

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2022] NZERA 48
3144002

BETWEEN	DCB Applicant
AND	RTS Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Matt Belesky, counsel for the Applicant Alistair Hall, counsel for the Respondent
Investigation Meeting:	1 November 2021
Submissions received:	At the hearing
Determination:	22 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 3 September 2020, the Applicant, DCB, and the Respondent, RTS entered into a record of settlement (“the settlement agreement”) under section 149 of the Employment Relations Act 2000 (“the Act”). A Ministry of Business, Innovation and Employment mediator certified their agreement under s 149 of the Act. The effect of certification is that the terms of the settlement agreement were final and binding and could only be brought before the Authority for the purposes of enforcement.

[2] DCB says the settlement agreement was breached, evidenced by a file note recorded by an HR advisor, from DCB's new employer, setting out a conversation with the RTS' CEO, the previous employer, about DCB.

[3] RTS accepts the conversation took place and that there was a breach of the settlement agreement in relation to a financial figure being discussed. It said the breach occurred because of a mistake made by its CEO which led him to believe he was able to speak freely about DCB. Beyond the accepted breach, RTS says there were no additional breaches.

[4] RTS therefore asserts the breach was inadvertent and minor and should not attract any penalty or in the event a penalty is warranted, it should be low to reflect this.

[5] The DCB says the breach was intentional seeks a determination confirming there was a breach, a compliance order, penalties and costs.

Non-publication orders?

[6] DCB requested non-publication of names and identifying details of the parties because identifying DCB may cause damage and harm to her current employment relationship. Non-publication of the settlement agreement was also sought. RTS does not oppose this application but seeks that those orders extend to both parties.

[7] The starting point when considering non-publication is open justice. However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.¹

[8] The circumstances in this case justify departure from the principle of open justice because the nature of the matter before the Authority means that matters that would ordinarily be confidential between the parties and protected by a s149 settlement agreement have had to be examined.

¹ *Erceg v Erceg* [2016] NZSC 135 at [3].

[9] While I am reluctant to make orders in relation to identifying the Respondent, it became evident during the hearing that identification of RTS would likely lead to identification of DCB because of the type of work and the networks between the organisations involved.

[10] I make an order under clause 10(1) of schedule 2 to the Act, that publication of all or any part of any evidence given including names and identifying details that might identify DCB are prohibited from publication, this includes the name of the Respondent and its employees.

[11] While the relevant clauses of the settlement agreement are disclosed for the purposes of this determining this matter, I also prohibit from publication the balance of the settlement agreement.

The Authority's investigation

[12] For the Authority's investigation, written witness statements were filed by DCB and RTS's CEO. They both answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[13] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[14] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Background

[15] DCB was employed as a Manager Policy and Strategy by RTS and resigned on 4 September 2020. While the parties agreed their terms of settlement were to be confidential, the following clauses are disclosed for the purposes of this determination:

1. These terms of settlement and all matters discussed at mediation shall remain, as far as the law allows, confidential to the parties.

2. This is a full and final settlement of any claims either party may bring against the other both now and in the future arising out of the Applicant's employment with the Respondent and the ending thereof.

...

5. The Respondent will, within seven days of the date of settlement, provide to the Applicant, on letterhead, a certificate of service document. This document will provide dates of employment, position held, duties performed and that the Applicant left by way of resignation. On any enquiry the Respondent will say that it is policy not to give personal references but will confirm the contents of the certificate of service.

...

[16] The settlement agreement was a full and final settlement of all and any claims either party may have against the other. The agreement also prohibited disclosure of all matters arising from mediation and what could be said in response to "any enquiry" was tightly controlled by clause 5. Only the information in the certificate of service could be discussed and that included the fact that DCB left by way of resignation.

[17] DCB said the issues discussed at mediation were primarily the deterioration in the relationship between her and her manager at RTS, and the personal grievance DCB had raised against RTS. DCB said other issues were also discussed and described them as "noise".

[18] On 5 October 2020, DCB commenced new employment. At some point prior to 14 April 2021, the CEO of another organisation contacted RTS's CEO, noting that he knew the new employer was "having problems" with DCB and asked if RTS's CEO would talk confidentially about DCB to the new employer.

[19] RTS's CEO said, knowing there was a mediated settlement agreement in place he checked whether there was any issue with him talking to the new employer. He thought he was told there was no "non-disclosure" clause in the settlement agreement but in fact he now believes the word may have been "non-disparagement".

[20] RTS's position is that the CEO acted on a miscommunication. He believed he was able to respond to the new employer honestly and fully when requested to provide information and because he was told it was to be a confidential conversation.

[21] On 14 April 2021, the HR advisor at DCB's new place of employment, spoke with the RTS's CEO, for the purpose obtaining information about the DCB. The HR advisor did not give evidence, but her file note of the conversation was provided to the Authority. The relevant excerpts about the parameters of the conversation are as follows:

Mr [X], the Chief Executive of [RTS] returned my call at approximately 1.12pm today. I had telephoned earlier in the day to advise him that our legal counsel, [name of legal counsel] would be calling about DCB, a former employee at RTS to confirm the date DCB had left RTS.

[Mr X, CEO of RTS] clarified that he could not clearly understand the voice message that had been left by [name of legal counsel] but had understood the one I left, hence his returning my call.

I advised [the CEO of RTS] that we were in an employment investigation with DCB (he was already aware of that) and we would respect any privacy and settlement issues. I had two questions to ask. The first was, when did DCB leave RTS and the second, was there a disciplinary process under way prior to [that] departure.

...

[22] It appears the intention was that the legal counsel, acting for the new employer would call the CEO from RTS to confirm the date that DCB left her employment. The HR advisor ended up speaking directly to RTS' CEO because he telephoned her back instead of legal counsel. RTS's CEO said he was confused about the voice mail messages.

[23] In any event there were two specific questions asked by the HR advisor, being what date DCB left, and secondly was there a disciplinary investigation into DCB's conduct before she left. The rest of the file note records the conversation from the HR advisor's perspective. What is set out is a wide ranging conversation, with RTS's CEO's unfettered opinion of DCB's management style and character traits conveyed in a way that can be described as prejudicial to DCB.

[24] RTS's CEO recalled being asked some questions but said it was more of a general conversation about DCB. At the end of the conversation, RTS's CEO referred to a financial amount and accepts this was in breach of the settlement agreement.

[25] DCB gave evidence that some of the matters she described as "noise" were referred to in the file note and by the CEO in his evidence. RTS's CEO did not have knowledge of what was discussed at mediation.

[26] The CEO said he was not given an opportunity to review or correct the record of the conversation set out in the file note or told it was to be used openly for employment purposes by DCB's new employer.

[27] Having said that RTS's CEO did accept that, overall, the file note was an accurate reflection of his view of DCB in the employment environment. He could not recall using some of the exact words recorded in the file note but confirmed to me that "in the round" those words represented his opinion of DCB and what he intended to convey about her.

[28] RTS's CEO also said in his experience it is common for information to be shared informally and confidentially at high levels between organisations. In this case he provided information about RTS' experience with DCB, because a peer had asked him, and he shared this information to be of assistance to a new employer, who he was led to believe was also experiencing similar problems.

[29] I note at this point that the peer he referred to was the CEO at a different but similar organisation, and not from DCB's actual new employer.

[30] On 16 June 2021, DCB received a letter from her new employer, attaching the file note and raising concerns with her arising from the content of the file note. DCB filed her statement of problem in the Authority on 21 June 2021.

Breaches of the settlement agreement?

[31] Section 148 of the Act makes it mandatory to keep confidential all information created or made for the purposes of mediation and it was accepted by RTS it had breached clause 1 of the settlement agreement, when the financial figure was disclosed.

[32] The conversation and disclosures were wide ranging and by RTS's CEO's own admission he did not know what was in the record of settlement or discussed at mediation and did not check either before providing the information.

[33] On that basis I am satisfied that it is more likely than not that matters discussed at mediation, were also disclosed, including matters described as "noise" by DCB.

[34] On any enquiry, RTS was only able to provide the information set out in the certificate of service and the fact that DCB left by way of resignation. RTS's CEO instead provided much more than what was permitted.

[35] In addition, what is portrayed in the file note, about the way in which the employment relationship ended is something other than resignation. RTS's CEO was also mistaken in thinking that the absence of a non-disparagement clause meant that he could speak freely. The absence of a non-disparagement clause could not alter the parameters of what could be discussed because of the way clause 5 of the settlement agreement was drafted.

[36] I am satisfied on the balance of probabilities that there were breaches of clauses 1 and 5 of the settlement agreement.

Penalty?

[37] A penalty was sought by DCB of \$20,000. RTS opposed any penalty being awarded but if one was to be awarded, it is submitted that it should be low to reflect the single breach caused by a mistaken belief that RTS's CEO could speak freely.

[38] A person who breaches an agreed term of a s 149 agreement is liable to a penalty.² The maximum penalty is \$20,000 in the case of a company.³ The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁴

² Employment Relations Act 2000, s 149(4).

³ Employment Relations Act 2000, s 135(2)(a).

⁴ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

[39] In determining the quantum of penalties to be imposed, if any, s 133A of the Act sets out the relevant matters the Authority is to have regard to as follows:

- (a) The object stated in section 3; and
- (b) The nature and extent of the breach or involvement in the breach; and
- (c) Whether the breach was intentional, inadvertent, or negligent; and
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or person involved in the breach, because of the breach or involvement in the breach; and
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[40] Guidance for the purposes of determining whether a penalty for non-compliance with a s 149 agreement is appropriate, and if so at what quantum, is set out in a decision of the Employment Court, *ITE v ALA*,⁵ as follows:

“[61] There are number of interlinking principles underlying the imposition of a penalty under s 151 for non-compliance with a s 149 agreement. These principles can be discerned from the statutory scheme and case law. In determining an appropriate penalty a range of considerations will be relevant, including:

- To protect the finality and integrity of s 149 settlement agreements by deterring the individual transgressor and others from similar breaches;
- To punish the transgressor;

⁵ *ITE v ALA* [2016] NZEmpC 42 at [61].

- Consistency with penalties imposed on others in similar circumstances;
- An assessment of the nature and extent of the breach, including whether it was deliberate, one-off or sustained, with maximum penalty being reserved for the worst cases;
- Any steps taken by the transgressor to remedy the breach;
- Proportionality in the circumstances.”

[41] The Authority must also take account of the guidance set out in the relevant case law in relation to penalties in general, including *Borsboom v Preet PVT Ltd*, *A Labour Inspector v Prabh Limited*, and *A Labour Inspector v Daleson Investment Limited*.⁶

[42] In *Preet* the Employment Court set out a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards:

- a. Step 1 – Identify the nature and number of breaches.
- b. Step 2 – Assess the severity of breaches considering both aggravating and mitigating factors.
- c. Step 3 – Consider the means and ability of the respondent to pay.
- d. Step 4 – Ensure that the amount arrived at after the first three steps is proportionate to other cases and the extent of the breaches.

Number and nature of breaches

[43] Two clauses in the settlement agreement have been breached. Matters discussed at mediation (described as “noise” by DCB and not refuted by RTS’s CEO in his evidence), and the financial settlement figure are both breaches of clause 1. Clause 5 was breached because a significant amount of information outside the parameters about what could be said “on any enquiry” about DCB was also provided.

⁶ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143; *A Labour Inspector v Daleson Investment Limited* [2018] NZEmpC 110; and *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

[44] Although there were a number of breaches, they occurred in the context of one conversation, on one occasion, and I consider because of that it is appropriate to globalise the breaches to one breach.

Nature and extent of any loss or damage

[45] It was accepted that the conversation caused consequences for DCB but it is submitted by RTS these were not adverse consequences. They say DCB was already under investigation by her new employer so any consequences she was suffering, were of her own doing and any resulting adverse consequences were not solely caused by RTS.

[46] Given that any employment concerns raised with DCB by her new employer must be confidential, neither RTS or the Authority should have any actual knowledge about whether they exist or if they do whether adverse consequences will result.

[47] Leaving that to one side, the evidence before the Authority of the correspondence from DCB's new employer to DCB, shows there were initially employment concerns and now allegations about DCB's honesty and integrity because of what RTS disclosed. This is an adverse consequence and one that is continuing consequence.

[48] DCB set out the loss and damage caused to her by the disclosure of this information in her brief of evidence. No steps were taken to mitigate any adverse consequences of the breaches.

Aggravating features

[49] The aggravating features are the undermining of the finality and integrity of s149 agreements, the fact the conversation occurred seven months after DCB had commenced new employment, that the breaches were not inadvertent (and only just stopped short of being deliberate), that the breaches will be ongoing as the information cannot be removed or taken back and they have had serious consequences for DCB.

[50] Having considered s 133A of the Act and the guidance set out in *ITA v ALA* and *Preet*, I have adopted a starting point of 80 per-cent for the breach of s 149(3) of the Act. This means that at the starting point, the proposed penalties to be imposed on RTS amount to \$16,000.00.

Consistency

[51] While counsel have assisted me with cases, there are very few that are similar enough to the circumstances of this case to be of much assistance. Most cases appear to have involved a combination of breaches relating to both confidentiality and non-disparagement, often with relatively unique fact patterns.

[52] In the case of *ITE v ALA*⁷ the Employment Court held that the Authority's award⁸ of \$6,000.00 was appropriate in a matter involving several intentional breaches, including a video posted on the internet which was found to be in breach of the settlement agreement.

[53] In *Van Altvorst v Kids Count Limited*,⁹ the respondent employer attached a copy of a settlement agreement to its online mandatory report form, which it submitted to the Teaching Council and disclosed the amount it had paid to the employee. These were found not to be deliberate or intentional breaches and the employer may have misunderstood what she was required to disclose to the Teaching Council, having sought legal advice.

[54] While *Van Altvorst* is possibly based on a mistake made after taking legal advice, the mistakes made with DCB's settlement agreement seems unusual for an experienced CEO. There was no suggestion legal advice was sought until after the conversation when all enquiries were referred to RTS lawyer. The other point to note about *Van Altvorst* is that it involved mandatory reporting required by statute which placed obligations on the respondent to provide some of the information.

[55] While RTS's CEO, was approached and asked to comment confidentially, there was nothing to compel him to provide the information other than his willingness to engage.

[56] In *Van Altvorst* the breach was able to be mitigated by the Teaching Council removing the settlement agreement from the mandatory report so the only continuing aspect to the breach was the financial figure. That is in contrast with DCB's position in that she now faces employment allegations from her new employer.

[57] *ITE v ALA* is a more flagrant and deliberate breach of a settlement agreement in that it involves purposeful posting of an online video. In *Van Altvorst* the harm was able to be

⁷ Above n5.

⁸ *P v Q* [2015] NZERA Auckland 181.

⁹ *Van Altvorst v Kids Count Limited* [2019] NZERA 642.

mitigated to a large degree. I see this matter falling somewhere in between those two cases but closer to *ITE v ALA*. Noting that *ITE v ALA* involved intentional conduct rather than negligence, the Employment Court considered sixty per-cent of the maximum an appropriate penalty.

Mitigating circumstances

[58] This was a one-off conversation and there is no evidence that RTS has previously had a penalty imposed on it by the Authority for breaching a settlement agreement. There is no issue with the financial circumstances of the Respondent.

Proportionality of outcome

[59] Noting that the purpose of penalties is both punishment and to deter the conduct, taking all relevant factors into consideration, it is appropriate to impose a significant but proportional penalty on RTS.

[60] The imposition of penalties in this case is consistent with the s 3 objectives of the Act. These include (among other things):

- (a) Promoting mediation as the primary problem solving mechanism;
- (b) Recognising the implied mutual obligations of trust and confidence;
- (c) Supporting good faith behaviour; and
- (d) Acknowledging the inherent inequality of power in employment relationships.

[61] Taking all of the factors into account, standing back and considering the overall merits of the case, the Authority considers it appropriate to impose a penalty on RTS of \$12,000.00.

[62] This penalty is set at a 60 per-cent of the maximum available that takes into account that the breaches were at best negligent and serious in that they are and will be on going and have caused significant direct consequences for DCB.

Compliance order sought

[63] A compliance order may be made where any person has not observed or complied with a provision of an employment agreement or any terms of settlement or decision that is a breach of s 149(3), and s 151 provides, may be enforced by compliance order.

[64] I have already dealt with the issue of breach. I am satisfied that compliance orders are necessary given that I have found there to be more than one breach, the seriousness of these breaches, and DCB's evidence was that these conversations happen regularly between senior members of organisations with agreement between participants that matters are to remain confidential.

[65] The submissions assert that DCB is the author of her own misfortune and does not come to the Authority with clean hands. This approach makes assumptions about matters that RTS cannot or should not know about and then seeks to use them to minimise its own conduct.

[66] DCB seeks a compliance order requiring to RTS to comply with all obligations under the terms of the settlement agreement and I am satisfied that this is necessary to prevent any future breach and to bring home to RTS the seriousness of its obligations. Any orders must be connected to the actual terms of settlement, and to the minimum extent required to ensure compliance.

[67] RTS is ordered to comply with all their obligations under the terms of the settlement agreement and the timeframe for compliance is immediate.

Orders

[68] RTS is ordered to pay a penalty of \$12,000 of which \$8,000.00 is to be paid to the Employment Relations Authority by way of the Crown and \$4,000.00 to DCB within 28 days of this determination.

[69] The application for non-publication orders is granted. There is an order under clause 10(1) of schedule 2 to the Act, that publication of all or any part of any evidence given including names and identifying details that might identify DCB are prohibited from publication, this includes the name of the Respondent and its employees

[70] The balance of the settlement agreement is also prohibited from publication.

[71] RTS is ordered to comply with all of its obligations under the terms of the settlement agreement and the timeframe is immediate.

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

Sarah Kennedy
Member of the Employment Relations Authority