Non-disparagement – what does it actually mean?

For those of you familiar with confidential Records of Settlement, a mutual non-disparagement clause is common. MBIE's template Settlement Agreement includes it as a matter of course.

However, employers and employees alike should carefully consider both the advantages and disadvantages of including such a clause.

The meaning of 'disparaging'

The Employment Court's Decision in *Lumsden v Sky City Management Limited* set out the definition of 'disparagement' contained in the Shorter Oxford Dictionary. "*Disparage – to:*

(i) bring discredit or reproach upon; to dishonor, lower in esteem;

(ii) degrade, lower in position or dignity; cast down in spirit; and

(iii) speak of or treat slightingly or critically; vilify; undervalue, depreciate."

The Court noted that this definition of 'disparage' did not require the disparaging comments to be fabricated or untruthful. A genuinely held believe may still be disparaging. A remark may still be disparaging even if it is believed to be factually correct or truthful.

Negative remarks consist of remarks about the other party that are *harmful, damaging, detrimental, belligerent, acrimonious, antagonistic, or which attack or criticise*. A 'disparaging' remark is also likely to be a 'negative' remark.

As you will appreciate from the above reference, the definition of disparaging is extremely wide and can capture fair comment or fair responses to questions asked or enquiries made.

Consideration

Both employers and employees may pause to consider whether the advantages of such a clause outweigh the risk of breach. Section 149 of the Employment Relations Act 2000 provides that *a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority*.

A review of some recent cases highlights the risk inherent in including a non-disparaging clause in a Record of Settlement.

In *Levchenko-Scott v Presbyterian Support Central Charitable Trust* the Authority found that Presbyterian Support Central Charitable Trust (**PSC)** breached the terms of a Record of Settlement.

The Record of Settlement detailed that PSC would provide Mr Levchenko-Scott (**LS**) a reference on letterhead with agreed wording. The Record of Settlement further provided that *if contacted by a third party, PSC will restrict its comments to those which are consistent with the text of the reference*.

LS moved to Australia following mediation and sought work there. He received three provisional offers of employment, each of which was withdrawn after the prospective employers had reference-checked him.

LS' evidence was that when prospective employers asked PSC referees whether they would employ him again, they answered 'no'. When asked why not, they referred to his failure to align with the organisation's values.

PSC submitted that answering questions from prospective employers honestly and factually as to whether it would employ LS cannot amount to disparagement.

The Authority rejected that submission and found that PSC was bound by the settlement agreement to provide

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LS a written reference containing an agreed text and to restrict its comments to those which were consistent with that text if contacted by a third party.

The Authority found that when PSC informed prospective employers it would not re-employ LS and explained that the reason was his non-alignment to, or fit with, its values, *PSC stepped well-outside the agreed text of the reference*.

In *Byrne v New Zealand Transport Agency* the Employment Court concluded that the word 'disparage' or 'disparagement' is capable of broad effect. Any statement having a negative meaning could be disparaging in a general sense. That is, a disparaging statement can be expressly stated or implied.

In that case the Court found that it was plain from the context of the Record of Settlement that the disparagement clause related to the employment circumstances which had existed up to the point of resignation. As a consequence, that clause should not be construed broadly. It did not preclude either party from making any disparaging remark about the other in any circumstances.

It was argued that potentially disparaging comments which did not relate to matters arising out of the employment relationship could not be caught by the clause in question. The Court agreed.

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.

The Court found that the facts relating to the reaching of settlement, and the discussions leading up to it and surrounding, it were confidential and this included related issues that were not investigated. Neither party could refer to these circumstances either explicitly or implicitly without breaching the non-disparagement clause.

In *Te Manawa o Tūhoi Trust v McDonnell* the Authority was required to determine whether Te Manawa o Tūhoi Trust (**TMOT)** breached the Record of Settlement by making disparaging comments to the Police about Ms McDonnell.

In this case the employment agreement contained a clause requiring the return of property upon termination of the employment relationship. TMOT made a complaint to the Police on the understanding that the employment relationship had ceased and the return of property clause had become operative. It was only following attempts to engage with Ms McDonnell and have its property returned, which she absolutely refused to do, that the complaint was made to the Police.

The Authority found that to the extent that TMOT was making a report to the Police based on its reasonable belief that Ms McDonnell was improperly retaining its property in breach of both the Record of Settlement and her employment agreement, it cannot be held to have made disparaging comments about her actions to the Police.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist Employment Team.