

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 101
5547285

BETWEEN Bidvest New Zealand Limited
Applicant

AND Graeme Vivian
Respondent

Member of Authority: Trish MacKinnon

Representatives: Scott Doolan, Advocate for Applicant
Karl Gill, Advocate for Respondent

Investigation Meeting: On the papers

Determination: 20 October 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Bidvest New Zealand Limited (Bidvest), claims that its former employee, Graeme Vivian, has breached the confidentiality provision of a settlement agreement. The alleged breach was by way of a Facebook message sent by Mr Vivian to a current Bidvest employee whom I will refer to as Mr Y.

[2] Bidvest seeks a compliance order, a penalty of \$5,632.50 and costs.

[3] Mr Vivian acknowledges sending the Facebook message to Mr Y but denies the message breached the confidentiality of the settlement agreement.

Background and the positions of the parties

[4] Bidvest and Mr Vivian entered into a Record of Settlement (the Agreement) under the auspices of the Ministry of Business, Innovation and Employment's Mediation Service on 7 October 2014. It is not necessary to record all the

terms of that settlement but I note they acknowledged Mr Vivian had resigned and would be paid out a notice period to 10 October 2014. The terms included a payment under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). They also included a confidentiality provision expressed in these terms:

"These terms of settlement and all matters discussed as part of this settlement shall remain, so far as the law allows, confidential to the parties."

- [5] The Agreement was signed by a mediator who certified under section 149 of the Act that, before signing, she had explained to the parties the final, binding and enforceable nature of the settlement.
- [6] On 26 February 2015 Mr Vivian sent a Facebook message to Mr Y, apparently as a result of a chance encounter between them at a supermarket earlier that day. Contained in the Facebook message were a number of derogatory statements about the recipient of the message and two of his friends. There were also derogatory and offensive comments about Bidvest and the General Manager of its Palmerston North branch, Mr Andrus Lei. It is not necessary for me to repeat those comments and I choose not to do so. However, the message included the following words which Bidvest alleges are in breach of the confidentiality provision of the settlement agreement:

*AT LEAST I GOT PAID A LOT OF MONEY TO LEAVE EVEN
THOUGH I WAS GOING TO QUIT THE NEXT WEEK...*

- [7] In his statement in reply Mr Vivian apologised for sending the message, which he had subsequently deleted, but said he had been under a lot of pressure since leaving Bidvest's employment. He said he had been subjected to ridicule and harassment from members of Bidvest's staff, particularly its nightshift and asked that his action be seen in that context.
- [8] Mr Vivian denied breaching the confidentiality provision of the mediated settlement agreement, and claimed the "*lot of money*" he had referred to in the message was the holiday pay and the staff account credit he had been paid out on his departure. He maintained he had never told anyone the amount of money he had been paid out, or that he had received any money other than for holiday pay.

The Authority's Investigation

[9] In the course of a telephone conference with the Authority on 19 May 2015 the parties agreed that the matter should be determined following evidence and submissions from them. A timetable for receipt of such documentation was put in place accordingly.

[10] This determination has been issued 11 days outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised a Member who had been delegated powers of the Chief under s166B of the Act that this would occur he decided, as he was permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Issues

[11] The issues for determination are:

- (a) whether Mr Vivian breached the confidentiality provision of the 7 October 2014 mediated settlement agreement;
- (b) if (a) is answered in the affirmative,
 - (i) whether a penalty should be imposed; and
 - (ii) whether a compliance order should be granted to Bidvest requiring Mr Vivian to comply with the confidentiality provision of the settlement.

Did Mr Vivian breach a term of the settlement agreement?

[12] Mr Doolan, in his submissions on behalf of Bidvest, rejects Mr Vivian's claim to have been referring to his holiday pay and the pay out of a credit in his staff account when he stated in the Facebook message to Mr Y that he had "*got paid a*

lot of money to leave". Mr Doolan notes that holiday pay is a statutory entitlement for an employee. He submits it is inconceivable that Mr Vivian was referring to that entitlement, and to a staff account credit payment of \$49.50, when he bragged about receiving a lot of money to end his employment with Bidvest.

- [13] Bidvest submits that, on the balance of probabilities, Mr Vivian had breached the confidentiality provision. In essence it says that, although Mr Vivian had not specified the amount he received from Bidvest, his description of "*a lot of money*" was an allusion to the compensatory payment he had received under s. 123(1)(c)(i).
- [14] Mr Gill submits on Mr Vivian's behalf that the words on Facebook were emotive and not factual. He says Mr Vivian was not paid to leave Bidvest, but resigned of his own free will. Mr Gill alleged that Bidvest was to blame for the Facebook comments Mr Vivian had made as it had "*planned and carefully orchestrated actionsto force a negative reaction*."
- [15] In the event the Authority finds the confidentiality of the settlement agreement has been breached, Mr Gill questions whether the Applicant should be compensated for that. He raises other issues, one of which is the non-payment of his advocate's fees in relation to the events that led to the settlement agreement, noting that those costs were provided for in the agreement. He also queries the reason for imposing a penalty, submitting that the Authority must consider what harm was caused by the breach, and whether it was flagrant or inadvertent. In Mr Gill's submission the Authority is obliged to look at whether Bidvest contributed to, and largely caused the breach.
- [16] I find Mr Gill's submissions to be fanciful and speculative and am not persuaded by his claim that Mr Vivian was forced into his Facebook message reaction to Mr Y by the actions of Bidvest employees. In relation to the non-payment of Mr Gill's fees, I note Bidvest's evidence is that it has never received an invoice for his fees from Mr Gill. The settlement agreement provides for payment of up to \$750 plus GST upon receipt of an invoice from KSG Corporation Limited.

Bidvest says it remains willing to pay out the sum agreed for Mr Gill's fees once he submits an invoice in accordance with the settlement agreement.

[17] I find it highly improbable that Mr Vivian's statement that he had "*got paid a lot of money to leave*" Bidvest referred to the holiday pay he had received on termination of his employment and to the \$49.50 credit in his staff account that was repaid to him. I have no doubt he was referring to the compensatory payment of \$4,500 he received under s. 123(1)(c)(i). While Mr Vivian did not quantify the amount he had been paid, his Facebook statement made it clear that it was substantial. I find that constitutes a breach of the confidentiality provision of the settlement agreement.

Should a penalty be imposed on Mr Vivian?

[18] A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement¹. Not all breaches will result in the imposition of a penalty and, as was noted by the (then) Chief Judge in *Xu*, the first question should be how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.

[19] Mr Lei's evidence was that Mr Vivian's Facebook message was widely read by Bidvest employees as Mr Y, to whom the message was sent, was unaware it related to a confidential matter and showed it to colleagues before alerting his manager. In Mr Lei's words the Facebook message "*immediately spread through the business like wildfire and has been the talking piece of many a lunch and smoko break.*"

[20] His greatest concern is broadly that, now staff are aware an employee received money to leave his employment, there is a real likelihood other employees will make claims for monetary payments to leave. Mr Lei provided no evidence that in the months following the dissemination of the Facebook message any other Bidvest employee has made such claims. At best then, Mr Vivian's breach of confidentiality could be described as having the potential for such harm rather than as having already occasioned any harm.

¹ *Xu v McIntosh* [2004] 2ERNZ 228 at464

- [21] Nonetheless there are valid public policy reasons for ensuring Mr Vivian clearly realises the error of what he has done in breaching the confidentiality of the Agreement. It is important that parties to such mediated settlements are able to rely on the mutually given undertakings of confidentiality. I find it is appropriate to impose a penalty to emphasise to the respondent the unacceptable nature of his behaviour and to deter others from following his example.
- [22] Bidvest seeks \$5,362.50 as a penalty, to be paid in its entirety to itself. It says this amount represents the total of Mr Vivian's payment under s. 123(1)(c)(i) and the \$750 plus GST costs agreed to be paid to Mr Vivian's advocate under the Agreement. Bidvest describes Mr Vivian's breach as deliberate and flagrant in that he bragged about getting "*a lot of money to leave*" in the context of a "*tirade of abusive, offensive and abhorrent comments*".
- [23] While that is an accurate description of Mr Vivian's Facebook message, I am concerned only with the breach of the confidential provision of the Agreement, and not with the offense given to his former workmates and manager. I find an appropriate penalty to be \$3,000, which should be paid in its entirety to the Applicant.
- [24] I also find it appropriate to issue a compliance order as sought by Bidvest requiring Mr Vivian to comply with the confidentiality provision of the mediated settlement agreement.

Orders

- [25] The following orders are made:
- (a) Graeme Vivian is ordered to pay a penalty in the amount of \$3,000, under s. 149(4) of the Act, the full amount to be paid to the Applicant, Bidvest New Zealand Limited.
 - (b) Mr Vivian is ordered to comply, with immediate and ongoing effect, with clause 1 (the confidentiality clause) of the mediated settlement agreement he entered into with Bidvest New Zealand Limited on 7 October 2014. This order is made under s. 137(1)(a)(iii) of the Act.

Costs

[26] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority