admissibility.

[15] In the brief of Mr Musa, paragraphs 9, 10 and 11 are irrelevant to the matters for decision and must be deleted. Paragraphs 13 and 14 should be replaced by a brief reference by way of background only to problems having developed in 2006 concerning the Board's paediatric services. Paragraphs 15 and 16 are admissible. Paragraph 17 should be condensed to refer by way of background to the Ministry of Health's review and its conclusion, and Mr Musa's evidence of Mr Solomon's

criticism of him at that time. Paragraph 18 is admissible. Paragraph 19 is inadmissible. Paragraph 20 is admissible. Paragraphs 21, 22 and 23 are generally inadmissible. Mr Musa is, however, entitled to refer to the Board Chair's instructions to the Board's solicitors and the distribution of these to Board members but any reference to the circumstances in which this came about should be very brief and by way of uncontroversial statement of background.

[16] As to the intended evidence of Kate Joblin, I confirm that none of the intended evidence is inadmissible and the brief can remain in its present form.

[17] Addressing the intended evidence of Allan Royce Anderson, I confirm that with the deletion of the final sentence in paragraph 8 of that brief, it may otherwise be adduced in evidence.

[18] With regard to the evidence of Ormond Brian Stock, I confirm that there is no inadmissible evidence contained in the brief and it may be adduced as it currently stands.

[19] As to the intended evidence of Ailsa Crawford Stewart, I confirm that the following changes will necessarily have to be made to the brief to make it admissible. In paragraph 15 the last two sentences should read: "The loss of Memo Musa in Wanganui is something that I will grieve over for a long time. I knew that we had lost a good leader." The second sentence of paragraph 16 should begin with the words "I considered" rather than the words "This is to say". The final sentence of paragraph 16 of the draft brief should be deleted. In all other respects the intended evidence of Ailsa Stewart is admissible.

[20] I reserve costs on this interlocutory application.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Monday 26 July 2010