

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 131/09  
5126315

BETWEEN                    A  
   Applicant  
  
AND                            Y LIMITED  
   First Respondent  
  
AND                            Z LIMITED  
   Second Respondent

Member of Authority:      Alastair Dumbleton  
  
Representatives:            David Neilsen, counsel for Applicant  
   Sherridan Cook, counsel for Respondents  
  
Investigation Meeting:     28 January 2009  
  
Submissions Received      28 January, 16 and 20 February 2009  
  
Determination:              24 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Prohibition on publication**

[1] Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000, the Authority orders that the name of the applicant and any evidence given or statements of any kind filed or provided for the investigation of this case, is not to be published until further order. This prohibition is necessary in the interests of justice as Mr A's name has been suppressed by the District Court in criminal proceedings brought against him in relation to his conduct while employed by the respondent Z Ltd.

[2] A large number of charges have been laid alleging serious offences involving dishonesty by Mr A in one form or another. He has not yet been tried but is expected to be later this year.

[3] To give effect to the District Court suppression it is also necessary to make an order prohibiting the publication of the names of the respondent companies, both of which, and/or their present and former employees, directors or agents, are closely involved in the District Court case.

### **Employment relationship problem**

[4] The Authority has investigated claims by Mr A that Y Ltd and Z Ltd in several respects breached the terms of a settlement which had been recorded by a mediator under s149 of the Employment Relations Act 2000 on 25 January 2007. Mr A claims that a particular director of the two companies, Mr D, caused the breach.

[5] To resolve his employment relationship problem Mr A seeks a penalty against each of the two respondent companies under s 149(4) of the Act. A penalty not exceeding \$10,000 is recoverable under that provision in conjunction with s 135 of the Act. Mr A also seeks to recover compensation for stress he claims to have suffered as a consequence of the breach.

[6] Y Ltd and Z Ltd deny that they breached in any way the terms of the recorded settlement and accordingly contend there is no basis for any penalty or compensation to be awarded against them.

[7] Mediation has not been attempted by the parties. In the particular circumstances of this case the Authority considered it unlikely that mediation would contribute constructively to resolving the matter, and therefore no direction to mediation was made pursuant to s 159 of the Act.

### **The terms of settlement**

[8] The settlement recorded on 25 January 2007 resolved an employment relationship problem between Mr A and Y Ltd and Z Ltd. He had previously been employed by those two companies, Y Ltd first then Z Ltd, for about five years in total.

[9] Clause 1 of the settlement provided;

*These terms of settlement and all matters discussed at mediation shall remain confidential to the parties, except that if required the third parties named in clause 6 shall be notified of the terms of clauses 6 and 7 only.*

[10] The terms of settlement went on to provide for payments to Mr A of reasonably substantial sums in compensation and as reimbursement for his legal costs.

[11] A further term required that actions filed in the Employment Court and in the Authority against Mr A were to be withdrawn and discontinued by Y Ltd and Z Ltd. Those actions were a challenge to the Court against an Authority determination awarding a very substantial sum to Mr A and an application to the Authority seeking to recover several hundred thousand dollars from Mr A.

[12] Clause 6 of the 25 January settlement provided that no legal action was to be taken against;

- certain former employees of Z Ltd,
- a named former officer of Z Ltd, and/or
- Mr A's company or its directors, of which he was one.

[13] Also relevant is clause 8 which ends with the following:

*... This is full and final settlement of all matters between the parties arising out of the employment relationship between [Y Limited and Mr A and Z Limited and Mr A].*

[14] There is no dispute about the enforceability of the Record of Settlement, which was expressed to be made under s 149 of the Employment Relations Act 2000. It was signed in the usual way by the mediator and by the parties or their representatives. Mr A put his signature to it, as did Mr D on behalf of Y Ltd and Z Ltd. Both men had personally attended the mediation of 25 January 2007 from which the settlement was gained.

[15] Little happened for a year after the settlement until February 2008 when a private investigation firm was engaged by an association representing the interests of the particular industry in which Mr A had been employed by Y Ltd and Z Ltd. That association had become concerned about possible criminal misconduct by Mr A during his employment with Z Ltd. An investigator from the firm approached Mr D seeking information about Mr A in relation to his actions while employed by Z Ltd.

[16] It is alleged by Mr A that Mr D eventually responded to that approach by giving certain information to Mr M the private investigator and that, by doing so as an agent of Y Ltd and Z Ltd, he breached the terms of settlement signed by him on behalf of the two former employer companies. Mr A alleges that the information

given by Mr D fell within the scope of “*matters discussed at mediation*” and therefore its disclosure breached the undertaking of confidentiality given by the parties in clause 1 of their settlement.

[17] The respondents contend that despite the terms of settlement the information given by Mr D remained discoverable and admissible as evidence, if not from him or Mr A then from others who had become aware of the information by one means or another. Also it is contended that Mr D became entitled to witness immunity protecting him from legal action taken with regard to any of his disclosures. This immunity is claimed to arise because Mr D intends being a witness in the forthcoming trial of the criminal charges that have been laid against Mr A. For that purpose he has provided the prosecution with a draft deposition or statement of his evidence.

[18] In March 2008, after first approaching Mr D, the private investigator Mr M obtained a search warrant under the Summary Proceedings Act 1957 permitting a search of Mr A’s home and business premises. A large number of documents were seized from those addresses, including many relating to the Authority and Court proceedings that had been withdrawn as a term of the 25 January 2007 settlement.

[19] The private investigation culminated in the laying of multiple charges under the Crimes Act 1961 against Mr A and two other defendants. That prosecution has been brought privately by an individual whose company had earlier acquired an interest in the business and other assets of Y Ltd and Z Ltd.

[20] Mr A claims that the commencement of the criminal proceedings against him was a breach of the undertaking, recorded in clause 6 of the settlement of 25 January 2007, that “*no legal action*” would be taken against any of the several named parties. They included Mr A in his capacity as a director of his company.

[21] Y Ltd and Z Ltd contend that the criminal proceedings were not commenced at their suit and that because the private informant had not been a party to the Record of Settlement, there was no breach of clause 6.

[22] In the course of its investigation the Authority took evidence from Mr A, Mr D and Mr M. Their evidence was examined by counsel, Mr Neilsen and Mr Cook, as well as by the Authority.

[23] Mr A and Mr D waived confidentiality in relation to the mediation they had attended on 25 January 2007, as s 148(1) of the Act contemplates parties may agree to do.

[24] Mr A and Mr D knew, or ought to have known, what had been “*discussed at mediation,*” since they were both there. Mr M had not been present and therefore had no direct knowledge of the matters discussed.

[25] In relation to the alleged breach of clause 1 of the Record of Settlement, I find from his evidence that Mr A has no direct and independent knowledge of anything done by Mr D that amounted to a breach of the provision. In bringing his application to the Authority, Mr A himself has not claimed to have seen or heard Mr D disclose to anyone else any matter discussed in mediation.

[26] It is largely supposition or inference on Mr A’s part that this is what happened when Mr M interviewed Mr D a year after the settlement had been concluded in January 2007. Mr A’s claim could not succeed on his evidence alone.

### **First breach**

[27] I find however, from the written evidence tendered by Mr D and confirmed orally by him when questioned during the investigation meeting, that a particular action of his that he admits to did amount to a breach of clause 1. He admitted (para.38 of his statement), that he had provided Mr M with a copy of the Statement of Problem in the claim against Mr A that had been brought by Z Ltd, a party to the mediated settlement. That claim had been commenced at the end of 2006 with the lodging of the Statement of Problem in the Authority.

[28] Under clause 5 of the Record of Settlement, the parties had undertaken to withdraw the actions previously commenced by Z Ltd in the Employment Court and in the Authority. The Authority’s records confirm that the latter claim was withdrawn a few days after the settlement, on 31 January 2007, and presumably the challenge to the Court was withdrawn at the same time.

[29] Under clause 1 of the terms of settlement the parties had undertaken to keep confidential all matters discussed at mediation. It is not disputed that the Statement of Problem was one of the matters discussed. Its existence and its purpose, if not its contents, must have been discussed for the parties to have reached agreement as to

what was to be done with the Statement of Problem or the action it had commenced. The document had been the vehicle for commencing a “*current action*” within the meaning of clause 5 and which the respondents had undertaken to withdraw from the Authority. Obviously the parties did not communicate their agreement in that regard by telepathy but must inevitably have had a discussion of some kind.

[30] The evidence of Mr D was that he had approached very carefully his communications with Mr M about Mr A and any matters to do with Mr A’s employment by Y Ltd and Z Ltd.

[31] Mr D said he obtained legal advice from which he had understood the Statement of Problem was not covered by the undertaking in clause 1 as to confidentiality. His evidence in this regard was that only documents which had been prepared for the purposes of the mediation, or which contained statements made by Mr A in the mediation, were to be kept confidential. He said he had understood that any documents or information that came into existence independently of the mediation, such as the Statement of Problem, were not covered by the confidentiality obligations in the Record of Settlement or the Act.

[32] I find that Mr D’s understanding was contrary to the confidentiality undertaking as expressly given by the respondents personally (through Mr D on their behalf). His view was therefore quite wrong. It is certainly true that the existence of the Statement of Problem was independent of the mediation and had been created prior to any proposal of mediation and for a completely different purpose (an Authority investigation), but it is also true that the document, and what it represented as an action brought by one of the parties against the others, was discussed at the mediation. This is so at least to the extent that the parties agreed on a particular course of conduct they would take with regard to that document; namely, the withdrawal of the action or proceedings it represented from the Authority.

[33] I do not accept the submissions made on behalf of the respondent companies that s 148(6) of the Act, which preserves discovery and/or admissibility in respect of any evidence which existed independently of the mediation process, serves to limit the ability of parties to give a binding undertaking that they personally will not communicate to any other person matters discussed in mediation.

[34] Section 148 of the Act does not purport to limit or qualify the terms of settlement the parties may agree to and record under s 149. Provided those terms are not contrary to law in any respect, the parties are free to restrain themselves from communicating to others any matters discussed by them at any time, whether in mediation or outside of it.

[35] The arguments raised about the effect of s 148 of the Act on clause 1 of the Record of Settlement in my view overlook or underestimate the value of a provision such as clause 1 in bringing final and binding resolution to an employment relationship problem through mediation. If the principal protagonists to the employment dispute continue after its resolution to raise the matters at the heart of it, this will usually tend to have an undermining effect on the settlement and relationships of the parties between themselves or with others. Such discussion, particularly in disparaging terms, is analogous to picking at a scab with the usual result.

[36] It is not the point that through discovery or by information provided from third parties who were not privy to and bound by the mediation, the same information can be obtained. The point is that the protagonist parties, who are those carrying the most influence, will not seek to revive the problem by future discussion about it. They have agreed not to reopen and expose again the wound healed by mediation.

[37] I agree with the submission made on behalf of Mr A by Mr Neilsen that the decision of the Human Rights Tribunal in *O'Malley* (HHRT 81/07, 23/08, 19 September 2008) relied on by Mr Cook is distinguishable. It is not about action taken between two parties who had given an express contractual undertaking, as Mr A's case is. *O'Malley* is about the ability of third persons or agencies (The Health and Disability Commissioner) to have evidence admitted by a tribunal of a person's conduct when that person had discussed his conduct in mediation with his employer and had undertaken to keep such discussions confidential. The Commissioner was an outsider to the mediation and therefore a stranger to the settlement, unlike Y Ltd and Z Ltd.

[38] As the Tribunal put it, the effect of such an undertaking between the parties to the mediation is not to confer a quality of absolute confidentiality over the conduct itself of one of them. Mr A is seeking to have Y Ltd and Z Ltd held to their undertaking agreed with him in mediation. He is not (directly at least) seeking, as Mr

O'Malley was, to prevent others from giving evidence about him or his actions while employed by the Y Ltd and Z Ltd.

[39] I therefore consider that Mr D as an agent of Y Ltd and Z Ltd did act in breach of clause 1 of the agreement when he supplied Mr M with a copy of the Statement of Problem. It might be a matter regarded as mitigation of the breach if Mr D reasonably believed Mr M already had a copy and already knew the information contained in it.

[40] Mr D's evidence was that he had assumed Mr M already had the Statement of Problem obtained from another person whose company had purchased the business and some of the assets of Y Ltd and Z Limited. That person became closely involved in the private prosecutions that have been brought against Mr A and other defendants, to the extent that he is the informant who laid the charges. It is quite possible that he had access to the Statement of Problem. If he did, there was nothing in the Recorded Terms of Settlement preventing him from supplying a copy to Mr M independently of Mr D.

[41] Mr M's evidence, however, is that he first obtained a copy of the Statement of Problem when the search warrant was executed on the home and premises occupied by Mr A. Mr M said that Mr D did not give him a copy of the Statement of Problem until after he had already obtained it by search and seizure.

[42] Mr A, however, in presenting his case, has drawn attention to the close similarity of wording and construction between certain passages in the Statement of Problem and in the document drafted by Mr M in support of the application to the District Court made in early March 2008 for a search warrant.

[43] I agree with Mr A that the similarity in the wording and in the sentence and paragraph construction of parts of the Statement of Problem and search warrant application is so striking as to indicate that the author of the latter had read the former and copied some of the ideas found in it. To do so Mr M must have had access to it before the search warrant had been obtained and executed. In this regard I note in particular the same expression "*lost confidence*" as used at para's 2(bb) of the Statement and 9 of the application. It is meaningful in the former document and in the employment jurisdiction but adds nothing to the latter in the criminal jurisdiction.

[44] I do not accept that it was simply by coincidence that the search warrant application referred to "*lost confidence*," especially given the similarity to the Statement of other words surrounding that expression and the order in which they were placed.

[45] I find it likely that Mr M obtained the Statement of Problem before the date in March 2008 when the search warrant was executed and he took a copy of the document from Mr A's address. It is likely Mr D had already given him a copy, but in any event, whether Mr M had obtained independently of Mr D a copy of the Statement of Problem before Mr D supplied him with one, is not a matter that can or should mitigate the breach by Mr D in supplying it at all at any time. Mr D had given an undertaking as a term of settlement not to communicate at any time matters discussed at the mediation. It was not for him to decide whether or not there was any harm in breaching that clause.

[46] The particular clause should not be viewed in isolation from the others forming the Settlement. They provided for the payment of considerable sums of money between the parties and the withdrawal of proceedings taken between them. The securing of undertakings as to confidentiality are likely to have contributed to decisions made by the parties to compromise their various claims, including the recovery of significantly larger sums of money and the pursuit of proceedings in the Authority and in the Court.

### **Second breach**

[47] There was I find another breach of clause 1 caused by Mr D. This one was through his email of 4 March 2008, which is exhibited as CT3 to Mr M's second statement of evidence. The email repeated matters to do with Mr A and his employment by Y Ltd and Z Ltd, and it did so in a way that was almost word for word the same as the allegations in the Statement of Problem lodged and subsequently withdrawn by those companies.

### **Third breach**

[48] I consider there was also a third breach of clause 1 by caused Mr D, this one in August 2008 when he initialled a handwritten witness deposition or statement intended for the trial of the private prosecution, whenever that was going to take place. It includes a paragraph which, although lines have been drawn through it and

initialled by Mr D, still clearly communicates matters discussed at the mediation. They are the same matters in the email (CT3) and part of the Statement of Problem. The allegations of misconduct against Mr A were obviously discussed at mediation when the parties advocated the strength of their respective cases before reaching settlement.

[49] Mr D was in August 2008 under no obligation to supply a statement of his intended evidence, let alone one that contained matters he had contractually undertaken to keep confidential.

[50] It is a separate question as to the ability of Mr D in a criminal prosecution to give sworn evidence that includes the matters he agreed to keep confidential. Mr D can be subpoenaed to give that evidence and he may be directed by a court to answer questions about the confidential matters. In this regard issues are likely to arise about the interests of justice, but they are ones that I do not need to decide for the purposes of this application as the time has not yet arrived for Mr D to present any evidence to the District Court in the prosecutions brought privately against Mr A.

[51] It seems to the Authority that Mr D chose to tread a very fine line in speaking to Mr M in March 2008 about matters to do with the investigation being conducted. It also seems likely that Mr D, during those interviews, did communicate other matters that had been discussed at mediation and therefore by doing so breached the undertaking given in clause 1 of the terms of settlement.

[52] However, the evidence does not leave the Authority in a position to determine exactly what other information he disclosed in this regard in breach of clause 1 and, because the application is for a penalty or fine, I am unable to find to the standard of evidence required that there were further breaches of clause 1 in addition to supplying the Statement of Problem and the particular disclosures referred to above in 4 March email and the handwritten and typewritten witness depositions.

### **Witness immunity**

[53] The rules of witness immunity were argued by Mr Cook to apply in this case. If they are applicable the effect of them is not to deem any breach of clause 1 never to have occurred but is to protect Mr D or Z Ltd and Y Ltd, from having action taken against them in respect of evidence given in the ordinary course of any judicial proceeding, when doing so might be a breach of clause 1.

[54] Witness immunity is a shield and not a sword as Mr D has sought to use it, to sever contractual undertakings before judicial proceedings have been commenced. As the cases of *Dentice* ([1992] 1 NZLR 720) and *Balfour* ([2007] ERNZ 808) make clear, the rules do not apply retrospectively to conduct before any proceedings have been brought and are running their course.

[55] In the circumstances I find that witness immunity has no application to the disclosure by Mr D to Mr M of the Statement of Problem. He breached clause 1 in this regard before the private prosecution was commenced and before evidence was being prepared for those proceedings. His breach occurred during the earlier private investigation phase.

[56] I make the same finding for the same reasons in respect of the email sent by Mr D, in breach of clause 1, on 4 March 2008.

[57] His witness deposition prepared in handwritten draft in August 2008 is I find covered by the immunity because by then the private prosecution had been commenced and evidence for the trial was being prepared. In that third instance therefore a penalty is not recoverable for the breach of clause 1.

### **Undertaking not to take legal action**

[58] The evidence satisfies me that there has not been a breach of this particular term of settlement by either Y Ltd or Z Ltd.

[59] Clause 6 begins with the following:

*The parties undertake that no legal action will be taken against  
[persons including Mr A]...*

[60] To meet the purpose of the undertaking, those words should not be construed so narrowly that there will only be a breach if the parties take action through becoming themselves, in their own names, a plaintiff, applicant or informant party in civil or criminal proceedings. It seems to me also a breach of the undertaking if the parties, by their actions, instigate or procure proceedings which are brought in the name of other persons not bound by the record of settlement.

[61] The question in this case is whether the informant is simply carrying out the will of the parties Y Ltd and Z Ltd to the record of settlement in bringing proceedings. I accept from the evidence of Mr D that he is not a driving force behind the private

prosecutions brought in another's name. I also accept that the person who is the informant has his own connection with the companies Y Ltd and Z Ltd, through his company's purchase of some of their former business and assets.

[62] I accept that the private informant is not merely a front for Mr D but has his own interests to protect and pursue that have led him to bring the private prosecutions. His interests are separate from any Mr D has. The informant is also involved with the industry association which also has distinct interests of its own in bringing Mr A to account for any criminal wrongdoing while involved in the industry.

[63] Attention was drawn by Mr A to the apparent interest Mr D does nevertheless have in respect of one of the remedies claimed. Reparations have been claimed for him in a considerable sum, in excess of \$1m. I accept, however, that Mr D himself was not responsible for that particular claim for relief being drawn up in that way in the private prosecutions, but that Mr M advised the informant the claim should be made for parties who may be regarded as victims of the alleged wrongdoing of Mr A, to recover any losses of theirs. This is in accordance with principle and in my view does not put Mr D in breach of clause 6 of the Record of Settlement.

[64] The undertaking of the parties at clause 6 must also be confined by implication to causes of action that they were aware of or ought reasonably to have been aware of at the time of settlement. The matters that have become the subject of the criminal charges seem not to have come to light until after the settlement and therefore are unlikely to have been within the contemplation of the parties when adding clause 6 to the terms of settlement.

### **Determination - penalty for breach of the terms of settlement**

[65] I have found there was a breach by Z Ltd and Y Ltd of the terms of settlement. A penalty is therefore available under s 149(4) of the Act. The maximum is \$10,000 in the case of a corporation such as Y Ltd and Z Ltd. As they were joint parties to the settlement that is the total maximum penalty which may be awarded.

[66] There were three instances in which the breach of clause 1 occurred through Mr D's actions; (1) disclosing the Statement of Problem, (2) writing the email of 4 March, and (3) providing the witness deposition. A penalty is recoverable for the first two instances but not the third to which witness immunity applies.

[67] While it may be tempting to look at what happened after the settlement was reached in January 2007, and particularly at the subsequent discovery of actions or conduct by Mr A that have led to allegations of criminal offending (of which he is presumed innocent until proven guilty), in my view the important thing is that Y Ltd and Z Ltd had settled their employment differences with Mr A on terms they agreed upon and gave undertakings in respect of. They were enforceable and, as a matter of public policy, it is important they are complied with so that resources such as mediation, investigation by the Authority and trial by the Employment Court, do not have to be further used to try and resolve for a second time matters regarded previously as resolved.

[68] It may be that in the outcome of the criminal proceedings, whatever and whenever that might be, much of the settlement of the employment dispute becomes unravelled and the harm caused by Mr D's disclosure of the Statement of Problem will occur anyway through discovery and/or admissibility of evidence given by other parties.

[69] That, however, should carry little weight, if any, as mitigation and should not excuse Mr D for a deliberate breach of a clear undertaking he had given on behalf of Y Ltd and Z Ltd. On behalf of Z Ltd and Y Ltd he acted deliberately, in the sense that he intended to disclose the Statement and to write the email and also the deposition.

[70] I consider that the level of penalty to be imposed should serve partly as a message to others that undertakings given under s 149 of the Act in a record of settlement are to be observed and respected by the parties, unless they agree to a release or are properly excused from them by direction of a court or agency such as the Serious Fraud Office.

[71] In addition and in the Authority's discretion, the level of penalty should provide a form of reparation to Mr A.

[72] As for the claim to recover compensation, treating it as a claim for compensatory damages and accepting that the settlement was contractual in nature, it cannot readily be seen that any harm suffered by Mr A was occasioned by the breach of Z Ltd and/or Y Ltd rather than by the disclosure by others, in the industry association for example, of information they had become aware of and were not

contractually bound to keep confidential. No order for compensation is therefore made.

[73] I fix \$3,000 as the total penalty to be paid jointly and severally by Y Ltd and Z Ltd. I order that half is to be paid to Mr A under s 136(2) of the Act. The balance is to be paid to the Authority which as required by the Act will pay it into the Crown Bank Account.

### **Costs**

[74] Costs are reserved. Application on behalf of Mr A may be made for costs by memorandum in which the level of actual costs and other relevant information is to be given. The memorandum shall be filed and served within three weeks of the date of this determination. The respondents shall have a further 14 days in which to make any reply by memorandum.

A Dumbleton  
**Member of the Employment Relations Authority**