

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Michael Grenside (applicant)
AND	Ian Gaskin (respondent)
REPRESENTATIVES	Graeme Ogilvie for the applicant No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS DUE BY	12 April, 2007
DATE OF DETERMINATION	30 April, 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed on 11 December 2006 Mr Grenside alleged the respondent had breached the confidentiality provision of a mediated decision. He sought damages of \$20,000, a penalty of \$5,000 and payment of his (unspecified) costs.
2. It proved necessary for Mr Grenside, on 1 February 2007, to personally serve a copy of his statement of problem on the respondent, along with a copy of the Authority's notice of record of it.
3. In his statement in reply received on 14 February Mr Gaskin denied the allegation.

4. The parties have not undertaken mediation in respect of their employment relationship problem. During a telephone conference on 26 February I was satisfied there was no merit in directing the parties to undertake mediation: s. 159 of the Act applied.

Agreement as to an Investigation on the Papers

5. My decision was reached in part because of the parties' agreement that I would investigate and determine their employment relationship on their written evidence and submissions, i.e. without the Authority's typical face to face, *viva voce* investigation. Mr Grenside agreed to file his material by 22 March, Mr Gaskin by 29 March, with the applicant having a right of reply by 12 April.
6. As it happened, submissions have been received from the applicant (and copied to the respondent), whereas – other than in his statement in reply – Mr Gaskin has not filed any argument and/or evidence. Efforts by Authority support staff to locate Mr Gaskin have gone unanswered: they were advised he no longer managed his taxi company and calls to his mobile telephone have gone unanswered.

Failure to Attend Without Good Cause

7. Because of Mr Gaskin's participation in the telephone conference on 26 February and his agreement to the Authority determining the problem on the papers, and his agreement to a submission filing schedule, and because the applicant's material has been copied to the respondent's given address, I am satisfied that Mr Gaskin has failed to attend or be represented without good cause and that it is proper for me to proceed to investigate and determine this matter as if he was present or represented: clause 12, Schedule 2 and s. 173 of the Act applied.

Background and Prohibition of Publication Order

8. Messrs Grenside and Gaskin reached a settlement agreement at a mediation hearing, pursuant to s. 149 of the Act, following the termination of the applicant's employment. The settlement agreement is dated 13 August 2001 and is signed off by the mediator.
9. The settlement records the parties' agreement that its terms and all matters discussed at mediation would remain confidential.

10. Pursuant to a statutory requirement under the Transport Services Licensing Act 1989 Mr Grenside arranged for his name to be included in a public notice inserted in the Dominion Post on 21 October 2006 regarding his application for a passenger service licence.
11. The applicant alleges that by email dated 24 October 2006 to Land Transport NZ (LTNZ), and copied to a third party, the respondent breached the confidentiality provision of the mediation agreement "*by disclosing matters concerning the settlement and the mediation discussions*" (par 2 (d) of his statement of problem). Mr Grenside also alleges the email contained incorrect information and was done in a malicious and injurious manner.
12. By letter dated 21 November 2006 from Mr Grenside's representative, the applicant initiated a claim for breach of contract but received no reply from Mr Gaskin.
13. By application dated 6 March 2007 Mr Grenside says that Mr Gaskin's email of 24 October 2006 contains an allegation which he denies, and which he says is not directly related to his cause of action but is part of the same communication. The applicant says the allegation is defamatory and could be very damaging to him if made public: Mr Grenside asks that the Authority prohibit publication of the allegation.
14. In an Authority letter dated 7 March 2007 The Authority invited Mr Gaskin to comment on the prohibition application. By letter dated 9 March he replied saying, verbatim he "*oppose(d) the request for a suppression order because it is not reverent to the application as to being a breach of mediation*".
15. Mr Gaskin clearly intended to say the application was not relevant. I agree the allegations are not relevant to the claim of breach of confidentiality as the parties' positions can be determined without quoting or referring to that allegation. However, I find that the prohibition of publication application is relevant and that it is fair and reasonable to grant it. Unlike Mr Gaskin's conclusion, I am satisfied that because it is not relevant to this employment relationship problem, and because the allegations are any way both serious and contested by the applicant, it is therefore appropriate to prohibit publication of any reference to those allegations: Clause 10 (2) of Schedule 2 of the Act applied.

Applicant's Position

16. In an affidavit dated 20 March 2007, Mr Grenside sets out what is summarised above while attaching a copy of an email sent by Mr Gaskin to LTNZ. He says the allegations contained

in the email are completely untrue. He also says he has never discussed the contents of the email with Mr Gaskin (see par 21 below).

17. Mr Grenside says that the allegations, because they were copied to a third party who has a key role in the taxi industry in Wellington, and to LTNZ, have caused him considerable distress and anxiety. He says LTNZ confirmed with him on 3 November 2006 that, should he continue with his licence application (the purpose of which is to own a taxi, Mr Grenside already having a licence to drive a taxi), it is obliged to make extensive inquiries as a result of Mr Gaskin's objections.
18. Mr Grenside also believes the breach of confidentiality of the mediated settlement will adversely affect his ongoing employment in the taxi industry as there is a likelihood that information about the mediated settlement will now circulate.
19. Mr Grenside says his costs to date total \$1800.

Respondent's Position

20. As set out above, Mr Gaskin has not adhered to his agreement of 26 February 2007 to file evidence and submissions by 29 March.
21. In his statement in reply Mr Gaskin says the only document in support of the alleged breach of confidentiality is "*a purported facsimile from me to Land Transport New Zealand dated 24 October 2006*" (par 2, above). Mr Gaskin says that, as an owner of an approved taxi organisation, "*I exercised my rights to file an objection under the public notification*" (par 4, above). He says the applicant invited by public notice the possibility of objections being lodged. He says his objection does not refer to any mediation decision or its contents, and that the reference to costs is a reference to what he had to pay his advisors in dealing with the applicant. He therefore did not breach the confidentiality of the settlement.
22. Mr Gaskin also claims that Mr Grenside told him he would not proceed with this application to the Authority if the respondent withdrew his objection to Mr Grenside's application to LTNZ.

Discussion and Findings

23. There is nothing *purported* (see par 20 above) about Mr Gaskin's email: it is real and clearly was sent to LTNZ (where it apparently has resulted in an inquiry, or will result in the same if

Mr Grenside continues with his application), and to a third party who in turn copied it to the applicant along with a note saying “*Michael, looks like Gaskin has it in for you! Regards, (first name)*” (attachment to applicant’s affidavit).

24. Mr Gaskin’s allegations about Mr Grenside, which are the subject of a publication prohibition order, are irrelevant to this employment relationship problem, as they were made after the parties’ employment relationship had ceased and in a context entirely removed from that relationship: Mr Grenside has other legal options available to him if he believes the allegations to be defamatory.
25. No issue is raised as to whether or not the settlement agreement is enforceable as an employment agreement as defined by the Act. That is because agreed terms were signed off by the parties and a mediator under s. 149 of the Act. Those terms, including agreement that all matters discussed at mediation are confidential, are therefore final and binding on the parties.
26. The parties are to be taken as meaning what they said. The parties were thereby bound to keep confidential the fact of the proceedings, the fact of the settlement and the terms of the settlement: see *Kerr v Associated Aviation (Wellington) Ltd* [2005] 1 ERNZ 632.
27. Mr Gaskin’s email of 24 October 2006 to LTNZ and another third party clearly breaches the confidential settlement in a number of respects. That is because Mr Gaskin’s email says:

I had to dismiss Michael as a driver after he told me (allegations set out) It cost me \$600 odd dollars in unfair dismissal costs.”

(attachment to the statement of problem and the applicant’s affidavit).

28. Those statements are clear breaches of the proceedings, the fact of the settlement and its terms. They are gratuitous and deliberate. They amount to a serious breach of Mr Grenside’s employment agreement: s. 133 (1) (a) of the Act.
29. In the absence of receipted evidence I do not accept Mr Gaskin’s claim that his reference to costs was a reference to what he had to pay “*his advisors*” in dealing with the applicant (par7, attachment to statement in reply). The costs cited by Mr Gaskin are very close to those he agreed to pay Mr Grenside in the mediated settlement.

30. I similarly reject Mr Gaskin's claim he was properly exercising his right to file an objection under the public notification: that is because his objections strayed into irrelevant areas. The respondent's references to dismissing the applicant and unfair dismissal costs were not relevant to the purpose of his objection. These claims have nothing to do with Mr Grenside's character and/or his fitness to holding a passenger service licence. The other claims, prohibited from publication, may prove relevant and could readily have been advanced by Mr Gaskin without him unnecessarily breaching his confidentiality obligations.
31. I note here that Mr Gaskin also said in his email that, "*I am willing to appear in court to back my objection ...*." Clearly, he was not prepared to appear in the Employment Relations Authority.

Remedies

32. It is Mr Grenside's uncontested evidence that the respondent's allegations are untrue, and that he has been adversely affected by them, particularly because he is now facing a LTNZ inquiry should he continue with his licence application. He seeks damages of \$20,000, a penalty of \$5,000 and costs.
33. The claim for damages of \$20,000 is not quantified or supported by any evidence. The claim appears to rest on what might happen to the applicant, both in terms of his application to LTNZ and if he should seek new employment in the taxi industry. The claim is also, clearly, significantly driven by the disputed comments that are now subjected to a prohibition of publication order and which are any way irrelevant to this application.
34. As Mr Gaskin's email is now over 6 months old I am satisfied that it is reasonable to expect some evidence of the actual impact the message has had on Mr Grenside's application for a passenger service licence and his re-employment experiences. It would be unconscionable to recover, in this case, damages out of proportion to the loss that actually occurred as a result of Mr Gaskin's breach: *Ozturk v Gultekin t/a Halikarnas Restaurant* [2004] 1 ERNZ 572. In this instance I am satisfied no damages have been established.
35. No case law is advanced to support a maximum penalty against an individual of \$5,000 (s. 135 (2) (a) of the Act).
36. However, other than filing a late statement in reply that sets out his position, Mr Gaskin has largely failed to defend this very serious claim.

37. I conclude that Mr Gaskin was well placed to communicate to LTNZ any concerns he had about Mr Grenside's fitness to hold a passenger service licence without reporting that he had dismissed the applicant, and that it cost him "\$600 odd dollars in unfair dismissal costs" (respondent's email of 24 October 2006 to LTNZ and copied to a third party). Those comments are unrelated to the merits of Mr Grenside's application, and any way are in clear breach of the respondent's undertakings as to confidentiality.
38. I am therefore satisfied that Mr Gaskin should be penalised to the extent of \$4,000 for what is a serious and gratuitous breach of his undertaking as to confidentiality, and that – having regard to the above, and the evident distress experienced by the applicant as a result of the breach of confidentiality – Mr Grenside is entitled to a portion of that amount, in the circumstances of this breach \$2,000 is an appropriate percentage: s. 136 (2) of the Act applied.
39. I am also satisfied that Mr Grenside should be fully reimbursed his fair and reasonable costs of \$1,800.

Determination

40. Mr Gaskin is to pay a penalty of \$4,000 (four thousand dollars), half of which, \$2,000 (two thousand dollars) is to be paid to Mr Grenside with the remainder going to the Crown, via the Authority.
41. Mr Gaskin is to pay costs of \$1,800 (one thousand, eight hundred dollars) to Mr Grenside.

