

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 27
5599356

BETWEEN LEES CONCRETE PUMPS
 LIMITED
 Applicant

A N D JUSTIN MONK
 Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Sandford, Counsel for Applicant
 Ken Usmar, Advocate for Respondent

Investigation Meeting: 20 January 2016 at Rotorua

Written Record of Oral 21 January 2016
Determination:

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Lees Concrete Pumps Limited (Lees Concrete) and Mr Justin Monk entered into a Record of Settlement under s.149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the parties and by a mediator from the Ministry of Business, Innovation and Employment on 17 November 2015.

[2] Lees Concrete claims that Mr Monk breached the Record of Settlement by sending two text messages to Mr Alex Tonihi on 18 November (the day after mediation). I do not set out the entire text message on the grounds it is offensive.

[3] Suffice to say, the text makes disparaging remarks about Mr Lees and one of the text messages claims "... got 15 lol ...". The parties acknowledge that the reference to "15" was factually incorrect and did not reflect the outcome of mediation.

[4] The number on the printout of the text which Lees Concrete presented to the Authority appears to be 0204 0859 524. Mr Monk says that was his previous phone number but he lost that phone sometime prior to 12 November 2015.

[5] Lees Concrete claims that the texts in issue breach clauses 1 and 5 of the Record of Settlement. Clause 1 requires the parties to keep the terms of settlement and all matters discussed in mediation confidential. Clause 5 requires both parties to not make any disparaging or negative comments about the other to a third party.

[6] Mr Usmar acknowledged that the texts appear to breach clauses 1 and 5 of the Record of Settlement. However Mr Monk denies having sent the text messages in issue. Mr Monk says that when his representative asked Lees Concrete to supply evidence to show that the text in issue had been sent by him (Mr Monk), Lees Concrete's counsel refused to do so. This made Mr Monk and his representative suspicious about the situation as it had been reported by Lees Concrete.

[7] Mr Monk produced to the Authority a written statement signed by Mr Tonihi which claims that he (Mr Tonihi) did not have anything to do with the text messages in issue. Mr Monk claims that Mr Tonihi volunteered this information (about the text message) to him (Mr Monk) while they were working at a Tauranga worksite together on 09 December 2012.

[8] Mr Monk claims that Mr Tonihi told him (Mr Monk) that Mr Scott Davies and Mr John Lees had taken his (Mr Tonihi's) mobile phone from him for seven days.

[9] During the Authority's investigation meeting, Mr Monk said that Mr Tonihi told him Mr Davies (who is Mr Tonihi's employer and who is a longstanding close friend of Mr Lees) sent the initial text asking about mediation to which the texts in issue responded. Mr Davies vehemently denied that.

[10] Mr Davies says he does not talk or write in the language used in the texts and he would not touch one of his employee's phones. Mr Tonihi did not attend the investigation meeting. The Authority was told that it was because he was attending a tangi. Mr Sanford says he was unaware that Mr Tonihi would not be at the investigation meeting until a few minutes before the meeting started.

[11] In terms of remedies, Lees Concrete asks that the Record of Settlement be set aside and/or amended because of the alleged breach of the agreed terms. Mr Sandford

acknowledged to the Authority that it does not have jurisdiction to provide these remedies even if Lees Concrete's claim succeeds.

[12] Mr Sandford initially sought a penalty against Mr Monk but that claim was not accepted by the Authority because it had not been identified in Lees Concrete's Statement of Problem so Mr Monk had not been able to put on notice of it before the investigation meeting. The penalty claim was therefore not before the Authority in terms of its current investigation meeting so the issues of penalties could not be investigated and/or determined.

[13] Mr Sandford then advised that Lees Concrete takes the alleged breaches very seriously so it would be happy with just a finding of liability in its favour.

[14] The Authority has been given a copy of a note dated 09 December 2015 which was written by Ms Samantha Hoyles which records the information that Mr Tonihi allegedly conveyed to Mr Monk that day. Ms Hoyles says that she wrote the following words in her handwriting on a piece of paper:

To whom it may concern. I Alex Tonihi had nothing to do with text sent in regards to case between John Lees and Justin Monk. Thank you. 09 December 2015.

[15] This document has the phone number 021 175 974 at the top and a signature in the bottom right hand corner. Ms Hoyles says that when she wrote the document out, there was no cellphone number at the top nor a signature at the bottom. Mr Monk claims that Mr Tonihi added these to the document himself to acknowledge its truthfulness.

[16] Mr Tonihi knew Mr Monk through his work as they came across each other occasionally. Mr Tonihi is a concrete placer so is employed at various sites throughout the Bay of Plenty and Waikato areas while Mr Monk is a concrete pumper so they occasionally worked on the same worksite at the same time (for different employers doing different concrete related activities).

[17] Mr Tonihi filed an affidavit which acknowledges he saw Mr Monk on 09 December while they were on the same worksite and that he wrote his cellphone number on a piece of paper Mr Monk gave him. Mr Tonihi says that was the only writing on the paper.

[18] Mr Tonihi's affidavit says that the note produced by Mr Monk to the Authority which has his (Mr Tonihi's) cellphone number written at the top and purportedly his signature at the bottom right hand side was not from him.

[19] Mr Tonihi claims in his affidavit that he did not write the message and the signature is not his signature. Mr Tonihi exhibited a copy of his New Zealand driver's licence to his affidavit which has his signature and he claimed that the two signatures are not similar. Mr Monk claims the signatures are the same or very similar.

[20] In his affidavit, Mr Tonihi denies telling Mr Monk that his (Mr Tonihi's) phone had been taken or even borrowed by Mr Davies and/or Mr Lees. Mr Tonihi says in his affidavit that even if it was proved that someone else had his phone (which he denies), the text message still came from Mr Monk.

[21] Mr Monk says that Mr Tonihi's affidavit evidence in support of Lees Concrete was provided only eight days after Mr Tonihi had signed the statement which Mr Monk has produced in support of his position.

[22] Mr Monk says that Mr Tonihi's change in position must have been influenced by Mr Lees and/or Mr Davies. Mr Monk says that Mr Tonihi was concerned about Mr Davies not seeing him when he added his cellphone number and signature to the note Ms Hoyles had written.

[23] Mr Monk says that when he saw Mr Tonihi at the service station on 09 December, he asked Mr Tonihi about the text message that had allegedly been sent from him (Mr Monk) to Mr Tonihi. Mr Monk says that Mr Tonihi told him he was aware of it but had nothing to do with it.

[24] Mr Monk says he then asked Mr Tonihi if he would be prepared to make a statement to that effect and when Mr Tonihi agreed he would, Mr Monk asked Ms Hoyles if she would write something up for Mr Tonihi to sign.

[25] Mr Monk claims that Mr Tonihi signed the statement and he wrote in his own handwriting his cellphone number at the top of the statement. Mr Tonihi did not attend the Authority so was unavailable to respond to that claim.

The issues

[26] The following issues are to be determined by the Authority:

- (a) Did Mr Monk breach the s.149 Record of Settlement?
- (b) If so, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

Did Mr Monk breach the s.149 Record of Settlement?

[27] Lees Concrete bears the onus of establishing on the balance of probabilities that Mr Monk sent the text messages in issue and that the text messages breached the Record of Settlement.

[28] The parties acknowledge the content of the texts did breach the Record of Settlement so the real issue is whether or not Lees Concrete has established to the required standard of proof that Mr Monk sent the texts in issue.

[29] I consider that Lees Concrete has not discharged its burden of proof because there is considerable uncertainty as to who created the text messages and sent them and the circumstances within which that occurred. Mr Monk says he would not be so silly as to immediately breach the Record of Settlement as he just wanted to put the whole situation behind him and start over.

[30] Mr Tonihi did not produce the phone with the original text messages on it so the Authority was left to view poor copy photos of what was said to have been on the screen of Mr Tonihi's mobile phone at the material time.

[31] There are conflicting versions of Mr Tonihi's evidence before the Authority which I consider, combined with his non-attendance at the Authority's investigation meeting, means this information must be treated with considerable caution. Although Mr Tonihi has filed an affidavit, Mr Monk has been prevented from testing that evidence which is of concern given it directly contradicts Mr Monk's evidence.

[32] Mr Tonihi is also an employee of Mr Davies' who in turn has a close friendship and collegial relationship with Mr Lees. In Mr Tonihi's absence the effect of such matters (if any) could not be satisfactorily explored. Accordingly, there remains a question mark about Mr Tonihi's involvement in the texts.

[33] I am also doubtful about Mr Tonihi's affidavit evidence that he did not sign the note which Mr Monk has produced to the Authority and which Ms Hoyles says she wrote. The reason for this doubt is that the cellphone number which Mr Tonihi admits to adding is written at the top of the page nice and neatly above the text (as in the words contained in the note).

[34] If Mr Tonihi's evidence was correct and he had merely written his cellphone number on a piece of paper, I consider it very unlikely that it would have been recorded in the position in which it currently appears.

[35] I also consider that the signature on the document appears to be a close match to the signature on Mr Tonihi's driver's licence. They are not sufficiently dissimilar to cause me to question whether or not they were signed by different people.

[36] Ms Hoyle is an independent third party and she impressed me as a credible neutral witness. She has no personal relationship with any of the parties although she sometimes works on worksite with them. This leads me to consider it more likely than not that Mr Monk's account of the note he produced from Mr Tonihi has some veracity.

[37] Mr Monk suggests that Lees Concrete created the texts in an attempt to avoid paying him the money owed under the Record of Settlement. Lees Concrete strongly denies that and notes that it has been continuing to fully comply with its obligations under the Record of Settlement.

[38] Whilst I can understand why Lees Concrete would be concerned about the content of the texts and why it would be suspicious of Mr Monk, suspicion and concern is insufficient to enable it to actually prove its claim to the required standard.

[39] The Authority must be satisfied it was more likely than not that Mr Monk sent the texts and I consider that the evidence did not meet that high standard. Lees Concrete's claim that Mr Monk breached the Record of Settlement therefore does not succeed.

What if any costs should be awarded?

[40] Mr Monk as the successful party is entitled to a contribution towards his actual costs. I do not consider there are any factors which warrant departing from the Authority's usual notional daily tariff based approach to costs.

[41] I am satisfied (upon production of GST invoices) that Mr Monk has incurred actual legal costs in excess of the tariff. The investigation meeting was 2.5 hours long and I award costs on a pro rata basis in accordance with the current daily tariff of \$3,500.

[42] Accordingly, Lees Concrete is ordered to pay Mr Monk \$1,250 towards his actual legal costs within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority