IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 187
EMPC 104/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VERONICA BYRNE Plaintiff
AND	THE NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing:	4 – 6 November 2019 (Heard at Whangarei)
Appearances:	R M Harrison, counsel for plaintiff G Cain and R M Butler, counsel for defendant
Judgment:	13 December 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Veronica Byrne is a well-qualified and experienced engineer. She emigrated to New Zealand with her husband. Her first job after doing so was with the New Zealand Transport Agency (NZTA). An employment relationship problem developed, which was resolved by the parties entering into a settlement agreement. One of its terms was that she would resign. Another was that neither party would disparage the other.

[2] Sometime later, she obtained work with an entity that had contractual arrangements with NZTA: Opus International Consultants Ltd (WSP Opus). After

some four months of employment with that entity, in which she interacted appropriately with NZTA staff, the agency became concerned that there was a potential health and safety issue for at least one of its employees about to become involved in the project on which Mrs Byrne was working. That concern was based on concerns expressed by that employee who was a near rural neighbour of Mrs Byrne and her husband, as well as statements made by one of her former colleagues. Accordingly, WSP Opus was asked to remove her from her role. No reasons were given by NZTA staff, even when pressed. WSP Opus considered it had no option but to comply with the request and advised Mrs Byrne accordingly.

[3] She says that in all the circumstances she was disparaged in breach of the non-disparagement clause of the settlement agreement.

[4] Mrs Byrne raised an employment relationship problem which came before the Employment Relations Authority. It investigated the matter and dismissed her application for a declaration, a compliance order, and a penalty.[1] It later issued a costs determination, ordering Mrs Byrne to pay a contribution to NZTA's costs of $7,500.[2] Subsequently, Mrs Byrne brought challenges to both determinations.

[5] This judgment resolves issues raised by the challenge; that is, whether there was a breach of the non-disparagement clause, whether steps taken by NZTA were justified on health and safety grounds, and, if so, whether any remedies should be awarded.

Relevant facts

Background

[6] Mrs Byrne was born and raised in Bolivia. Her first language is Spanish. She is also reasonably fluent in English, although she says she struggles at times with words and meanings.

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1 *Byrne v The New Zealand Transport Agency* [2019] NZERA 179.
2 *Byrne v New Zealand Transport Agency* [2019] NZERA 283.

[7] She has a Bachelor's Degree in Civil Engineering, with a speciality in transport infrastructure, from the University of San Simone. Between 2004 and 2013, she worked on engineering projects in Bolivia and Papua New Guinea. In the latter location, she met and married Gerard Byrne, a New Zealander.

[8] In 2013, the couple decided to move to New Zealand. They purchased a block of land in Northland. Following that relocation, Mrs Byrne was approached and offered a role with NZTA as Maintenance Contract Manager (MCM) for Northland and Auckland North, based in Whangarei. She signed an individual employment agreement (IEA) on 17 November 2014 and commenced her employment on 12 January 2015.

[9] She thus became a member of the Safety and Network Performance Team for the NZTA. As MCM, she was responsible for delivering what was described as the Network Outcomes Contract (NOC) with Fulton Hogan. Other members of the team were responsible for developing the programme and funding of the NOC, under Jacqui Hori-Hoult, a Whangarei Manager who Mrs Byrne had dealings with from time to time. Mrs Byrne and Ms Hori-Hoult both reported to Mr A, who was based in Auckland.

[10] In the first few months of 2015, Mrs Byrne considered some colleagues were acting aggressively towards her. She felt intimidated by her interactions with them. For their part, Ms Hori-Hoult and Mr B thought she was often belligerent, refusing to listen to them about particular issues such as the use of vehicles available to staff, and how NZTA worked with regard to various processes they were required to operate.

[11] Mrs Byrne then complained to Mr A about treatment of her by colleagues. He arranged a facilitated team meeting to discuss roles and responsibilities, held on 31 July 2015. This did not resolve the relationship problem.

[12] Mr Byrne became increasingly upset at the impact of work issues on Mrs Byrne; he considered she had reached a breaking point. He therefore rang Mr A to ask him what he was doing to protect Mrs Byrne. He also contacted Mr B and,

according to his evidence, said he should stop harassing Mrs Byrne. Mr B considered that Mr Byrne became abusive and hung up.

[13] It was at that point that Mrs Byrne told Mr A she intended to make a complaint that she was being bullied. Advice was then sought from and given by Mervyn Johnston, Lead Human Resources (HR) Advisor.

[14] This led to Mr Johnston asking Mrs Byrne to provide details of the behaviour which had caused her to become concerned or distressed. She provided a detailed complaint on 1 September 2015, which raised concerns about Mr A, Ms Hori-Hoult, and Mr B. She alleged the three individuals had behaved towards her in a bullying and threatening manner, had undermined her work, and had failed to follow NZTA procedures. She referred to a range of incidents that had occurred from January to August 2015. She said she believed all three should have their employment terminated.

[15] Mr Johnston determined that the issues that had been raised should be discussed at an urgent mediation to establish "an agreed and appropriate way forward". Mediation would not be about addressing the substance of the allegations but would explore acceptable processes for addressing the issues. For the purposes of the intended mediation, staff members were asked to provide an initial response to the allegations. Before the Court were the responses given by Ms Hori-Hoult and Mr B.

[16] In the course of these developments, Mrs Byrne became increasingly upset and anxious about the work-related issues. She commenced counselling, a step which she had never previously undertaken. She said she suffered an emotional breakdown, and that, from having been a confident and professional woman, she found herself questioning her abilities.

[17] Mrs Byrne was also concerned at the difficulties that further processes might entail. She felt that she was somewhat of an outsider given her relatively recent arrival in New Zealand. She also believed language difficulties created problems for her; she said that, at times, she did not always understand what was being said or meant, in a culture which was new to her.

[18] On the advice of an employment advocate, Mrs Byrne told Mr Johnston that she would be interested in an exit package. Mr Johnston responded by saying that the agency would be willing to consider any reasonable option.

[19] Mr Byrne felt his wife was not in a fit state to engage with NZTA; he became involved in drafting emails on behalf of his wife to Mr Johnston. As Mr Byrne acknowledged, these communications reflected much of his own frustration and upset as to what was occurring. He accepted that the language and tone of two particular emails were inflammatory; in fact, they were unnecessarily abusive of Mr Johnston and other NZTA staff.

[20] Mrs Byrne's employment advocate then became directly involved in resolving the employment relationship problem. Confidential negotiations occurred, in which it was agreed Mrs Byrne's employment would be terminated by her resigning on 18 September 2015, and that the various complaints would not be investigated, along with other agreed terms.

[21] The terms of settlement were recorded in a record of settlement signed by a mediator under s 149 of the Employment Relations Act 2000 (the Act) on 17 September 2015.

[22] The document contained these provisions:

> ...
>
> 8. The terms of this Agreement, the fact that a settlement has been reached, and all discussions leading up to and surrounding the settlement, are strictly confidential to the parties and their legal representatives, except:
>
> (a) As required by law and the Agency's public reporting obligation; and
>
> (b) The employee may disclose the terms of settlement to her spouse, subject to them observing the confidentiality obligations in this clause.
>
> 9. Both parties agree that they will not make any disparaging remarks about the other to any third party.
>
> ...

[23] The document also recorded that Mrs Byrne would continue to comply with her obligations of confidentiality under her employment agreement with NZTA, which

would continue beyond the cessation of employment. This was a reference to cl 16 of her IEA, which precluded her from disclosing any confidential information other than in the course of her duties, or using such information to her own benefit, or in a manner which may harm NZTA's interests, or those of a related organisation. The term "confidential information" was defined in broad terms, and included personal information, as defined under the Privacy Act 1993, relating to any other employee, contractor or customer of NZTA, or a related organisation.

[24] Finally, the record of settlement contained a comprehensive clause recording that it evidenced an accord and satisfaction and resolution of all issues between the parties directly or indirectly arising from Mrs Byrne's employment with NZTA, including its cessation.

Employment with WSP Opus

[25] Mr and Mrs Byrne then travelled to Bolivia for a period, returning to New Zealand in 2017. Mrs Byrne said she believed she had learned from the NZTA experience, including her part in the breakdown of working relationships that had occurred.

[26] Upon her return, she began looking for civil engineering work. After about eight months, she secured employment with WSP Opus as a Senior Engineer – Civil Projects; her role was to provide contract administration support.

[27] NZTA had engaged WSP Opus as principal advisors/consultants of the Northland Bridges Project (the Project). The Project related to three sites where one-lane bridges were to be replaced with two-lane bridges. WSP Opus was responsible for the business case of the Project, procurement of design and construction, and contract management.

[28] There was no signed or final contract between those parties, although there was a draft document. The draft referred to a document described as 2009 Conditions of Contract for Consultancy Services (CCCS), to which reference will be made later.

[29] There were a number of important professional relationships between WSP Opus and NZTA for the purposes of the Project. Brian Fear of WSP Opus was the engineers' representative; in that role, he was the key contact person for NZTA. Mr Fear had been supported by another WSP Opus employee, Laura Devcich, who provided technical and business case support. However, she had ceased her involvement in the Project.

[30] WSP Opus wanted a contract administrator to support Mr Fear in his role, as his workload was perceived to be very high. Mr Fear wished to retire, so the company was looking to replace him. This was the context in which Mrs Byrne was employed.

[31] Mrs Byrne was interviewed by Project Manager, Chris Parker. He knew she had worked for NZTA in the past; but was unaware of any issues between her and that organisation. When interviewed, Mr Parker understood Mrs Byrne to say she had left NZTA because she was not getting any support and was not given authority to run the contract on which she was working as she saw fit. According to an email he sent subsequently in which he recorded what had happened, Mr Parker then spoke informally to Ms Hori-Hoult, telling her that WSP Opus was looking at employing Mrs Byrne. She said she did not have any comments but said perhaps he should be talking to Mr B, who by then worked for WSP Opus. There is no evidence that this occurred.

[32] Mrs Byrne was employed by WSP Opus on a casual contract. Mr Parker recorded this was because Mrs Byrne was something of an unknown quantity, there was concern as to why she had left NZTA after only a short period of employment, and the full extent of the scope and scale of the intended role was not known.

[33] Once she commenced her role with WSP Opus, Mrs Byrne worked a minimum of 40 hours per week, continuously. Although Mr Byrne had obtained employment following the couples return to New Zealand, once Mrs Byrne commenced with WSP Opus, he resigned his job in order to care for their child. In short, the couple believed Mrs Byrne would have a full-time role for the time being and ordered their affairs accordingly.

[34] Mrs Byrne was required to work with NZTA staff, including James Sephton, who was a client representative for the purposes of the Project. She also liaised with Vivian Tadros, NZTA's Senior Project Manager responsible for the programme's budget and funding, as well as Sean Ryder, another Project Manager.

[35] The evidence before the Court is that Mrs Byrne's performance when working for WSP Opus was satisfactory in all respects; this included her regular interactions with NZTA personnel.

New client representative

[36] In early 2018, Mr Sephton wished a current NZTA employee, Kevin Johnson, to take over his role as client representative on the Project. Mr Johnson was at the time working in the Waikato, but, in early 2018, agreed with Mr Sephton that he would take over the client representative role in June of that year, having a formal handover and some involvement in the Project before then.

[37] One of the reasons for this development was that Mr Johnson lived not in the Waikato, but in Northland – in fact, on the same rural road on which Mr and Mrs Byrne lived.

[38] In February 2018, Mr Johnson told Mr Sephton that he would have concerns working with Mrs Byrne on the Project. He referred to certain incidents which it is unnecessary to detail, save only to note that those who gave relevant evidence to the Court, Mr and Mrs Byrne on the one hand, and Mr Johnson on the other, do not agree as to what happened with regard to many of the alleged neighbourhood incidents.

[39] Mr Sephton said Mr Johnson had spoken not only to himself, but also to Ms Hori-Hoult, about these issues. He therefore asked Ms Hori-Hoult about Mrs Byrne. This was because he himself had not been present when she was an employee of NZTA in 2015, but Ms Hori-Hoult had been.

[40] During the conversation with Ms Hori-Hoult, she told Mr Sephton that she understood Mr Johnson's concerns. She said she would not herself feel comfortable being alone in a room with Mrs Byrne; she referred to previous issues she had with

Mrs Byrne, although did not provide much detail. Mr Sephton said he took these concerns seriously, since he considered she would not make such a statement without proper cause.

[41] Mr Sephton concluded, on the basis of what he had been told by both Mr Johnson and Ms Hori-Hoult, that he could be placing Mr Johnson at significant risk of aggressive behaviour from Mrs Byrne, as well as other NZTA staff, if they were required to work regularly with her.

[42] He also decided to authorise the instillation of a camera on the dashboard of Mr Johnson's vehicle, saying he "could capture any further untoward behaviour" by Mr or Mrs Byrne. Mr Sephton said this would allow Mr Johnson to record evidence in order to liaise with the police. In this context, he understood that Mr Johnson was also installing CCTV cameras on his rural property.

