

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 101
5405772

BETWEEN J C CONTRACTING (NZ)
LIMITED
Applicant

A N D BRADLEY SMART
Respondent

Member of Authority: M B Loftus

Representatives: Shayne Boyce, Advocate for Applicant
Bradley Smart on his own behalf

Investigation Meeting: 30 May 2013 at Nelson

Submissions Received: At the investigation

Date of Determination: 6 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, J C Contracting (NZ) Limited, claims the respondent, Mr Smart, has breached a term contained in a mediated settlement.

[2] Mr Smart denies the allegation.

Background

[3] Various tensions arose between the parties during 2012 and resulted in Mr Smart's dismissal. He took a personal grievance which was mediated on 15 November 2012.

[4] The dismissal was rescinded and replaced with a resignation. Other provisions required J C Contracting pay a small compensatory sum and a contribution toward Mr

Smart's legal expenses. Also contained within the record of settlement was a clause reading:

These terms of settlement and all matters discussed at mediation shall remain confidential to the parties.

[5] J C Contracting claims Mr Smart has breached the confidentiality provision.

[6] After leaving the mediation, Mr Smart returned to his new place of work where those present were well aware of the reason for his absence that morning. Mr Smart accepts he was *dirty* on J C Contracting and had previously given his new colleagues a detailed appraisal of his dismissal and the issues that led to it.

[7] It is said that on arrival Mr Smart said *woohoo, I won my case* to his new employer, Mr Jason Garland.

[8] Mr Garland, goes on to say he then heard, but did not directly observe, another of the employees asking how much Mr Smart had received. Mr Garland says the response was *compared to the money I'm making here, I've got enough to last me till Easter*.

[9] Mr Smart is adamant he made neither comment. He says the first person he saw when he arrived was not Mr Garland but his brother, Tony Garland. Mr Smart says Tony yelled *did you win?* to which he replied *yes, I wasn't sacked*. Mr Smart says Tony then commented it would be his (Smart's) shout at the pub to which he responded *I doubt it*. Mr Smart says Mr Garland then asked how much, to which he responded *I cannot talk about it*.

[10] By this time there were also tensions between Mr Smart and Mr Garland which led to the later contacting J C Contracting in order to get some guidance as to how he may handle Mr Smart. He raised the fact he was aware of the mediation but was told by J C Contracting they could not, and would not, discuss the issues. J C Contracting suggested Mr Garland contact Ms Boyce for assistance.

[11] Mr Garland did and it was while discussing his concerns with Ms Boyce he advised her of the comments he says Mr Smart made on 15 November. Ms Boyce passed the information to J C Contracting which led to this application.

[12] In the interim, and prior to gaining knowledge of the alleged breach, J C Contracting had paid the compensatory sum. They had not paid the contribution towards legal costs. It remains unpaid and there is a dispute about the amount with the law firm having added an office expense fee not provided for in the settlement.

Determination

[13] Having observed the witnesses and listened to their oral evidence, I conclude Mr Smart did breach the confidentiality clause in the mediated settlement. As he acknowledged he was *dirty* on J C Contracting and told those about him. He was also open about going to mediation, which put him in a situation where he would face questions from his colleagues. In the circumstances I have no doubt he gave air to the jubilation he admits he felt.

[14] More importantly, there is the fact Mr Smart admits he claimed a win which is, in itself, a breach and that he disclosed one element of the settlement – the replacing of dismissal with resignation.

[15] With respect to the disputed allegations Mr Smart disclosed the fact of a monetary payment though not the amount, I prefer the applicant's evidence. Mr Garland is a third party. His evidence was plausible and remained consistent. There is also no evidence of any reasons why he would have made the disclosure to Ms Boyce without factual foundation. It does not make sense for him to have fabricated the allegation.

[16] The conclusion Mr Smart breached the confidentiality provision raises the question of remedies.

[17] J C Contracting asks that I:

- a. Order that Mr Smart pay a penalty in the sum of \$10,000;
- b. Order the penalty be paid to J C Contracting in accordance with the provisions of section 136(2) of the Employment Relations Act 2000 (ERA);
- c. Reimburse the compensatory payment to J C Contracting;

- d. Cancel the requirement that J C Contracting pay a contribution towards Mr Smart's legal costs;
- e. Declare that Mr Smart has breached the terms of settlement; and
- f. Make an award of costs in favour of J C Contracting.

[18] The fifth remedy has already been dealt with. I have concluded Mr Smart breached the terms of settlement.

[19] The third and fourth remedies are not ones I can consider. Combined they effectively amount to a cancellation of the terms of settlement and Ms Boyce confirmed that is what I am being asked to do. The settlement is a contract between the parties and to cancel it I would have to exercise powers granted under the Contractual Remedies Act 1977. While the Authority may apply the provisions of the Contractual Remedies Act (ERA, section 162), the power is limited by an express preclusion against doing so in respect to mediated terms of settlement (ERA, section 149(3)).

[20] The above conclusion means the issue of unpaid costs remains. J C Contracting remains obliged to honour this clause in the agreement, though only to the extent agreed.

[21] That leaves the claim for a penalty. The Authority is empowered to apply a penalty for breaches of settlement agreements entered into pursuant to section 149 of the ERA. Indeed, it is the only real remedy for such breaches.

[22] This is a settlement properly concluded in accordance with s.149. It was breached. Having considered the evidence I conclude a penalty of \$750 is appropriate.

[23] There is then the request I award any penalty to the applicant. By returning money to the applicant in this fashion I would, in effect, be nullifying the settlements effect. The result is no different from that which would occur if I were to apply provisions of the Contractual Remedies Act. I am precluded from doing that (19 above). In the absence of any other rational, or any evidence as to actual hurt or harm suffered by the applicant, I decline to do so.

Conclusion

[24] The respondent, Mr Bradley Smart, has breached a s.149 agreement he was a party to.

[25] As a result Mr Smart is ordered to pay a penalty of \$750 (seven hundred and fifty dollars). Payment is to be made to the Crown via the Authority.

[26] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority