



## **Employment Relationship Problem**

[1] Massam Transport Limited (MTL) applied to the Authority for a penalty to be imposed on Toi Moerua under s 149 of the Employment Relations Act 2000 (the Act). The company sought the penalty because it said Mr Moerua breached a confidentiality term in a settlement agreement they had made to resolve an employment relationship problem he raised after his position was made redundant. The agreement was reached in mediation and certified under s 149 of Act on 8 February 2018. Certification by a mediator made the terms of their agreement final, binding, enforceable and unable to be cancelled or, except for enforcement, to be subject to review by the Authority.<sup>1</sup>

[2] MTL's statement of problem also sought a compliance order requiring Mr Moerua to remove a post from his Facebook page that the company considered referred to their settlement agreement and an order requiring him to return the compensation sum it had agreed to pay him under that agreement.

[3] The Facebook post of concern to MTL, dated 13 February 2018, read as follows (including use of the hashtag symbol as shown):

Well this year has started off with a bang. I beat another a#shole employer in the employment court thanks for the 20k donation d#ckheads ....lol.....And after hassling the LTSA for 3 months I get a call today that my driving instructor application has been approved thanks to the Minister of Transport Phil Twyford so it's onwards and upwards next stage driving instructor course then I'm back self-employed like I was 6 years ago .....lol.....They say life's a bitch well I just kicked that bitches a#s .....lol

[4] Mr Moerua offered two defences to MTL's claim that he had breached the confidentiality of their settlement agreement. Firstly, he suggested his privacy had been breached by people looking at and copying his Facebook post. Secondly, he said the employer referred to in that post was another company that he had worked for after his employment ended with MTL.

## **The Authority's investigation**

[5] For the Authority's investigation I took account of written and oral evidence from Mr Moerua and MTL's accountant Shilo Roberts, documents provided by the parties (including Mr Moerua's Facebook post), and submissions from him and the company's advocate.

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<sup>1</sup> Employment Relations Act 2000, s 149(3).

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The breach**

[7] On 16 November 2017 Mr Moerua applied to the Authority for an investigation of the circumstances in which, two months earlier, MTL had terminated his employment on the grounds of redundancy. After MTL lodged its statement in reply the matter was referred to mediation. The first term of the agreement made and certified at their mediation held on 8 February 2018 was:

These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.

[8] For the purposes of this determination it was only necessary to reveal that other terms in the agreement included a payment of an amount of money to Mr Moerua as compensation under s 123(1)(c)(i) of the Act and towards his costs of representation. The total amount to be paid was less than the sum of \$20,000 Mr Moerua referred to in his 13 February Facebook post.

[9] The evidential standard for assessing whether Mr Moerua's post referred to MTL and their settlement agreement is the balance of probabilities, that is what was more likely than not to be the case.<sup>2</sup>

[10] Mr Moerua's first point in defence, concerning what he said was a breach of his privacy in the Facebook post, could be put aside at once. The post was made with public settings, as shown by a small world or globe icon beside it. Any Facebook user could go to Mr Moerua's page and see it there. It was akin to a person talking in a public place or venue, such as a street or a café, and being overheard. However even if such a post was made with more restrictive settings on who could see it, such as friends only, the person making that post would still be bound by whatever other confidentiality obligations she or he had entered into. She or he could not justify breaching an agreed term of confidentiality by saying they only told someone else on the basis they thought the communication was private. To hold otherwise would

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<sup>2</sup> *Ahuja & Ors v A Labour Inspector* [2018] NZEmpC 31 at [25]

make a nonsense of such terms which are permitted to be made binding and enforceable under s 149 of the Act.

[11] Mr Moerua's second point of defence required an assessment of the likelihood that the wording of the post truly referred to another employer, not MTL. His explanation was not convincing for the following reasons.

[12] Mr Moerua said that by February he was working for a labour hire and placement company. He was frustrated with ongoing problems over getting paid the agreed hourly rate. He described his 13 February post as a "rant" about that situation with his new employer, not MTL. During the investigation meeting he searched on his mobile phone and found emails exchanged in February and March with a supervisor and manager of that new employer and which referred to the issues about his correct pay rate. Mr Moerua said he had, around this time, got agreement from that employer that he would be paid around \$1000 in back pay. He was not able to find any email or text that confirmed agreement for such a payment being made around that time. He said the back pay of around \$1000 was the money referred to as "the 20K donation" in his 13 February post. Asked about the difference between that amount and what he said he was to get in back pay from that employer, his explanation was that he "did exaggerate a little bit".

[13] However another factor made his explanation for the post more likely than not to be incorrect. In answer to a question at the investigation meeting Mr Moerua accepted that he used the phrase "the employment court" to refer to attending mediation. He did so even though he knew going to court was not the same thing as going to mediation. He had been involved in mediation and an Authority investigation with a previous employer prior to working for MTL.<sup>3</sup> He said his 13 February post had referred to the court "to make it more convincing to some family members and to make a good story that you have gone to court and not just a mediation". However he also accepted that he had not been involved in mediation, or anything else that could be even loosely described as being "in the employment court", with the company that was his employer by 13 February. The only employer he had been engaged in with such processes around that time was MTL.

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<sup>3</sup> *Moerua v TNL Group Limited* [2013] NZERA Auckland 558 and [2014] NZERA Auckland 60.

[14] And it was the coincidence of his 8 February settlement agreement and his 13 February post that made it more likely than not he intended the phrase “another a#shole employer” to mean MTL and that it could only mean MTL. Ms Roberts made the arrangements for bank transfer of the settlement amount to Mr Moerua on 9 February and he had got that payment by the time, only four days later, that he made his 13 February Facebook post. A difference between the actual amount MTL paid him and the reference to “20K” in his post did not reduce the likelihood that it was a breach of the confidentiality of the payment. This was because he accepted he exaggerated amounts he referred to in order “to make a good story” in his post.

[15] Accordingly MTL had established to the necessary evidential standard that Mr Moerua’s post was an intentional breach by him of the term of confidentiality. It would be readily apparent to managers and employees of MTL who saw it and to any friends or family members who knew he had worked for MTL that it was “the employer” referred to. There was no doubt others had viewed the post because it had eight ‘likes’ and 15 comments. Ms Roberts’ evidence confirmed some managers and employees at the MTL workplace were aware of the post and understood the company had paid a sum of money to Mr Moerua.

### **The penalty**

[16] Having established Mr Moerua’s post amounted to a breach of the confidentiality term, he was liable to a penalty imposed by the Authority.

[17] Factors relevant to determining the appropriate amount are listed in s 133A of the Act and applied through a four step analysis recommended by the Employment Court.<sup>4</sup>

[18] Although the post comprised a single breach his refusal of a request by MTL to remove it from his Facebook page meant the breach was ongoing. However, for the purposes of the first step of this assessment, his actions have been treated as a single breach for which Mr Moerua was liable to a provisional maximum penalty of \$10,000.

[19] The second step of the assessment considers the severity of the breach in each case. Mr Moerua’s action undermined mediation as a primary problem-solving

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<sup>4</sup> *Borsboom v Preet Pvt Limited & Ors* [2016] NZEmpC 132 at [137] – [151].

mechanism and the reliance parties are entitled to have in the certainty of agreements made and certified under s 149 of the Act. He deliberately made his Facebook post to boast about receiving a settlement payment, knowing that it did not keep his side of the bargain that it would be kept confidential. Those finding out about it through his post were not aware that the payment was made on a ‘without admission of liability’ basis. In her evidence Ms Roberts said she formed the impression that news of the payment had harmed the confidence of other employees had in MTL and harmed the company’s reputation in a relatively small industry as having done something wrong, which it had not accepted it had in its settlement agreement with Mr Moerua. There were no factors mitigating the severity of the breach because Mr Moerua showed no remorse for it and continued it by refusing to remove his post.

[20] Weighing those factors an adjustment to 20 per cent of the maximum was warranted to set the provisional penalty at this second step. The maximum is reserved for the most serious cases involving heinous and repeated breaches.<sup>5</sup>

[21] This adjustment resulted in a provisional penalty of \$2000. This was within the range of penalties imposed in other similar cases in recent years. In one recent case a worker who posted part of the text of a confidential settlement agreement on Facebook but took it down after one day was ordered to pay a penalty of \$1000 to the Crown.<sup>6</sup> In another case a worker who posted information on Facebook about the confidential terms of a settlement agreement and breached a non-disparagement clause was ordered to pay two parties a penalty of \$2000 and the Crown a further penalty of \$2000.<sup>7</sup> In another case the Employment Court ordered a former worker to pay the Crown a penalty of \$6000 for breaches of confidentiality terms in a settlement agreement. He was later sent to prison after he repeatedly refused to take down YouTube videos that featured him talking about his employment issues in a way that breached those confidentiality terms.<sup>8</sup> In other recent cases determinations of the Authority have imposed penalties ranging from \$1500 to \$3000.<sup>9</sup> In the latter case the former worker sent a message on Facebook to one current employee of his former

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<sup>5</sup> *Ahuja & Ors v A Labour Inspector* [2018] NZEmpC 31 at [45].

<sup>6</sup> *Adams Plumbing, Drainage and Electrical Ltd v Hughes* [2018] NZERA Christchurch 27.

<sup>7</sup> *X v Z* [2017] NZERA Auckland 244.

<sup>8</sup> *ITE v ALA* [2016] NZEmpC 42 and *ITE v ALA* [2017] NZEmpC 130.

<sup>9</sup> *Pullen v Agrissentials NZ Ltd* [2015] NZERA Auckland 145 (\$750 to Applicant and \$750 to the Crown); *McIntyre v TTR Automotive Ltd t/a Pit Stop Nelson* [2015] NZERA Christchurch 93 (\$1000 to Respondent); *Bidvest New Zealand Ltd v Vivian* [2015] NZERA Wellington 101 (\$3000 to the Applicant).

employer. His message read, in part, “at least I got paid a lot of money to leave” and there was evidence it was also seen by other employees.

[22] The third step of the assessment considers Mr Moerua’s means and ability to pay. He said he had recently resigned from another job and was presently working as an Uber driver, with variable income. He pays rent and board at a house owned by a family member. There was no information to show he could not, if needed, call on assistance from friends, family or financial institutions to borrow funds to meet the cost of a penalty. And he also had the relatively recent benefit of the settlement money MTL paid him a little over two months ago. To take account of Mr Moerua’s means and ability to pay, a further 25 per cent downward adjustment could be made to the provisional level of the penalty, that is to \$1500.

[23] The fourth step is a final check on the proportionality of the provisional level of penalty reached by application of the previous three steps. The final amount should be proportionate to the seriousness of the breach, the harm occasioned and the level of penalties imposed in other relevant cases.

[24] The cases referred to earlier show that a penalty of \$1500 sits near the lower end of the range of penalties imposed in recent cases for similar breaches. It fairly reflects some accommodation for Mr Moerua’s ability to pay, punishes his conduct and represents a deterrent to others who might consider breaching settlement agreements. More than 10,000 employment relationship problems are resolved each year through the use of certified s 149 agreements. Those agreements typically include a term of confidentiality of the type that MTL and Mr Moerua agreed. If parties could breach such agreements without consequence, there is a risk that many, many thousands of employers and workers 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 fundamental to how most employment relationship problems are formally resolved under the Act’s dispute resolution regime.<sup>10</sup>

[25] As explained by the Employment Court in *David Lumsden v Sky City Management Limited*.<sup>11</sup>

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<sup>10</sup> *ITE v ALA* [2016] NZEmpC 42 at [62].

<sup>11</sup> [2017] NZEmpC 30 at [66].

There is also a broader public interest in deterring parties from renegeing on s149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that might prove to be.

[26] MTL did not seek any portion of the penalty be paid to it under s 136 of the Act. Accordingly Mr Moerua must pay \$1500 to the Authority for transfer to the Crown Account. He must make that payment to the Authority within 28 days of the date of this determination.

### **Compliance**

[27] MTL asked for an order requiring Mr Moerua to comply with their settlement agreement by removing words from his 13 February Facebook post that referred to it and the agreement. Mr Moerua confirmed at the investigation meeting that the post remained on his page and he knew how to remove it.

[28] While this determination has made the facts and contents of his post a matter of public record, there was still some value in having the offending words removed from Mr Moerua's Facebook page in order that he complied with the confidentiality obligation he had entered into on 8 February 2018. Accordingly, under s 137(1)(iii) and (2) and (3) of the Act, Mr Moerua is ordered to delete the words from "I" to "d#ckheads" from the second sentence of his 13 February post. He must complete this deletion by no later than 12 noon on Monday, 23 April 2018.

### **MTL's claim for repayment of settlement amount**

[29] In closing submissions MTL withdrew its application for an order requiring Mr Moerua to repay the amount paid to him under the 8 February settlement agreement. I doubt such an order would have been open to make anyway. It would cancel a term of the agreement. Section 149 of the Act prohibits terms of such an agreement being cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017. Before certifying the agreement the mediator had the parties confirm they understood the terms could only be brought before the Authority for enforcement purposes, not appeal or review. Whatever sanction might be imposed for a breach of those terms had to be made by the penalty available under s 149(3).

### **Costs**

[30] Because MTL has succeeded in its application for a penalty to be imposed, it was entitled to a contribution to its costs of representation. MTL's advocate indicated

the company agreed to costs being assessed on the Authority's usual daily tariff. On that tariff the starting point for an investigation meeting that took just on two hours was \$1500.

[31] The limits on Mr Moerua's ability to pay a costs award have been considered earlier in this determination in setting the level of penalty. In respect of costs those limits were a factor favouring payment by instalment rather than a downward adjustment of the tariff.

[32] Mr Moerua must pay MTL \$1500 as a contribution to its costs of representation. He may pay those costs in full by 18 May 2018 or he may opt to pay in three instalments of \$500 a month, starting on that day with the further two instalments due on 15 June and 13 July 2018.

[33] Mr Moerua must also reimburse MTL \$71.56 for the fee paid to lodge its application to the Authority. That amount must be paid by 18 May 2018.

Robin Arthur  
Member of the Employment Relations Authority