

**Attention is drawn to the order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 145  
5548067

BETWEEN	JOHN EDMINSTIN Applicant
A N D	SANFORD LIMITED First Respondent
A N D	GORDON JOHNSON Second Respondent

Member of Authority: Helen Doyle

Representatives: Peter Andrew and Lee Goffin, Counsel for the Applicant  
Richard McIlraith and Kylie Dunn, Counsel for the First and Second Respondents

Submissions Received: 30 September 2015 on behalf of the Applicant  
24 September 2015 on behalf of the Second Respondent

Date of Determination: 7 October 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The second respondent applies to have the proceedings against him dismissed as frivolous or vexatious pursuant to clause 12A of Schedule 2 to the Employment Relations Act 2000 (the Act). The first respondent supports the application to have the proceedings against the second respondent dismissed.

[2] The applicant opposes dismissing the proceedings against the second respondent on the basis that there are sound and legitimate reasons for naming him a

party to the proceedings and that special relief is sought against him so it is essential that he has notice of a claim against him for relief.

### **The proceedings**

[3] The applicant was employed by first respondent as the skipper of its vessel *The Toiler*. He raised personal grievances.

[4] The applicant and the first respondent through the provision of mediation services by a mediator employed by the Ministry of Business Innovation and Employment (MBIE) entered into a full and final settlement of all matters between them arising out of their employment relationship under s 149 of the Employment Relations Act 2000 (the Act).

[5] The mediator certified that before he had signed the agreed terms of settlement he had amongst other matters explained the effect of s 149(1) and (3). The settlement agreement is dated 24 February 2015. The name of the respondent party to the agreement, Salford Limited, is a typing error. This was confirmed by counsel for the respondents to the Authority.

[6] I prohibit from publication all details of the Record of Settlement except for clause 6 as it is the basis of the application for compliance. Clause 6 of the settlement agreement provides that:

*The applicant may collect his "marks" off The Toiler on February 27, 2015 after making appropriate arrangements with the respondent.*

[7] The second respondent is now the Skipper of The Toiler.

[8] The applicant seeks in his amended application for an order for compliance with the settlement agreement dated 17 March 2015:

- (a) An order requiring the respondents to comply with the settlement agreement of 24 February 2015 and in particular clause 6 of the agreement. It is stated in the amended application that the *marks* are the applicant's sole and exclusive property and the respondents are in breach of clause 6 by retaining and using a copy of the marks.

- (b) An order requiring the respondents forthwith to delete all records of his *marks* from its GPS and computer systems and from any other locations or medium on which the *marks* might be stored;
- (c) An order directing that any computer and IT experts commissioned may examine the GPS and computer systems on board *The Toiler*, for the purposes of deleting or ensuring the deletion of the *marks* from the GPS and computer systems on board *The Toiler*;
- (d) An order directing the respondents cease forthwith from using or relying upon the *marks* in any way, and in particular for locating oysters and any other fishery related purpose, within the Bluff Oyster Fishery;
- (e) An order directing the respondents to pay compensation and/or an account of profits, to the applicant for the unauthorised and illegal use of his *marks* since 1 March 2015 and any corresponding diminution in their value;
- (f) Penalties against the first respondent for breach of the employment agreement between the applicant and the first respondent and in particular for unauthorised use of the *marks* of the applicant, which are the confidential information and/or intellectual property of the applicant; and
- (g) Penalties against the second respondent for breach of the Act.

[9] By notice of opposition to the amended application for compliance on behalf of the second respondent dated 26 March 2015, the second respondent opposed the application on the grounds:

- (a) The second respondent is not a party to the settlement agreement and was not aware of its terms, has no obligations under the agreement and could not have breached it.
- (b) The Authority has no jurisdiction under s 137 to make a compliance order requiring the second respondent to comply with the settlement agreement.

- (c) The Authority has no jurisdiction in relation to any issues between the applicant and the second respondent as there is not and has never been an employment relationship between them.

[10] The applicant and the first respondent who also opposed the amended application for a compliance order but on different grounds attended mediation but the matter was unable to be resolved. In the interim neither the application for compliance nor the application for dismissal by the second respondent were progressed.

[11] The applicant then applied under s 178 of the Act for an order removing the whole of the proceedings to the Employment Court.

[12] Both respondents oppose that application for removal. The Authority is to firstly determine the application by the second respondent for dismissal and then the application for removal once submissions from the respondent(s) are received on that application.

**Are the proceedings against the second respondent vexatious and frivolous?**

[13] Clause 12A of the Act provides:

- (1) *The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.*
- (2) *In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.*

[14] Mr Andrew and Ms Goffin in their submission say that the proceedings against the second respondent are not frivolous nor vexatious because s 137(2) of the Act expressly contemplates orders being made against persons who are not parties to the settlement agreement or to any relevant employment agreement. Section 137 (2) provides:

*Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.*

[15] Mr Andrew and Ms Goffin submit that the second respondent has used the applicant's marks, which they say are the applicant's personal property, to his own advantage, to the first respondent's advantage and to the applicant's detriment.

[16] It says that unless specific orders are sought from the Authority against the second respondent restraining him from using the applicant's marks and requiring him to destroy all copies that he has then any compliance order will be of limited or no utility. It is not contended though in the submissions that s 137(2) is a power in substitution for compliance but submitted that the orders sought against the second respondent are complementary to or a corollary to the main order of compliance sought and necessary to make the compliance order effective and meaningful.

### **Determination**

[17] The power of the Authority to order compliance is contained in s 137 of the Act.

[18] Section 137 applies<sup>1</sup> where any person has not observed or complied with, amongst other matters in s 137 (1) (a) (iii) any terms of settlement that section 151 of the Act provides may be enforced by compliance order. This is a matter that s 151 (1) (a) applies to because the agreed terms of settlement are enforceable by the parties under s 149 (3) of the Act.

[19] It is common ground that the second respondent is not a party to the settlement agreement and was not in an employment relationship with the applicant. The second respondent therefore has not failed to observe or comply with the settlement agreement.

[20] The applicant has relied to overcome that difficulty on s 137 (2) of the Act. The issue is whether that provision gives the power to the Authority to order compliance against a person who is not a party to the terms of settlement and cannot therefore be said to have failed to observe or comply with the terms of settlement.

[21] Mr McIlraith and Ms Dunn say that the Authority has no additional powers to order compliance under s 137(2) and this has been confirmed by the full Court of the

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<sup>1</sup> S 137(1)

Employment Court in *South Tranz Limited v Strait Freight Ltd.*<sup>2</sup> Further they submit the Authority does not have the power to order compliance against a person who was not a party to the original agreement alleged to have been breached - *Credit Consultants Debt Services NZ Limited v Wilson.*<sup>3</sup>

[22] It was stated in *South Tranz* amongst other matters at [33], *What it makes clear is that the power to make an order of the kind referred to in s 137(2) was not intended to be in substitution for other powers the Authority might have in respect of any particular matter but in addition to those other powers. Thus the expression recognises jurisdiction expressly conferred elsewhere.*

[23] An example was given in *South Tranz* where the Authority in the event of wages being calculated in breach of an employment agreement makes an order under s 131 of the Act for payment of arrears of wages and in addition a compliance order.

[24] There is I find some difficulty with the submission by the applicant that he is not seeking a compliance order against the second respondent which he accepts can only be made as against parties to the relevant settlement agreement. Clause 6 of the settlement agreement is a non-monetary aspect of the agreement. Under s 151 (2) (a) of the Act clause 6 may be enforced by a compliance order. It was stated by the Court in *South Tranz* at [38] that *Where, as in this case, the term of the agreement which is found to be broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question.*

[25] I am not satisfied that s 137(2) and to the extent there is reference to it s 138 of the Act gives the Authority the power to make an order for compliance against the second respondent who was not a party to the settlement agreement alleged to have been breached.

[26] Mr Andrews and Ms Goffin submit it may be necessary for the applicant to amend the application for compliance orders to clearly articulate the nature of relief sought against the second respondent but that should not provide a basis for dismissing the proceedings. I accept that if a proceeding can be amended to disclose a tenable cause of action then it should not be dismissed.

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<sup>2</sup> [2007] ERNZ 704 at 33

<sup>3</sup> [No 2] [2007] ERNZ 205 at 11

[27] I am not satisfied for the above reasons even with amendment however there will be a tenable cause of action disclosed against the second respondent which has any prospect of success. The proceeding against the second respondent is misconceived.

[28] Pursuant to clause 12A of the second schedule of the Employment Relations Act 2000 I dismiss the proceedings against Gordon Johnson in file number 5548067 as frivolous or vexatious.

### **Costs**

[29] I reserve the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority