IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 225
5378750

	BETWEEN	AUCKLAND CITY COURIERS LIMITED Applicant
	A N D	JOSS PRIEST Respondent

Member of Authority:	James Crichton
Representatives:	Anthony Vlatkovich, Counsel for Applicant Respondent in Person
Investigation meeting:	29 June 2012 at Auckland
Date of Determination:	4 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant in the present proceedings (Auckland City Couriers) commenced a restructuring process earlier this year involving the respondent (Ms Priest). As a consequence, the parties entered into a mediated settlement and a record of that settlement was executed by all parties on 22 March 2012. Included amongst the terms of that settlement is a standard confidentiality provision in the following terms:

> *The parties will keep confidential these terms of settlement, all matters discussed in mediation, and the background circumstances which led to the parties entering into this agreement.*

[2] It is common ground that the day after the record of settlement was executed by the parties, that is on 23 March 2012, Ms Priest spoke with a third party who was employed by Auckland City Couriers and although she did not discuss the terms of the mediation in any detail, she clearly revealed that there had been a mediation and

the observations that she made to the third party were arguably in breach of the portion of the confidentiality clause which refers to *"the background circumstances which led to the parties entering into the agreement"*.

[3] It is common ground that both parties have behaved in good faith the one to the other. In that regard, Auckland City Couriers has, notwithstanding the breach made immediately after the record of settlement was executed by the parties, fulfilled each and every one of its obligations under the terms of the mediated settlement. Similarly, and in pursuance of its obligations under the record of settlement, Auckland City Couriers has continued to speak highly of Ms Priest and done everything in its power to assist her to obtain new employment. In the circumstances, that is entirely laudable but actually not difficult to understand.

[4] Auckland City Couriers does not suggest that Ms Priest has behaved maliciously in doing what she did. It accepts that the breach was inadvertent and was made out of ignorance of the niceties of the confidentiality requirement rather than any deliberate action by Ms Priest to disadvantage her former employer. In particular, it is clear on the evidence available to the Authority that Ms Priest spoke to the third party about a quite unrelated matter (she was expecting the delivery of a tent and was inquiring about that), and it was only in the context of an inquiry in that regard that she inadvertently referred to the fact of there being a mediation. She then went on to make certain observations about the factual matrix which had underpinned the mediation although it is clear to the Authority that she believed that the comments that she was making were comments that came from a source other than the mediation itself. The Authority accepts without reservation that Ms Priest believed throughout that she was behaving appropriately and correctly but that she failed to identify that the very fact of there having been a mediation was itself a matter which Auckland City Couriers wished to keep private.

[5] This was because Auckland City Couriers had been in the midst of a restructure and for obvious reasons it did not suit it to have staff aware of the fact that it had engaged in a mediation with one of the affected staff members and by implication had settled with her on some basis or another. The fact that by Ms Priest's actions, another staff member became aware that there had been a mediation between Ms Priest and Auckland City Couriers meant that, as it were, *"the cat was out of the bag"*.

[6] The Authority sought evidence from Auckland City Couriers as to just how the damage could be quantified. Auckland City Couriers was unable to assist the Authority in that regard. The issue for it was simply that, having entered into a private and confidential arrangement with a longstanding and trusted staff member, it did not suit it to have other staff aware that that was what it had done.

[7] Of course, the law does not allow recovery of compensation that is out of all proportion to the damage done. There is a sense in which, once the *"cat is out of the bag"* as is the case in the present situation, the damage is irreparable and no amount of compensation, however expressed, can remedy the original default.

[8] However, the Authority considered that Auckland City Couriers' argument that there must be some response to a breach of this kind or confidentiality undertakings of parties in mediated settlements and the like would be a meaningless gesture. The Authority agrees with that assessment.

Determination

[9] The Authority has no hesitation in concluding that there has been a breach of the record of settlement entered into between the parties on 22 March 2012 and that in revealing to a former co-worker that there had been a mediation and referring generally to some of the information which preceded the mediation, Ms Priest broke the terms of her undertaking to maintain the confidentiality of the settlement. In these situations, it will be most important that employees in situations such as the one Ms Priest found herself in understand that the confidentiality sought by the other party is not an arid or vacant construct but a real benefit which the party seeking it can derive significant advantage from. In the present case, Auckland City Couriers told the Authority (and the Authority accepts the evidence at face value), that one of the principal reasons it felt able to settle with Ms Priest on the terms it did was because of the benefit of confidentiality.

[10] That benefit has now been lost to the employer and notwithstanding the goodwill between the parties and notwithstanding the continuing efforts being made by Auckland City Couriers to assist Ms Priest to obtain fresh employment, there must be a monetary penalty levied against Ms Priest to record the Authority's condemnation of her breach of the terms of settlement of the agreement reached in

mediation, notwithstanding again that that breach was inadvertent, made innocently and was also at the lower end of culpability in terms of the matters actually disclosed.

[11] But the real point here is that in the present case (and in many other cases where similar facts are in issue), the damage is done by the revelation that there has been a mediation rather more than the particular information that is improperly imparted.

[12] The Authority directs that Ms Priest is to pay to Auckland City Couriers the sum of $1,000 as a penalty for the established breach of the record of settlement entered into between herself and Auckland City Couriers on 22 March 2012, that payment being levied against her pursuant to the power so to do conferred on the Authority in s.149(4) of the Employment Relations Act 2000 (the Act). The penalty is to be payable to Auckland City Couriers pursuant to s.136(2) of the Act which confers power on the Authority to determine whether the aggrieved party should receive the benefits of the penalty, or not.

Costs

[13] In the normal course of events, Auckland City Couriers as the successful party could expect to look to Ms Priest to contribute to its legal costs in the proceeding. The parties are urged to reach an arrangement as to costs on their own terms.

[14] If the matter comes back to the Authority for costs to be fixed, in all the circumstances of the case, the Authority is likely to be difficult to persuade that this is not a case where costs should lie where they fall.

James Crichton
Member of the Employment Relations Authority