

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 93  
5545853 and 5546273

BETWEEN                      BERNARD McINTYRE  
Applicant in 5545853  
Respondent in 5546273

A N D                              TTR AUTOMOTIVE LIMITED  
Trading as PIT STOP Nelson  
Respondent in 5545853  
Applicant in 5546273

Member of Authority:        Helen Doyle

Representatives:              Luke Acland, Counsel for the Applicant  
Maree Kirk, Counsel for the Respondent

Investigation Meeting:       29 May 2015 at Nelson

Submissions Received:       On the day of investigation meeting

Date of Determination:       6 July 2015

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**DETERMINATION OF THE AUTHORITY**

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- A        Bernard McIntyre breached the confidentiality term of the settlement agreement he entered into with TTR Automotive Limited dated 14 January 2015 and is to pay a penalty of \$1000. The penalty is to be paid to TTR Automotive Limited.**
- B        An order has been made that TTR Automotive Limited comply with the terms of the settlement agreement and the period to do so is specified in this determination.**

**C TTR Automotive Limited breached the terms of settlement by non-compliance and in the circumstances is to pay a penalty of \$300. The penalty is to be paid to Bernard McIntyre.**

**D Costs are reserved and failing agreement a timetable has been set.**

### **Employment relationship problem**

[1] Bernard McIntyre and TTR Automotive Limited trading as Pit Stop Nelson (TTR) entered into a record of settlement on 14 January 2015 under s 149 of the Employment Relations Act 2000 (the Act). The record of settlement was certified by a mediator from the Ministry of Business, Innovation and Employment under s 149 (1) and the effect of s 149 (3) explained to the parties.

[2] Section 149 (3) of the Act provides that the agreed terms of settlement are final and binding on and enforceable by the parties and they may not be cancelled under s 7 of the Contractual Remedies Act 1979. Except for enforcement purposes no party can bring the terms before the Authority.

[3] There has been no compliance with the agreed terms of the settlement agreement.

[4] Mr McIntyre in his application to the Authority seeks compliance with the provisions of the settlement agreement and an award of a penalty for the failure of TTR to comply with its terms.

[5] TTR in its application to the Authority says that Mr McIntyre breached the confidentiality term in clause one of the settlement agreement which provides:

*1. These terms of settlement and all matters discussed at mediation shall remain confidential to the parties.*

[6] TTR says that Mr McIntyre discussed the terms of the settlement agreement with Patrick Valentine, an employee of a parts supplier Brake and Transmission Limited in Nelson (BNT), on the afternoon the record of settlement was signed.

[7] TTR says that Mr Valentine then told another employee Jeremy Chisnall at BNT the details of the settlement.

[8] Tony Toa and his wife are the franchise owners of TTR. Mr Toa says that he was told that same day by the BNT sales representative Christopher Penson that everyone at BNT was talking about the mediation and knew about the terms of settlement.

[9] Mr McIntyre denies breaching confidentiality.

[10] TTR seeks a finding that the payments to Mr McIntyre under the settlement agreement are no longer payable or alternatively, if deemed to be payable then a penalty of the same amount is imposed on Mr McIntyre. Further that there is no requirement to assist Mr McIntyre as agreed to gain his AVIC certification or provide the reference.

[11] It was agreed that the applications would be investigated jointly.

### **Prohibition from publication**

[12] I prohibit from publication the terms of settlement that I have not referred to in this determination.

### **The Issues**

[13] The Authority needs to determine the following issues:

- a. Was there a breach of the confidentiality provision of the settlement agreement by Mr McIntyre?
- b. If there is a breach should a penalty be awarded?
- c. Should there be an order for compliance?
- d. If there is an order for compliance then should a penalty be awarded for the failure to comply?

### **Was there a breach of the confidentiality provision of the settlement agreement by Mr McIntyre?**

[14] Mr McIntyre worked for TTR between November 2013 and September 2014 under the supervision and management of Mr Toa. Mr McIntyre raised a personal

grievance about the termination of his employment and attended mediation in January 2014.

[15] The terms of settlement included payment of a sum of money to Mr McIntyre. Further that TTR co-operates and supports Mr McIntyre's application to the NZTA to gain his AVIC certification (warrant of fitness (WOF) certification) provided he does so within three months of the date of the settlement agreement and for a positive reference to be provided within seven days.

[16] The mediation finished at about 1.30pm on 14 January 2014.

[17] Mr Toa returned to work after lunch at about 2.30pm. He said in evidence that he was feeling down and working on a car when Mr Penson, the BNT sales representative, asked him how the mediation went. Mr Toa said not to ask because he had signed *a privacy clause*.

[18] Mr McIntyre says that he got home about 2pm and saw he had been paid \$500 for his first fishing trip and after talking to his skipper he was told he would be paid for the second trip on Friday 16 January which was about \$1500. Mr McIntyre provided copies of his bank statement showing those payments. He felt with that money and the money from the TTR settlement he would be able to make a start on rebuilding the motor in his car which he had been planning to do for some time.

[19] At about 3pm on 14 January 2014 an employee from TTR, Jesse Hendry, was at BNT to get some parts. He was asked by Mr Chisnall how the court case had gone and he said that he was not aware of any details *as a privacy agreement had been signed*. I find it likely, as Mr Chisnall wrote in a written statement on 15 January 2015, that Mr Hendry advised the case was settled. I find that Mr Hendry expressed his view that Mr Toa was not happy to Mr Chisnall and Patrick Valentine. It was not long after 3pm when Mr McIntyre telephoned Mr Valentine. Mr Hendry advised Mr Toa when he got back from BNT that Mr McIntyre had just telephoned. The evidence supports that Mr Toa was concerned about that.

### **Telephone call from Mr McIntyre to Mr Valentine**

[20] Mr McIntyre said that he wanted to talk to Mr Valentine about an engine rebuilder he knew, Zebbie. He wanted Mr Valentine to introduce him to Zebbie so that he could pay him to rebuild the engine.

[21] Mr Chisnall answered the telephone and recognised Mr McIntyre's voice. Mr McIntyre asked to talk to Mr Valentine and Mr Chisnall put him through. Mr Chisnall said that he was standing about 3 metres away from Mr Valentine during the telephone conversation and could hear Mr Valentine's side of the conversation.

[22] Mr McIntyre said that Mr Valentine was happy to introduce him to Zebbie and that they arranged that Mr McIntyre would pick Mr Valentine up that day after work and they would go to Zebbie's house to discuss the engine rebuild.

[23] During the call Mr McIntyre said that Mr Valentine asked him how his court case went. Mr McIntyre said that he had not really said anything about the personal grievance/ mediation earlier to Mr Valentine so he was surprised that he knew about it. Mr McIntyre said that he said *I assume Tony's happy, I'm happy*. He said Mr Valentine asked him if he was still going to get his WOF ticket and he said *yes* he was putting the things together. Mr McIntyre did not accept he said that the WOF ticket was going to be with TTR or Mr Toa.

[24] Mr Valentine gave evidence at the Authority investigation meeting. He said that he asked Mr McIntyre about the court case during the telephone call and that Mr McIntyre responded both sides were happy. He took it to mean that Mr McIntyre had won his case as he knew that Mr Toa had returned to work unhappy or in a bad mood. He felt that Mr McIntyre was hesitant to say anything so he asked about his fishing trip. Mr Valentine said that he thought he asked about the WOF and that Mr McIntyre said that *he could probably go back to it*. Mr Valentine said that he kept pushing Mr McIntyre about the court case and he said something vague like he was going to pay off some bills and get the motor rebuilt.

[25] They then talked generally before confirming the pickup time to go to Zebbie's place. Mr Valentine said that they did not discuss the case further when later that day they went to Zebbie's. He said they just talked about the engine. Mr Valentine said that he was not told and still does not know how much money Mr McIntyre was to get under the terms of his settlement agreement. He said under questioning from Ms Kirk that he asked the question about the WOF because *the WOF ticket was linked sort of with the Court case* and that he was aware of earlier difficulties in respect of getting a WOF ticket for Mr McIntyre. He said that Mr McIntyre never said that he got money from the settlement or that he had enough to pay off bills.

**Discussion following telephone call between Mr Valentine and Mr Chisnall**

[26] Mr Chisnall lodged two statements of evidence in addition to a statement he was asked by Mr Toa to write on 15 January 2015. The statement dated 15 January 2015 was closer in time to when the event actually occurred and I have placed reliance on that statement in the circumstances where there is a difference between that statement and the statements of evidence.

[27] Mr Chisnall asked Mr Valentine what had happened in the court case when he got off the phone call from Mr McIntyre. Mr Chisnall said that Mr Valentine told him that Mr McIntyre had won his case and would receive enough money to pay off all his debt and get an engine for his car. Mr Chisnall said that Mr Valentine told him Mr McIntyre was at least \$5000 in debt although Mr Valentine said that he just assumed that this was the amount of debt. Mr Chisnall said that he surmised that the cost of buying an engine would make the total sum about \$10,000 and may be more.

[28] He also said that Mr Valentine told him Mr Toa would be required to sponsor Mr McIntyre for a WOF certificate and that he would have to carry the certificate under his workshop until Mr McIntyre found employment at another workshop that it could be transferred to.

[29] In an additional statement of evidence Mr Chisnall did not accept that Mr Valentine pushed Mr McIntyre for information. He said that after an initial question there was no further questioning.

[30] Mr Valentine did not accept that he told Mr Chisnall that Mr Toa was required to sponsor Mr McIntyre with his WOF. He said that he did not recall reaching any conclusion the WOF was part of the settlement.

**Discussion between Mr Chisnall and Mr Penson**

[31] At about 3.30pm Mr Penson arrived back at BNT and had a conversation with Mr Chisnall about what McIntyre had said to Mr Valentine about the settlement. Mr Penson had also written a statement on 15 January 2015 in which he wrote that Mr Chisnall told him Mr Toa was going to help Mr McIntyre get his WOF ticket. Further that Mr McIntyre had been telling Mr Valentine that *he will now have enough money to buy a new motor for his car and pay off his debt because of the money he was getting.*

[32] Mr Penson stated in his written statement of evidence supplied for the Authority investigation that Mr Toa had to give Mr McIntyre a positive reference. Mr Chisnall could not recall hearing about that aspect and talking to Mr Penson about it. It does not appear in Mr Penson's handwritten statement prepared the day after the exchange. I could not be satisfied that a reference was discussed.

### **Discussion between Mr Penson and Mr Toa**

[33] Mr Penson came back to the TTR at about 4.30pm and told Mr Toa that everyone at BNT was talking about the mediation and that he knew about the money and the WOF certificate.

[34] Mr Toa was quite understandably upset. He said that he had only entered into the settlement because it was confidential and he had stretched himself financially to do so. He was concerned about the reputation of his business if word got out about the settlement and with BNT, a large parts supplier in the area knowing about it.

### **What happened then?**

[35] Mr Toa's solicitors prepared a letter dated 16 January 2015 advising that Mr McIntyre had breached the record of settlement and that TTR intended to seek a penalty of \$10,000. Mr Toa said that he placed that letter in Mr McIntyre's letter box and then hand delivered to Mr McIntyre a further letter on or about 19 January 2015 that attached the statement of Mr Chisnall. An alternative settlement agreement was provided to Mr McIntyre but he did not sign it.

[36] Mr McIntyre then consulted Julia O'Connor who is a solicitor at the Nelson Community Law Centre. By letter dated 27 January 2015 to TTR solicitors Ms O'Connor recorded that there was non-compliance with the settlement and that a breach does not abrogate the responsibility of either party to comply with the settlement. She sets out that there was a misunderstanding and that the statement from Mr Chisnall was hearsay and speculative leaving open substantial areas of dispute.

[37] The applications were then lodged with the Authority.

**Conclusion on breach**

[38] A number of employees of BNT and TTR knew of the mediation or, as some thought, court case between Mr McIntyre and TTR that took place on the morning of 14 January 2015. There was no evidence that this information came from Mr McIntyre. There was a heightened interest in the outcome from those at BNT.

[39] Mr Valentine and Mr Chisnall had just before the telephone call asked Mr Hendry on 14 January 2014 how the case went and Mr Hendry expressed a view that Mr Toa was not happy. Mr Chisnall said that Mr Hendy knew the case had been settled but he did not know any details as it was confidential. The evidence supports that Mr McIntyre was ringing to enquire about rebuilding his engine, not as Mr Toa may have been concerned to talk about the settlement. The question about the court case came from Mr Valentine.

[40] I do not find that Mr McIntyre disclosed the amount of money he was to receive under the settlement agreement to Mr Valentine. There is no evidence to support that. The only direct evidence about that is that Mr McIntyre made a comment about paying some bills and getting the motor rebuilt. I accept though that enough was said for Mr Valentine to conclude that Mr McIntyre was getting some money and that it was more than \$5000. Mr Valentine made certain assumptions that Mr McIntyre may have debts of about \$5000 and the cost of rebuilding an engine was between \$1,500 and \$3,500. Mr McIntyre in his evidence said that his debt level was higher than Mr Valentine assumed it was.

[41] Neither Mr Valentine nor Mr Chisnall reached a correct view about the amount of the compensatory sum to be paid. I return then to see if the term of settlement regarding payment in clause 3 was breached. A cautious approach should be taken where the evidence is hearsay and could be speculative.

[42] I could not on the balance of probabilities be satisfied that Mr McIntyre advised Mr Valentine he had won rather than stating he was happy. Mr Valentine already knew from Mr Hendy that Mr Toa was unhappy and I think more likely than not concluded that Mr McIntyre had been the successful party. That view though was more than likely strengthened by Mr McIntyre disclosing enough for Mr Valentine to understand he had was to receive enough money to pay off some bills and have an engine rebuilt. I find whilst Mr McIntyre did not talk about the exact payment he was

to receive under clause 3, what he did say enabled Mr Valentine to make assumptions about the level of payment based on his understanding of Mr McIntyre's debt level and costs of an engine rebuild which he then talked to Mr Chisnall about.

[43] The confidentiality clause requires the terms of settlement and all matters discussed at remedies to remain confidential. If Mr Valentine had simply concluded without being specifically told that there was to be some money to be paid to Mr McIntyre than in the circumstances of this matter I would not have found a breach. I find though that the level of disclosure went further and Mr Valentine understood that any payment to be made was to be at least \$5000 based on what he was told by Mr McIntyre. Mr McIntyre did not I find in all likelihood tell Mr Valentine that the terms of the settlement agreement were confidential and that he could not talk about it. If that had been the case then I would have expected Mr Valentine to have told Mr Chisnall about that. I find a breach by Mr McIntyre of clause 3 of the settlement agreement.

[44] Mr McIntyre said he did not disclose to Mr Valentine that Mr Toa was to support his application to gain his AVIC certification. Mr Valentine consistent with that evidence did not accept that Mr McIntyre disclosed to him that Mr Toa would be required to sponsor or assist with his WOF certificate. Mr Chisnall though said that Mr Valentine told him after his telephone call with Mr McIntyre that Mr Toa would still have to put Mr McIntyre through the WOF certificate and hold onto the ticket until Mr McIntyre found employment at another workshop. He did not agree when questioned by Mr Acland that Mr Valentine did not know about the WOF certification support or that Mr Chisnall had made assumptions himself about what would happen.

[45] The day after mediation on 15 January 2015 Mr Chisnall recorded in writing that *Tony would be required to sponsor Bernie in his application for a WOF certificate and that he would have to carry the certificate under his workshop until Bernie found employment at another workshop.*

[46] I found Mr Chisnall to be a credible witness. I find it less likely that he simply made assumptions about the WOF certificate and it is more probable than not that he was told about that by Mr Valentine who had been advised by Mr McIntyre.

[47] I find a breach of confidentiality about that term of settlement. I am not satisfied that there was a breach of confidentiality in respect of the provision of a positive reference.

### **Penalty for breach of confidentiality**

[48] The Employment Court in its judgment in *Xu v McIntosh*<sup>1</sup> sets out criteria to guide the Authority in the imposition of a penalty. A penalty is imposed for the purpose of punishment.

[49] *Xu* provides that not all breaches are equally reprehensible and the first question should be the harm the breach has caused and then consideration of the importance of deterring such breaches and whether the breach was technical and inadvertent or flagrant and deliberate.

[50] When Mr Toa came to hear that employees at BNT had knowledge of the terms of settlement he felt very upset and let down and had a sleepless night. Confidentiality was an important part of the settlement for him. He was concerned that knowledge of the settlement meant he could be considered by some to be a *bad employer*. He had to incur legal expenses and suffered concern and worry. I agree that he had a genuine concern that he may be considered to be a *bad employer* but there is no evidence to support that he was regarded in that way as a result of the breaches or indeed that he should be. I do accept that the breach did cause some harm.

[51] Whilst Mr Toa in all likelihood considered Mr McIntrye telephoned Mr Valentine to talk about the settlement that was not I find the purpose of the call. Mr Valentine did manage to elicit some information from Mr McIntrye but I do not find that the breach by way of disclosure was planned deliberately in advance. As was found in *Zoe Cumming-Steward v Twenty Five Station Limited T/a Law Debt Collection*,<sup>2</sup> which also concerned a breach of confidentiality, it was more likely to be spontaneous and careless. There was no evidence to support any further breach. In *Cumming-Steward* there was a penalty awarded of \$750 for a disclosure of the amount received under the settlement agreement and I have considered that award and others made in the Authority for a penalty in these circumstances. There should be some consistency in the awards made for breaches of a settlement agreement.

