IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 188/08
5116459

	BETWEEN	ASSOCIATED INSULATION MATERIALS LIMITED Applicant
	AND	ROGER ERNEST WILEMAN Respondent

Member of Authority:	Robin Arthur
Representatives:	John Harris for Applicant Respondent in person
Investigation Meeting:	20 May 2008 at Auckland
Determination:	23 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns an alleged breach of a term in a settlement agreement that had been certified under s149 of the Employment Relations Act 2000 ("the Act") and the remedy for such a breach.

[2] The Applicant alleges that the Respondent breached an agreed term that "*these terms of settlement and all matters discussed at mediation shall remain confidential to the parties*".

[3] For that reason the Applicant seeks to have the other terms of settlement "*cancelled*". Cancellation would release the Applicant from three specific obligations that were other agreed terms. These were to (i) investigate one of its managers "*overall manner and professionalism in dealing with staff*"; (ii) provide a positive reference to the Respondent; and, (iii) to pay to the Respondent a specified amount of

compensation under s123(1)(c)(i) of the Act. The compensation was said to be on a "*without prejudice and denial of liability basis*".

[4] During the investigation meeting I interviewed three witnesses – the Applicant's director John Harris, the Applicant's credit controller Douglas Anderson and the Respondent. I had hoped to interview another former employee of the Applicant, Alastair Sinclair, but he did not attend the investigation meeting. I did have a brief written statement from him.

[5] The Authority determines the facts of matters under investigation according to the balance of probabilities, that is what is more likely to have happened than not. Here I must determine whether Mr Wileman breached the term of confidentiality by revealing details of the settlement agreement to Mr Sinclair.

[6] The settlement agreement was reached in mediation on 18 February 2008 and a record of settlement was prepared, signed by the parties and certified by a mediator that day.

[7] Mr Anderson's evidence was that the morning after the mediated agreement was made – and about which he knew nothing at that point – he received a telephone call from Mr Sinclair. He says Mr Sinclair referred to an amount of money that the Respondent was to be paid and to Mr Harris having to "*discipline*" a supervisor employed by the Applicant.

[8] Mr Anderson subsequently reported this conversation to the Applicant's managing director John Harris. Mr Harris had attended the mediation and had signed the record of settlement subsequently certified by the mediator. Mr Harris was shocked that Mr Sinclair and Mr Anderson knew of some of the content of the settlement when it was agreed to be confidential.

[9] Following my interviews of witnesses, each under oath, and taking into account the written but unsworn statement of Mr Sinclair, I have concluded that it is more likely than not that the Respondent did make the alleged disclosures and that this was in breach of the term of confidentiality.

[10] The Respondent does not deny talking to Mr Sinclair about the settlement. He admits telling Mr Sinclair that he considered he "*won*" and telling him "*about how we had talked back and forward and what the mediator said*".

[11] In comments made during the investigation meeting it was also clear that Mr Wileman was not clear about what he called the "*boundaries*" of confidentiality and confessed himself to be confused on what that meant for what he could and could not say about the content of the settlement agreement.

[12] Against that background it is more likely than not that he did reveal further details of the confidential terms to Mr Sinclair, particularly as Mr Sinclair was asking him questions because he was considering raising a grievance of his own against the Applicant. Accordingly I find that the Respondent did breach the agreed term of confidentiality in the settlement agreement by telling Mr Sinclair both the amount of compensation he was to receive and of action required of the Applicant regarding a supervisor.

[13] Having made that finding I must now deal with its consequences in terms of what is allowed for in the Act and whether the terms of settlement may be cancelled or some other action required of the parties.

The legislation

[14] Section 149 of the Act provides for a mediator – at the request of the parties to a problem – to sign the agreed terms of settlement reached between the parties. Before doing so the mediator must explain that this will result in a final and binding settlement that cannot be cancelled under the Contractual Remedies Act 1979 and that any further legal action is barred except for the purposes of enforcing the agreement. Once satisfied the parties know the effect of their request, and that they affirm their request, the mediator may sign the agreement.

[15] The form of agreement includes an acknowledgement from the parties that they have had its effect explained to them and a certificate from the mediator.

[16] Section 149(3) provides that once this process is complete:

> *(a)* *those terms are final and binding on, and enforceable by, the parties; and*
>
> *(ab)* *the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*
>
> *(b)* *except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether by action, appeal, application for review or otherwise*

[17] Section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[18] A party breaching an agreed term of settlement is liable to a penalty of up to $5000 in the case of an individual: s135. The Authority may order that the whole or any part of any penalty recovered must be paid to any person: s136(2) of the Act.

[19] Terms of settlement agreements are enforceable by way of compliance orders issued by the Authority: ss137 and 151 of the Act.

Determination

[20] The Authority is prevented by s149(3)(ab) from granting the remedy of cancellation of the entire settlement agreement as sought by the Applicant.

[21] During the investigation meeting Mr Harris, for the Applicant, asked the Authority to consider imposing a penalty if it could not cancel the agreement. He also acknowledged that, depending on the effect of the penalty, some or all of the obligations in the settlement agreement would still apply to the Applicant.

[22] The substantial merits of this case require measures to, firstly, mark the seriousness of a party breaching a term of an agreed and certified settlement agreement and, secondly, to ensure that the agreement is fully complied with by both parties from this point on.

[23] The Respondent deliberately and unnecessarily referred to the terms of the settlement agreement in his conversation with Mr Sinclair. Of such a breach the

Employment Court has stated, in *Gaskin v Grenside* (WC20A/07, 27 September 2007, Judge Shaw:

> *The imposition of the penalty is necessary not only to mark the breach of the agreement but to act as a deterrent to those who have entered into confidential settlement agreements. The Authority and the Court take the undertakings as to confidentiality seriously. Unless parties strictly adhere to their obligations of confidentiality, the integrity of the mediation process would be undermined.*

[24] Mr Harris accepted that revelation of the amount of compensation had no real negative effect but considered the confidentiality about the term requiring him to "*investigate*" the conduct of one of his supervisory staff as being of some importance. He was concerned, rightly in my view, that the breach meant there was at least one former employee (Mr Sinclair) and one present employee (Mr Anderson) who knew about this requirement before Mr Harris had a reasonable opportunity to speak to that supervisor. If Mr Harris was to fairly put concerns to that supervisor and consider his responses in a process which might have disciplinary consequences for that supervisor, the Applicant's obligations to be a fair and reasonable employer could have been compromised by the Respondent's breach of confidentiality.

[25] The appropriate measures to resolve this particular problem are to impose a penalty on the Respondent for his breach of the term of confidentiality and to require the Applicant to comply with all agreed terms not yet completed.

Penalty

[26] I am satisfied that the Respondent deliberately breached an important term of an agreed settlement and that it is appropriate to impose a penalty in the sum of $1500. I direct under s136(2) of the Act that the whole of that penalty be paid to the Applicant.

Compliance order

[27] The net effect of the penalty imposed is that the Respondent has lost some of the benefit of the settlement he agreed with the Applicant in mediation on 18 February 2008. However he should not lose all benefit from an agreement where his former employer must be taken to have acknowledged that all was not as it should have been

during their employment relationship and that some compensation and other measures (including providing a positive reference) were necessary to put it right. For that reason it is necessary – in considering the overall justice of this matter – to make sure that the Applicant meets the rest of its obligations under the settlement agreement.

[28] By not paying the agreed compensation and providing the agreed reference the Applicant also breached the settlement agreement. It is not entitled to take the law into its own hands and engage in 'tit-for-tat' action based solely on its own assessment of the situation. It must now rectify that situation.

[29] Within fourteen days of the date of this determination the Applicant must:

(i) pay the specified sum of compensation to the Respondent, less the amount imposed by way of penalty and awarded to it in this determination; and

(ii) provide the agreed letter of reference.

Confidentiality

[30] To make it clear to the parties, I note that the confidentiality term regarding the terms of settlement and all matters discussed at mediation remains in place. While the parties can talk about the fact and content of this determination, which is a public document, neither should talk about the specific terms of settlement or what was said in mediation.

Robin Arthur
Member of the Employment Relations Authority