Employment Court of New Zealand

ITE v ALA [2016] NZEmpC 42 (15 April 2016)

Last Updated: 20 April 2016

THERE IS AN ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY INFORMATION LEADING TO THE PARTIES' IDENTITY.

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 42

EMPC 196/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ITE Plaintiff
AND	ALA Defendant

EMPC 272/2015

IN THE MATTER OF a challenge to a determination of the

Emloyment Relations Authority

AND BETWEEN ALA Plaintiff

AND ITE Defendant

Hearing:	10 and 11 December 2015, 17 February and 11 April 2016
Appearances:	Plaintiff in person M Ward-Johnson, counsel for defendant
Judgment:	15 April 2016

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff was employed as an IT Network Specialist with the defendant organisation from 30 October 2005. The defendant is a local authority. The plaintiff

undertook project work involving the defendant and other local authorities (the shared services project). Security concerns relating to the defendant's information systems arose in March 2014. A meeting with the plaintiff was convened on 10

March 2014 and he was placed on special leave. An employment investigation followed.

[2] At around this time the defendant made a complaint to the Police, which resulted in a criminal investigation. The plaintiff was subsequently formally charged with two offences, namely of damaging or interfering with a computer system and of accessing a computer system without authorisation. Both related to actions the plaintiff was alleged to have taken during the course of the

employment investigation, while on special leave. The plaintiff was suspended from work shortly thereafter. He accepted that he had remotely accessed the defendant's computer system and had deleted information from it but contended that he had done so because the information belonged to other organisations which were involved in the shared services project and deletion was necessary to protect their interests.

[3] The parties attended mediation in an effort to resolve matters and settlement was reached. One of the terms of settlement1 was that the plaintiff's employment would come to an end on an agreed basis, namely by reason of redundancy. The agreement was signed off by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act). The agreement included express reference to the plaintiff's ongoing obligations of confidence and included expanded undertakings of confidentiality in relation to matters arising from the employment investigation.

[4] The plaintiff subsequently appeared in the District Court and entered a plea of not guilty on the criminal charges. The charges were subsequently withdrawn by leave on 4 February 2015.

[5] It is apparent that by this stage the plaintiff felt very aggrieved. He decided to prepare a video in which he set out his explanation and perception of what had occurred and why. He made the video available via his website and on 5 March

2015 sent emails to a large number of the defendant's staff and staff of other

organisations. The emails included an invitation to view the video. The plaintiff's

website and video advised that further disclosures and interviews would follow.

[6] The plaintiff's communications, website, video and associated publication has been an ongoing source of concern for the defendant. It says that he has breached his obligations under the agreed terms of settlement and/or his personal undertaking and/or his employment agreement. The plaintiff denies this. He contends that he has a right to ventilate matters that are of concern to him and that the video is an important educational tool to enable those involved in the process, or interested in it, to learn some valuable lessons.

[7] The defendant sought compliance orders in the Employment Relations Authority (the Authority). The Authority made compliance orders against the plaintiff, including a requirement that the video be removed from the internet. A penalty was imposed for breach of his obligations under the settlement agreement.

The Authority also made permanent non-publication orders.2 The plaintiff

challenges the Authority's determination and effectively seeks that the orders made

in that forum be rescinded. The challenge was pursued on a de novo basis.

[8] The plaintiff's key argument in the context of his de novo challenge is that he

had not breached any of his obligations. In particular he says that:

- The disclosures did not offend the terms of settlement or the ongoing obligations of confidentiality in his employment agreement, as they were focussed on the criminal investigation rather than the employment investigation and/or resulting disciplinary process;

- In any event, the information was in the "public domain" so was no longer

confidential.

[9] Consideration of whether or not the plaintiff breached his obligations requires consideration of what he agreed to and the undertakings he gave, viewed against his subsequent actions.

The facts

[10] Clause 14 of the plaintiff 's individual employment agreement provided that:

14.1 You agree to maintain strict confidentiality with respect to the services and duties performed for the [defendant]. You will not disclose to any person, firm, corporation or entity, any trade information acquired through the [defendant] including, but not limited to, computer programmes, software, forms and documents, training manuals and techniques, products, services, the identities of the current, past and prospective customers, prices charged by the [defendant], marketing and sales plans, financial information and any other information in intellectual property both during the term of this Agreement and after its termination. This restriction shall cease to apply to knowledge or information which may come into the public domain without there being a breach by you of this restriction.

[11] It follows that under cl 14 the plaintiff was required to maintain confidentiality about services and duties he performed for the defendant and any trade information. This duty extended beyond his departure but ceased to apply to knowledge or information in the "public domain", unless it was there by reason of a breach by the plaintiff.

[12] The plaintiff subsequently signed personal undertakings, on 4 June 2014. Those undertakings were later incorporated by way of reference into the settlement agreement. The undertakings document recorded that the defendant had required the plaintiff to execute an undertaking as to confidentiality, non retention, non dissemination and destruction of data. These undertakings reinforced the confidentiality requirements in cl 14 of the employment agreement and incorporated an undertaking as to costs consequent on any breach.

[13] The settlement agreement was entered into six days later, on 10 June 2014. It provided that:

Clause 1

These terms of settlement and the fact that a settlement has been reached and all matters discussed on a without prejudice basis at the meeting between the parties ... shall remain, as far as the law allows, or [the defendant] policy requires, strictly confidential to the parties and/or their professional, legal and financial advisers.

...

Clause 5

... [The plaintiff] expressly acknowledges and agrees that clause 9.2 of his IEA applies to the termination of his employment in that during the 12 week notice period in that he remains an employee of [the defendant] and will continue to be bound by his duties of confidentiality and fidelity, which duties [the plaintiff] agrees survive the termination of his employment pursuant to clause 14 of his IEA (refer clause 11 herein).

Clause 6

... [the parties] agree that no statement will be made to staff at [the defendant] or any other third party about the reason for termination or [the plaintiff's] employment until his employment end date ... and from that date any statement will be limited to termination by redundancy.

Clause 11

[The plaintiff] expressly acknowledges and agrees that clause 14 (confidentiality and non disclosure) of his IEA continues to apply despite the termination of his employment. [The plaintiff] further agrees that this obligation of confidentiality includes and extends to disclosures to [the defendant's] staff (past or present) and to:

11.1 any and all information and/or reports and/or data of any kind whatsoever provided to him during the course of [the defendant's] employment investigation into him (investigation data) and/or the resulting disciplinary process;

11.2 any and all information and/or data related to his employment at [the defendant] in his possession, power or control regardless of whether or not that information and/or data relates to the employment investigation and/or the resulting disciplinary process; and

11.3 the scope of the employment investigation and/or resulting disciplinary process including (but not limited to) [the plaintiff's] own position in response to any issue raised with him during the course of the investigation and/or the resulting disciplinary process.

Clause 12

[The Plaintiff] further agrees: to return and/or not retain copies of; not to disseminate or disclose to any third party (verbally or otherwise); destroy if any copies have been made and not interfere with in any way; all of the investigation data provided to him during the course of [the defendant's] employment investigation and/or resulting disciplinary process and/or any other information and/or data related to his employment at [the defendant] in his power, possession or control regardless of whether or not that information and/or data relates to the employment investigation and/or the

resulting disciplinary process. The clause does not apply to the file held by

[the plaintiff's lawyer].

Clause 13

[The plaintiff] agrees and acknowledges that, if he breaches clauses 11 and/or 12 of this agreement, he will be liable for any of [the defendant's] costs and/or disbursements (including expert fees and/or solicitor/client costs) incurred in addressing, responding to or dealing with the breach.

[14] As will be apparent, the settlement agreement extended the obligations of confidentiality contained within the plaintiff's employment agreement. Part of the plaintiff's extended obligations centred on what had been discussed, provided and made known to the plaintiff during the course of the investigation/disciplinary process and his position in relation to issues raised (as reflected, in particular, in cls

11 and 12). It is accordingly necessary to consider what information was imparted during this process. This can largely be discerned from the notes of an investigation meeting which took place with the plaintiff on 15 April 2014.

[15] The meeting was lengthy and covered a range of concerns, including the extent of the plaintiff's involvement in the shared services project; criticisms the plaintiff had of management within the defendant organisation; concerns relating to perceived flaws in the defendant's security systems; perceived IT risks for both the defendant and other organisations; resourcing concerns and concerns relating to the competency of other employees of the defendant; concerns about the defendant's financial expenditure; a perceived personal vendetta against the plaintiff by senior management, characterised as a "witch hunt"; and related concerns that certain members of the senior management team were "purging" the organisation, mismanaging funds and had created an environment of fear.

[16] Following the meeting, the above issues and concerns were reiterated in email correspondence from the plaintiff to the defendant

staff members who were involved in the investigative process. The plaintiff was also, by this stage, raising a series of concerns and criticisms about the way in which the investigation was being conducted. The defendant wrote to the plaintiff on 7 May 2014 enclosing a quantity of information for the purposes of the investigation process, including email files on a USB stick which the defendant advised must be treated as confidential.

[17] On 4 July 2014 the plaintiff lodged a request for official information. This included a request for a breakdown of the costs associated with running the IT department for the preceding 12-month period and a request for advice as to the IT security standards the defendant used. The plaintiff also asked for details of any security breaches from May to June 2014. He accepted in cross-examination that these issues had been raised during the employment investigation. He also accepted that information relating to these matters had been made available to him as part of the employment investigation.

[18] The defendant declined the request, and raised a number of concerns in relation to it, advising that:

4. All of the information [the plaintiff] seeks falls within [the defendant's] investigation into him, data obtained, investigation scope, his response to any issue raised with him, the disciplinary process and, of most concern, [the plaintiff's] admitted unlawful forensic undeletion of [the defendant's] data *(refer clauses 11, 12 and 14 of the settlement deed)*. If [the plaintiff] believes that this request is a lawful method by which he can obtain and disseminate information to which he is not entitled then he is mistaken as to his rights and entitlements. The inescapable conclusion is that, at best, [the plaintiff] does not fully understand or appreciate his obligations under the agreements & the potential risk to him by making this request, or at worst, that he is determined to deliberately disregard his obligations under the agreements. ...

(emphasis in original)

[19] While the defendant declined the request on the basis that the request itself was a breach of the plaintiff's obligations, this was not a point that was pursued by the defendant at hearing. Rather it was clarified that the defendant's concern lay in what the plaintiff intended to do with the information he sought. The concern was a reasonable one.

[20] In the event, the plaintiff advised (through his then lawyer) that he did not wish to pursue his request. Nothing further occurred until early 2015. As I have said, the charges against the plaintiff were withdrawn on 4 February 2015. A flurry of group emails from the plaintiff followed shortly afterwards, on 5 March. The first in time was entitled "The Story Behind [the plaintiff] and What Happened". It was sent to a number of people associated with the defendant. It said:

I suspect that you are all probably aware of me as a result of updates provided by [the Chief Executive of the defendant] as the NZ Police investigation proceeded to the eventual conclusion that the charges were withdrawn. I also suspect that you may not have had the full story on this as much of the "new management" is lacking knowledge in so many areas to which this relates. The "new management" referred to here are [four named individuals].

Anyway, from my point of view, if you are interested in the "good oil" on this one visit the website below...

[website]

Make a cuppa and watch the video. I suspect it will fill in a lot of missing parts. It has been a very sad journey from my perspective to this point and all totally avoidable.

[21] The second email was sent 10 minutes later, this time to a group email address (".Everyone" and ".BS Tech"). The email was entitled "What Happened to [the plaintiff] in 2014 – be quick !" It stated:

Do you recall the chap who was in IT who suddenly disappeared about midway thru 2014?

If you do you might be interested in the [defendant's] sequence of events that resulted in this outcome which was primarily centred around [the defendant] management failings. The matter eventually caused the NZ Police to get involved with lots of money being spent on this investigation all of which was for nothing in the end.

Anyway go to [website] to get the video with the "good oil" if you are

interested.

Make a cuppa and the first video link in the list will work on most devices. For further updates visit [website] as there will be additional video produced

– I have still to interview the NZ Police about this matter.

[22] The third email was sent to employees at another organisation at 12.52pm, the subject line of which read: "What Happened to [the plaintiff] in 2014!". The email said:

Do you recall me?

I was in the [defendant] IT department and had a lot of involvement with

[the project] getting setup. I suddenly disappeared about midway thru 2014.

If you do you might be interested in the [defendant's] sequence of events that lead to what has been a very costly process with a sad ending. The video documents the management failings, money that was spent, the NZ Police involvement and other matters around

what happened behind my sudden departure.

Anyway go to [website] to get the video with the good oil if you are interested. It will probably fill in a lot of gaps you haven't been told by [the defendant].

[23] The same email was sent to a large number of recipients at 1.47 pm, predominantly employees of the defendant.

[24] I pause to record that numerous documents, including these emails, were the subject of objection. In accordance with an earlier direction made following discussion and agreement with the parties, I reserved determination of the respective objections (insofar as they remained in issue) and allowed the parties to refer to the documentation at hearing. I understood the plaintiff's objection to the emails referred to above to be based on relevance and an assertion that they are insufficiently material to warrant consideration. The plaintiff's arguments in relation to relevance dovetail into his submissions as to why he says the emails did not breach any of the obligations he was subject to. However, the documentation is plainly relevant to the key issue as to whether the plaintiff's communications constituted a breach of his obligations. They are therefore relevant and admissible.

[25] As will be evident, each of the emails provided a link to a webpage. The webpage stated that it had been set up to track progress in relation to the criminal prosecution, referred to the "triggering" of that investigation and identified the staff members of the defendant organisation who were said to be involved. It went on to state that:

The background events that resulted in these charges being laid fundamentally relate to high levels of management change in a complex environment involving [the defendant's] own IT requirements in addition to those required for [the project]...

The information provided here will typically be of video based commentary related to what has happened and the outcomes. It would be worthwhile viewing for any [similar organisation] wanting to provide shared services or for employees to understand how high management change can result in disastrous outcomes in such an environment. It also shows the capability of the NZ Police in investigating these sort of matters so has general viewing interest in this context.

[26] The webpage indicated that a video containing a "detailed analysis of failings" could be expected around 25 April 2015. The following explanation appeared under the heading "Why Have You Done This?":

This website has been setup to enable dissemination of information related to the performance of [the defendant], the NZ Police, the Crown Prosecutor and other aspects related to the criminal justice system.

It would be fair to say that I have been dismayed by the ability of all of these parties to cope with modern day complexity around IT especially with regard to [the project]. ...

ADDITIONAL OUTCOMES

It would also be fair to say that the other outcomes I am after relate to ...

- **Proper behaviour of large organizations and the highly paid management staff**. They need to add the value that their salary commands.

- For the **truth in regard to the behaviour of large organisations** to become more visible. Too often public money is spent on matters that were avoidable.

- For the **real costs** ... to become known especially where personal matters get involved ...

- For financial recompense related to this to be made and any criminal failings to be held to account.

(emphasis in original)

[27] A copy of the video was before the Court, as was a transcript of the video. The video shows the plaintiff talking at length about a number of matters, including details as to his employment and the tasks he was engaged on; details of project work with other local authorities which he was undertaking at the time of his departure; details of what happened to information garnered as a result of the project and how it was stored and protected; the extent of access the plaintiff had to information held by other organisations involved in the project; the background to the concerns that gave rise to the employment investigation and the "pointless witchhunt" which ensued; the steps that the plaintiff took to delete information after the employment investigation had commenced and why he had taken such a step; staff changes and perceived organisational failings within the organisation, including allegations of malice and management stupidity; reference to the confidentiality

agreements (which he asserted did not benefit him in any way) and an invitation to draw inferences as to why he may have left the organisation in such a hurry.

[28] Three days after sending the emails, the plaintiff contacted the defendant and requested that an item of equipment, provided in the context of the employment investigation, be returned. The plaintiff advised that if the item was not returned within the next week "escalation events will occur". The email was rejected, as the defendant had by this time put a block on incoming emails from the plaintiff. The plaintiff did not take kindly to this and sent a further email advising that:

I understand that you may be reeling from the **truth** and **opinion** that has been provided from the video but you really need to do is **separate truth from abuse**. What has been said in the video is the truth for the most part and [the plaintiff's] opinion (again sensible deductions from the truth). ...

So get off your current strategy about trying to **avoid the problem** and **address it head on** which is what you are paid to do. Next week please apply some **sensible logic** as it is very possible if you don't you will get closer to the "tectonic plates" from additional digging. The strategy you have used so far in employment and criminal matters is leaving you exposed and is woeful. It is **not the standard of intelligence** you should be providing ...

You can fool some of the people some of the time but not all of the people all of the time.

(emphasis in original)

[29] A further email from the plaintiff soon followed, advising that if the requested equipment was not returned within the specified timeframe further (unspecified) action would follow. During the course of the hearing, these emails were described as threatening. I agree. Later the same day (8 March 2015) the plaintiff sent an email to employees of another organisation attaching a link to the website and inviting them to view it. He advised that the website would be "updated as new stuff comes out". He indicated that the recipients should feel free to circulate the material to whomever they wanted.

[30] Later that evening the plaintiff forwarded another email to a group of people who had previously worked with the chief executive of the defendant organisation. It invited the recipients to view the video, and attached a link to the website, to

enable them to obtain the details of "his first exceptional failure which ultimately involved the NZ Police...".

[31] It is clear that a number of people viewed the plaintiff's website and video,

leaving various comments in relation to the issues he had raised.

[32] The defendant was concerned with the steps the plaintiff was taking to ventilate his concerns. It applied for orders from the Authority requiring the plaintiff to comply with his obligations under the settlement agreement. The Authority issued a number of compliance orders by way of determination dated 22 June 2015.3

[33] On 2 October 2015 the plaintiff filed a lengthy submission with the defendant under the Protected Disclosures Act 2000. He also wrote to an overseas organisation seeking details as to the employment history of one of the defendant's employees who had been involved in the employment investigation. The Protected Disclosure submission traversed matters which had been raised in the context of the employment investigation, including concerns that the plaintiff had about his manager's motives and actions. The submission was responded to on 5 November

2015. The defendant advised that the six allegations of serious wrongdoing by staff had been investigated but were found not to be supported. The plaintiff was advised of his rights under the Protected Disclosures Act to complain and/or seek a review of the response.

[34] A request under the Local Government Official Information and Meetings Act 1987 followed on 20 November 2015. The request was declined by way of letter dated 23 November 2015. The plaintiff was advised of his right to complain about the response.

[35] The plaintiff forwarded a further lengthy letter (entitled "Response to Protected Disclosure Act Submission") to the defendant on 23 November 2015. The defendant replied by reminding the plaintiff of his right to complain to the Ombudsman about its response and advising that it would not be responding further

in relation to the request.

3 *P v Q*, above, n 2.

[36] By November 2015 the plaintiff had changed his email address and was emailing the defendant organisation again under the new pseudonym ("Truthsayer"). This was despite the fact that, as he accepted in cross-examination, he had been given a point of contact within the organisation and each of his requests had been responded to, although not in a way which he had found satisfactory. The plaintiff asserted that his right to contact the defendant organisation, including its elected members, had been impeded.

Breach?

[37] The defendant submits that the emails referred to above, the website and the video breached the plaintiff's obligations under the settlement agreement.

[38] The confidentiality clauses in the agreement are clear and unambiguous. The agreement was in full and final settlement. Consideration was clearly given. The agreement was signed by a mediator who certified that he had explained the effect of s 149(3) to the parties prior to signing the agreement and that he was satisfied that they understood the effect of that provision. Section 149(3) provides that the agreed terms of settlement are final and binding on, and enforceable by, the parties. The plaintiff was legally represented by an experienced practitioner at the time. I can discern no reason why the agreement would not be enforceable.

[39] In evidence the plaintiff suggested that what was being referred to in the emails were matters at issue in the Police investigation and which fell outside of the scope of the agreements he had entered into. This characterisation was at odds with the text of the emails and I do not accept it. Plainly the references to management failings, issues giving rise to the involvement of the Police and the plaintiff's departure from the organisation were based squarely on the matters that had led to the employment investigation, were discussed during the course of it and related to his subsequent departure from the organisation. Indeed the plaintiff accepted in cross-examination that perceived management failings were raised during the employment investigation, as is reflected in the meeting notes.

[40] I conclude that the emails breached the plaintiff's obligations under the settlement agreement. In particular they referred to his position in relation to the employment process in breach of cl 11.3.

[41] The webpage referred to the "triggering" of the police investigation and relevant background events. The shared services project and management capability and performance are referred to. It is not credible to suggest that references to management failings and performance were directed at anything other than the plaintiff's employment and concerns he had in relation to aspects of it and which had been raised and discussed during the course of the employment process. Plainly the observations were not limited to the Police investigation and cannot be characterised as simply providing some limited background context.

[42] I conclude that the webpage breached the plaintiff's obligations under the

settlement agreement, in particular cl 11.3.

[43] The video traversed numerous issues including to do with the plaintiff's employment and tasks he was engaged on, the defendant organisation's systems and arrangements with other organisations, the deletion of data by him and why he had considered this necessary, and dealt at length with his view of management failings and the "witch hunt" that he said he had been subjected to, the allegedly degrading work environment and the employment investigation. The video also referred to the confidential agreement he had entered into.

[44] The video breached the plaintiff's obligations under the agreement, particularly cl 11.2 (being information related to his employment), cl 6 (by referring to the confidential agreement and, by necessary implication, the reason for and fact of settlement) and cl 11.3. Indeed during the course of cross-examination the plaintiff accepted that statements made during the video were directed at setting out his response to issues raised during the course of the employment process. This was a point which had earlier been referred to in his pleadings, where he stated that he had elected to prepare a video to explain both the dismissal and the criminal charges which followed.

[45] The plaintiff's employment agreement provided an exclusion in relation to information which might otherwise fall within the scope of the confidentiality provisions, namely where such information was in the public domain. The plaintiff placed considerable reliance on this exclusion in support of his submission that there had been no breach of his obligations. I understood him to be saying that information provided to him as part of the criminal disclosure process was in the public domain and accordingly did not breach his confidentiality obligations.

[46] The employment matters gave rise to the Police investigation and subsequent charges. Those charges were withdrawn and no evidence was ever given in relation to them. The plaintiff was entitled to request information under the criminal disclosure regime and he did so. Such disclosure is limited in scope and in purpose. It appears that the plaintiff was the only person who received the information he had requested. While a person other than a party may seek access to documents related to criminal proceedings, and may seek access to the court file, there is nothing to suggest that any such request was made. If it had been it would have needed to be supported by reasons and considered by a Judge, including having regard to the

protection of confidentiality.4

[47] It cannot be correct that the fact that the plaintiff himself obtained material via the criminal disclosure process meant that he could then further disseminate it in breach of his confidentiality obligations to the defendant, and no caselaw was cited in support of the proposition. In any event, the short point is that various matters referred to in the video related to information that was not publicly available (as the plaintiff conceded in cross-examination).

[48] The plaintiff mounted a further argument that he was permitted to refer to the otherwise protected material in order to prove his innocence. The charges against the plaintiff were withdrawn and he was not called on to defend them in the criminal courts. Accordingly the justification that the plaintiff seeks to rely on does not arise.

[49] A witness for the plaintiff gave evidence that he had viewed the video and considered that it gave a useful insight into what had occurred. The plaintiff also

4 Criminal Procedure Rules 2012, rr 6.8-6.10.

suggested that dissemination was necessary in the broader public interest, to enable others to learn from the alleged mistakes that had been made. I do not accept that the disclosures were in the broader public interest or were otherwise justified.5

Conversely there is a strong public interest in maintaining the confidentiality of s

149 settlement agreements freely entered into.

[50] As the former Chief of the Employment Relations Authority has observed:6

If the principal protagonists to the employment dispute continue after its resolution to raise the matters at the heart of it, this will usually tend to have an undermining effect on the settlement and relationships of the parties between themselves or with others. Such discussion, particularly in disparaging terms, is analogous to picking at a scab with the usual result.

It is not the point that through discovery or by information provided from third parties who were not privy to and bound by the mediation, the same information can be obtained. The point is that the protagonist parties, who are those carrying the most influence, will not seek to revive the problem by further discussion about it. They have agreed not to reopen and expose again the wound healed by mediation.

[51] The plaintiff also submitted that his actions were protected by his right to free speech. The first point is that the plaintiff voluntarily restricted his ability to air his views about employment issues when he agreed to keep matters relating to his employment confidential. In evidence he said:

I however have a right to state my case in regard to the criminal matters as part of the rights granted in the Bill of Rights, Criminal Disclosure and Court Rules related to court files.

[52] Again, the argument does not arise on the facts. I did not understand the defendant to be suggesting that matters discussed during the course of the plaintiff's interview with the Police amounted to a breach of the obligations he had agreed to or that the plaintiff was prevented from raising any matters relevant to the criminal inquiry with the Police, or would have been prevented from raising any such matters in court in defending the charges laid against him. As I have said, the criminal charges were withdrawn and the plaintiff was not called on to answer them in the

District Court.

5 See, for example, *Evolution E-Business Ltd v Benjamin Smith* [2011] NZEmpC 109 at [59], for a discussion of the sort of circumstances in which the Court will not restrain a disclosure of otherwise confidential information. This is not such a case.

6 *A v Y Ltd* (2009) 9 NZELC 93,200 at [35] and [36].

[53] The plaintiff advanced an additional submission that he had been jointly employed by the defendant organisation and other organisations on the shared services project, and that this was relevant to whether or not he could be said to have breached his obligations to the defendant. I took this submission to be based on a suggestion that much of the information which the defendant said was confidential had in fact been obtained during his asserted employment elsewhere and accordingly could not amount to a breach. I do not accept this.

[54] There was no evidence before the Court, other than the plaintiff's uncorroborated evidence, that he was employed by anyone other than the defendant at the relevant time. He accepted in cross-examination that there was no written employment agreement with any other organisation and the information that was before the Court, namely a structural diagram, tended to support the defendant's submission that it was the plaintiff's sole employer.

[55] As I have said, the defendant did not advance an argument that the plaintiff's request under the Local Government Official Information and Meetings Act or his submission under the Protected Disclosures Act constituted a breach of any of his obligations. Rather the argument centred on the plaintiff's assertion that because he had requested information under the Local Government Official Information and Meetings Act and had made a submission under the Protected Disclosures Act, he was then free to disseminate any such information because it was in the public domain. The defendant took issue with this, although the point is moot because no information was in fact provided under either statutory mechanism.

[56] The plaintiff indicated that it would be helpful if the issue could nevertheless be dealt with in this judgment. In relation to this issue, I am inclined to agree with the Authority member's analysis.7 In summary, that is that the confidentiality obligations attached to the plaintiff. The mere fact that he obtained information via either of these statutes did not release him from his obligations under the agreements. I doubt (and as I have said the defendant did not pursue such an

argument) that the making of a request or submission could of itself amount to a

7 *P v Q*, above n 2, at [39].

breach. That would effectively cut across the statutory entitlements contained within the relevant legislation.

Penalty?

[57] The defendant seeks to uphold the Authority's determination imposing a

penalty and the compliance orders made.

Penalty – for what and why?

[58] The Authority imposed a penalty of $6,000. The plaintiff says that no penalty should be imposed. I understood this to be on the basis that there had been no breach of his obligations. I have not accepted this. The defendant submitted that a higher penalty should be imposed, but did not specify at what level or traverse the sort of factors that might relevantly be taken into account.

[59] Section 149(4) provides that a person who breaches an agreed term of a s 149 settlement agreement is liable to a penalty. The maximum penalty is $10,000 in the case of an individual.8

[60] I have already concluded that the plaintiff breached the certified settlement agreement. The question then becomes whether a penalty is appropriate and if so at what quantum.

[61] There are a number of interlinking principles underlying the imposition of a penalty under s 151 for non-compliance with a s 149 settlement agreement. These principles can be discerned from the statutory scheme and case law. In determining an appropriate penalty a range of considerations will be relevant, including:9

- To protect the finality and integrity of s 149 settlement agreements by deterring the individual transgressor and others from similar breaches;

- To punish the transgressor;

- Consistency with penalties imposed on others in similar circumstances;

8 Employment Relations Act 2000, s 135(2)(a).

9 See *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448 (EmpC) at [47]- [48]; *Tan v Yang* [2014] NZEmpC 65 at

[32].

- An assessment of the nature and extent of the breach, including whether it was deliberate, one-off or sustained, with the maximum penalty being reserved for the worst cases;

- Any steps taken by the transgressor to remedy the breach;

- Proportionality in the circumstances.

[62] I am satisfied that a penalty is appropriate in the present case. Deterrence is particularly relevant in the present circumstances, both in relation to the plaintiff and more generally. As the Authority member observed, having regard to the number of settlement agreements concluded under s 149:10

If breaches such as those made by [the plaintiff] were not subject to penalty awards big enough to deter such behaviour, there is a risk that more than

10,000 employers and 10,000 workers who have agreed confidential settlements in the last two years could feel it might be worth ignoring their

own on-going obligations not to reveal the terms of such arrangements. It would significantly undermine the finality and certainty that is fundamental to the settlement arrangements that form the basis on which most

employment relationship problems are formally resolved under the Act's

dispute resolution regime.

[63] The breaches in this case were deliberate and sustained. The plaintiff took the time to prepare a lengthy video and sent numerous communications to numerous people on multiple occasions encouraging them to view the video via his website. The breaches had a significant negative impact on others. The plaintiff has shown no remorse and no insight into the seriousness of his behaviour. The explanation for the steps taken, including to illuminate deficiencies within the defendant organisation, to act as an educational tool for others and to prove his innocence lack strength and do not mitigate the breaches.

[64] I agree with and adopt the Authority's summation that:11

Those activities were not minor or technical. Rather they were fundamentally contradictory to what [the defendant] had agreed with [the plaintiff] that he would not do. Neither were those breaches inadvertent. They occurred through [the plaintiff's] careful and deliberate preparation of the video, creation of the website and then sending emails to staff at [the defendant] and other councils publicising the contents and inviting their attention to his account of events.

10 *P v Q*, above n 2, at [57].

11 *P v Q*, above n 2, at [44].

[65] I have had regard to the range of penalties imposed in other cases. While it is desirable that there be a degree of consistency in the quantum of penalty imposed, each case needs to be considered on its own facts. I have also had regard to the plaintiff's claimed financial circumstances but do not consider that they warrant a reduction in the penalty I would otherwise impose. A penalty of $6,000 strikes the balance in the present case, including having regard to the need to send a strong message to the plaintiff of the need to comply with the obligations he voluntarily assumed and which were recorded in a s 149 settlement agreement and to deter others from similar breaches.

[66] The plaintiff is accordingly ordered to pay a penalty of $6,000. That is to be paid to the Registrar of the Employment Court within a period of 14 days and to be on-paid by the Registrar to a Crown Bank Account.

Compliance orders sought

[67] The plaintiff challenges the compliance orders made by the Authority, seeking that they be set aside. This hinges on earlier arguments (which I have already dealt with) about whether there had been a breach.

[68] The defendant confirmed during the course of hearing that it seeks the same compliance orders as were made in the Authority, namely an order that the plaintiff comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):

(i) not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 11 March 2014) by way of his website and video recordings or sending emails to past or present staff and elected members of [the defendant]; and

(ii) ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal adviser) about matters subject to his confidentiality obligations to [the defendant].

[69] On a de novo challenge the Court must make its own decision on the matter and any relevant issues.12 A compliance order may be made where any person has not observed or complied with a provision of an employment agreement or any terms of settlement or decision that s 151 provides may be enforced by compliance order.13

[70] I have already dealt with the issue of breach. I am satisfied that compliance orders are necessary. The plaintiff has doggedly breached his obligations under the settlement agreement and it is apparent that he has an appetite to continue to disregard the terms of settlement which he agreed to. I appreciate that the plaintiff has very strong views about a number of issues, including the competency of various ex-colleagues, and considers that publication is necessary to clear his name and in the broader public interest. However, the terms of settlement which he voluntarily agreed to compromise his ability to do so. It is this point that he has been unwilling to accept, and which makes the imposition of compliance orders, and the possibility of sanctions for breach, particularly appropriate.

[71] I am satisfied that compliance orders are necessary to prevent any future breach and to bring home to the plaintiff the seriousness of his obligations. Any orders must be connected to the actual terms of settlement, and to the minimum extent required to ensure compliance.

[72] As I have said, the defendant seeks compliance orders in the same terms as those made by the Authority. The orders included a prohibition on publication of any information about the employment investigation and disciplinary process by way of the plaintiff's website and video recordings or sending emails to past or present staff and elected members of the defendant. As currently worded, it is possible to read the Order as prohibiting the publication of any information via the website and video recording and as prohibiting the mere sending of emails to past or present staff regardless of their content, although such an interpretation would be strained.

[73] While it became apparent during the course of hearing that there are significant concerns about the plaintiff contacting employees of the defendant

12 Section 183(1).

13 See s 137(1)(a)(i) and (iii).

organisation I do not consider that a blanket ban on such contact can properly be achieved by way of compliance order. That is because any compliance order must be required to enforce terms of settlement, not broader concerns that a party might harbour. If such broader concerns exist then there are other avenues available, such as orders under the Harassment Act 1997, which can be sought in the District, rather than this, Court.

[74] I consider the following compliance orders appropriate and they are accordingly made:

[75] The plaintiff is ordered to comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):

(i) Not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 11 March 2014) by way of his website, video recordings and/or email or other communications. This includes but is not limited to publication to past or present staff and/or elected members of the defendant organisation;

(ii) Ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal adviser) about matters subject to his confidentiality obligations to the defendant organisation.

The timeframe for compliance is *immediate*.

[76] I expressly draw to the plaintiff's attention the potential consequences of breaching these orders. These are set out in s 140(6) of the Act, which provides that the Court may:

...

(d) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:

(e) order that the person in default be fined a sum not exceeding $40,000: (f) order that the property of the person in default be sequestered.

[77] It follows that if the plaintiff does not comply with the compliance orders I have made, the defendant may apply to the Court for an order that the plaintiff be imprisoned, that he be fined up to $40,000, and/or that his property be sequestered. As the Court has previously observed, these are significant orders and reflect the importance that the Act places on individuals complying with orders imposed on them.14

Application for Permanent Non-Publication Orders

[78] The defendant applies for permanent non-publication orders. This is on the basis that such orders are necessary to protect the interests of various non-parties who previously worked with the plaintiff and who are said to be fearful of the repercussions that might follow if their identifying details are revealed; and to protect the interests of the defendant organisation, including its reputation and its relationships with other local authorities.

[79] The plaintiff opposes any such order. His opposition centres on two matters. First, he says that in order to obtain maximum "learnings" from this saga, it is important that the public is aware of the identity of the defendant. He does not seek non-publication in relation to his own identity. Second, he says that if individuals are fearful it is not because of any safety threat that he presents. Rather it is because they have likely come to the realisation that it is their own ineptitude that will be revealed if the non-publication orders are lifted. It is self-interested objectives, the plaintiff says, which lie at the heart of the concerns that the defendant has raised.

[80] The Court may, in any proceedings, make non-publication orders. The scope of the Court's powers was recently traversed in *H v A*.15 There it was held that the applicant for such an order does not need to make out to a high standard the existence of exceptional circumstances such that a non-publication order is

warranted.

14 For instance, *Denyer (Labour Inspector) v Peter Reynolds Mechanical Ltd (t/a the Italian Job*

Service Centre) [2015] NZEmpC 41, (2015) NZELR 685 at [16]- [17].

15 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78]- [79].

[81] The defendant is a public organisation and there is an interest in knowing its identity, including concerns and issues relating to its operations. This factor weighs against an order being made. However there are other factors to be considered in the particular circumstances of this case. The proceedings arise out of an established breach of the confidentiality provisions of a s 149 settlement agreement which the defendant was entitled to rely on. Further, there is evidence before the Court to support the defendant's submission that non-publication orders are necessary to protect the defendant's relationships with other organisations. It is also clear that the plaintiff's actions have had a significant negative impact on staff whom he used to work with. That is unsurprising, having regard to the evidence before the Court.

[82] It is plain that the plaintiff has a keen sense of grievance and is determined to seek to right the perceived wrongs committed by the defendant and various of its employees. In this regard he indicated during the course of hearing that he intends to pursue private prosecutions against staff members involved in the employment investigation and he confirmed that he had recently taken a photograph of his previous manager while in public because he was wishing to place it on his website so that people could put a face to his name.

[83] I accept, based on the evidence before the Court that employees of the defendant have been negatively impacted by the plaintiff's disclosures and that there are well placed concerns that identification of the parties could lead to their identification and scrutiny, which is likely to exacerbate the impact on them. I have not found it necessary to name the affected employees in this judgment. To some extent that mitigates the potential impact. I do not, however, consider that it would adequately address the concerns raised on behalf of the defendant. And while the plaintiff does not wish his name to be suppressed, the reality is that naming him will effectively name the defendant.

[84] I conclude that the grounds on which permanent non-publication orders have been sought have been made out. I accordingly grant the defendant's application for permanent non-publication orders. There will accordingly be an order permanently prohibiting the publication of the names of the parties and of any information leading

to either party's identification. I make a further order that no person is to have

access to the court file without the consent of a Judge.

Indemnity costs?

[85] The defendant sought an order of indemnity costs against the plaintiff by way of cross-challenge. The Authority ordered $15,000 by way of contribution to costs in that forum. The cross-challenge was pursued on a de novo basis.

[86] The Court may order a party to pay indemnity costs where the party claiming costs is entitled to indemnity costs under a contract.16 This reflects the well- established principle that one party may contractually bind itself to pay the other's full solicitor/client costs.17 I have no difficulty concluding that that is what the plaintiff did when he signed the settlement agreement. It provided that:18

[the plaintiff] agrees and acknowledges that, if he breaches clauses 11 and/or

12 of this agreement, *he will be liable for any of [the defendant's] costs*

and/or disbursements (including expert fees and/or solicitor/client costs)

incurred in addressing, responding to or dealing with the breach.

(emphasis added)

[87] The agreement as to costs was reflected, in identical terms, in the undertakings signed by the plaintiff on 4 June 2014.

[88] Use of the phrase "any of the defendant's costs and/or disbursements" and the reference to "solicitor/client costs" make it plain that the contract extends to costs on an indemnity basis.

[89] As the Court of Appeal has observed:19

It is clear in principle and on authority that once it is established that the indemnity is applicable in the circumstances and that,

properly construed, it

16 See reg 6(2) of the Employment Court Regulations 2000 which provides that where no form of procedure has been provided for in the Act or the Regulations, the Court must dispose of the case in accordance with the provisions of the High Court Rules affecting any similar case. The relevant High Court Rule is r 14.6(4)(e).

17 See *Black v ASB Bank Ltd* [2012] NZCA 384 at [78] citing *Gibson v ANZ Banking Group (NZ) Ltd*

[1986] 1 NZLR 556 (CA).

18 Clause 13.

19 *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595 at [35].

includes solicitor-client costs, no discretion remains available other than on public policy grounds or as part of an assessment by the court as to whether the amount of the solicitor-client costs is objectively reasonable...

[90] I turn to consider whether the defendant's costs were reasonable in amount and reasonably incurred. This requires an assessment of the tasks attracting a costs indemnity on a proper construction of the contract.20

[91] I am not satisfied, based on the evidence before the Court, that the fees incurred for IT services were reasonable in the circumstances or arose out of the plaintiff's breaches. I am however satisfied, based on the evidence before the Court, that the costs incurred in obtaining the services of a psychologist were reasonable and were required to assist staff to deal with the negative effect of the plaintiff's breaches on them.

[92] The Authority concluded that around $50,000 would reasonably have been incurred as directly related to its investigation, although ultimately awarded $15,000. I agree, based on the material before the Court, that around $50,000 in legal fees was reasonably incurred in responding to the plaintiff's breaches. I am also satisfied that the costs claimed by the defendant in relation to the attendances before the Court (to the end of October 2015), of $27,370, are reasonable.

[93] There will be occasions where the imposition of indemnity costs will not be appropriate, including in relation to costs in the Authority. However, I am unable to discern any public policy reasons why indemnity costs would not be awarded against the plaintiff in the circumstances of the present case. Even accepting that the plaintiff's financial position may on occasion be relevant in this jurisdiction this is a case where the parties bound themselves voluntarily to an express contractual term. The plaintiff had the advantage of advice and assistance from an experienced lawyer at that time. In the present case I am not persuaded to override, rewrite or otherwise interfere with the parties' agreement that indemnity costs would follow any

established breach.

20 See *Black v ASB Bank Ltd*, above n 17, at [80]–[99].

[94] As Mr Ward-Johnson pointed out, he was not in a position to advise the total legal costs the defendant has faced. It is accordingly not possible to quantify fully the costs to be ordered against the plaintiff at this stage. If the parties cannot agree on the issue, further memoranda, with supporting information, will need to be provided. The defendant will have 20 working days from the date of this judgment; the plaintiff a further 10 working days; a further 5 working days for any reply.

Residual matters

[95] The plaintiff advanced two interlocutory applications in the course of the hearing. One was for penalties for an alleged breach of the settlement agreement, linked to steps it had taken to advise the Police of concerns relating to the plaintiff. The second, as subsequently clarified by the plaintiff, was for a compliance order against the defendant in respect of an alleged breach of the interim non-publication order made in these proceedings.

[96] The applications raised a number of issues which were discussed during the course of a telephone hearing on 11 April 2016. Following discussion it was agreed that if the plaintiff wished to pursue his application for penalties in relation to the alleged breach of the settlement agreement he would file a fresh application in the Authority. That is because the legislation makes it clear that such claims are to be advanced in that forum. It may be that an application for removal will be pursued, which the defendant has said it would not oppose. Following this judgment the only issue which will remain before the Court relates to costs. Whether the grounds for removal are made out at the time any such application for removal is advanced will be a matter for the Authority to determine.

[97] As the defendant accepted, the application for a compliance order in respect of the defendant's alleged non compliance with the Court's non-publication order can proceed in the Court and it was agreed that it could be dealt with on the basis of the material filed.

[98] The Court's power to order compliance is contained within s 139. Where the

Court is satisfied that there has been non compliance with an order it has made the

Court may require the party to cease any specified activity for the purpose of preventing any further non-observance.

[99] The alleged non compliance in this case is directed at the defendant's advice to the Police that it had safety concerns relating to the plaintiff in respect of his firearms licence. It is said that this breached the non-publication order of the Court. Even assuming this to be so, there is no suggestion that any such alleged breach will be repeated or is on-going. The disclosure was limited. It was one-off, directed at a particular end (namely alerting the Police to safety concerns) and was made for rational reasons explained in the

affidavits filed in opposition to the application (including having regard to the defendant's obligations to ensure the safety and well-

being of its staff).21

[100] It follows that even if I accepted that the defendant had breached the non- publication order, I would not have been minded to issue a compliance order. The application is accordingly declined.

Result

[101] The plaintiff's challenge is dismissed.

[102] The plaintiff is ordered to pay a penalty of $6,000 to the Registrar of the

Employment Court within 14 days for on payment to a Crown bank account.

[103] The defendant's application for permanent non-publication orders is granted. There is an order under cl 12, Sch 3 of the Act permanently prohibiting the publication of the names of the parties and of any information leading to either party's identification. I make a further order that no person is to have access to the court file without the consent of a Judge.

[104] The plaintiff is ordered to comply with all of his obligations under the terms of the settlement agreement, including (but not limited to):

21 See *Evolution E-Business Ltd v Benjamin Smith*, above n 5.

(i) Not publishing any information about the employment investigation and disciplinary process (including information about his activities in deleting data on 14 March 2014) by way of his website, video recordings and/or email or other communications. This includes but is not limited to publication to past or present staff and/or elected members of the defendant organisation;

(ii) Ceasing any and all communication by any means with any third party (including employees of other local authorities but not including his own legal adviser) about matters subject to his confidentiality obligations to the defendant organisation.

The timeframe for compliance is *immediate*.

[105] The plaintiff is liable to pay the defendant indemnity costs in relation to the breach of the settlement agreement, the final quantification of which is to be determined by the Court (absent agreement between the parties) following the exchange of memoranda according to the timetable set out above.

[106] The plaintiff's application for a compliance order is dismissed.

[107] The determination of the Authority is set aside by virtue of s 183(2) of the

Act and this judgment stands in its place.

Christina Inglis

Judge

Judgment signed at 2.45 pm on 15 April 2016