IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 100
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	BETWEEN	DIANA HENRY Applicant
	A N D	THE WAREHOUSE LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Shayne Boyce, Advocate for Applicant Penny Swarbrick, Counsel for Respondent
Investigation Meeting	11 May 2011 at Nelson
Date of Determination:	8 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter was initiated by a statement of problem filed in the Authority on 4 November 2010 by the applicant (Ms Henry) in which she alleges that the respondent employer (The Warehouse) has breached the terms of a mediated record of settlement in that it has failed to pay her the sum of $2,500 by way of compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), being the settlement proceeds of an employment relationship problem which Ms Henry had raised with The Warehouse in respect of her then employment by that firm.

[2] By statement in reply dated 10 November 2010, The Warehouse resisted Ms Henry's claim and alleged that she had in fact repudiated the settlement by breaching its confidentiality provisions. Contemporaneously, The Warehouse filed and served a counterclaim wherein it sought a penalty of $5,000 for the alleged breach of the settlement agreement.

[3] By common consent, the matters were heard together in a single investigation meeting.

[4] The matters in dispute between the parties can be simply summarised. Ms Henry had been employed by The Warehouse at its Motueka store. The employment came to an end. A personal grievance was raised. That grievance was resolved by a mediated settlement reached between the parties on 20 October 2010. It is not necessary for me to set out in full the terms of that mediated settlement. Suffice it to say that the terms included a provision wherein Ms Henry and The Warehouse each accepted the usual duties to keep the terms and conditions of the settlement confidential and The Warehouse agreed to pay to Ms Henry the sum of $2,500 as compensation in full and final settlement of her grievance.

[5] That sum was never paid because The Warehouse says that within two days of the mediated settlement, Ms Henry had called at the Motueka store where she previously worked, had purchased certain items, and in the course of paying for those items at checkout, had indicated to the checkout operator that she had *"won"* her case against The Warehouse. There is dispute about exactly what happened in that discussion between the checkout operator and Ms Henry, but it is common ground that there was a discussion of some sort. Critical to The Warehouse's case is that the checkout operator knew about the mediated settlement between The Warehouse and Ms Henry and the only way that she could have known what she did, The Warehouse submitted, was that she had been given the information by Ms Henry. The Warehouse stoutly maintained in its evidence that there was no other source of the information.

[6] The checkout operator so entrusted with this intelligence was so surprised by its import that she consulted her superior and eventually the store manager was apprised of the situation.

[7] Through counsel, The Warehouse sought an explanation from Ms Henry and was simply told that Ms Henry *"strongly refutes the allegations"*. No further information was provided by Ms Henry and accordingly The Warehouse indicated it would treat the mediated settlement as having been repudiated by Ms Henry and the settlement proceeds would be held in trust pending a resolution of the issues between the parties.

Issues

[8] The only factual issue for determination here is what happened when Ms Henry attended at The Warehouse that she had formerly worked at immediately after the mediated settlement. Once that issue has been decided, it will be possible to address the parties' respective claims regarding remedy.

What happened on 22 October 2010?

[9] In her brief of evidence dated 28 April 2011 filed in respect of this matter, Ms Henry recites what happened at the mediation (in non-confrontational terms) and her subsequent receipt of a letter from Ms Swarbrick (counsel for The Warehouse) making the allegation which is central to The Warehouse's claim, namely that she had told a checkout operator at The Warehouse Motueka on 22 October 2010 that she had *"won"* her case against The Warehouse and had received monetary compensation.

[10] The brief of evidence then goes on to recite what Ms Henry did in relation to the receipt of the letter, namely that she instructed her advocate, Ms Boyce, to deal with the matter for her by filing a statement of problem in the Employment Relations Authority. What is striking about the brief though, is that at no point does Ms Henry say unequivocally or otherwise just what the position was in respect of The Warehouse's allegation. Indeed she makes no comment at all about The Warehouse's allegation in that brief of evidence save to describe its receipt and her organisational response to it.

[11] Then she subsequently filed a brief of evidence in reply. This was filed in the Authority on 5 May 2011 and responded to The Warehouse's evidence. In this second brief, Ms Henry distances herself from the detail of the evidence given by Ms Ann Moody who was The Warehouse's checkout operator who had dealt with Ms Henry. In this brief, Ms Henry acknowledges that she was in The Warehouse (although disputes the date), acknowledges that she spoke with Ms Moody at the checkout, but denies absolutely the nature of the conversation which Ms Moody gave evidence of and on which The Warehouse's position relies. Every single aspect of Ms Moody's evidence is, according to Ms Henry, wrong; there was no discussion about the mediated settlement, no discussion about the case being won or money being paid out and no introduction by Ms Henry to Ms Moody of one or other of her family members.

[12] Additionally, Ms Henry says that she observed the store manager (Mr Cotton) standing on the floor of the shop when she was in The Warehouse and that he was talking to another senior staff member. Again, this evidence is diametrically opposed to The Warehouse's evidence; the supervisor referred to had been promoted and could not have been in The Warehouse on either the day that Ms Moody identified or indeed the day that Ms Henry said that she was in the shop. Furthermore, Mr Cotton's evidence was that he was in his office when Ms Henry went through the checkout, not on the floor as she alleges.

[13] Much was made in Ms Henry's evidence about the question of whether she introduced Ms Moody to a family member or not. Ms Henry is very clear that by the time she went through the checkout, she was by herself, although she had entered the shop with family members. A particular family member (namely her mother) who Ms Moody thought she had been introduced to, was not even in Motueka at the time according to Ms Henry and while I did not hear from Ms Henry's mother, I am happy to accept that evidence at face value and record my conclusion that Ms Henry's mother was not involved in this exchange at all.

[14] But all of this really misses the point. Ms Henry has gone to a great deal of trouble to rebut the peripheral evidence of Ms Moody about what she remembers about this brief checkout conversation which took place some seven months before she gave her evidence to the Authority. The central issue, which Ms Henry fails to address absolutely in her evidence, is how Ms Moody would have had any idea at all about the fact of Ms Henry's settlement with The Warehouse, if Ms Henry did not tell her. Ms Henry wanted me to believe that Mr Cotton, the store manager, *"had it in for her"* and that *"his version of events was fabricated lies"*. I heard Mr Cotton give his evidence and I thought him a straightforward and reliable witness. What is more, I could not imagine from the evidence before the Authority what possible benefit Mr Cotton would derive from making up a tale such as this to get Ms Henry into trouble. Mr Cotton was involved in the mediation which settled matters with Ms Henry and he told me (and I accept) that he made a particular point of encouraging the mediator to spell out to Ms Henry the effect of the confidentiality provisions. That being the case, it is difficult to conceive of why Mr Cotton might then spread the word around about the nature of the settlement with Ms Henry when that would seem to be absolutely inconsistent with his insistence at mediation that he needed Ms Henry to maintain confidentiality. He told me in his evidence that he

thought that it would have a negative effect on his continuing staff if they knew that Ms Henry had *"got a payout"*.

[15] It may well be that Ms Moody got the peripheral parts of her evidence wrong and that she remembered bits about her exchange with Ms Henry that were simply not right. But I am satisfied on the evidence before me that the exchange at the checkout took place on 22 October 2010 and not the alternative date that Ms Henry identifies of 23 October. Ms Moody was clear about the issue and I prefer her recollection. Further, Mr Cotton remembers Ms Henry being in the store and he remembers that as 22 October 2010, so I accept that is the date on which the events in contention happened.

[16] Next, while Ms Moody may not have been introduced to family members as she seems to recall, it seems to me that Ms Henry has not satisfied me that there is any logical explanation for how Ms Moody knows enough about the terms of her settlement with The Warehouse to report the matter to her superior if she did not get that information from Ms Henry. I discount the prospect that Mr Cotton *"spread the word"* as Ms Henry invites me to conclude; for reasons that I have just made clear, I simply think that suggestion is fanciful. Mr Cotton wanted to protect the confidentiality of the arrangements rather than to advertise what had happened. He was the only person in store who knew about the mediation and its terms and so only he could have *"spread the word"*. Given my rejection of him as a source of the information, the only other source available is Ms Henry herself.

[17] It follows that I conclude that Ms Henry did tell Ms Moody that she had received a payout from The Warehouse and while the details of that may not have been explicit, I am satisfied that Ms Henry gave Ms Moody enough information to prick the other's interest and critically, for our purposes, to breach the explicit terms of the confidentiality provision in the record of settlement.

Determination

[18] Having found as a fact that Ms Henry disclosed the existence of her mediated settlement with The Warehouse and sufficient information about that to prick the interest of a former colleague, the effect of Ms Henry's action is to repudiate the terms of settlement.

[19] In its counterclaim, The Warehouse seeks a penalty. In the Authority's decision in *Douglas v. Hanes Sharley International Ltd* AA24/07, Member Robinson made the following observation about penalties at para.[18] which I adopt:

> *Penalties are penal sanctions for breaches of an agreement. The Authority may order that the whole or any part of the penalty be paid to any person. Penalties, being punitive in nature, are directed at proscribing undesirable behaviours or conduct. It is logical that such behaviours be deliberate or wilful. It has been said that generally speaking, a penalty is appropriate only where there has been a wilful breach or default.*

[20] Ms Henry has breached the terms of her mediated settlement with The Warehouse and by so doing has deprived herself of the benefit of that agreement by repudiating it. However, Ms Henry did not strike me as *"deliberate or wilful"* in her behaviour but rather unthinking and perhaps foolish. I am not satisfied that the law requires me to further penalise Ms Henry beyond her loss of the settlement proceeds from her personal grievance.

[21] I think the proper result is for Ms Henry to forego the $2,500 she would otherwise have been entitled to because of her repudiation of the agreement by telling a former colleague sufficient of the confidential settlement to breach its terms.

[22] Put another way, if the repudiation of itself does not ground the loss of the benefit of the mediated agreement (as I have concluded), then I direct that Ms Henry is to lose the benefit of the mediated settlement that she would otherwise have been entitled to and so the correct course is for the $2,500 to be retained by The Warehouse and not paid out to Ms Henry. Analysed in this way, in lieu of the repudiation conclusion, Ms Henry has suffered a penalty of $2,500 and the Authority has directed that that penalty be paid to The Warehouse Limited.

Costs

[23] Costs are reserved.

James Crichton
Member of the Employment Relations Authority