



alleges that the complaint came from Plumbing and Gas Works personally, whereas Mr Foote for Plumbing and Gas Works, told me that the complaint came from a member of the Waikato Master Plumbers Association and was processed by him since he was at the time Secretary of the Association.

[4] Mr Bryant responded to the complaint from the Plumbers Gas Fitters and Drainlayers Board ( the Board ) by letter dated 21 July 2010. In that letter Plumbing and Gas Works allege that Mr Bryant breached the terms of the settlement agreement executed between the parties on 9 July 2010 by, *inter alia*, communicating the terms of that agreement to the Board.

[5] Plumbing and Gas Works seek a penalty for the alleged breach of confidentiality, while Mr Bryant denies the breach and says the application to the Authority is activated by bad faith.

### **Issues**

[6] There are a number of factual matters on which the Authority needs to make a decision and it is useful to set out now the questions that the Authority must address:

- (a) Whose complaint to the Board was it?
- (b) What did Mr Bryant tell the Board?
- (c) What was Mr Bryant's motivation?
- (d) Does Plumbing and Gas Works have grounds for complaint?

### **Whose complaint to the Board was it?**

[7] The Authority is satisfied on the evidence it heard that the complaint was made to the Board by a member of the Waikato Master Plumbers Association via its Secretary for the time being, Mr Foote, who is, of course, the Manager of Plumbing and Gas Works. Mr Bryant thought it inappropriate that Mr Foote should deal with a complaint by a member of the Waikato Master Plumbers Association (the Association) when at the relevant time that that complaint was received, Mr Foote was engaged in his own issues with Mr Bryant by way of an employment relationship problem between his firm and Mr Bryant.

[8] The Authority agrees. It considers it was ill advised of Mr Foote to undertake to deal with the complaint, given that at the point at which the complaint was received by the Association, there were already employment relationship problems between Mr Bryant and Plumbing and Gas Works.

[9] Mr Foote told the Authority he was anxious to fulfil his obligations as Secretary of the Association having only just been elected and that is an understandable reaction, but it is the wrong one. Mr Foote should have excused himself on the basis that his firm had ongoing issues with Mr Bryant which might be seen by an outside observer as posing a conflict of interest. This is because by promoting a complaint against Mr Bryant when Mr Foote's own firm had its issues with Mr Bryant, it might be thought that Mr Foote was endeavouring to influence either or both proceeding, against Mr Bryant.

[10] Having said that, the Authority is not persuaded that Mr Foote acted out of malice, nor does the Authority accept Mr Bryant's contention that there was never an independent complainant and that the real complainant was actually Plumbing and Gas Works. That view was advanced by Mr Bryant both in oral evidence to the Authority and in the statement in reply; the Authority is not persuaded that view of Mr Bryant's can be supported. The evidence from Mr Foote was unequivocal, and on oath, that he simply dealt with a complaint from another member of the Association in his role as the Association Secretary. That evidence is accepted by the Authority at face value, although the Authority emphasises its view that it would have been better in all the circumstances if Mr Foote had stood aside.

[11] It is also appropriate to point out that Mr Foote was, at the relevant time, just the Secretary of the Association and the Association is, and was, a separate legal entity from the Board. The Board is a statutory entity charged with the task of managing the trades qualifications and other matters to do with the plumbing, gas fitting and drainlayers' trades while the Association is a trade association of plumbers in the Waikato area who elected Mr Foote to the office of Secretary prior to the events complained of. The Authority clarifies these issues because, again, in the statement of reply filed by Mr Bryant, he erroneously contends that Mr Foote was *the local President of the Board*.

**What did Mr Bryant tell the Board?**

[12] Mr Bryant's letter of 21 July 2010 was written to the Board in response to its earlier notification of a complaint having been received about Mr Bryant. The complaint, as notified to Mr Bryant, had Mr Foote's name on it. Mr Bryant assumed (erroneously) that Mr Foote was personally responsible for the complaint.

[13] As the Authority has already noted, Mr Foote was simply the messenger and no more than that. However, Mr Bryant thought that because the complaint had come from Mr Foote, Mr Foote had himself broken the terms of the settlement agreement between the parties and that as a consequence, in defending himself, Mr Bryant was entitled to refer to the settlement agreement between the parties.

[14] As the Authority has already made clear, Mr Bryant was mistaken about the genesis of the complaint to the Board; it had not come from Mr Foote in his own right but via Mr Foote from another member of the Association. It follows that there was no breach of the settlement agreement by Mr Foote as Mr Bryant alleged. All Mr Foote did was fulfil his office-holder obligations as a member of the executive of the Waikato Master Plumbers Association in forwarding to the Board a complaint about a tradesman who happened to be his current employee, Mr Bryant.

[15] In any event, what Mr Bryant did in his letter of 21 July 2010, amongst other things, was to seek to both explain and defend himself against the allegation that he was operating without the requisite licences. In the course of doing so, Mr Bryant wrote two paragraphs in his letter which are the nub of Mr Foote's complaint. Set out below are the two subject paragraphs:

*Confidentially I have just had resolved an unfair dismissal against Plumbing and Gas Works (owned by Mike Foote) in my favour. So I feel that this is a bit of a bad blood issue that has resulted from that.*

*Please do not pass this info on to anyone else (including Mike Foote) as its not common knowledge about the unfair dismissal as I'm not allowed to tell anyone due to being resolved, this was a clause in the contract that we signed.*

[16] It will be apparent from the foregoing paragraphs that Mr Bryant referred to the resolution of an *unfair* dismissal claim against Plumbing and Gas Works, claimed that that resolution was *in my favour* and alleged that the reason that the Board was being troubled with the complaint at all was because of *bad blood* between Mr Foote

and Mr Bryant. Further, it is apparent from the second paragraph that Mr Bryant knew that he had an obligation to keep the matter of the settlement agreement confidential.

[17] Mr Foote's evidence to the Authority was that he was particularly exercised by the contention that the complaint filed by him (but on behalf of someone else) had been activated by *bad blood* and that in referring to the dismissal as *unfair* and to settlement *in my favour*, Mr Bryant had attempted to blacken Mr Foote's name and damage his integrity with the Board. Mr Foote pointed out that as an office-holder of the Association, and a member in good standing, having his integrity questioned with the Board was profoundly damaging because he had regular contact with the Board.

### **What was Mr Bryant's motivation?**

[18] It will be plain from the two paragraphs that have been set out earlier in this determination that Mr Bryant was alleging that the explanation for the complaint being filed was not so much a legitimate concern about whether he was practising his trade without the requisite licence but rather an attempt by Mr Foote to blacken his name because of the employment relationship problems that Mr Bryant and Mr Foote were in the process of. Of course, it is apparent to the Authority that first, Mr Bryant acted in that way precisely because he believed (erroneously) that the complaint came from Mr Foote in person and not from Mr Foote as agent for someone else, and that as a consequence Mr Foote had himself breached the settlement agreement.

[19] As the Authority has already noted, that view is mistaken but it is an understandable mistake in the circumstances and it is a mistake that was effectively facilitated by Mr Foote's error of judgement in handling the complaint in the first place. It should have been apparent to Mr Foote that there was the possibility of his actions being misinterpreted when he undertook to personally refer this complaint.

[20] It is also apparent to the Authority that in engaging frankly with the Board, Mr Bryant believed that he was in a confidential environment. His email is to the Registrar of the Board who Mr Bryant told me he understood to be a qualified lawyer, and he went on to say that he *thought he was on safe ground talking to the Board in that way because it was a bit like talking to a doctor*. In essence, Mr Bryant thought that he could engage frankly with the Board without breaching his obligations.

**Does Plumbing and Gas Works have grounds for complaint?**

[21] The Authority is satisfied on the evidence before it that Mr Bryant did breach the settlement agreement between the parties but that he did that innocently in the mistaken belief that he was responding to a complaint from his former employer who he considered, on reasonable grounds, had already breached the settlement agreement.

[22] Mr Bryant's innocent motivation is a matter that the Authority is entitled to take into account in a penalty setting; Mr Bryant's view that in talking to an officer of a statutory board was like talking to a doctor, goes some distance to explaining the terms in which Mr Bryant expressed himself, the Authority having already concluded that the primary reason for Mr Bryant addressing the Board in this way at all was because of his conviction that the settlement agreement had already been breached by his former employer.

[23] It follows that the Authority is not persuaded that it should exercise its discretion in awarding a penalty against Mr Bryant for breaches of this settlement agreement, although the Authority has found that there was a technical breach of the agreement. Clearly, Mr Bryant knew the agreement was confidential (he says as much in his email to the Board) and the disclosure of the matters to the Board does, in the Authority's opinion, go further than Mr Bryant would have been entitled to say in the normal course of events. As Mr Foote correctly identifies, by claiming that the dismissal was *unfair* and that it was resolved *in my favour* Mr Bryant is expressing a conclusion about the settlement agreement which goes further than simply telling third parties that there was been a mediated settlement after a personal grievance was raised. That is as far as one can go and the use of expressions which qualify the nature of the resolution, as Mr Bryant has used, create an impression which Mr Foote is rightly anxious about.

[24] However, while Mr Bryant has, the Authority considers, breached the terms of the mediated settlement agreement by those expressions, the Authority is satisfied his motivation was innocent, particularly because of Mr Bryant's belief that in talking to the Registrar of the Board, he was effectively in a confidential forum. Furthermore, Mr Bryant's reference to the settlement agreement is primarily directed at addressing his perception (again an erroneous one) that Mr Foote was activated by bad faith in promoting the complaint against him. Mr Bryant thought that by referring the Board

to the settlement agreement between the parties, he could to some extent explain himself and point out why the complaint had been mounted at all.

[25] Finally, even if the Authority is in error in failing to conclude that a breach of the settlement agreement ought to be subject to a penalty against Mr Bryant, the fact is that the Authority has found as a fact that Mr Foote, by wrongly agreeing to promote the complaint against Mr Bryant from a third party, effectively created the very basis for this claim against Mr Bryant because had Mr Foote not been the person who promoted the complaint to the Board, Mr Bryant would have had no purpose at all in referring to the settlement agreement. It follows that if there is more than a technical breach which ought to attract a penalty in the normal course, in the present case there has been a contribution from Mr Foote of such magnitude that by his own actions, he effectively created the environment in which Mr Bryant erred.

[26] It cannot be fair and just for Mr Bryant to pay a penalty in circumstances where, had Mr Foote properly exercised his judgment and declined to act in passing the complaint about Mr Bryant on, there would have been no issue at all.

### **Determination**

[27] The Authority is not satisfied that Mr Bryant has committed anything other than a technical breach of the settlement agreement, and given the circumstances in which that breach happened, having heard from both Mr Bryant and Mr Foote for the applicant Plumbing and Gas Works, the Authority's conclusion is that its discretion ought not to be exercised in awarding a penalty against Mr Bryant.

### **Costs**

[28] Costs are to lie where they fall.

**James Crichton**  
**Member of the Employment Relations Authority**