IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 343
5384509

	BETWEEN	WONDERLAND TOUR GROUP LIMITED Applicant
	AND	SHUO DIAO Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael Kan, Counsel for Applicant May Moncur, Advocate for Respondent
Investigation Meeting:	20 September 2012 at Auckland
Determination:	2 October 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 3 May 2012 a Record of Settlement (the Settlement) was signed pursuant to s 149 of the Employment Relations Act 2000 ("the Act"). The parties to the Settlement were the Applicant, Wonderland Tour Group Limited (WTG), and the Respondent, Ms Shuo Diao. The Settlement was signed by Ms Hong Zhang, sole Director and Shareholder of WTG. The Record was also signed by a Mediator employed by the Department of Labour.

WTG Claim

[2] The issue now brought before the Authority by WTG is that Ms Diao has not complied with clauses 1 and 4 of the Settlement, which state:

> 1. *These terms of settlement – except for clause 4) below – and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.*
>
> 4. *The parties agree that the statement attached as Appendix 'A' is available for the Applicant to post on a single occasion the QQ and Skykiwi websites.*

[3] QQ is China's largest social networking site and *Skykiwi*.com is the largest Chinese website in New Zealand providing information to the Chinese community.

[4] *The* document identified as 'Appendix A" stated:

> *I hereby formally retract an allegation of stealing against my former employee, Nina (Diao Shuo), and with this I express my sincere apology.*
>
> *Both parties hereby declare that the employment dispute has reached settlement and understanding.*[1]

[5] As Ms Diao was not a member of the QQ website, the posting of Appendix 'A' onto this web site was made on Ms Diao's behalf by Mr Xiang Guo who was a QQ website member. Appendix 'A' was accompanied on the web site by the following posted statement:

> *The following contents are relayed as entrusted by a party (involved): Hello everyone! I am Nina Diao, a former employee of Wonderland Tour Group Ltd owned by Hong Zhang (online name Wan0Dou-Lan). On 3rd of May 2012, a resolution was reached by the Employment relations Authority on my claims regarding the dismissal & defamation against me by Hong Zhang. Hong Zhang must make a public apology to me, and publish the original letter of apology in the QQ group as well as on other websites. Meanwhile Hong Zhang has made payments for compensation in relation to al my claims. With permission of the Employment Relations Authority Hong Zhang's letter of apology is published herewith.*

Ms Diao's Counter-claim

[6] Also before the Authority is a counterclaim brought by Ms Diao that WTG has breached the terms of the Settlement, by making repeated allegations concerning Ms Diao on the QQ website on 23 May 2012, including a reference to the incident which had lead to the employment relationship problem and the Settlement.

[7] Although the allegations concerning Ms Diao were posted on the QQ web site by Ms Zhang; in her capacity as Sole Director and owner of WTG, I consider that they were in effect posted by and on behalf of WTG. I am supported in this conclusion by the fact that Ms Zhang's evidence at the Investigation Meeting was that she posted the comments to address her own reputation and that of her business (WTG) and to limit the damage caused to the business of WTG by the web site posting by Ms Diao

[1] All website postings were in Chinese characters and have been translated into English

[8] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted that they understood that the agreed terms:

1. were final, binding and enforceable;

2. could not be cancelled;

3. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms; and that

4. section 149(4) provided that a person who breached an agreed term of settlement to which subsection (3) applies was liable to a penalty imposed by the Authority.

Determination

[9] From the evidence available to the Authority, I am satisfied that both WTG and Ms Diao have failed to comply with, and have breached, the Settlement.

Penalties

[10] Ms Diao and WTG have both applied for a penalty to be awarded in respect of the other party's breach of the Settlement.

[11] Pursuant to s 149(4) of the Act, a person who breaches an agreed term of settlement to which the Act applies, is liable to a penalty of up to $10,000.00 for an individual or up to $20,000.00 for a company.

[12] As the then Chief Judge observed in *Xu v McIntosh*[2], a penalty: "*is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act …"*

[13] Ms Diao is an individual who has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. As such Ms Diao is liable to a penalty not exceeding $10,000.00.

[2] [2004] 2 ERNZ 448

[14] WTG is a company which has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. As such WTG is liable to a penalty not exceeding $20,000.00.

[15] The Employment Court in *Xu v McIntosh*[3] said that the first question to be asked in contemplating the award of a penalty is "*how much harm has the breach occasioned?"*

[16] I find that both parties have suffered harm in this case in that the posting of statements and information on the QQ website has had the effect of bringing the employment relationship problem under the scrutiny of the relatively small Chinese business community in New Zealand following the entering into the Settlement which was designed to bring closure to both parties.

[17] Although Ms Zhang submits that the complete statement posted on the QQ website on half of Ms Diao had been calculated to cause her personally, and WTG, maximum damage, I observe that Ms Diao had not posted the statements on the *Skykiwi* website which had a far larger exposure to the Chinese community in New Zealand, and which would therefore have had a larger potential to cause both Ms Zhang and the Applicant damage.

[18] I take into consideration Ms Zhang's submission that her postings on the QQ website on 23 May 2012 had been provoked by the additional statement to the posting of Appendix 'A' and the subsequent associated queries and interest this had provoked within the QQ online community.

[19] However I do not accept that this gave WTG the right to also breach the Settlement. As pointed out in the Settlement, s. 149 of the Employment Relations Act 2000 (the Act) makes provision for a breach of a mediated settlement to be addressed by the Authority, and indeed this route was taken by WTG in filing a Statement of Problem in the Authority on 5 June 2012.

[20] The Employment Court said in *Xu v McIntosh*[4] that the next question to be examined is the culpability of the perpetrator. Was the *"the breach technical and inadvertent or was it flagrant and deliberate?"*

[21] Both Ms Diao and Ms Zhang submitted that they were unaware that their actions had breached the terms of the Settlement. I note that English is not the first language of either

[3] Ibid at para [47]
[4] Ibid at para [48]

party and that this may to some extent mitigate culpability. I do not find that the breach caused by either party was flagrant and deliberate.

Public Interest

[22] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and therefore the failure by one party, or in this case, both parties, to honour the terms of any resulting agreement is a serious matter.

[23] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[24] It is consequently in the public interest to impose a penalty which not only punishes the parties for their breach of the agreed Settlement, but which will additionally act a deterrent to others who may contemplate engaging in such behaviour.

[25] The penalty should be set to reflect the Authority's disapproval of such behaviour; however I also take into consideration the extent to which these mutual breaches have caused harm to the other, and the fact that the breach by WTG was, albeit wrong, in response to the initial breach by Ms Diao. I determine that penalties of $200.00 to be paid by WTG and $300.00 to be paid by Ms Diao to be appropriate in the circumstances.

[26] I order Ms Diao to pay $300.00 and WTG to pay $200.00 as a penalty pursuant to ss 134(2) and 135 of the Act.

Payment of the penalties

[27] In accordance with the observation of the Employment Court in *Xu v McIntosh*[5] whether a penalty is paid to the victim of the breach, should be decided with respect to the degree of harm suffered as a result of the breach.

[28] I have observed that both parties have suffered harm as the result of the breach of the Settlement by the other. In the circumstances I do not consider it appropriate that a proportion of the penalties be paid to either party.

[5] [2004] 2 ERNZ 448

[29] Ms Diao is ordered to pay $300.00 penalty and WTG is ordered to pay $200.00 penalty to be paid to the Crown.

Costs

[30] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any rely submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority