

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 145
5536166

BETWEEN ROSS PULLEN
 Applicant

AND AGRISSENTIALS NZ
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 John Morris for Respondent

Investigation Meeting: On the papers

Determination: 20 May 2015

DETERMINATION OF THE AUTHORITY

- A. Agrissentials NZ Limited has breached the Record of Settlement.**
- B. Agrissentials NZ Limited is ordered to pay the sum of \$1,500 to the Employment Relations Authority within 28 days of the date of this determination.**
- C. Agrissentials NZ Limited is ordered to reimburse Mr Pullen for the Authority's filing fee in the sum of \$71.56.**

Employment relationship problem (optional wording and heading)

[1] Mr Ross Pullen claims Agrissentials NZ Limited (Agrissentials) has breached the Record of Settlement (settlement agreement) made in mediation and seeks the imposition of a penalty against it.

[2] The respondent did not respond to the application on the correct form. Pursuant to Schedule 2, clause 13 of the Employment Relations Act 2000 I have continued to investigate this matter irrespective of the error of form.

[3] In its letter of response Agrissentials counter-claims against Mr Pullen alleging that information provided to ACC was incorrect and seeking repayment of the money paid to Mr Pullen under the settlement agreement.

[4] The parties have agreed for the matter to be heard on the papers currently before the Authority.

Issues

[5] The issue requiring determination is whether the settlement agreement was breached by Agrissentials and if so, whether it is appropriate to impose a penalty.

Background

[6] The parties attended mediation on 26 June 2014 and reached an agreed settlement of all matters between them arising out of the employment relationship. The settlement was recorded in a Record of Settlement and signed by a Ministry of Business, Innovation and Employment Mediator pursuant to section 149 of the Employment Relations Act 2000 (the Act).

[7] The settlement agreement provided for two payments to be made. The first to Mr Pullen pursuant to section 123(1)(c)(i) and the second being a payment to cover legal costs. The settlement agreement makes clear that the terms of settlement and all matters discussed in mediation would remain confidential to the parties.

[8] On 4 September 2014 Mr John Morris, Chief Executive Officer of Agrissentials completed an ACC 33 - Application for Review form. In this form Mr Morris alleges Mr Pullen had made a false claim and disclosed to ACC the amount of money paid to Mr Pullen as a result of the settlement agreement.

Determination

[9] The public interest in having terms of a settlement agreement, made and certified in mediation, honoured by the parties to that settlement agreement is an

important feature of the disputes resolution process in employment related matters. That discussions and agreements reached in mediation are subject to confidentiality provisions is equally important for the parties.

[10] The Act states that settlement agreements certified pursuant to section 149 are final, binding and enforceable. In this matter Agrissentials has breached the confidentiality provision of the settlement agreement when it disclosed to ACC the amounts paid to Mr Pullen pursuant to the settlement agreement. If the point need to be made at all, Mr Morris could have made his point by simply advising that the parties had attended mediation and matters had been resolved.

Application for penalties

[11] Mr Pullen seeks the imposition of penalties against Agrissentials for the breach of the settlement agreement and asks that the recovered penalties be paid to him pursuant to section 136(2).

[12] Section 149(4) of the Act allows for the recovery of a penalty where a party breaches a settlement agreement. In the case of a company, the maximum penalty is \$20,000.00.

[13] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*¹ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

¹ [2014] NZEmpC 65.

[14] The breach was serious as it breached the express term that confidentiality of the settlement agreement would be maintained. The breach was not repeated but was made on a form seeking an ACC Review. It is highly likely that more than one person would view this form and therefore the breach is a continuing breach. There is no evidence of the impact the breach has had on Mr Pullen.

[15] I find that this case warrants the imposition of penalties but at the lower end of the scale. I consider a penalty of \$1,500 for the breach of the settlement agreement to be justifiable.

[16] Agrissentials NZ Limited is ordered to pay a penalty of \$1,500 into the Authority within 28 days of the date of this determination. Pursuant to section 136(2) of the Employment Relations Act 2000, 50% of the penalty is to be paid to Mr Pullen. The remaining 50% is to be paid to the Crown.

Alleged Counter-Claim

[17] I have reviewed the allegations made by Mr Morris and the counter-claim set out in his letter. The counter-claim relates to the ACC claim made by Mr Pullen with respect to a work related injury. The appropriate process to address this matter is through ACC's processes.

Costs

[18] Mr Pullen is entitled to be reimbursed the costs of this application. Agrissentials NZ Limited is ordered to pay Mr Pullen the \$71.56 filing fee within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority