

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 27
3021793

BETWEEN ADAMS PLUMBING,
DRAINAGE AND
ELECTRICAL LIMITED
Applicant

AND GARY HUGHES
Respondent

Member of Authority: Christine Hickey
Representatives: Mark Preston, Advocate for the Applicant
Mr Hughes was self-represented
Investigation meeting: 16 February 2018
Submissions received: Orally at the investigation meeting
Determination: 22 February 2018

DETERMINATION OF THE AUTHORITY

- A. Gary Hughes must not breach the confidentiality provision of the Record of Settlement again.**
- B. Gary Hughes must pay a penalty of \$1,000 to the Employment Relations Authority for payment into a Crown bank account.**
- C. Within 28 days of the date of this determination, Gary Hughes must pay Adams Plumbing, Drainage and Electrical Limited \$71.56 as reimbursement of the filing fee.**

Employment relationship problem

The settlement

[1] Gary Hughes worked for Adams Plumbing, Drainage and Electrical Limited (Adams). He was dismissed in January 2016. He lodged a personal grievance claim. The parties attended mediation and on 27 June 2016, they entered into a Record of Settlement. The Settlement terms included:

2. These terms of settlement shall remain, so far as the law allows, confidential to the parties. If anyone asks about the employment dispute, both parties will say only that the issue has been resolved. Neither party will mention the fact that there was a financial settlement or the amount of the settlement.

...

4. This is the full and final settlement of all matters between the employee and the employer arising out of their employment relationship.

...

6. Both parties have had the opportunity to obtain independent legal advice before signing this agreement.

[2] Within seven days of the Record of Settlement being signed, Adams paid Mr Hughes the amount of money it had agreed to pay him.

After the settlement

[3] Over a year later, on 27 October 2017, Mr Hughes published the first page of the Record of Settlement outlining the amount of money Adams agreed to pay him on his Facebook page under the following comment:

I've been very reasonable in my requests of documentation from Adams management, why can't you just reproduce my notice of termination, your really starting to F*** ME OFF.

[4] Some Adams' staff and customers alerted Mark Preston, a director of Adams, to the post. Mr Preston let Mr Hughes' lawyer know that the breach had occurred and demanded that the post be taken down by 5 pm that evening, or he would make an application to the Authority.

[5] Mr Hughes removed the post at about 5.30 pm.

[6] On 31 October 2017, Adams made an application to the Authority that because of Mr Hughes' breach he should repay Adams the settlement amount.

[7] Mr Hughes replied that he was happy to pay the settlement back if he could have his dismissal "heard in the Employment Court." He also wrote that realised the issue was one of confidentiality:

... but it stems from the more important issue of workers rights to privacy, fair and reasonable contracts and when employers admit fault though such payments it should be in the public arena.

[8] In addition, Mr Hughes alleges that Adams breached the settlement agreement by telling a number of its employees and other tradespeople in Dunedin why he was dismissed.

[9] I held a case management conference on 13 December 2017, at which I informed both parties that I was unable to cancel the Record of Settlement and order Mr Hughes to repay the amount Adams paid him. I would be able to make an order for compliance with the settlement agreement and consider imposing a penalty on Mr Hughes for his breach if Adams wished to amend its claim.

[10] Following the telephone conference, Mr Preston amended Adams' claim by way of email to asking for compliance and a penalty.

[11] I held an investigation meeting in Dunedin on 16 February 2018. Mr Hughes did not attend the meeting. I instructed the Authority officer to contact Mr Hughes. Eventually, Mr Hughes agreed to participate in the meeting by telephone. I heard affirmed evidence from Mr Hughes and Mr Preston.

Issues

I need to determine the following issues:

- (a) Did Mr Hughes breach the settlement agreement?
- (b) If so, should I impose a penalty on him?
- (c) Did Adams breach the settlement agreement?

Did Mr Hughes breach the terms of the settlement agreement?

[12] Mr Hughes agrees that he published terms of the settlement agreement on Facebook. Mr Hughes also agrees that publication was in breach of clause 2 of the agreement in which he agreed to keep the terms of the settlement confidential.

Why did Mr Hughes breach the confidentiality of the settlement agreement?

[13] I consider that Mr Hughes was well aware of what he was doing in publishing the terms of the settlement agreement on his Facebook page. His reason for doing so was that after he entered into the settlement agreement and received the monetary payment he remained dissatisfied with the grounds on which he believed he had been dismissed. In his mind injustice existed.

[14] Before the mediation, Mr Hughes had a copy of all of the relevant documents provided to him by Adams, including letters related to his dismissal. He gave those documents to his lawyer. After the mediation, he requested further copies of letters Adams wrote to him in relation to the dismissal. Mr Preston's evidence is that he provided a further copy of correspondence related to Mr Hughes' dismissal. However, Mr Hughes was convinced, and remains convinced, that there was a letter missing. He alleges that Adams wrote him a letter when it dismissed him alleging that it concluded that he had been under the influence of drugs while at work. He wants a copy of that letter. Mr Preston says no such letter exists.

[15] Mr Hughes is concerned that employees are being unfairly dismissed based on faulty reasoning and drug tests that do not and cannot prove that those employees were impaired while at work. Mr Hughes says that after entering into the settlement he decided that it was wrong that Adams could conceal what he says was its wrongdoing.

[16] In addition, he says he became aware that a number of tradespeople at sites he worked at believed he had been dismissed for being impaired by drugs when at work. He says that Adams must have been the source of those incorrect rumours. Therefore, he decided that Adams was not complying with its obligation of confidentiality under the settlement agreement.

Should the Authority impose a penalty on Mr Hughes for the breach?

[17] The Record of Settlement was signed by a duly authorised representative of the Chief Executive of the Ministry of Business, Innovation & Employment (MBIE), who had explained to the parties that they would be bound by the terms of the settlement. He also explained the effect of s 149(3) of the Employment Relations Act 2000 (the Act).

[18] Section 149(3) of the Act provides that the settlement is final and binding and cannot be cancelled, and, except for enforcement purposes, neither party can seek to have the terms of settlement reviewed or appealed.

[19] Section 135 of the Act provides that the maximum penalty for every person who is liable to a penalty under the Act is \$10,000 for every breach.

[20] Section 133A of the Act sets out a number of factors the Authority should consider when determining penalties. These factors are:

- the objects of the Act stated in s 3;
- the nature and extent of the breach or involvement in the breach;
- whether the breach was intentional, inadvertent, or negligent;
- the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach, or the person involved in the breach, because of the breach or involvement in the breach;
- whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;

- the circumstances in which the breach, or involvement in the breach took place, including the vulnerability of the employee; and
- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

[21] In *Borsboom v. Preet PVT Ltd & Anor*¹ the Employment Court identified the objectives of penalties in employment law generally as:

- (a) Punishment;
- (b) Deterrence, both specific and general;
- (c) Compensation for a victim of a breach;
- (d) Eliminating unfair competition in business.

[22] The Court in *Preet* added the following four factors to the Authority's assessment of penalties²:

- (a) When assessing deterrence, to do so both in relation to the particular person to be penalised and the wider community of employees/employers;
- (b) When considering the seriousness of the breach, assess the degree of culpability of the person in breach;
- (c) Be aware of the general desirability of consistency in decisions on penalty; and
- (d) When assessing a penalty or penalties, stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches to which the penalty is imposed.

[23] In *David Lumsden v Sky City Management Limited*³ the Employment Court considered penalties for a breach of a settlement agreement under s 149 of the Act. The Court identified two further factors in addition to those specified by s 133A of the Act, as relevant to an assessment of penalties, namely, the need for general and particular deterrence and the desirability of broad consistency with other penalties in

¹[2016] NZEmpC 143 at [50].

²No. 1 above at paragraph [68].

³[2017] NZEmpC 30.

similar cases. At para [66] of the judgment, the court stated, relevantly for the current case:

There is also a broader public interest in deterring parties from renegeing on s 149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that might prove to be.

[24] It is clear that s 149(4) of the Act has, as its purpose, punishment for breaches of legally binding agreements, deterrence to prevent repetition for such breaches and possible compensation to the victim of the breach.

Should Mr Hughes be penalised?

[25] This is case in which a penalty should be imposed. There is a clear need for punishment to signal the Authority's disapproval of Mr Hughes' behaviour. There is a need for the Authority's determination to act as a disincentive for others who may be inclined to breach their record of settlement obligations.

[26] Mr Hughes intentionally breached the confidentiality terms of the settlement. In the investigation meeting, he maintained his position that he did so because he had public interest concerns about how employers use drug-testing results to dismiss employees. He showed no remorse before the investigation meeting. In fact, after Adams lodged its claim and before he put in his statement in reply, on 10 November 2017 he posted on his Facebook page:

Bring it on ADAMS, confidentiality my ass, see you in court

[27] That was typical of his approach during the investigation meeting as well. He continued to insist that Adams had been in the wrong, he had a larger concern and that employees should not be expected to keep employer wrongdoing confidential.

[28] Mr Hughes also suggested that he entered into the agreement under duress. I do not find that to be the case. Mr Hughes had independent legal advice leading up to, during and after the mediation. I am satisfied that he freely decided to enter into the record of settlement.

[29] During the investigation meeting, I asked Mr Hughes if he could give any assurance that he would not breach the confidentiality terms of the agreement again. He gave a verbal assurance that he would not breach confidentiality again.

The amount of penalty

[30] I need to undertake the four-step analysis set out in *Preet*.

Step 1 - the nature and extent of the breach

[31] There was one breach. The settlement remained on display through Mr Hughes' Facebook page for approximately seven hours.

[32] The maximum penalty for one breach is \$10,000.

Step 2 - Assessment of severity of breaches

[33] A number of Adams' staff and some customers are or were Facebook friends with Mr Hughes. Although there was only one breach, the text of the settlement was relatively widely published to precisely those people that Adams had an interest in keeping from knowing the details of its settlement with Mr Hughes. The breach was intentional.

[34] The post was taken down on the same day it went up after Adams complained.

[35] Mr Hughes has not previously been found to be guilty of any similar breach.

[36] In my view, the breach should attract a penalty of \$6,000.

Step 3 – Means and ability to pay

[37] I asked Mr Hughes about his financial circumstances and what submissions he wanted to make to me in relation to his ability to pay a penalty. I also asked if he wished to apply to make payment by instalments.

[38] Mr Hughes does not own a house. However, he has savings and some assets. He has a full-time job in which he earns more than he earned with Adams. Mr Hughes did not ask to pay a penalty by instalment.

[39] No doubt the imposition of a penalty will cause some financial hardship for Mr Hughes. However, as one of the main purposes of a penalty is to punish, hardship is to be expected.

[40] Mr Hughes' financial circumstances do not disclose any need to reduce the penalty.

Step 4 – Proportionality

[41] I need to consider this case alongside the already decided cases and penalties imposed for breaches of confidentiality provisions in records of settlement. They range between \$250 to \$7,500. Cases at the higher end tend to involve a number of breaches and many include disparaging comments, which are not involved in this case.

[42] Taking proportionality into account, I consider Mr Hughes must pay a penalty of \$1,000. This must be paid to the Authority for payment into a Crown bank account.

Did Adams breach the settlement agreement?

[43] Mr Hughes was dismissed in January 2016. He told some of his colleagues why Adams dismissed him and why he considered that to be unfair. Between his dismissal in January and up until 27 June 2016, when the settlement was reached, no-one was bound by any duty of confidentiality about his dismissal.

[44] Mr Preston gave clear and credible evidence that he had not breached the confidentiality provision of the settlement agreement and as far as he was aware no other person at Adams had either, because he had not shared the details of the settlement.

[45] Mr Hughes was not able to give me any evidence that the rumours about his dismissal only began after the settlement agreement was entered into. He was unable to give any evidence ruling out the possibility that the rumours started in or after January 2016 but before the parties entered into the Record of Settlement.

[46] Mr Hughes has not proved that Adams has breached the Record of Settlement.

Should I make a compliance order?

[47] I am satisfied that Mr Hughes has breached the record of settlement. He let me know during the investigation meeting that if I imposed a penalty on him he would be very angry.

[48] A compliance order is discretionary with the discretion having to be exercised on a principled basis. Given that Mr Hughes has breached the Record of Settlement the Authority does have jurisdiction to issue a compliance order.

[49] Mr Hughes acted promptly to take down the Facebook post once his lawyer informed him of Adams' request. However, he continues to nurse dissatisfaction with how he was treated by Adams. I trust that after this process and the imposition of the penalty Mr Hughes will appreciate the seriousness of his breach, and will not breach any of the settlement provisions again.

[50] However, to underscore the seriousness of the breach and to protect the confidentiality of the settlement in the future I consider that a compliance order is necessary.

[51] Mr Hughes will need to ensure the Facebook post is permanently removed from his Facebook page and that he adheres to the confidentiality obligation to which he previously agreed.

[52] Any further breach of the confidentiality provision is likely to result in a higher penalty than that imposed in this determination.

Costs

[53] Adams did not have legal representation for any part of these proceedings. Therefore, I do not need to consider its legal costs. However, I consider that Mr Hughes must pay Adams the filing fee of \$71.56 it paid to bring its claim to the Authority.

Christine Hickey
Member of the Employment Relations Authority