

Attention is drawn to  
the order suppressing  
details in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 223/09  
5284442

BETWEEN                      A  
   Applicant  
  
AND                                B  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Applicant in Person  
   Lucy Jenkins, Counsel for Respondent  
  
Investigation Meeting:    26 November 2009 at Christchurch  
  
Submissions received:    11 December from Respondent  
   22 December from Applicant  
  
Determination:              24 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Attention is drawn to an order I have made prohibiting the publication of any information leading to the identifying of the parties, the terms of the agreement between them or any of the circumstances leading up to the agreement. The order is pursuant to Clause 10(1) of the schedule 2 to the Employment Relations Act 2000.

[2]      In a statement of problem filed in the Authority on 21 October 2009, the applicant (A) alleges that he was unjustifiably dismissed and suffered an unjustifiable action causing him disadvantage. He sought reinstatement and/or compensation. The dismissal grievance, for want of a better description, alleges impropriety by the respondent employer (B) in failing to conduct a fair disciplinary process and other alleged wrongs associated with the termination of Mr A's employment with B. The

disadvantage grievance, on the other hand, is concerned exclusively with an alleged breach of the settlement agreement entered into between the parties when Mr A's employment with B came to an end. Specifically, Mr A alleges that B released confidential information to the media in breach of the settlement agreement which action caused him damage.

[3] B, through counsel, responded to the statement of problem by a letter dated 27 October 2009 raised as a matter of urgency an argument that because there had been a full and final settlement of any employment relationship problems between the parties, and the terms of that settlement had been performed in pursuance of s.149 of the Employment Relations Act 2000, the Authority had no jurisdiction to deal with the matters raised in Mr A's statement of problem. In essence, as well as the statutory underpinning provided by s.149, B argued that the old contract principle of *accord and satisfaction* applied. A telephone conference was sought by B.

[4] The Authority agreed to that course of action and a telephone conference was convened between the parties on 2 November 2009. At that telephone conference, I directed that the issues raised by B in its letter of 27 October 2009 were to be dealt with by oral argument before me as a preliminary issue. I accepted B's argument that it should not be put to proof in respect of Mr A's argument unless and until I could be satisfied that there was a justiciable basis on which Mr A could bring his claim. An investigation meeting was set for 26 November 2009 to deal with this preliminary argument.

[5] Mr A filed helpful and clear submissions on his position on 24 November 2009. That submission sets out in two parts Mr A's views about the alleged unjustified dismissal and the basis for that claim, and secondly his claim for a penalty to remedy the alleged default of B in revealing confidential information about him in breach of the settlement agreement to the media. Critically, the submission, while persevering with the claim in relation to the alleged breach of the settlement agreement, actually withdraws the claim of alleged unjustified dismissal.

[6] In response to that submission, B, through counsel, indicated by letter dated 25 November 2009 that it acknowledged Mr A had changed his position and was now only seeking a penalty (or penalties) in respect of the alleged breach of the settlement agreement and in particular had withdrawn his claim for alleged unjustified dismissal.

[7] B's letter goes on to suggest that the preliminary hearing, set down for the day after B's letter, might not now need to proceed because of Mr A's late change of position. I was out of the country until my return to the office on the morning of the hearing and accordingly the Senior Support Officer was unable to obtain my views on this late change in position. The Senior Support Officer quite properly refused to abandon the hearing in my absence.

[8] The investigation meeting then proceeded in the normal way with each party offering oral argument based on the submissions that had previously been filed, but properly reflecting the concession that Mr A had made to withdraw the claim for personal grievance on the basis of an unjustified dismissal. It was agreed that further submissions would be filed and served by each party dealing with what had become the issues of dispute between them, supported in the case of B by appropriate affidavit evidence. I undertook to give the determination urgency once those submissions were available to me.

[9] By letter dated 2 December 2009, Mr A referred to the fact of the investigation meeting on 26 November 2009 proceeding at all and responding to the letter from B's counsel dated 25 November 2009. In that letter, Mr A refutes B's contention that the costs it incurred in attending at the hearing of the preliminary issue on 26 November 2009 was occasioned by the change in his position rather than by its own choice.

### **Issues**

[10] There are two issues that need to be developed in determining this matter:

- (a) What are the alleged breaches of the settlement agreement;
- (b) Should penalties apply?

### **What are the alleged breaches of the settlement agreement?**

[11] Mr A alleges that there are two breaches of the confidentiality provision in the settlement agreement by staff members of B. In committing those breaches, Mr A says that B did him damage and, amongst other things, specifically breached the term of the agreement which required the parties not to *disparage* one another.

[12] After Mr A and B had executed the settlement agreement, Mr A was approached by a journalist from C seeking information about his conviction for a

blood alcohol offence and his employment status. Mr A declined to comment but immediately contacted the former employer who confirmed that, through its media liaison officer, a statement had been released confirming Mr A's resignation and providing generic information about B's approach to blood alcohol offences by staff.

[13] Mr A alleges that the initial *tip off* to the journalist at C *could have come* from B. Mr A lodged a Privacy Act request with B in relation to that allegation and that Privacy Act investigation by B, as the Authority understands it, remains to be concluded.

[14] Clearly, as a matter of fact, the journalist at C obtained information somehow which alerted him to the fact that Mr A had been convicted of a blood alcohol offence in the District Court. The source of that information is unknown but Mr A's surmise, as I have just indicated, is that it is likely that the journalist received a tip off from within B.

[15] While there is an element of speculation about that alleged breach of the settlement agreement, the second allegation Mr A makes against B has more specificity. This is quite simply that, in responding to the initial inquiry from the C journalist, B confirmed that Mr A had resigned but gave no other information. It is clear from the documents before the Authority that the C journalist emailed B on 8 September 2009 and amongst other things sought the answers to a number of specific questions pertaining to Mr A's situation. In addition, that email makes clear that the journalist was aware that Mr A had been convicted of a blood alcohol offence on a particular date at the District Court. That email was responded to the same day by B and simply confirmed that Mr A had resigned. Other generic information pertaining to B's attitude to blood alcohol offences was also conveyed in the same email.

[16] Mr A says that in even confirming that he had resigned his position, B had breached the terms of the settlement agreement because that fact of his resignation was, amongst other things, a term of the settlement.

### **Should penalties apply?**

[17] I am absolutely clear that there can be no culpability in respect of the first allegation, that is Mr A's contention that B is the source of the original *tip off* to the C journalist. I reach that conclusion for the straightforward reason that there was not a

shred of evidence to confirm that view save for Mr A's bare assertion. B is quite properly conducting a Privacy Act inquiry in relation to Mr A's request for that to be done and no doubt that investigation will conclude in the short future and may provide some further information. If that inquiry by B uncovers any inappropriate activity on the part of any staff member of B in relation to the tip off to the C journalist, then leave is reserved for Mr A to reopen his proceedings in respect of that aspect. At the moment, though, there is no evidence whatever to support Mr A's contention.

[18] The position is otherwise in respect of the second allegation, namely that by confirming that Mr A had resigned, B has breached the settlement agreement. Plainly, the evidence for that allegation is there for all to see; the email exchange has been provided to the Authority and it is self-evident that B has confirmed that Mr A has resigned his position.

[19] Critically, Mr A says that the resignation is a term of the agreement and therefore that it is protected by the confidentiality provisions of the agreement. Conversely, B says that Mr A's dismissal is both part of the agreement and outside the agreement and that it would be a logical nonsense to allege that a factual matter such as the status of a person's employment could never be referred to in the public arena.

[20] I am inclined to agree. If, for instance, a confidential settlement agreement had referred to an hourly rate for instance, or the title of a particular office holder, it cannot be that those factual matters are excluded from the public domain because they are referred to in a confidential record of settlement. Quite clearly, those matters of fact exist outside of the provisions of the agreement as well as being referred to within it, and it must be available to an entity to confirm those kinds of matters without being in breach of the agreement.

[21] The same argument must hold true for the status of Mr A's employment. It cannot be the position that his employment status is protected from the public domain for all time because the settlement agreement happens to refer to his having resigned. That fact is, I hold, not a fact which is capable of being protected from public scrutiny because it is already in the public domain. The purpose of the confidentiality provision in settlement agreements, where that provision exists, is to protect the unique terms of the settlement negotiated between the parties.

[22] A fact already in the public domain, such as the status of the employment, or a rate of pay or an amount of holiday pay owing to a particular employee or the title of a position, cannot be protected by the confidentiality provisions of the agreement because that basic factual information is not unique and exclusive to the settlement agreement but is only referred to in that document in passing and for the sake of completeness. It is a fact that the resignation was already known to a number of people in the organisation by the time the settlement agreement was completed. The fact of the resignation simply can not be protected from public scrutiny when it is already public property. There can not practically be grades of public disclosure with different rules applying within the organisation to those applying without.

[23] A complains that if as B says, “*hundreds*” of B’s staff knew about his resignation then that constitutes a further breach of confidentiality because A never agreed to that wide a level of distribution. But that complaint misses the point that any disclosure makes the information public and thus incapable of being protected.

[24] If a breach of the agreement (technical or otherwise) has occurred then B says that A has affirmed the agreement. This is because if there were a breach, it happened on or about 8 September 2009 and the agreement was not certified by the Mediator until on or about 22 September 2009. Clearly it was available to A to refuse his consent to the Mediator’s certification but he chose not to.

[25] As I have decided that the fact of A’s resignation is not capable of being protected from public scrutiny because it is already in the public domain, it is not necessary for me to consider this issue of affirmation. However, if I am wrong in my fundamental conclusion, then I am satisfied that A has affirmed the agreement by his actions after the alleged breach.

### **Determination**

[26] It follows that, subject to the gloss that if further information is uncovered about the original source of the *tip off* to C’s journalist where leave is reserved for Mr A to reopen this matter before the Authority, there is no basis on which Mr A can properly complain about the behaviour of B. Mr A’s claim, for the present anyway, is dismissed.

**Costs**

Costs are reserved.

James Crichton  
Member of the Employment Relations Authority