Request to remove Mrs Byrne from the Northland Bridges Project

[43] These concerns led to a meeting being held within NZTA on 22 February 2018, involving Mr Sephton, Ms Hori-Hoult, Mr Johnson, Glenn Murray from the NZTA People Team, and Mr Johnston, the HR advisor referred to earlier.

[44] Mr Sephton said that Mr Johnson and Ms Hori-Hoult explained why they were concerned about working with Mrs Byrne; he referred to his concern that all staff members should be safe.

[45] Mr Sephton was told that he could exercise client prerogative, which included the ability to say how many people WSP Opus should employ on the Project, as well as who would be acceptable. But a decision to do so would be his call.

[46] Mr Johnston confirmed that he also told Mr Sephton that if he were to decide to ask for Mrs Byrne to be removed from the Project, reasons for doing so could be given, but he should avoid making any personal comments about Mrs Byrne.

[47] Mr Sephton said he understood he was given this advice because there had been some sort of settlement agreement with Mrs Byrne, though he did not know the

details of it, including that there was a non-disparagement clause. He said it was a very strange conversation.

Mr Sephton's decision

[48] Following this meeting, Mr Sephton decided to proceed on the basis of the draft contractual documentation which existed between NZTA and WSP Opus, which permitted NZTA to give a direction as to how many people and who would be working on the Project.

[49] The relevant clause of the CCCS was as follows:

> **4.3 Key Personnel**
>
> The written approval of the Client shall be obtained by the Consultant before Key Personnel can be replaced or substituted.
>
> If the Client decides for good reason that one of the Key Personnel is unsuitable:
>
> - the Client can require the Consultant not to have that person perform the Services; and
> - the Consultant shall then replace that person with someone acceptable to the Client; and
> - The Client shall not bear any cost or liability arising from the replacement of that person.

[50] As mentioned, Mr Sephton was also concerned about the performance of the engineers' representative, Mr Fear. He considered that, in light of that concern, it was desirable that Ms Devcich return to her supportive role as assistant to the engineers' representative, instead of Mrs Byrne. Ms Devcich had been named in the Personnel Schedule of the draft contract as Programme Management Support, but there had never been any formal request under cl 4.3 of the CCCS for her to be replaced by Mrs Byrne.

[51] Mr Sephton believed there were clear health and safety risks. He felt it would not be unreasonable for NZTA to ask WSP Opus to remove Mrs Byrne from the project, relying on the provisions of the CCCS.

The implementing of Mr Sephton's decision

[52] On 22 February 2018, Mr Sephton met with Mr Parker to discuss the Project and changes to personnel working on it. He outlined his concerns about Mr Fear, and asked that he be removed from the project; he also requested that Mrs Byrne be removed. He did not provide any reasons for that request. Mr Sephton did not say he wished Ms Devcich to be reinstated to her original role in the Project.

[53] In a subsequent email, Mr Parker said that he had pushed Mr Sephton for a reason, but he refused to provide one. Mr Parker's initial reaction was that Mr Sephton wanted to bring someone on to the contract from the NZTA side who had a history with Mrs Byrne, but that was only an assumption.

[54] On 23 February 2018, Mr Parker informed Peter Houba, Business Manager for WSP Opus, of the request to remove Mrs Byrne from the Project. In the following week, Mr Houba called Mr Sephton by way of follow-up to discuss the request he had made. Mr Sephton reiterated that he wanted Mrs Byrne removed. Again, he did not provide a reason for the request.

[55] On 2 March 2018, Mr Parker requested advice from an HR advisor within WSP Opus. He recorded his understanding of Mrs Byrne's circumstances, as already summarised. He noted NZTA had said WSP Opus should remove Mrs Byrne from the Project, with no reason being given. He said that, from the company's perspective, she had been performing well. He requested advice about employment law issues and the risk to WSP Opus.

[56] On 8 March 2018, Mr Houba met Ms Hori-Hoult at a meeting. Afterwards, he took the opportunity to initiate with her a "higher level discussion" as to why NZTA wanted Mrs Byrne to be removed from the Project. She confirmed that Mrs Byrne was to be removed but said she was unable to answer any other questions. Mr Houba asked her if she had anything to do with the decision, and whether she had a problem with Mrs Byrne; he also asked why Mrs Byrne had left NZTA. Ms Hori-Hoult said she was unable to comment, was not involved in the detail of the project and did not work directly with its staff. She reiterated that any issues needed therefore to be raised with Mr Sephton.

Conversation between Mr Houba and Mr Johnson

[57] On 9 March 2018, Mr Parker and Mr Houba met with the recently appointed NZTA Contract Manager, Mr Johnson. This was to enable him to provide a briefing as to how he saw his future role and to discuss current issues on the Project.

[58] In the context of a discussion as to the number of persons working on the project, Mr Houba raised the subject of Mrs Byrne's removal from it. He queried the reasons for this.

[59] In cross-examination, Mr Houba said that Mr Johnson confirmed that there had been an employment law-related matter involving Mrs Byrne, with a confidential settlement.

[60] For his part, Mr Johnson said that his recall was that, when asked why NZTA did not want Mrs Byrne to work on the Project, he said he thought she had left WSP Opus and was surprised that her name was mentioned in the conversation. Then, when Mr Houba asked what had happened with her previous employment, he said he declined to talk about the issue, citing confidentiality and the direct instructions of HR.

[61] Mr Cain, counsel for NZTA, argued that Mr Houba's evidence in cross-examination was unreliable because it was vague and not in accordance with his evidence-in-chief.

[62] In part, this issue turns on the content of an email Mr Houba sent to colleagues several days after the conversation. In that email, he referred to the fact that initially, no reason had been given for the request for Mrs Byrne to be withdrawn from the Project, but in the last communication held with the organisation, it was confirmed there had been an employment law-related matter with a confidential settlement. There was a typographical error in the particular sentence involved, but when the sentence is read within the overall context of the email, it is plain that the "last communication" was a reference to the conversation held with Mr Johnson on 9 March 2018, the final in a sequence of conversations held with NZTA staff.

[63] Given this relatively contemporaneous evidence, I find that the position is as spelt out in that email and confirmed by Mr Houba in his evidence.

[64] Mr Houba also noted that there had been no formal request by WSP Opus to NZTA to utilise Mrs Byrne's services, although in fact she had been providing them since late 2017, interacting regularly with Mr Sephton. He also accepted that she had performed well in her role.

[65] Mr Houba was concerned that if the request was not complied with, there was a prospect of NZTA taking the Project work away from WSP Opus. He believed it was possible for NZTA to do this, since the final documentation had not been signed. However, no express statement to this effect had been made by Mr Sephton.

Advice given to Mrs Byrne by WSP Opus

[66] For all these reasons, Mr Houba and his colleagues concluded that Mrs Byrne would need to be withdrawn from her role. On the afternoon of 9 March 2018, Mr Houba and Mr Parker met her, telling her that NZTA could not accept her working on the Project. When asked by Mrs Byrne why, Mr Houba said NZTA had cited confidentiality and legal reasons. Because Mrs Byrne was engaged on a casual contract, the decision would be effective immediately, and she would not attend work as from the following week. At that time, Mr Parker and Mr Houba would assess their workload with a view to considering whether alternate work would be available.

[67] About an hour after this meeting, Mrs Byrne returned and spoke to Mr Houba again. She asked what she would find if she undertook an Official Information Act request. Mr Houba told her that all communications from NZTA had been verbal. Mrs Byrne then confirmed she had a confidential employment settlement with NZTA in 2015, in which it was agreed there would be a "two-year confidentiality period" that expired in late 2017. As can be seen from the confidentiality clause set out earlier, she was mistaken in stating that the effect of the clause was time limited.

[68] On 16 March 2018, Mrs Byrne called Mr Houba, requesting the names of the NZTA staff who had requested she be removed from the Project. Mr Houba did not provide her with any individual names.

[69] For some time, Mrs Byrne remained a casual employee in the WSP Opus system, so that she could be called on if any work became available. However, this did not eventuate.

[70] In the course of subsequent correspondence between Mr Houba and Mrs Byrne's employment advocate, Mr Houba confirmed that she had been removed from the NZTA project on the basis of unforeseen circumstances that were unrelated to her performance which had been satisfactory in every respect.

The parties' cases

[71] In summary, Mr Harrison, counsel for Mrs Byrne, submitted as to liability:

a) The requirement to remove her without reason in the circumstances amounted to a disparagement. There was no good reason for her removal at this time, nor was it justified on the grounds of health and safety.

b) It was accepted that not every situation where there is criticism or implied criticism would amount to a breach of the non-disparagement clause. The provision could not have precluded NZTA from raising concerns if, for example, there had been issues with regard to her performance or behaviour in the course of working on the Project. There needed to be a nexus between the purpose of the settlement agreement, and the employment relationship problems which led to it, and the application of the clause and its accompanying confidentiality provisions.

c) The issues giving rise to the settlement agreement had never been investigated by NZTA, and no findings as to the validity of the various claims was ever made. Instead, the settlement agreement was entered into, with Mrs Byrne agreeing to resign from her NZTA employment.

d) The settlement agreement had three important components:

- The departure was agreed to be a resignation. Such a circumstance enables an employee to present his or her departure to prospective employers as having been voluntary.

- The settlement and all discussions leading up to and surrounding the settlement were to be confidential. Such a provision ensures that unresolved issues cannot impact on the employee or be used against that person at a later stage.

- The non-disparagement clause, which ensured that the employee was not discredited or otherwise harmed by having agreed to depart in such circumstances. This would ensure that the previous two components were not undermined.

e) Here, the request made to WSP Opus undermined all three of these important components. In essence, Mr Sephton had concluded there was a significant risk of aggressive behaviour from Mrs Byrne towards NZTA staff, and the assessment was based not only on Mr Johnson's concerns, but on what Ms Hori-Hoult had told Mr Sephton. That meant that unresolved employment issues were factored into the decision. The injustice of such an approach was that matters that were not investigated influenced the decision.

f) Moreover, NZTA had not complied with the relevant clause of CCCS in that no advice of any reason was given to WSP Opus, in a situation where this could be expected. This only made the situation worse for Mrs Byrne and the direction that she not work on the Project all the more disparaging.

g) With regard to health and safety issues, much of the evidence that had been placed before the Court was completely overstated, and indeed the constant referral to neighbour-related issues only inflamed the difficulties. The principal submission was that there was never any proper health and safety assessment made by NZTA as to the validity or

likelihood of health and safety risks to NZTA staff, and nor was this ever notified as a risk to WSP Opus at any time. Also, Mr Sephton had acknowledged in evidence that Mrs Byrne's behaviour had never been identified as a hazard for the purposes of the working arrangements with WSP Opus.

h) Much of the extensive evidence given to the Court about neighbourhood issues was not relevant to Mrs Byrne's claim that the terms of her settlement had been breached.

[72] For NZTA, Mr Cain submitted in summary as to liability:

a) It was denied that in its request to WSP Opus, NZTA had disparaged Mrs Byrne in breach of the settlement agreement.

b) The terms of settlement should not be construed as meaning that NZTA could not take a step referred to in its contractual arrangements with WSP Opus. The comments made by Mr Sephton, Ms Hori-Hoult or Mr Johnson to WSP Opus did not amount to disparagement, express or implied. All that happened was that a request for removal was made, with nothing more stated.

c) Reference was made to other authorities in which disparagement allegations were made.[3] It was submitted that a careful examination of the evidence showed that Mr Sephton in particular, but also Ms Hori-Hoult and Mr Johnson, were careful not to provide any explanation or reasons for removing Mrs Byrne from the Project. The way in which the request was made and received was also relevant; what was said did not affect the positive regard in which WSP Opus held Mrs Byrne. Her employment agreement continued for another five months. Obviously, WSP Opus did not regard the request as demonstrating Mrs Byrne was not a person they could continue to

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3 *Lumsden v Skycity Management Ltd* [2017] NZEmpC 30, [2017] ERNZ 96; *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46, (2018) 15 NZELR 840.

employ. In any event, her ongoing employment was by no means secure. She had been employed by WSP Opus on a casual basis and was not a longstanding permanent employee.

d) Applying settled interpretation principles, the non-disparagement clause could not extend to preventing NZTA from requesting WSP Opus to remove Mrs Byrne from the Project.

e) It had been in the interests of both parties to agree to the non-disparagement clause, which provided an assurance that the issues leading up to the resignation had ultimately been left unresolved and would not be raised with any third party to their detriment. Mrs Byrne was prevented from going to the media, as she had threatened to do, and/or claiming she had been bullied during her employment. Equally, NZTA was prevented from telling any third party, including prospective employers, about what had transpired during her employment with NZTA.

f) The primary reason for requesting that Mrs Byrne be removed was that Mr Johnson raised concerns about working with her because of her behaviour towards him as a neighbour. He had not become an employee of NZTA until mid-February 2016, and had not been associated with Mrs Byrne when she was an NZTA employee. The non-disparagement clause could not be interpreted as restraining NZTA from acting as it did.

g) If necessary, a term could be implied that the non-disparagement clause did not extend to any circumstances whatsoever; the clause should be limited to matters connected with the employment relationship.

h) Even if NZTA did disparage Mrs Byrne through its comments to WSP Opus, it was justified in making the request to remove Mrs Byrne in order to meet its statutory duties under the Health and Safety at Work Act 2015 (HSW Act). Under that Act, NZTA had a primary duty as a person conducting a business or undertaking (PCBU) to ensure, so far as is

reasonably practicable, the health and safety of workers who work for it while they are at work (s 36(1)(a)); and the provision and maintenance of a work environment that is without risks to health and safety (s 36(3)(a)). To meet the duty, it was required to eliminate risks to health and safety so far as was reasonably practicable; if it was not reasonably practicable to eliminate those risks, it was required to do so as far as was reasonably practicable. The extent to which NZTA was expected to manage risks depended on its ability to influence and control the matter to which the risks relate (s 30).

i) It was not the Court's role to assess the truth or otherwise of the claims and counter-claims that were made by Mr and Mrs Byrne on the one hand, and Mr and Mrs Johnson on the other, as to the neighbourhood issues. Rather, the question was whether it was reasonable for Mr Sephton, when presented with Mr Johnson's version of events, to conclude there was a serious problem warranting him to take the step he did in order to protect an employee. It was not reasonable to expect Mr Johnson to work with Mrs Byrne in light of concerns he raised. Mr Sephton had no alternative but to take the step he did, in the way he did.

Issues

[73] Having regard to the pleadings and counsel's submissions, the issues for resolution are:

a) What is the correct interpretation of the relevant provisions of the record of settlement?

b) Was there a breach of cl 9 of the record of settlement?

c) Were the steps taken by NZTA appropriate in light of the statutory obligations held under the HSW Act?

d) Subject to the above, should any remedies be awarded?

First issue: scope of the provisions of the settlement agreement

[74] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the Supreme Court summarised the position as to the principles which apply to the interpretation of contracts in these words:[4]

> [60] ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contract has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependant on there being an ambiguity in the contractual language.
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> ...
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> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[75] The same court has confirmed that these principles apply to agreements reached with regard to employment issues.[5]

[76] In construing cl 9 of the record of settlement, I start with the objective meaning of the words used in the text and will then cross-check that meaning against context.

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4 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

5 *New Zealand Airline Pilot' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, (2017) 1 NZLR 948 at [71].

[77] On the face of it, the language contained in cl 9 suggests that both parties committed to an absolute obligation not to make any disparaging remarks about the other to any third party.

[78] There is no real controversary as to what the word disparagement means. Mr Cain referred to Black's Law Dictionary, the tenth edition of which defines the word as:[6]

> **Disparage**:
>
> 1. To speak slightingly of; to criticise (someone or something) in a way showing that one considers the subject of discussion neither good nor important.
> 2. To degrade in estimation by disrespectful or sneering treatment.
>
> **Disparagement**:
>
> 1. A derogatory comparison of one thing with another < the disparagement consisted in comparing the acknowledged "liar to a murderer">.
> 2. The act or an instance of unfairly castigating or detracting from the reputation of someone or something <when she told the press the details of her husband's philandering, her statements amounted to disparagement>. Although many disparagements are untruthful or otherwise unfair, falsity is not a requirement. *Any statement cast in a negative light may amount to a disparagement in the general sense.*

[79] The shorter Oxford Dictionary is to similar effect:[7]

> 2. Bring discredit or a reproach upon; dishonour; lower in esteem.
> 3. Degrade; lower in position or dignity; cast down in spirit.
> 4. Speak of or treat slightingly or critically; vilify; undervalue, deprecate.[8]

[80] In short, the word is capable of broad effect. As is recognised in the final sentence of the Black's Law Dictionary definition, any statement having a negative meaning, could be disparaging in a general sense. That is, a disparaging statement can be expressly stated, or implied.

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6 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, St Paul, 2014) (emphasis added).

7 Lesley Brown *New Shorter Oxford English Dictionary* (6th ed, Oxford University Press, New York, 2007) at 709.

8 A definition which was adopted by the Court in *Lumsden v Sky City Management Ltd,* above n 4, at [36].

[81] However, there are several contextual factors which are relevant. They are:

a) The statement is contained in a document where an employer and an employee agreed to compromise employment-related differences.

b) In that context, the employer chose not to investigate the complaints that were before it, and the employee chose to resign.

c) An aspect of the agreement was that its terms, and the fact a settlement had been reached, as well as all discussions leading up to and surrounding the settlement, were to be strictly confidential, except as specified.[9]

d) In a related obligation, the employee agreed to comply with obligations of confidentiality under her employment agreement, which included a commitment not to disclose any confidential information as defined.

c) Finally, the parties agreed that, without any admission of liability by either party, there would be a full and final settlement of all matters arising out of the employment, and its cessation.[10]

[82] It is plain from the context that the disparagement clause related to the employment circumstances which had existed up to the point of resignation. Consequently, it must follow that cl 9 should not be construed broadly. It does not preclude either party from making any disparaging remark about the other in any circumstances.

[83] This much was common ground between the parties. Mr Cain submitted that comments which did not relate to matters arising out of the employment relationship between the parties would not be caught by cl 9. It was his submission that the clause provided an assurance that the employment-related issues that had been left unresolved would not be raised by either the employer or the employee with a third party to the detriment of the other party. He said that the effect of the clause was that

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9 Clause 8.
10 Recital D and clause 10.

NZTA was prevented from telling any third party, including prospective employers, about what had transpired during Mrs Byrne's employment with NZTA.

[84] To similar effect was Mr Harrison's acceptance that there needed to be a nexus between the purpose of the settlement agreement and the employment relationship problems which had led to it, and the application of the non-disparagement clause and its accompanying confidentiality provisions. He agreed that not every situation where there is a criticism, or an implied one, would be a breach of a non-disparagement clause of this nature.

[85] These submissions are consistent with my conclusion that not every disparaging remark one party might make about the other would fall foul of cl 9.

[86] For the purposes of this case, then, I find that facts relating to the reaching of the settlement, discussions leading up to it and surrounding it, were confidential; this included the related issues that were not investigated. Neither party could disparage the other by referring to these circumstances, either explicitly or implicitly.

[87] Given this conclusion, it is not necessary to consider whether by necessary implication there should be a term limiting the scope of cl 9, as was submitted by Mr Cain on a backup basis.

Second issue: was there a breach of cl 9 of the record of settlement?

[88] The analysis of this issue must begin by considering the conclusions reached by Mr Sephton, which led him to make the request that Mrs Byrne be removed from the Project. There were several reasons.

[89] The first was that concerns had been expressed by Mr Johnson as to neighbourhood issues. Mr Sephton accepted at face value what Mr Johnson said without any further investigation.

[90] Second, Ms Hori-Hoult expressed her concerns about working in the same room as Mrs Byrne. This arose from the matters that had been the subject of complaint

that NZTA had decided not to investigate, deciding instead to settle all issues with Mrs Byrne.

[91] Third, NZTA was concerned about the personnel WSP Opus was utilising on the Project; specifically, it did not wish Mr Fear to continue as the engineers' representative and wanted Ms Devcich to return to provide the technical and business case support, with Mrs Byrne being removed from her role of contract administration support.

[92] Mr Sephton took HR advice from Mr Johnston as to what could be said when making a request for removal. Mr Johnston told the Court he gave advice that personal comments should be avoided; but he also said this would not preclude Mr Sephton from providing any reasons at all for the request.

[93] Mr Sephton did not advance any reason at all for the request when he spoke to Mr Parker, nor again when Mr Houba followed up the matter with him. That was contrary to Mr Johnston's advice, as he confirmed in his evidence.

[94] From Mr Houba's perspective, the request was puzzling because in the four months of employment with WSP Opus, Mrs Byrne's interactions with NZTA had led it to conclude that there were no performance or conduct issues.

[95] Mr Houba's inability to understand the reason for the request was compounded when he entered into what he described as a higher-level discussion with Ms Hori-Hoult. Again, no reason was given for Mrs Byrne's departure from NZTA.

[96] However, in the discussion he had on the matter with Mr Johnson, it was confirmed that there had been an employment law-related matter in respect of which there had been a confidential settlement. Since no other possibility had been mentioned, this statement inevitably led to a conclusion that the fact of the settlement was the reason for the request to remove Mrs Byrne. The various statements made by NZTA employees on the issue all suggested that the reason was one of substance to the point that Mr Houba reasonably believed that, were WSP Opus not to comply with the request, the company may lose the contract relating to the project.

[97] In the result, when Mr Parker and Mr Houba met with Mrs Byrne on 9 March 2018 to discuss these matters, Mr Houba told her that she was no longer required for work because NZTA had ordered her removal from the project. He told her he had been contacted by three people from the organisation directing her removal. When asked why, he said that confidentiality and legal reasons had been cited. Discussing her performance, Mr Parker confirmed she was more than capable of doing what was required of her.

[98] In the later conversation that day between her and Mr Houba when she requested the names of the three people he had spoken to, he again said NZTA had cited confidentiality and had not provided any reasons. But he also said, "You must have done something really bad for NZTA to request this."

[99] Finally, in this review of evidence, I record Mr Johnston's concession that, in all the circumstances, the statement made by Mr Johnson that the request for removal was because there was a confidential employment settlement in place between NZTA and Mrs Byrne had a "negative connotation". I agree.

[100] In summary, after the initial request to Mr Parker, Mr Houba approached no fewer than three persons to attempt to understand why the request was being made. This only served to exacerbate the disparagement. The initial refusal to provide any reason at all arose in circumstances where Mrs Byrne's performance, including interactions with NZTA staff, had been satisfactory. The subsequent confirmation that the request followed the confidential settlement inevitably led Mr Houba to believe that there was a significant reason impacting on Mrs Byrne's suitability to work on the Project. The totality of statements made on behalf of NZTA was disparaging.

[101] I find that, when considered in the context in which they arose, the remarks made amounted to a breach of cl 9 of the record of settlement.

[102] I referred earlier to the submissions made by counsel about two disparagement cases, *Skycity* and *Evans-Walsh*.[11] What these cases illustrate is that any assessment as to a breach of a non-disparagement clause involves consideration of the scope of

[11] Above at para [72](c).

the clause in the particular context, and as to whether the particular facts relied on amount in fact to a breach. It is a case-specific exercise. That being so, I am not assisted by a detailed review of those judgments, where the circumstances were very different from those which arise here.

[103] It was also contended that the request to remove Mrs Byrne was, in effect, part of a restructuring sought by NZTA. That request should therefore be understood as being a first step in that process, or, as Mr Sephton put it, Mrs Byrne's removal was "accelerated".

[104] I do not accept this submission. Whilst Mr Sephton and his colleagues at NZTA had discussed personnel issues, and indeed wished Ms Devcich to return to her role so that Mrs Byrne would not be a member of the Project team, this was not the focus of the request concerning Mrs Byrne. As already indicated, initially no reason was given, and ultimately the only reason given related to the confidential employment-related settlement. The assertion as to breach of cl 9 requires a focus on the statements made by NZTA, and not on matters that were not articulated.

Third issue: were the steps taken appropriate in light of health and safety obligations?

The legal framework

[105] Mr Cain submitted that NZTA's statutory health and safety obligations trumped the terms of the settlement agreement. He said this was because NZTA had serious concerns about Mr Johnson's health and welfare.

[106] It is evident from Mr Sephton's evidence that the primary concern which triggered the chain of events resulting in the request related to what he had been told by Mr Johnson about neighbourly disputes involving him and his wife on the one hand, and Mr and Mrs Byrne on the other. These concerns were reinforced by what he was told by Ms Hori-Hoult.

[107] He concluded that there was a "significant risk of aggressive behaviour" from Mrs Byrne if Mr Johnson was required to work with her. That led him to make the request, as already explained.

[108] Then, it was submitted that the plain words of the settlement agreement could not be stretched to impose an obligation on either party to prevent them from meeting their statutory duties under the HSW Act.

[109] Finally, it was argued that cl 4.3 of the CCCS confirmed the NZTA's ability to take the step it did on health and safety grounds; that is, it had a right to approve personnel to be involved on the Project.

[110] There is no doubt that NZTA was a PCBU for the purposes of the Project, holding a range of responsibilities and obligations under the health and safety legislation. That much is not in dispute.

[111] What is in dispute is whether it could legitimately rely on the existence of those obligations to justify the steps it took.

The evidence

[112] The Court has received a great deal of evidence from each party as to the pros and cons of the neighbourhood disputes, which was the primary factor relied on by Mr Sephton in making his decision on health and safety grounds. Most of the evidence produced to the Court relates to events that occurred after Mrs Byrne's withdrawal occurred.

[113] It is evident that relationships amongst persons who live in the community in which Mr and Mrs Johnson and Mr and Mrs Byrne reside have become acrimonious. Endless allegations and counter-allegations have been made.

[114] Earlier this year, proceedings came before the District Court under the Harassment Act 1997; the result was that the parties all gave undertakings not to harass each other. That court also made non-publication orders in respect of the evidence which both parties had placed before the court.

[115] So as not to undermine the non-publication order, I will not detail all the evidence of what each party says about the other as to their disputes. There are, however, several points which should be made about those issues.

[116] Much of the evidence involves concerns that were plainly overstated and fuelled by personal animus between the parties. Two examples of events that occurred after the giving of the undertakings may be given. An assertion was made by Mr Johnson concerning Mrs Byrne about an event that occurred the day after the District Court proceedings just mentioned. There was incontrovertible evidence before this Court that, following that hearing, Mrs Byrne returned to Wellington, where she is currently employed. She said she had returned directly to her job; she produced confirmation of air travel arrangements from Air New Zealand. If accepted, that meant she could not have been at her property in Northland when Mr Johnson asserted she was. Asked to comment on this evidence, Mr Johnson said he disbelieved it, preferring to rely on observations made by members of his family, as he had not been present. That evidence was not credible. I find Mr Johnson's views were fuelled by the acrimony.

[117] The second example to which I refer relates to the unilateral actions of Mr Byrne, which, as I will explain later, Mrs Byrne was largely unaware of. These steps were taken from a misguided sense of loyalty to her. The most recent example was the distribution of a flyer regarding the Employment Court proceedings by Mr Byrne at the offices of WSP Opus on the last working day prior to the commencement of the hearing. This and other public utterances he has made have done nothing to resolve either his wife's difficulties, or the neighbourhood issues; they have only exacerbated them.

[118] Next, Mr Sephton's decision to authorise the installation of a camera on the dashboard of Mr Johnson's vehicle, which it supplied, to capture what he described as "untoward behaviour" on the rural road on which Mr and Mrs Johnson live, was a most surprising step. The use of that device predictably inflamed the circumstances, because, for example, it led to regular video recordings being made for the purposes of the neighbourhood dispute. Mr Sephton justified his decision to do so on health and safety grounds but appears to have done so without any proper consideration of

the context in which it would be used or by any reality testing of what Mr Johnson told him.

[119] The consequence of this evidence being placed before the Court is that it has placed a spotlight unnecessarily on events which were, at best, peripheral and of little assistance to the Court. NZTA witnesses suggested that the post-withdrawal events showed Mr Sephton had reached the right conclusion in asking for Mrs Byrne's withdrawal on health and safety grounds. But that overlooks the fact that an obvious and significant contributory cause to the ongoing acrimony between the neighbours was the fact of Mrs Byrne's removal from the project, after Mr Johnson raised his personal concerns. The step taken by NZTA, and the way it undertook it, inflamed the poor relations.

[120] The proper focus has to be on the circumstances as they existed at the time of the request for withdrawal.

[121] Curiously, although Mr Sephton said he had health and safety concerns which related to a risk of aggressive behaviour by Mrs Byrne based on what he had been told by Mr Johnson, the issue of her continued role in the Project was not presented in that way. It was presented purely as an issue of what was described by Mr Sephton as "Client's prerogative" to determine who would work on the Project, with no reason being given for the request at all.

[122] In light of the findings I have made as to the scope of cl 9 of the record of settlement, it is obvious that there could have been no impediment to a health and safety concern being raised in light of Mr Johnson's concerns.

[123] At the time Mr Sephton made his decision, NZTA staff appear not to have considered s 34 of the HSW Act if health and safety obligations were to be relied on. It provides that, if more than one PCBU has a duty in relation to the same matter under the statute, each PCBU with that duty must, so far as is reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs having the same duty. A failure to do so is an offence.[12]

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[12] See for example *WorkSafe New Zealand v Phil Stirling Building Ltd* [2019] NZDC 10608.

[124] Both WSP Opus and NZTA were PCBUs, employing personnel who were required to interact with each other. The primary concern held by NZTA related to the potential interactions between a NZTA employee, Mr Johnson, with a WSP Opus employee, Mrs Byrne.

[125] Assuming for the moment that the concern held by NZTA as regards Mr Johnson's health and safety was appropriate, it had a statutory duty to "consult, co-operate with, and co-ordinate" with the other PCBUs involved. These are obviously broad terms which require constructive dialogue.

[126] The non-disparagement clause did not preclude NZTA from undertaking its s 34 obligations properly; as I have found Mr Sephton could have discussed with Mr Parker and/or Mr Houba the issues Mr Johnson had raised concerning poor neighbourly relations with Mrs Byrne.

[127] This is not a mere technical point. Constructive dialogue might well have given rise to an acknowledgment that Mrs Byrne had worked effectively for some four months with Mr Sephton and his colleagues without any particular difficulties. Both sides of the neighbourhood dispute were able to enter into mutual undertakings subsequently, which suggest that they could and can exercise common sense on those difficult issues if need be.

[128] I conclude that constructive dialogue at the time was not only a statutory obligation which the NZTA did not fulfil but one that could have avoided many of the difficulties which followed.

[129] I find that a consideration of the issues raised under the HSW Act do not justify statements which were made on behalf of NZTA in breach of cl 9.

Issue four: remedies

[130] Mr Harrison submitted that the Court should make a declaration that NZTA had breached the record of settlement and make a compliance order requiring it to comply with the obligations in that document. He said that Mrs Byrne wishes to be sure that NZTA will not take into account the employment relationship problems

which occurred prior to the settlement when assessing, or commenting on, her suitability for any position over which NZTA may have influence. It was argued that this is not an unreasonable request in the particular circumstances.

[131] A penalty was also sought; Mr Harrison, however, did not press that application, stating that it was a matter for the Court having regard to the factors set out in s 133A of the Act.

[132] For NZTA, it was not argued that a declaration should not be made. Rather, it was submitted that for a range of reasons, neither a compliance order nor a penalty would be appropriate.

[133] First, Mr Cain submitted that NZTA had acted in good faith, had said only what it thought was necessary to have Mrs Byrne removed from the Project in order to ensure its employees were safe, that it genuinely believed its actions were not in breach of the record of settlement, and that, having regard to the acrimonious dispute between the Johnsons on the one hand, and the Byrnes on the other, NZTA was justified in maintaining its concerns as to health and safety.

[134] I have already explained that Mr Johnson's concerns could and should have been dealt with by constructive dialogue. I do not accept the submission that what was said on behalf of NZTA was appropriate; or that the holding of genuine but incorrect beliefs should mitigate against the making of a compliance order.

[135] It was also submitted that the behaviour and conduct of Mr and Mrs Byrne rendered it inappropriate for the Court to exercise its discretion to grant a compliance order, citing in particular steps taken by Mr Byrne on a number of occasions in which he became strident in his criticisms of NZTA and Mr Johnson. The Court was urged to accept that Mrs Byrne must have been aware of her husband's remarks and that her evidence to the contrary was not credible, particularly as she had on a previous occasion when still an employee of NZTA threatened to involve her husband in her employment relationship problem. It was submitted Mrs Byrne believed she could get away with criticising NZTA by making such comments through her husband and that she was also using him to intimidate Mr Johnson.

[136] This submission was founded on several communications which were sent in the name of Mrs Byrne – for instance, two to NZTA when she was employed by the agency, and later to the Police. However, it is obvious the language used in those emails was not that of Mrs Byrne; moreover, it is inherently unlikely she would have sent them in the circumstances which existed on each such occasion. Also relied on were various other communications which Mr Byrne himself acknowledges he sent – to neighbours, to a blogsite, in the flyer mentioned earlier, and in emails to one of Mr Johnson's employers. In all of these, unnecessary critical remarks were made by Mr Byrne.

[137] Both Mrs Byrne and Mr Byrne said she was unaware of such initiatives, and indeed both acknowledged Mrs Byrne had told her husband to desist from making critical statements of NZTA. Nonetheless, he persisted.

[138] I have already found that Mr Byrne acted unilaterally on these matters; it is also to be noted that Mr Johnson, in his diary recording what he considered were untoward events, primarily recorded the activities of Mr Byrne, rather than Mrs Byrne.

[139] As a relatively new immigrant, Mrs Byrne faced hardship and was at times quite isolated. Since May of this year, she has had to live apart from her family whilst working in Wellington as a direct result of the circumstances reviewed in this judgment.

[140] Unsurprisingly, she has had to rely on the support of her husband, notwithstanding his unilateral actions.

[141] Standing back, I am satisfied Mrs Byrne was unable to persuade Mr Byrne to desist from making the criticisms he did of NZTA.

[142] Nor is it correct to assert that Mrs Byrne used Mr Byrne to intimidate Mr Johnson. This is not only for the reasons just discussed but also because Mr Johnson is a person well able to handle himself and resist intimidation.

[143] Next, I refer to a submission that was made as to the effect of the confidentiality clause in the settlement agreement which allowed Mrs Byrne to inform Mr Byrne of the terms of settlement on the basis he would maintain confidentiality as to the terms. It was submitted that this obligation had been breached and that this was a yet further reason for denying relief. I am not persuaded that this is the case. Although Mr Byrne has made various extravagant claims about NZTA, at no time did he refer to the terms of settlement, as recorded. I am not persuaded that, in all the circumstances, Mr Byrne's remarks rule out the making of a compliance order.

[144] Mr Cain also strongly emphasised the ongoing neighbourly disputes as being a reason for concluding that NZTA's concerns as to the safety of its employees continue to be valid. However, that submission does not acknowledge the fact that there was a legitimate path for NZTA to follow with regard to health and safety issues without disparaging Mrs Byrne in breach of the record of settlement. The NZTA submission comes close to repeating its defence that breach of the non-disparagement clause could be excused.

[145] Standing back, what does not seem to be appreciated by NZTA is the significant consequences which arose for Mrs Byrne as a result of the way in which this issue was handled. She has been forced to obtain work away from the Northland region, which has required her to live away from her family for long periods.

[146] In my view, although NZTA faced a challenging situation when informed of the neighbourhood issues by Mr Johnson, they were issues which could and should have been discussed constructively with WSP Opus.

[147] What was not permitted was the making of any statement based on the circumstances giving rise to the settlement agreement which had not been investigated.

[148] In advancing the submissions placed before the Court, that distinction was not acknowledged for NZTA. Rather, a defensive approach was adopted. Accordingly, it is necessary to make a compliance order.

[149] Although there has been serious consequence for Mrs Byrne because of the way the issues were handled by NZTA, I consider that the equities of the situation will be satisfied by the making of a declaration and compliance order, and that an order of penalty is not appropriate in the circumstances.

Non-publication

[150] At the commencement of the hearing, NZTA applied for non-publication orders in respect of three colleagues of Mrs Byrne at NZTA when she was an employee of that agency.

[151] Two of them did not give evidence, and there was no real opposition to non-publication of their names being ordered in the circumstances, an option which I agree is appropriate since they have not had the opportunity of being heard. I have anonymised their names accordingly.

[152] The position relating to Ms Hori-Hoult, who did give evidence, is different. She was one of the two NZTA employees who expressed views that led to Mr Sephton's conclusion that removal should be sought. But it is also to be noted that the decision to seek Mrs Byrne's removal from WSP Opus was not one she made, and she is not to be criticised for it.

[153] Mr Cain submitted that, in all the circumstances, publication of her name and identifying details in the Court's decision could cause irreversible damage to her reputation.

[154] I consider that submission to be overstated. I also note that no evidence was called by NZTA to support the contention of potential harm to Ms Hori-Hoult's reputation.

[155] In my view, given the nature of the issues before the Court, the principles of open justice outweigh Ms Hori-Hoult's reputational interests. The high threshold for non-publication has not been made out.[13]

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[13] *Crimson Consulting v Berry* [2017] EmpC 94, [2017] ERNZ 511; *XYZ v ABC* [2017] NZEmpC 40, [2017] ERNZ 175 at [61]-[72].

[156] Accordingly, I discharge the interim order of non-publication of her name and identifying details which I made at the outset of the hearing.

Conclusion

[157] The challenge in respect of the Authority's substantive determination succeeds.

[158] I find that NZTA breached cl 9 of the record of settlement.

[159] I make an order requiring NZTA to comply with the record of settlement; in particular, it is not to disparage Mrs Byrne, expressly or impliedly, in respect of any matters connected with the employment relationship she had with NZTA. This compliance order has immediate effect.

[160] Mrs Byrne is entitled to costs. If possible, this issue should be agreed between counsel directly. My provisional view is that costs should be considered on a Category 2, Band B basis under the Court's Guideline Scale. If agreement cannot be reached, Mrs Byrne may apply for these by 31 January 2020, with NZTA responding by 14 February 2020. Submissions with regard to Mrs Byrne's challenge to the Authority's costs determination are to be filed and served under the same timetable.[14]

B A Corkill
Judge

Judgment signed at 4.10 pm on 13 December 2019

[14] *Byrne v New Zealand Transport Agency*, above n 2.