

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 86
5540000

BETWEEN BENGAL INVESTMENTS
 LIMITED t/a MUFFIN BREAK
 JOHNSONVILLE
 Applicant

AND STACI IBELL
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Andrew Crook, for Applicant
 Nathan Bourke, for Respondent

Investigation Meeting: 2 September 2015

Submissions Received: 2 and 3 September 2015, from the Applicant
 2 September 2015, from the Respondent

Determination: 4 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bengal Investments Limited t/a Muffin Break Johnsonville (Muffin Break Johnsonville) lodged proceedings in the Authority on 3 February 2015. It claimed Ms Ibell had breached confidentiality relating to a mediated settlement. The applicant invited the Authority to find accordingly and determine an appropriate remedy.

[2] Ms Ibell denies any such breach took place. Her application to dismiss Muffin Break Johnsonville's application on the grounds that it was frivolous or vexatious was considered as a preliminary matter and dismissed¹. At that time the applicant was in

¹ [2015] NZERA Wellington 78.

the process of attempting to serve a witness summons on an individual whose evidence potentially would support its claim.

Issues

- [3] The issues for the Authority to determine are:
- a. whether Ms Ibell breached the confidentiality of the mediated settlement of 7 September 2011; and, if so
 - b. what is the appropriate remedy for that breach.

Events leading to the application

[4] Ms Ibell is a former long-serving employee of Muffin Break Johnsonville. It is not necessary to dwell on details of the employment but suffice to say an employment relationship problem arose as a result of which the parties attended mediation provided by the then Department of Labour.

[5] They signed a Record of Settlement recording the agreement they had reached in mediation. One of the provisions was that the terms of settlement and all matters discussed in mediation would remain, so far as the law allowed, confidential to the parties. That settlement was signed on 7 September 2011. Ms Ibell continued to work for Muffin Break Johnsonville following the settlement until she resigned to take up an opportunity elsewhere during 2012.

[6] Three years and four months later, Andrew Crook, a Director of the applicant company, says an employee resigned without giving notice. Text messages were exchanged between the employee, whom I will refer to as Mr K, and Mr Crook, in the course of which Mr K referred to taking an employment-related action against his former employer. He made comments in his texts which gave rise to Mr Crook's belief that Ms Ibell had breached the confidentiality of the Record of Settlement she had entered into with Muffin Break Johnsonville in September 2011.

[7] On the basis of that text exchange Mr Crook inferred there was collusion between Ms Ibell and Mr K to discredit him and his wife and their business. Mr Crook provided the Authority with a transcript of the text messages between himself and Mr K, which were as follows:

AC: *Well I guess I'll hear from them in due course*

K: *Ull here from them in the moring stacy all all over (sic)*

AC: *Sorry, Stacy who?*

K: *Last person to sue you and win hahahahaha*

K: *Internet is a big place shes willing to testify on my behalf lol hahahaha your screwed (sic)*

The law relating to mediated settlements

[8] Section 149 of the Employment Relations Act 2000 (the Act) concerns settlements entered into for the resolution of an employment relationship problem. It provides that terms of such settlements are final and binding on the parties and that this is explained to, and accepted by, the parties before the mediator signs the settlement.

[9] It also provides that settlements can only be brought before the Authority for enforcement purposes and that, in the event of a breach of a settlement that has been signed by a mediator, the party in breach is liable to a penalty imposed by the Authority.

Evidence and discussion

[10] Mr Crook was the only witness for Muffin Break Johnsonville. He had been unable to serve the summons on Mr K who was no longer at his last-known address and the process server he had engaged had been unable to locate him. Mr Crook suggested it was a reasonable inference that Mr K would not have referred to "Stacy" being "*the last person to sue you and win...*" if he had not had knowledge of the mediated settlement. Mr Crook did not think there could be any other possible way Mr K would have had the information to make the comments he made in his text messages.

[11] Mr Bourke, on Ms Ibell's behalf, objected to the text messages being placed before the Authority in the absence of Mr K. In his submission they could only be treated as hearsay. Mr Crook disagreed with this but accepted that the text messages did not assert that Ms Ibell had told him anything about her mediated settlement with Muffin Break.

[12] He acknowledged his claim that Ms Ibell had breached confidentiality was based on an inference he had taken from the texts. He contended that the text messages referred specifically to Ms Ibell and to the fact that she had "*taken a case*" against the applicant company. It was his evidence that he had employed staff throughout 18 years in the hospitality industry and that, in that time, he had hired only one person called "*Staci*" and had only once been to mediation. That was the matter with Ms Ibell. Given those circumstances Mr Crook said he believed on the balance of probabilities that Ms Ibell must have breached confidentiality. He acknowledged, however, that apart from the texts from Mr K he had no reason to believe that Ms Ibell and Mr K knew each other.

[13] Ms Ibell denied breaching confidentiality. She said she had never met Mr K, who did not work at Muffin Break during her employment there. Nor had she heard of him, before the matter currently before the Authority arose. She had never spoken to him. Ms Ibell said she had maintained the confidentiality of the mediated settlement and had told nobody, including family and friends, about it.

[14] I have no reason to doubt Ms Ibell's veracity. The fact that the text message from Mr K referred to "*Stacy*" rather than "*Staci*", which is how Ms Ibell spells her name, suggests Mr K does not know her although he may have heard her name spoken. He does not say in his texts to Mr Crook that he has spoken to "*Stacy*" or had any knowledge from her about a settlement agreement.

[15] I reject Mr Crook's submission that on the balance of probabilities Ms Ibell must have breached confidentiality. There are a number of possible explanations for Mr K's apparent knowledge of a person called "*Stacy*" suing the applicant.

[16] For example, it is possible other employees of Muffin Break Johnsonville knew of the existence of an employment relationship problem between Ms Ibell and her employer before the 2011 mediation. It is possible they knew the matter was to be mediated. The fact that Ms Ibell's employment continued after the mediation could have led to speculation that she had been successful in whatever claim she had against her employer.

[17] If that was the situation, Ms Ibell could not be held in any way responsible for any resulting gossip, rumour, or speculation. Nor should culpability for breaching the

confidentiality of the settlement agreement be attributed to her without convincing evidence.

Determination

[18] I find there is no evidence to support the applicant's claim that Ms Ibell breached the confidentiality of the 2011 mediated settlement. I dismiss the application accordingly.

Costs

[19] At the conclusion of the investigation meeting I informed the parties orally of my finding. Mr Bourke submitted that Ms Ibell, who had sought legal advice at an early stage and was represented throughout the proceedings, should be reimbursed for the costs she had incurred. Those costs were \$1,200 plus GST.

[20] Mr Crook chose not to make submissions on costs but wanted it to be recorded that he believed he had acted in good faith and that the principle of confidentiality of a mediated settlement was an important one for him and for the business he and his wife operated.

[21] The issue of costs arose in the course of a telephone conference with the parties that took place in April 2015. Mr Crook was aware from that time of the level of proof required to establish his claim and the costs implications if he failed.

[22] The investigation meeting was short, lasting less than half a day. I find it appropriate that costs be awarded to Ms Ibell. Muffin Break Johnsonville put her to the expense and anxiety of an Authority investigation on the scantiest evidence that she had breached the confidentiality of a mediated settlement.

[23] In the circumstances it is appropriate that the employer reimburse Ms Ibell \$1,200. The Authority does not normally award GST and I decline to do so.

[24] Bengal Investments Limited t/a Muffin Break Johnsonville is to pay costs in the sum of \$1,200 to Ms Ibell.

Trish MacKinnon
Member of the Employment Relations Authority