

**Attention is drawn to the order
prohibiting certain information
in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 35
5357529

BETWEEN

ALAN BREEN
Applicant

A N D

ADAMS PLUMBING AND
DRAINAGE (2010) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Brett Gray, Counsel for the Applicant
Pieter Brits, Counsel for the Respondent

Investigation Meeting 20 February 2012 in Dunedin

Submissions On the day

Date of Determination: 27 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alan Breen and Adams Plumbing and Drainage (2010) Limited (Adams Plumbing) were in an employment relationship. They reached an agreement about terms of settlement concerning the employment relationship outside of a formal mediation process. A mediator from the Department of Labour was asked under s.149 (1) of the Employment Relations Act 2000 to sign the agreed terms of settlement. The mediator signed the agreed terms of settlement under s.149 (1) and (3) on 17 February 2011. The settlement agreement was dated 16 February 2011 and the employment relationship did not continue from the date of the settlement agreement.

[2] Mr Breen said in his application lodged with the Authority that there were two provisions in the agreement that were not complied with as follows:

(4) The Respondent will place a written memo in all employees pay slips advising of the Applicant's resignation to take up new employment.

(6) The Respondent to facilitate the return of all personal tools and equipment owned by the Applicant from the Respondents premises.

[3] The remaining terms of settlement are prohibited from publication under clause 10(1) of the second schedule to the Employment Relations Act 2000.

[4] The parties attended further mediation in an attempt to resolve matters. There was progress but matters did not resolve.

[5] In an amended statement of problem lodged just before the investigation meeting Mr Breen sought a compliance order requiring that Adams Plumbing comply with clauses 4 and 6 of the settlement agreement. In the alternative if the personal equipment and tools could not be produced then Mr Breen wanted Adams Plumbing to pay an amount equal to the value of the tools to Mr Breen. A penalty was sought and an order that Adams Plumbing pay to the applicant his loss of income as a result of his inability to work at his trade on being deprived of his tools together with costs.

[6] Adams Plumbing says that it has done its utmost to comply with the terms of settlement and does not accept that there should be a compliance order or penalty awarded. It disputes Mr Breen's ownership of the tools he wants. It does not accept that the Authority has jurisdiction to grant the orders in the form sought by Mr Breen.

[7] The parties did attend a further mediation before the investigation meeting and some progress was made but matters were still not resolved.

The Issues

[8] The Authority will need to consider the following issues in this matter:

- Has there been compliance with clauses 4 and 6 of the settlement agreement?
- If the clauses have not been complied with should an order be made and a penalty awarded? This includes consideration of the extent of the jurisdiction of the Authority to grant remedies for a breach of the settlement agreement.

Has there been compliance with clauses 4 and 6 of the settlement agreement?

[9] Mr Breen accepts that clause 4 of the settlement agreement has now been complied with. There was some delay in complying with the requirements of this clause. An all up staff meeting was convened and employees told at that meeting about the circumstances of Mr Breen departing the company. When advised that strict compliance with clause 4 was required the company attended to this on the payslips of each employee. The circumstances are not such so as to attract a penalty.

[10] Mr Breen says that clause 6 of the agreement has not been complied with. Some tools have been returned to him but he says that there are a number that have not.

[11] The managing director of Adams Plumbing, Mark Preston relies on a list of tools Mr Breen provided at the meeting in early February 2011 at which agreement to the terms of settlement was reached. He says the tools on the list were immediately provided to Mr Breen but that list has subsequently been added to several times and in his view casts doubt on the validity of the claim for the tools and has also impacted on the ability for compliance. He also disputes that tools that are marked on a list as still not returned were ever on site and/or that the tools the majority of which Mr Breen says were in his work Ute actually belong to Mr Breen. Mr Preston says that he returned what he could clearly identify as Mr Breen's tools.

[12] Adams Plumbing and Drainage (2010) Limited purchased the business of Adams Plumbing and Drainage Limited as a going concern – sale and purchase agreement dated 21 December 2009. Mr Breen had at this time worked for several years for Adams Plumbing and Drainage Limited and then continued to be employed by Adams Plumbing from 11 January 2010. Prior to the sale the previous owner Chris Adams had prepared a stock and plant list of Adams Plumbing and Drainage Limited.

[13] On 23 January 2010 Mr Breen and Mr Preston reviewed the plant list together. Mr Breen identified tools that were his own on the list and these were marked on the

list. Mr Preston says that Mr Breen then gave him a list which he attached to his statement as List D as tools to be excluded from the sale and purchase agreement.

[14] Mr Breen says that he had set out some items on list D that he had on site for which he wanted to be compensated for letting the company use them.

[15] The items on the stock and plant list are a complete list of what was owned by the company at the time of the sale. It does not necessarily follow that all of what is owned by Mr Breen appears on the list and in fact I find that it is less likely.

[16] The stock and plant list reflects the following belonging to Mr Breen, one small angle grinder metabo, small trolley jack, LPG gas plant, Hitachi Angle buffer, air sander, two step ladders, steel table and vice, one rake and one broom and a battery charger. Those items therefore could be excluded from the sale and purchase agreement because they belonged to Mr Breen and were clearly identified in that manner on the list after discussion with him.

[17] List D is made up of items not on the stock and plant list including a Drill Press, large drill selection, sanding polishing machine, ¾ drive socket set and an air scraper. The evidence supported that most of the items of List D were to be found in the workshop rather than in Mr Breen's work Ute. Whilst List D is made up of Mr Breen's tools I am not satisfied that it was ever intended to be a full list of tools he owned and had with him whilst he worked for Adams Plumbing. In support of that Mr Breen does not include items on that list that Adams Plumbing accepted from a later list "G" were his, the large steel bench and small service trolley, Bosch 125mm angel grinder and CT Primer used on the Sumitomo digger.

[18] There was reference to Mr Breen having personal tools in both the workshop and his work Ute in a letter dated 21 January 2011 from Mr Gray to Mr Preston sent before the meeting at which the terms of settlement were agreed. I found Mr Preston's evidence that the first he knew of Mr Breen's view that he had tools in the Ute was after the terms of settlement had been entered into therefore less likely.

[19] A meeting took place on 3 February 2011 between Mr Preston, a human resource advisor for Adams Plumbing, Murray Dixon, Mr Breen and Mr Gray at

which agreed terms of settlement were discussed. List E was provided at that meeting which was identical in nature to List D. Mr Preston says that after the settlement agreement was signed those tools were given to Mr Breen. Mr Breen accepts, with the exception of the ¾ drive socket set they were returned.

[20] After settlement on 17 February 2011 and return of those tools there was further correspondence between respective counsel.

[21] In a letter dated 2 March 2011 Mr Brits wrote to Mr Gray. He accepted that it was up to his client to facilitate the return of all personal tools and equipment owned by Mr Breen but did not accept that Mr Breen should be allowed to attend the property and simply point out tools that he believed belonged to him. The letter provided that Mr Breen was not allowed back on the premises under any circumstances and referred to the issue of a Trespass notice. Mr Brits further stated that it was for Mr Breen to prove to Adams Plumbing that he owned the tools and requested a list of personal tools and equipment that Mr Breen says he owned together with evidence that he in fact owned the items in question. Mr Preston in his evidence said that as far as he was concerned he had returned all of Mr Breen's tools as requested in List E. The letter from Mr Brits however makes no mention of that.

[22] There was a further letter dated 2 March 2011 sent to Mr Gray on the same date by Mr Brits following a visit by Mr Breen to an independent director of Adams Plumbing, Mr Black. Mr Breen had talked to Mr Black about the tool situation, attempting to give him a list of his tools. Mr Brits asked in his letter that Mr Breen not contact Mr Black again and that any list of tools was to be provided to Mr Brits.

[23] Mr Gray responded to Mr Brits by letter dated 10 March 2011 and enclosed a further list of tools stating amongst other matters the following in para. 6:

The onus is on your client to facilitate the return of our client's tools contained in the work ute together with the other items of plant.....It does not provide any mechanism for determining the ownership of tools. At the time of drafting same, it was not apparent that such a mechanism would be required. Your client's inexplicable refusal to accept our client's word and attendance on site to uplift these items has created this issue.

[24] Mr Brit responded to the letter by letter dated 11 March 2011. He advised that some of the items had already been returned and that his client did not dispute that the following items belonged to Mr Breen:

- Large steel bench on wheels and matching support bench
- Small service trolley
- Bosch 125mm angle grinder
- CT Primer used on Sumitomo digger

These were returned to Mr Breen. In relation to the other tools Mr Brits said that they were owned by Adams Plumbing.

[25] On 18 April 2011 Mr Gray responded to the letter stating that his client was still awaiting the return of all of his personal tools which were last seen in the Mitsubishi L200 Service Ute. He referred in his letter to the list of plant and equipment at the time of purchase by Adams Plumbing and stated that list and other labelling of Adams Plumbing tools would provide evidence as to which tools belong to Mr Breen and which to the company.

[26] On 21 April 2011 Mr Brits replied to Mr Gray and advised in a short letter that it was for Mr Gray's client to prove he owns the tools that he is alleging have not been returned to him. He said in his letter that his client was adamant that the tools were tools purchased at the time of handover so ownership is in dispute.

[27] Matters were then left until the proceedings were lodged with the Employment Relations Authority in September 2011.

[28] After a telephone conference with the Authority both parties agreed to and did attend mediation before the Authority investigation meeting.

[29] There was some suggestion from the evidence of the applicant and from Mr Gray's submissions that there was agreement reached between the parties about the value to be attributed to the tools if they were not returned. Mr Preston did not accept that there was an agreement and there was no further written settlement

agreement. I do not find that there was a further and different agreement reached about the tools following the second mediation.

[30] There is agreement that some of the tools and personal items on Mr Breen's final list have not been returned. Some tools on the list are currently in a white container at the premises of Adams Plumbing. These are tools that Mr Breen and Mr Preston found when they both attended together at the site shortly before the Authority investigation meeting. There are also some tools in a red/orange container. These are tools not on the list but Mr Breen said they belonged to him when he attended at the premises of Adams Plumbing. Mr Preston does not accept that he conceded Mr Breen owned the tools in the red/orange bin.

[31] The following items on Mr Breen's list were not found at the workshop:

- Battery Razor
- Leatherman Multi Tool
- Tap Dwang
- Assorted bearing pullers
- Repco $\frac{3}{4}$ socket set
- Crow Bar 1.8m
- Crow Bar 1.2 metre
- Jumper leads 4metre in holder under bonnet of ute
- Cold Chisels
- Tyre levers
- Claw Hammer
- Fencing Pliers
- Wad punch set
- Circular pliers (snap on)
- Headlight
- LED with battery pack on back
- Wire Stripper stainless steel
- Towing strop
- Two hook lifting chain 3m
- Spray gun
- LED work light

Conclusion as to breach of clause 6

[32] *Facilitate* is defined in the Oxford Concise English dictionary as *to make easy or easier*. With this definition in mind I have considered whether or not Adams Plumbing breached clause 6. Mr Breen was not allowed after signing the settlement agreement to return to the premises of Adams Plumbing to identify what he owned and have it returned to him. After attempting to discuss the tools issue with an independent director of Adams Plumbing he was served through his solicitor with a trespass notice. Mr Preston said that he did not want Mr Breen to come onto site saying he owned this tool and that tool without proof because, as I understood his evidence, he did not trust Mr Breen. Mr Breen could have come onto site and indicated the tools that he believed were his. Mr Preston could have agreed or disputed that Mr Breen owned the tools. He did not have to hand them over but the areas of agreement/disagreement would have been apparent from an early stage.

[33] Instead of being able to provide a list following a visual inspection Mr Breen had to compile a list from memory. This I found does account for the different lists and additional tools. Mr Breen impressed as a practical man who was very knowledgeable and specific about the tools that he said belonged to him and were still at Adams Plumbing. He would have been assisted by being allowed to visit the premises and take a note of the tools he claimed were his.

[34] Many of the tools Mr Breen said he owns were described by him as being in his work Ute. In the list of stock and plant there is a section that refers to *Alan's truck*. It specifically identifies an impact wrench and a dewalt kit and then refers to sundries with a value of \$200. Mr Preston said that he considered he had bought all the tools in the Ute for \$200. He did agree though under questioning that the previous owner of Adams Plumbing Chris Adams may have had a view on what tools were referred to but was not asked. Mr Preston said that after Mr Breen left, Mr Breen's role was disestablished but that he did not undertake a stock take of the items removed from the Ute or retain them separately until the tool issue could be resolved. Mr Breen said that the tools he used as a mechanic were different to those used in plumbing and that Adams Plumbing did not have many small hand tools. I was not

satisfied from the evidence and find it unlikely that Mr Breen simply made up an entire list of tools that did not in fact belong to him.

[35] After Mr Breen was advised he could not go onto the site to identify tools he provided a list of tools. He was then advised that he had to prove ownership of the items. The evidence supports that whilst Adams Plumbing may have marked its bigger tools it did not tend to mark its hand tools and Mr Breen did not generally mark his own tools. Mr Breen has to establish ownership of his tools. The company accepted that some of the tools were his and have returned them. There was however other steps the company could have taken to facilitate the return of tools and personal equipment belonging to Mr Breen. There was a stock list and a previous owner who could have had a view about the tools and equipment. There was a value of \$200 on tools Adams Plumbing owned in the Ute. Some care could have been taken to record the tools particularly in the Ute when Mr Breen left his employment but was not.

[36] Adams Plumbing would have facilitated the return of tools if Mr Breen had been allowed on site, not to simply take whatever he wanted, but to prepare a list for both parties to consider at an early stage. There were multiple and growing lists but I find that occurred because Mr Breen was not allowed on site and had to prepare those by memory. Mr Breen was then advised on providing an initial list of tools that a large number on his list were the property of Adams Plumbing. I find that when all the evidence is considered Adams Plumbing did not facilitate the return of all Mr Breen's tools and equipment from its premises. I find that Adams Plumbing breached clause 6.

Should there be an order for compliance with clause 6 and a penalty awarded?

[37] I shall start with the extent of the jurisdiction of the Authority to grant remedies for a breach of a settlement agreement. This was set out by the Full Court of the Employment Court in *South Tranz Ltd v Strait Freight Limited* [2007] ERNZ 704. The Employment Court held that where the parties have concluded an agreement which is enforceable under s149 (3) the only means of enforcement available are those provided in s151 of the Act. In this case, as in *South Tranz Ltd*, the terms of the agreement found to have been breached did not require the payment of money but the return of tool and equipment. The only remedy is to order compliance with the

breached term. Payment for example of the value of those tools is not the agreement the parties concluded but a new and different matter and an order for compliance cannot be made in relation to payment of a sum to the value of the tools under s137. The Authority has no jurisdiction to make an order for damages as a remedy for a breach of a settlement agreement. Mr Breen told me he wanted compensation for hurt and humiliation but the Authority has no jurisdiction in that regard.

[38] I am not prepared to order compliance in relation to the tools Mr Breen says are still outstanding because there would be no practical benefit in doing so. Both Mr Breen and Mr Preston have looked for them and they were not found.

[39] I now turn to the red container that has in it tools Mr Breen saw on his visit and said were his. I find that this is a case where a line had to be drawn in the sand about which tools Mr Breen owned and were on site at Adams Plumbing. The final list was that line. I do not order compliance in respect of return of the tools in the red/orange container. Adams Plumbing has two weeks from the date of this determination to return to Mr Breen the tools in the white container failing which leave is reserved for Mr Gray to return to the Authority for an order for compliance.

Penalty

[40] The Authority has jurisdiction to consider a penalty where there has been a breach of an agreed term of settlement where subsection (3) applies as it does in this case under s.149 (4) of the Employment Relations Act 2000.

[41] I am satisfied that the action for the recovery of a penalty was commenced within 12 months after the date when the cause of action first became known.

[42] The Authority will not always impose a penalty where there has been a breach of a settlement agreement. It will generally look for some deliberate or wilful behaviour in relation to the circumstances that gave rise to the breach. It was agreed as a term of settlement that Adams Plumbing would facilitate/make easy the return to Mr Breen of things that belonged to him. Instead I find that the deliberate decision not to allow Mr Breen on site at an early stage after settlement to identify what those items were resulted in a lack of clarity around establishing what property was owned

by Mr Breen and what by Adams Plumbing. This led to Mr Breen expanding his list as he recalled new tools and equipment from memory. Even if there had not been a site visit there would still have been facilitation if Adams Plumbing had protected the tools removed from the Ute and prepared a list of them in the knowledge that Mr Breen said a large number of his tools were in the Ute. That did not happen either. There was also no attempt to clarify what Adams Plumbing had purchased for \$200 in the Ute Mr Breen used whilst employed and what therefore was Mr Breen's over and above that amount. This was in circumstances where Mr Breen had been generous in allowing Adams Plumbing and its predecessor the use of his tools over a long period. This was not a situation where an employee only wanted to recover a few items. Mr Breen believes he owns a significant number of tools at Adams Plumbing that would be expensive to replace and that have not been returned.

[43] I do take into account that some tools were returned but it is now almost inevitable that Mr Breen will not be able to recover all his property given the passage of time. He has suffered harm therefore from the breach of his settlement agreement from deliberate decisions made at an early stage by Adams Plumbing. I find that there should be a penalty imposed and that it should be paid in whole to Mr Breen.

[44] I order Adams Plumbing and Drainage (2010) Limited to pay into the Authority a penalty in the sum of \$2500 and then the Authority orders that the whole of that penalty is to be paid to Alan Breen under s.136(2).

Costs

[45] I would encourage the parties to reach agreement about costs failing which Mr Gray has until 12 March 2012 to lodge and serve submission as to costs and Mr Brits has until 26 March 2012 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority