

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 373
5383490

BETWEEN TARNIA CLARKE
 Applicant

A N D SOUTHERN PAPRIKA
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Michael Kyriazopoulos, Advocate for Applicant
 Chris Patterson and Anneke Reid, Counsel for Respondent

Investigation meeting: On the papers

Submissions Received 27 August 2012 from Applicant
 10 September 2012 from Respondent

Date of Determination: 17 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Clarke) alleges that the respondent (Southern Paprika) has breached the terms of a mediated settlement it reached with her dated 18 August 2011. The breach is said to have happened when evidence was given in a subsequent employment dispute by Southern Paprika's witnesses referring to matters within Ms Clarke's mediated agreement.

[2] Southern Paprika resists the claim by denying the commission of the alleged wrong, or in the alternative alleging that if there was a breach it was either allowed by law, covered by witness immunity, or generally so insignificant as to be properly regarded as inadvertence.

[3] The parties helpfully agreed that the matter could be dealt with by the Authority on the papers.

Issues

[4] It will be useful if the Authority addresses the following questions:

- (a) What actually happened;
- (b) Does that constitute a breach;
- (c) Does the law allow the breach if found;
- (d) Does witness immunity apply;
- (e) What remedies, if any, ought to apply?

What actually happened?

[5] There is no dispute about the facts in this matter. Ms Clarke entered into a record of settlement with Southern Paprika bringing her employment relationship to an end by agreement. The terms of that mediated settlement were, in the usual way, protected by confidentiality provisions.

[6] Subsequently, another employee of Southern Paprika suffered an employment relationship problem and in the result, proceeded to a hearing before the Authority. Amongst other things, that employee argued disparity of treatment. To defend its position, Southern Paprika referred to Ms Clarke's position. Two witness briefs are relevant. One of them referred to Ms Clarke's situation in a general way without naming her and the other referred to her by name and indicated she had been dismissed.

[7] Ms Clarke claims that these statements breached the confidentiality obligations of the record of settlement and caused her damage.

Was there a breach of confidentiality?

[8] The Authority is satisfied there has been a breach of confidentiality. That breach occurred when Ms Clarke was named in the subsequent proceedings. The

reference to Ms Clarke's circumstances without naming her does not breach the requirements of the confidentiality provision in the mediated settlement.

[9] As a matter of good practice, a reference in an open forum (such as an Authority investigation) to a proceeding or event covered by confidentiality ought to be made in such terms as to preclude the identification of the particular individual involved. That is the purpose of the confidentiality rule and it needs to be followed.

Does the law require the statement to be made?

[10] Southern Paprika alleges that because it was required to defend itself in the Authority and deal with the allegation of disparity of treatment made in a subsequent employment relationship problem case, it was required by force of law to breach confidence. This claim cannot succeed. Nothing precludes Southern Paprika from referring to Ms Clarke's circumstances without naming her. Had it done that, the Authority is satisfied it would have both fulfilled its obligations in relation to the subsequent Authority proceedings and in relation to the confidentiality provisions of the earlier mediated settlement with Ms Clarke.

[11] It does not avail Southern Paprika to maintain, as it does, that the evidence led in the subsequent Authority proceeding simply referred to Ms Clarke and the fact that she had been dismissed, without reference to the mediated settlement. The whole point of the mediated settlement was to, amongst other things, vary the way in which the termination of the employment happened. As a matter of fact, Ms Clarke was dismissed from her employment. The effect of the mediated settlement was to vary that so as to record her termination of the employment as having been a resignation. That being the position, the fact that Southern Paprika referred to her by name and indicated that she had been dismissed plainly breaches the confidentiality of the mediated settlement. As the Authority has just noted, that was the very point of the mediated settlement.

Does witness immunity apply?

[12] Under this head, the Authority deals with two related questions. The first, strictly speaking, does not relate to witness immunity at all but relates to the specific provision in the record of settlement which imposes confidentiality "*so far as the law allows*". It is suggested on behalf of Southern Paprika that this exclusion applies in the present case.

[13] It is suggested that Southern Paprika was required to make the relevant disclosure in order to defend the subsequent claim because it had an obligation to provide the Authority hearing that subsequent claim with all relevant evidence.

[14] For the purposes of the present claim, the Authority does not accept the proposition advanced. It is true that Southern Paprika had an obligation to provide all relevant evidence to the Authority for the subsequent hearing, but what is not true is that it was necessary for Southern Paprika to reveal the identity of Ms Clarke in so doing. Clearly, it could have provided all of the relevant evidence to the Authority without disclosing Ms Clarke's identity or indeed any other information that could lead to the discovery of her identity.

[15] As to witness immunity itself, the legal position is clear that there is a common law immunity of some antiquity which applies to material disclosed in legal proceedings, including in evidence given by witnesses.

[16] It follows, so the argument goes, that because the evidence containing the breach of confidence was prepared for legal proceedings, witness immunity necessarily applies. But the Authority thinks that logic is mistaken. In the Authority's view, witness immunity gives immunity to the witness and not to the party for whom the evidence is actually tendered. That party, in the Authority's opinion, cannot derive witness immunity by osmosis.

What remedies apply?

[17] Given that the Authority has found there has been a breach of the confidentiality provision in the record of settlement with Ms Clarke, and has rejected the various defences offered by Southern Paprika, the next question for determination is what remedies, if any, are available.

[18] In this connection, the Authority notes that the statement of problem seeks compensation of \$20,000 and costs. First, there can be no question of compensation being ordered. There is no statutory basis for such a claim and the Authority, as a creature of statute, is obligated to remain within its remit. The reason, of course, that there is no provision in the statute for compensation to apply in such a circumstance is that there is no longer an employment relationship and even although the Authority has accepted there has been a breach of the confidentiality provision in the settlement agreement, that does not confer the right to expect compensation to flow.

[19] Nor is there any basis for the view that, by identifying a breach of the agreement, the legal effect is to make the balance of the memorandum of settlement void or voidable. Again, no statutory enactment would justify such a conclusion.

[20] The only basis on which there can be a remedy provided for a breach of the record of settlement is in s.149(4) of the Employment Relations Act 2000 (the Act). Such penalty may be up to \$20,000 for an incorporated company.

[21] Pursuant to the Employment Court decision in *Xu v. McIntosh* [2004] 2 ERNZ 488, the Employment Court indicated that the purpose of a penalty was to punish wrongdoing and that the issues that the tribunal must consider are first how much harm has the breach caused, and secondly whether the breach was flagrant or inadvertent. As to the issue of the harm done, there is no evidence before the Authority to suggest what harm was done to Ms Clarke. All the evidence discloses is that she was cross about the disclosure, but there is nothing to suggest that any actual harm was done.

[22] As a matter of fact, the only person to whom the disclosure was actually made (that is, the only person who did not know about the events covered by the mediated settlement) was the Authority Member hearing the subsequent claim. As it happens, no other person was involved in that investigation meeting and it seems implausible that an Authority Member would take any inappropriate action in respect of a disclosure of the sort of evidence referred to. It is clear that the other persons involved in the Authority's investigation were persons who either had been involved in Ms Clarke's previous proceeding from her side, or, in the alternative, had been involved in her employment relationship problem from Southern Paprika's side.

[23] Furthermore, the breach which the Authority has identified is hardly flagrant. There were two briefs of evidence filed by Southern Paprika in the relevant Authority proceeding. One of them correctly referred to Ms Clarke's situation but provided no identifying detail whatever and the other revealed both her name and the fact that she had been dismissed from her employment, both matters which in the Authority's opinion are clearly protected by the confidentiality provision in the record of settlement and indeed, one of which (the issue about the way in which the relationship came to an end) is plainly a matter that Ms Clarke would have sought protection for in terms of the mediated settlement.

Determination

[24] For reasons already articulated, the Authority is satisfied that there had been a breach of the mediated settlement entered into between Southern Paprika and Ms Clarke on 18 August 2011. However, the Authority is also satisfied that that breach was inadvertent and that it did no harm to Ms Clarke and in consequence, the Authority declines to award any penalty against Southern Paprika.

[25] Counsel for Southern Paprika urge on the Authority the proposition that the claim is vexatious and, in effect, ought to be punished in costs. The Authority is not disposed to deal with costs at this juncture, but does observe in the context of those submissions from Southern Paprika that the irony of the present claim by Ms Clarke is to provide further publicity to her situation (and therefore potentially harm) for which she can have no one to blame but herself.

[26] The Authority is a public body and its decisions are and should be available to the public to peruse; in that general connection, Authority decisions are frequently published in the newspaper and on the footing that this decision receives any publicity at all, it potentially will damage Ms Clarke's position vis-à-vis the mediated settlement with Southern Paprika. .

Costs

[27] Costs are reserved.

James Crichton
Member of the Employment Relations Authority