ORDER FOR NON-PUBLICATION OF INFORMATION AS CONTAINED AT PARAGRAPH [73] OF THIS JUDGMENT

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 165
EMPC 152/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CULTURESAFE NZ LIMITED First Plaintiff
AND	ALLAN HALSE Second Plaintiff
AND	TRACEY SIMPSON Third Plaintiff
AND	TURUKI HEALTHCARE SERVICES CHARITABLE TRUST Defendant

Hearing:	2-4 June 2020 (Heard at Auckland) Additional submissions filed 15, 18 and 26 June 2020
Appearances:	T Braun, counsel for first and second plaintiff T Simpson, third plaintiff in person A Drake, D J Pine and I Shores, counsel for defendant
Judgment:	14 October 2020

JUDGMENT OF JUDGE J C HOLDEN

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[1] The plaintiffs, CultureSafe NZ Ltd (CultureSafe), Mr Halse and Ms Simpson, have challenged a determination of the Employment Relations Authority (the Authority) in which the Authority made compliance and suppression orders and

ordered the plaintiffs jointly and severally to pay the defendant, Turuki Healthcare Services Charitable Trust (Turuki) a total of $30,000 as a penalty in terms of s 149(4) of the Employment Relations Act 2000 (the Act) and $3,000 as general damages.[1] The plaintiffs say the Authority had no jurisdiction to make the orders against them. They also say that, if the Authority had jurisdiction, the amounts ordered were excessive and ought not have been ordered on a joint and several basis.

[2] As set out in this judgment, there is jurisdiction for orders to be made against the plaintiffs and the compliance orders made by the Authority were appropriate. In substance, those orders continue as orders of the Court, but some adjustment is required to reflect the present circumstances.[2]

[3] However, jurisdiction does not extend to the order for general damages. Further, the penalties ordered by the Authority are set aside and replaced by new orders, imposing a penalty on each of the plaintiffs, payable to Turuki.[3]

There is little dispute about the relevant facts

[4] The facts that are relevant to the plaintiffs' challenge are not substantively in dispute. There are other background issues that were and remain contentious, but those issues are not before the Court.

[5] Turuki is a healthcare provider providing whānau-based health, wellness and social services to people in South Auckland. It has clinics in both the Counties Manukau and Auckland DHB areas. It is also a Whānau Ora provider so that it can work with families or whānau to put them in touch with appropriate social services.

[6] Ms Makea-Ruawhare was employed by Turuki in about September 2016.

[7] CultureSafe is an employment consultancy company that specialises in cases of alleged workplace bullying. Mr Halse is its sole director. At all relevant times, Ms

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1 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136 (Member Crichton).
2 See below at [73].
3 See below at [92]–[93].

Simpson was a contractor to CultureSafe working as an employment advocate with a focus on managing the mental health of CultureSafe's clients. She ceased working for CultureSafe and as an employment advocate in April 2018 and now works in a different field.

[8] In 2017 issues arose between Ms Makea-Ruawhare and Turuki. CultureSafe set out a personal grievance on Ms Makea-Ruawhare's behalf in a letter to Turuki, dated 8 November 2017.

[9] The parties attended mediation with a Ministry of Business, Innovation and Employment (MBIE) Mediator on 13 November 2017 and settled Ms Makea-Ruawhare's personal grievance.

[10] Ms Makea-Ruawhare attended mediation with Mr Halse and Ms Simpson; Turuki was represented by its Chief Executive, Ms Winiata, and by Ms Ratcliff, who is engaged by Turuki in a human resources consultant role. Mr Anthony Drake, Turuki's solicitor, also was in attendance.

[11] A record of settlement was entered into under which Turuki agreed that it would make certain payments to Ms Makea-Ruawhare or for her benefit. Relevantly it agreed to pay:

(a) Without admission of liability, a payment in terms of s 123(1)(c)(i) of the Act, with that sum to be paid to Ms Makea-Ruawhare by direct credit.

(b) A contribution to Ms Makea-Ruawhare's representation costs of an agreed sum (plus GST), to be paid within seven days of receipt of an invoice from CultureSafe NZ Ltd.

(c) Up to an agreed sum (plus GST) on receipt of invoices from Ms Makea-Ruawhare's psychologist.

(d) Up to an agreed sum (plus GST) on receipt of invoices from Ms Makea-Ruawhare's general practitioner.

(e) Up to an agreed sum (plus GST) for outplacement counselling services on receipt of invoices from her counsellor.

[12] There are two further terms of the record of settlement that are of particular relevance to these proceedings, which I set out in full:

> (1) These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties and to the representatives of CultureSafe NZ Limited.
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> …
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> (11) Neither party, including CultureSafe NZ Limited, shall make derogatory remarks or disparaging comments about the other. Further, CultureSafe NZ Limited shall not make any reference whatsoever to this employment relationship problem in any publication, including social media.

[13] The record of settlement was signed by Ms Winiata for, and on behalf of, Turuki, and by Ms Makea-Ruawhare. It also was signed by the Mediator. It was not signed by either Ms Simpson or Mr Halse.

[14] The agreed sum in terms of s 123(1)(c)(i) and CultureSafe's costs were paid without delay.

[15] In December 2017, Ms Makea-Ruawhare's general practitioner sent an invoice to Turuki. The invoice, dated 12 December 2017, was made out to Ms Makea-Ruawhare at her residential address and the envelope was addressed to "Manager" at Turuki. The invoice was passed to the Primary Care Manager at Turuki, who apparently did not regard it as an invoice for Turuki to pay and placed it on Ms Makea-Ruawhare's patient file.[4]

[16] The Primary Care Manager had not been involved in the employment relationship problem with Ms Makea-Ruawhare and was not one of the small number of people within Turuki who was aware of the mediation and settlement.

[17] Ms Makea-Ruawhare's psychologist also contacted Turuki, initially on 26 January 2018. He said he wanted to talk to someone "regarding a termination

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[4] Ms Makea-Ruawhare had been a patient of Turuki before transferring to another general practice.

package of a former employee". That message was passed on to Ms Ratcliff to follow up. She did not do so immediately, and in February 2018 the psychologist again called Turuki and left a message saying he was asking for payment of his costs. At that stage, no invoice had been received from the psychologist. After prompting from Ms Winiata, Ms Ratcliff called the psychologist on 12 February 2018. He provided his invoice the same day, and it was paid by Turuki immediately.

[18] Ms Simpson had some conversations with Ms Makea-Ruawhare concerning the non-payment of the general practitioner fees. Ms Simpson gave evidence that Ms Makea-Ruawhare was distressed about the matter.

[19] However, neither Ms Simpson, nor Mr Halse, followed up the non-payment with Turuki. Instead, on 1 March 2018, Ms Simpson sent a letter to three Ministers, copied to other Members of Parliament. That letter was sent without specific instructions from Ms Makea-Ruawhare and was written in consultation with Mr Halse and with his guidance and approval. The letter also was copied to Ms Winiata and Ms Ratcliff. The letter included commentary on the mediation, details from the Record of Settlement, and comments that were critical of Turuki. It erroneously said that Mr Halse had contacted Turuki "both verbally and in a follow up email" advising them they were in breach of the legislation and requesting immediate payment. The letter made other unsubstantiated statements and made references to Turuki being tax payer/government funded.

[20] The letter to Ministers was the first Ms Winiata or Ms Ratcliff knew of the alleged default in payment of the general practitioner.

[21] Ms Winiata immediately investigated the issue, found the invoice that had been filed on Ms Makea-Ruawhare's patient file and arranged for payment, which occurred the next day, Friday 2 March 2018.

[22] The following week, on Tuesday 6 March, Mr Drake emailed the recipients of the letter from CultureSafe advising them that the content of the letter breached confidentiality provisions agreed to by the parties and a signed settlement agreement; that he would contact CultureSafe to attempt to resolve the issue between the parties;

and asking that the recipients respect Turuki's statutory and contractual rights to confidentiality, disregard the letter and delete it from their records.

[23] Mr Drake wrote to Ms Simpson and Mr Halse at CultureSafe the same day, expressing his client's concerns regarding the letter and asking for a retraction to be sent to the Members of Parliament. Mr Drake advised Ms Simpson and Mr Halse that unless he received a copy of the retraction, together with a written undertaking that they would continue to abide by the terms of the settlement agreement, by 4 pm on Thursday 8 March 2018, Turuki would commence action against them without further reference to them or to CultureSafe.

[24] No response was received by 8 March 2018 as requested, but, on 15 March 2018, CultureSafe responded to Turuki's solicitors advising "We are in receipt of your letter dated 06 March 2018 which we fully dispute." CultureSafe also sent a lengthy email to the Ministers and other Members of Parliament to whom the original letter had been sent, repeating the claim that Turuki had refused to make payments as set out in the settlement agreement and that it had intentionally delayed payments despite "tireless efforts to chase payments by [Ms Makea-Ruawhare], ourselves and the provider concerned". The email repeatedly referred to the fact that Turuki was "tax payer funded" and intimated that CultureSafe would be widely publicising allegations about Turuki. A further letter addressed to four Ministers, including the Prime Minister, was sent by CultureSafe, signed by Ms Simpson, on 20 March 2018. Again allegations were made about Turuki. The same day an email was sent to Turuki, copied to the four Ministers. As well as repeating claims made, the email sought payment for CultureSafe to compensate it for "the added time necessary in having to manage the effects of exacerbated anxiety and associated health risk caused to our client and her family, and our tireless efforts necessary to ensure [Turuki] met their legal obligations".

[25] On 23 March 2018, Turuki applied for urgent ex parte orders from the Authority and, in a determination the same day, Member Crichton made orders against the plaintiffs, together with Ms Makea-Ruawhare, that they:[5]

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5 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95.

(a) were to comply with the terms of the mediated settlement agreement dated 13 November 2017; and

(b) were not to make any further breaches of the confidentiality provisions contained within the terms of the mediated settlement agreement; and

(c) were not to publish Turuki's name or the names of any employees or representatives of Turuki in any manner connected or associated with the mediated settlement agreement or the extant proceedings; and

(d) were to comply with the orders made immediately in terms of s 137(3) of the Act.

[26] The same day, a copy of the Authority's determination was served on the plaintiffs and Ms Makea-Ruawhare together with Turuki's statement of problem and associated documents. A statement in reply was required but not received, rather the plaintiffs continued with their campaign, which now extended to criticising Member Crichton and calling for his dismissal and making threats of further adverse comments about Turuki and its legal advisors, unless Turuki withdrew its action in the Authority.

[27] Mr Halse also made posts on CultureSafe's Facebook page, including one on 14 April 2018 making derogatory comments about Turuki, its solicitors and Member Crichton. The Authority continued with its investigation without any input from the plaintiffs and issued its second determination, the subject of this challenge, on 1 May 2018.[6]

[28] The orders made against the plaintiffs, and Ms Makea-Ruawhare were as follows:[7]

(a) The interim orders made in the first determination were made permanent.

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6 *Turuki Healthcare Services*, above n 1.
7 At [47].

(b) Permanent orders were made suppressing any publication relating to the settlement agreement or Ms Makea-Ruawhare's employment with Turuki.

(c) CultureSafe NZ Ltd, Ms Simpson and Ms Halse were ordered to jointly and severally pay a total of $30,000 as a penalty in terms of s 149(4) of the Act, with that penalty to be paid to Turuki.[8]

(d) The plaintiffs jointly and severally were to pay Turuki the sum of $3,000 as general damages.

(e) All payments were to be made within 30 days of the date of the determination.

[29] Following the issue of the second determination, Mr Halse continued to be vocal on CultureSafe's Facebook page, including making more derogatory comments about Turuki, alleging collusion between Member Crichton and Mr Drake, and requesting information linking Member Crichton to Mr Drake "to learn whether [Mr Drake] has a personal relationship with James Crichton".[9]

[30] The principal issues for the Court are:

(a) whether the actions of the plaintiffs were contrary to the Act and/or the terms of the settlement agreement;

(b) whether the plaintiffs are bound by the terms of the settlement agreement;

(c) whether the plaintiffs are liable for penalties and/or general damages in these circumstances; and

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8 Employment Relations Act 2000, s 136(2).

9 He had no evidence of a link and there remains no basis for Mr Halse's suggested connection between Mr Crichton and Mr Drake.

(d) if penalties and/or general damages are available against the plaintiffs, what the proper level should be, and whether that is on a joint and several basis.

[31] CultureSafe also raises whether the Authority had jurisdiction to make the ex parte orders in its first determination, but no challenge was filed in respect of that determination.[10]

Statements made for the purposes of mediation are confidential

[32] Mediation is one of the cornerstones of employment relationship problem resolution in New Zealand. Mediation generally is provided by mediators engaged by MBIE. It operates on the basis that the people present at a mediation respect that it is conducted on a without prejudice and confidential basis.

[33] Except with the consent of the parties to a mediation, the mediator, the parties, and any other people present to assist either the mediator or a party, must keep confidential any statement, admission, or document created or made for the purposes of mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.[11]

[34] Where a problem is resolved at mediation the terms of settlement are final and binding on, and enforceable by, the parties.[12] A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.[13]

[35] An agreed term of settlement can be enforced by way of a compliance order under s 137 of the Act or, in the case of a monetary settlement, either by a compliance order or in the same manner as an order made or judgment given by the District Court.[14]

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10 *Turuki Healthcare Services*, above n 5.
11 Employment Relations Act, s 148(1).
12 Section 149(3)(a).
13 Section 149(4).
14 Sections 141(1) and 151(2)(b).

CultureSafe's actions were contrary to the interests of its client and to the record of settlement

[36] CultureSafe holds itself out as having particular expertise in handling claims of workplace bullying. Its clients often are vulnerable and feeling distressed by their perceptions that they have been the subject of such bullying.

[37] CultureSafe's clients are entitled to expect CultureSafe to behave responsibly and in their best interests. That did not happen here.

[38] A repeated theme of Ms Simpson's evidence, also picked up by Mr Halse, was that it was not their job to pursue payment for Ms Makea-Ruawhare.

[39] Ms Simpson stayed in contact with Ms Makea-Ruawhare, and provided her with some support, but did not ensure the general practitioner knew who to contact at Turuki about his invoice and did not take the obvious step of contacting Ms Winiata, Ms Ratcliff or Mr Drake when payment was not received as expected.

[40] Ms Simpson says this was because it had not occurred to her that Turuki "would be fair and reasonable, or do the right thing". That is not supported by the evidence. After CultureSafe sent its letter of 8 November 2017, Ms Simpson and Ms Winiata engaged constructively to get to an early mediation. As noted, there was prompt payment of the agreed compensation sum and CultureSafe's invoice. The psychologist's invoice also was paid immediately once it was received. The transfer of Ms Makea-Ruawhare's medical file from Turuki to her new general practitioner was attended to efficiently, in December 2017. Ms Simpson had no other contact with Turuki after the mediation.

[41] Even at the hearing, Ms Simpson asserted that her sending the letter of 1 March 2018 was justified because it led to payment of the general practitioner, ignoring that this could have been accomplished in a much more straightforward way, which would not have breached the agreed confidentiality and would have caused Ms Makea-Ruawhare far less stress than eventuated. Of course, by the time Ms Simpson sent her

email to Ministers on 15 March and correspondence of 20 March 2018 no payments required by the settlement were outstanding.[15]

[42] Mr Halse's commentary on Facebook also post-dated all payments.

[43] It is readily apparent that Ms Simpson's letters of 1 and 20 March 2018 and emails of 15 and 20 March 2018 to Ministers, and Mr Halse's commentary on Facebook, all contained derogatory remarks and/or disparaging comments about Turuki. None of the plaintiffs suggest otherwise.

[44] These actions by Ms Simpson and Mr Halse all put Ms Makea-Ruawhare at risk of being found to have breached the record of settlement and, in fact, led to orders being made against her by the Authority.

CultureSafe submits the Authority acted without jurisdiction

[45] CultureSafe and Mr Halse submit:

(a) The jurisdiction of the Authority can only be invoked where the problem before it is one that directly and essentially concerns the employment relationship. There was no employment relationship between the plaintiffs and Turuki. The Authority therefore erred in finding jurisdiction to entertain the claims against the plaintiffs under the Act for alleged non-employment-related breaches of the record of settlement.

(b) Section 149(3) of the Act does not prevent the Court from inquiring into the enforceability of the terms of a record of settlement. The record of settlement must be a valid contract for s 149 to be effective. The imposition of contractual obligations on the plaintiffs is invalid as they were not parties to the record of settlement. As they are not parties, they cannot breach the record of settlement.

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[15] No claim has been made for outplacement counselling services.

(c) If the plaintiffs are bound by the record of settlement (which is denied) qualified privilege attaches to the correspondence at issue.

(d) If penalties are available (which is denied) then those ordered by the Authority are manifestly excessive and should not have been ordered on a joint and several basis.

(e) The Authority has no jurisdiction to award damages for breach of a record of settlement.

[46] Ms Simpson filed separate submissions. These are lengthy and went well beyond the matters at issue in this proceeding. To the extent they are relevant, they support the submissions made by CultureSafe. Ms Simpson further submits that:

(a) Turuki was in breach of the record of settlement as it did not pay the general practitioner's invoice, thereby releasing the plaintiffs from any obligations they had.

(b) In any event, the record of settlement is an illegal contract so not enforceable.

(c) Policy considerations point away from the record of settlement being enforceable against the plaintiffs.

[47] The plaintiffs also make the following submissions:

(a) The first determination is invalid and therefore the second determination, in which the orders made in the first determination are confirmed, also is invalid.

(b) The claim amounts to a claim to obtain a right to a defamation action without a defence.

(c) The disputed correspondence attracted qualified privilege.

(d) The plaintiffs were entitled to correspond with Ministers by virtue of the Protected Disclosures Act 2000.

(e) The New Zealand Bill of Rights Act 1990 (NZBORA) protected their correspondence.

(f) The Authority Member should have considered recusing himself after CultureSafe made complaints about him.

[48] In summary, Turuki submits that:

(a) CultureSafe clearly made disparaging comments about Turuki.

(b) In so doing, CultureSafe breached the terms of the record of settlement.

(c) The plaintiffs all are persons caught by s 149(4) of the Act.

(d) Turuki was not in breach of the record of settlement given no invoice had been received that was made out to it.

(e) Further, there were no time limits on when payment of any invoice had to be made.

(f) In any event, Ms Makea-Ruawhare's recourse, if she considered Turuki to be in breach and wanted to enforce the record of settlement, would be through the District Court or to seek compliance orders; cancellation of the contract is not available.

The Authority has jurisdiction to order compliance and penalties against non-parties for breach of a record of settlement

[49] It is accepted that there was no contract between the plaintiffs and Turuki and that there was no employment relationship between them but that does not prevent the Authority from having jurisdiction.

[50] While the record of settlement is a contract between the parties to it, there also is a statutory overlay.

[51] Section 137(1)(a)(iii) of the Act applies where any person has not observed or complied with any term of settlement that s 151 of the Act provides may be enforced by compliance order. Pursuant to s 137(2), the Authority may, by order, require a person who has not observed or complied with any terms of settlement to cease any specified activity, for the purpose of preventing further non-observance of, or non-compliance with the requirement contained in the terms of settlement.

[52] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[53] The use of the word "person" in both those provisions takes them further than "party", which is used elsewhere in ss 137 and 149. There is no reason to read "person" down. Reading it more broadly is not only consistent with the section wording, but also with s 148 of the Act, which reinforces that all persons involved in a mediation have obligations. To constrain only parties to adhere to non-disparagement or confidential clauses in a record of settlement, would, for example, mean that a journalist could broadcast or publish with impunity the confidential terms of settlement reached under s 149, so defeating, without sanction, the statutory confidentiality of the settlement. Of course, as can be seen in this case, other attendees at mediation such as partners, support people and representatives likewise would be able to act contrary to the agreed terms of settlement without any sanction. That interpretation of the word "person" cannot have been intended by Parliament. A person who knows of the fact of the settlement having been achieved, and of the relevant terms of the settlement, and who then breaches an agreed term of the settlement, can be liable for a penalty for breach of s 149.[16]

[54] The gloss on this is that the Authority has jurisdiction only to the extent the terms are in settlement of an employment relationship problem. To the extent a record

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[16] *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236 at [55]-[57].

of settlement goes beyond settling an employment relationship problem, jurisdiction would not rest with the Authority.[17]

[55] Here, the only matter in issue was Ms Makea-Ruawhare's employment relationship problem. The record of settlement was entirely directed to settlement of that employment relationship problem.

[56] Clauses containing non-disparagement and confidentiality obligations are a common feature in settlements of employment relationship problems. These are often necessary to maintain requirements as to privacy and to preserve future employment prospects and business normalcy as the parties move on from the dispute.[18] They usually are seen as being in the interests of both parties to the problem.

[57] Accordingly, where, as here, the terms of settlement of an employment relationship problem include requirements of confidentiality and/or non-disparagement, and a person with knowledge of the terms of settlement breaches those terms, they are liable to a penalty under s 149(4).

[58] Ms Simpson and Mr Halse, as a director and employee of CultureSafe, were representing Ms Makea-Ruawhare at the mediation, and CultureSafe was referenced in the record of settlement that Ms Makea-Ruawhare signed. Clearly all plaintiffs were well aware of the requirements for confidentially and non-disparagement. Indeed, Ms Simpson acknowledged as much in her correspondence and her evidence.

[59] The letters and emails sent to Ministers by CultureSafe and the Facebook posts all breached the record of settlement. Accordingly, the plaintiffs are each liable to a penalty under s 149(4).

The other points made by the plaintiffs can be dealt with briefly

[60] Before turning to remedies, I deal briefly with the other points raised by the plaintiffs.

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17 *Telfer Electrical Nelson Ltd v Trotter* [2017] NZHC 2528 at [46].
18 *H and C v RPW* [2020] NZEmpC 141 at [7].

[61] While the second determination refers to the orders made in the first determination, it stands on its own. Further, as this is a de novo challenge, the issues now are for the Court.

[62] The reference to defamation appears to be a submission that Turuki is somehow precluded from making a claim based on s 149(4) of the Act because it could have taken a defamation case but did not do so. However, it is no answer to one claim to suggest another claim might have been pursued.

[63] Qualified privilege is a defence available for a claim of defamation. It does not apply here. In any event, where the defence is available, to succeed there must be public interest in the publication and the communication must be responsible.[19] Neither of these elements are made out. This was a private matter in which a confidential settlement was reached. What led to the letter was a perceived failure by Turuki to pay an invoice from the general practitioner. That does not amount to a matter of public interest. Further, the communication clearly was not responsible. As noted, many of the allegations made in the correspondence were unfounded and not properly checked by CultureSafe.

[64] The Protected Disclosures Act 2000 has no application here. It protects employees who disclose information about serious wrongdoing within the organisation for which they work.[20] Further, its definition of serious wrongdoing sets a very high threshold, which is not met by any of the allegations made by CultureSafe. The approach adopted by CultureSafe also does not follow the procedures set out in the Protected Disclosures Act.

[65] Section 5 of NZBORA allows for justified limitations on freedom of expression. A confidentiality clause in a record of settlement entered into under s 149 of the Act is such a justified limitation.[21]

[66] A party cannot lightly throw the "bias" ball in the air, make a complaint about a judicial officer and then expect the judicial officer to recuse themselves from hearing

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19 *Durie v Gardner* [2018] NZCA 278.
20 Protected Disclosures Act 2000, s 6(1).
21 *ITE v ALA* [2016] NZEmpC 42, (2016) 15 NZELR 16 at [56].

their case.[22] Before recusal is appropriate, circumstances must exist that would cause a reasonable lay observer to reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the case before them, bearing in mind that a judicial officer is expected to be independent in decision making.[23] Authority Members take an oath or affirmation that they will faithfully and impartially perform their duties as members of the Authority. They cannot pick and choose their cases. Finally, and perhaps most obviously, the issue is not to be tested by reference to the individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and therefore is the least objective observer of all.[24] Here, CultureSafe complained to the Minister of Workplace Relations. There is no evidence on whether Member Crichton was aware of the letter and it also would not follow that he would have been anything but impartial because of it.

[67] In any event, as this is a de novo challenge, the Court must make its own decision on the matter before it and once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court on the matter stands in its place.[25] In that sense, the determination of the Authority is now of only limited relevance.

The compliance orders were appropriate

[68] The compliance orders made against the plaintiffs by the Authority in its second determination were appropriate.[26] Some adjustment is necessary to reflect the current situation, as set out below.

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22 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62]; *Wall v Works Civil Construction Ltd* EmpC Christchurch CEC 2/01, 10 July 2001 at [68]-[69].

23 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [89].

24 At [10].

25 Employment Relations Act, s 183.

26 *Turuki Healthcare Services*, above n 1, at [47(a)].

Non-publication

[69] At the end of the hearing, the issue of non-publication was raised, and submissions were sought from the parties. No party seeks an order for non-publication of their name.

[70] All parties traversed terms of the record of settlement in their evidence. This judgment also refers to terms. Given the nature of the case, that has been unavoidable.

[71] Beyond that, the plaintiffs, in particular, gave (mainly hearsay) evidence of background matters that led to the employment relationship problem. They also gave evidence about what occurred at mediation. Ms Simpson's closing submissions included detail on these matters.

[72] I am conscious that Ms Makea-Ruawhare is not part of these proceedings and her interests have not been reflected in submissions; CultureSafe took no substantive steps in the Authority on her behalf. As noted, confidentiality orders in records of settlement are commonplace and of benefit to both parties to a mediation. Here, the actions of Ms Makea-Ruawhare's former representatives have already caused her affairs to be more widely known than she would have anticipated. Turuki also should not be further disadvantaged because of the actions of the plaintiffs in breach of the record of settlement.

Orders of the Court on compliance and non-publication

[73] Reflecting these matters, the orders of the Court are:

(a) The first, second and third plaintiffs:

(i) Shall keep the terms of settlement and all matters discussed in mediation confidential, except as are expressly referred to in this judgment.

(ii) Are to comply with cl 11 of the record of settlement and not make derogatory remarks or disparaging comments about

Turuki. Nor are they to make any reference whatsoever to the employment relationship problem between Ms Makea-Ruawhare and Turuki in any publication, including on social media.

(b) Further, a non-publication order is made in relation to the evidence and submissions that addressed the nature of the employment relationship problem between Ms Makea-Ruawhare and Turuki, matters that are said to have occurred at the mediation, and the terms of settlement included in the record of settlement that are not specifically referred to in this judgment.

Damages not available

[74] The jurisdiction of the Authority is found in, and limited by, s 161 of the Act. That jurisdiction includes actions for the recovery of penalties and for compliance orders under s 137.[27] The Authority has jurisdiction with respect to any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to, the employment relationship or related to the interpretation of the Act (other than an action founded on tort).[28] Section 162 also allows the Authority, in any matter related to an employment agreement, to make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts. None of those provisions would provide a basis for the Authority's award of general damages here. The powers enabling the Authority to make any orders that the High or District Court may make cannot operate as an independent source of power, are limited in their application to any matter related to an employment agreement. They do not extend to a more widely defined "employment relationship problem". The Court's jurisdiction also is as provided in the Act and would not extend to awarding damages for breach of a record of settlement.[29]

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27 Section 161(1)(m) and (n).
28 Section 161(1)(r).
29 *Musa v Whanganui District Health Board* EmpC Auckland WC 20/08, 18 November 2008 at [32]; *JP Morgan Chase Bank NZ v Lewis* [2015] NZCA 255, [2015] ERNZ 37 at [107]-[109].

[75] Accordingly, the award of $3,000 as general damages against the plaintiffs is set aside.

Penalties payable but not on joint and several basis

[76] Penalties were sought against each of CultureSafe, Mr Halse and Ms Simpson. In the case of Mr Halse and Ms Simpson, each are potentially liable to a penalty for each breach not exceeding $10,000; CultureSafe, as a company, is potentially liable to a penalty for each breach not exceeding $20,000.[30] In any claim for a penalty, the Authority or the Court may give judgment for the total amount claimed, or any amount not exceeding the maximum specified.[31] Where there has been a breach of the Act for which more than one person or entity may be responsible, the culpability of each person needs to be considered separately. The Court also must be mindful of the need to avoid double penalties.[32]

[77] The Authority ordered that the penalties were to be joint and several. That approach has led to the outcome that each of Mr Halse and Ms Simpson became liable for penalties totalling $30,000. Turuki has been seeking to enforce the full amount of the penalties against Mr Halse.[33] There is no basis for the penalties to be ordered on a joint and several basis and I deal with each of the plaintiffs separately, adopting the four-step process set out in *Labour Inspector v Preet PVT Ltd*.[34] The criteria to be considered are as identified in *Nicholson v Ford*.[35]

Ms Simpson – penalties

[78] Ms Simpson breached the record of settlement on three occasions: the letter of 1 March, the email of 15 March and the letter and email of 20 March 2018. The maximum penalty for each breach is $10,000 but they are related so penalties ought to be looked at globally.

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30 Section 135(2).
31 Section 135(4).
32 *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [14].
33 As well as the general damages of $3,000.
34 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [138]-[151].
35 *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [18].

[79] Ms Simpson was the author of the objectionable correspondence and must take responsibility for it.

[80] Ms Simpson was well aware that the terms of settlement and all matters discussed at mediation were confidential and that the record of settlement included non-disparagement prohibitions, but felt entitled to ignore these terms.

[81] While the breaches were intentional, I acknowledge that Ms Simpson was not acting for her own gain. However, the actions she took were not only in breach of the record of settlement but were irresponsible. The correspondence was cast in a way to cause harm to Turuki and included material that was plainly false.

[82] There is no previous conduct of Ms Simpson that is relevant to this proceeding.

[83] As she has withdrawn from acting as an employment advocate, there may be no need for deterrence against her personally, but it is important that the Court recognises the seriousness of her breaches of the Act. The penalty ordered against her should act as a deterrent to others who may consider similar actions in future.

[84] Another factor that goes against Ms Simpson is her lack of regret for what she has done. She still stands by her actions.

[85] Ms Simpson has taken no steps to mitigate any actual or potential adverse effects of the breach. She declined to withdraw her allegations and her attacks on Turuki, its employees, and its solicitors has continued, including throughout the Employment Court hearing and in her submissions. She seems unable to recognise the harm that she may be doing to other individuals by behaviour that is of the type she objects to from employers.

[86] There was no evidence on Ms Simpson's ability to pay a penalty, but I recognise that she is on a relatively new career path in uncertain times.

Mr Halse – penalties

[87] Mr Halse's breaches are in respect of his involvement with the correspondence to Ministers and his Facebook post of 14 April 2018.[36]

[88] Mr Halse shows no understanding of, or remorse for the behaviour he adopted. In his Facebook posts, including those made after the second determination, and in evidence before the Court, he indicated every intention of repeating this behaviour or behaviour like it. Again, it is ironic that a person who holds himself out as an advocate for people who suffer bullying in the workplace, and who claims to have a good understanding of the impact that bullying has on people, has deliberately adopted such behaviour himself.

[89] It is common ground that Turuki has filed bankruptcy proceedings against Mr Halse for the full amount ordered by the Authority. However, it is not clear whether his failure to pay that amount is because of inability to pay.

[90] In all the circumstances, given his experience, his role at CultureSafe and his continued conduct, a higher penalty is warranted against Mr Halse than against Ms Simpson.

CultureSafe - penalties

[91] CultureSafe, as the entity through which both Ms Simpson and Mr Halse operated, is responsible for their actions as outlined above.

Conclusion on penalties

[92] In the circumstances, after considering other cases in which penalties have been ordered, I consider appropriate penalties for the breaches of the record of settlement, that apportion responsibility but avoid double-counting are:

(a) Ms Simpson to pay $3,000;

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[36] Mr Halse's other Facebook posts were after the determination under challenge.

(b) Mr Halse to pay $5,000;

(c) CultureSafe to pay $2,000.

[93] Accordingly, the plaintiffs are each ordered to pay penalties for the identified amounts. Those penalties are to be paid to Turuki pursuant to s 136(2) of the Act within 14 days of this judgment.

Costs to lie where they fall

[94] Although the plaintiffs have had some success in terms of the quantification of penalties and the remission of the award of general damages, their principal argument regarding the jurisdiction of the Authority failed. Further, in all the circumstances, I do not consider it to be in the interests of justice for them to be awarded costs against Turuki.

[95] Accordingly, there is no award of costs.

J C Holden
Judge

Judgment signed at 11.45 am on 14 October 2020