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<sup>1</sup> [2004] 2 ERNZ 448 at [47] – [48]

<sup>2</sup> [2014] NZERA Auckland 485 (Member Arthur) at [22]

[52] I agree with Ms Kirk's submission that the Act encourages early and full and final settlement and confidentiality is an important part of settlements. I agree that there must be confidence in s 149 settlements and their enforceability. Ms Kirk submits that the Act does not provide sufficient protection if there is a breach of a confidentiality provision because the agreement cannot be cancelled and that the penalty awards in cases in the Authority are in such nominal amounts as to be a *mere slap on the wrist*. Ms Kirk referred in her submission to another Authority determination in *Tic-Tac-Toe Educare Limited v Thomas*<sup>3</sup> in which a penalty was awarded in the sum of \$1000 for a breach of the confidentiality clause.

[53] Ms Kirk submitted a rather unorthodox approach should be taken by the Authority to achieve a result which deprives Mr McIntyre of any benefit from the settlement. She referred to the Authority determination in *Henry v The Warehouse Limited*<sup>4</sup> which relied on the common law to deprive an employee of any benefit of a settlement. She submitted the same outcome could be achieved by the Authority invoking the equity and good conscience jurisdiction to take into account that if there had not been a confidentiality clause then TTR would not have settled the issue and is therefore *out of pocket*.

[54] I do not find that approach available to the Authority where there is a breach of a settlement agreement. Section 149 (3) of the Act is very clear that the terms of a settlement agreement cannot be before the Authority except for enforcement purposes and the term may not be cancelled. Section 149 (4) provides that if there is a breach then the person who breaches is liable to a penalty.

[55] I find that there should be a penalty under s 149 (4). I am guided by similar awards made in similar circumstances. I award a penalty in the sum of \$1000 with the whole of the penalty paid to TTR under s 136 (2) of the Act.

### **Compliance order with confidentiality clause**

[56] There was no application by TTR for a compliance order although such a power may be exercised by the Authority of its own motion under s 138 of the Act. I do not find that an order for compliance is required for Mr McIntyre to comply with the confidentiality provision.

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<sup>3</sup> [2013] NZERA 475 at [19] and [20]

<sup>4</sup> [2011] NZERA Christchurch 100

**Application for compliance with the settlement agreement**

[57] There has been no compliance with the terms of the settlement agreement. To the extent that Mr McIntyre should have picked up the reference and applied for AVIC certification I accept that he felt that would be uncomfortable and as he said in his evidence he thought *everything had come to a stop*. He was also advised by his solicitor not to talk to Mr Valentine or Mr Toa. I find that an order for compliance should be made. There can be an exchange of cheques by counsel to take into account the penalty ordered. It may be that the requirement to provide a reference was satisfied during the Authority investigation meeting although the Authority was not party to discussion about that matter.

[58] I order compliance by TTR Automotive Limited with the terms of settlement as follows:

- (a) Within seven days of the date of this determination there is to be compliance with terms 3 and 5 of the settlement agreement dated 14 January 2015.
- (b) There is to be compliance with term 4 provided that Mr McIntyre makes an application to gain his AVIC certification within three months from the date of this determination.

**Penalty for failing to comply with terms of the settlement agreement**

[59] Mr Acland seeks a penalty on behalf of Mr McIntyre for what he called an egregious breach in circumstances where TTR knew legally that a breach did not entitle it to cancel and compliance was still required with the settlement terms.

[60] In *Cumming- Stewart* the Authority concluded that the breach of the confidentiality term and the substantial merits did not warrant a penalty against the employer in that case for what it did in response. In that case there had been some compliance with the settlement agreement and it was the second instalment that was delayed. In this case there was no compliance whatsoever not even a partial payment.

[61] I find that Mr McIntyre did suffer some harm as a result of the non-compliance. There was a deliberate decision not to comply notwithstanding the clear obstacles to that in s 149 which were drawn to the attention of TTR. That does

though have to be considered in light of the fact of the breach of confidentiality and that Mr McIntyre was required to take some steps with respect to the AVIC certification.

[62] There was an offer to place the money owing under the settlement agreement in an interest bearing account and a genuine concern if paid Mr McIntyre would not be able to afford to pay a penalty.

[63] I find that there should be imposition of a modest penalty to reflect the failure to comply taking all matters into consideration in the sum of \$300.

[64] I award a penalty under s 149 (4) in the sum of \$300 with the whole of the penalty paid to Bernard McIntyre under s 136 (2) of the Act.

### **Costs**

[65] I reserve the issue of costs. Counsel should be able to resolve these. I note Mr McIntyre is legally aided.

[66] If resolution cannot be reached then both submissions are to be lodged and served within 14 days of the date of this determination and any reply lodged within a further 7 days.

Helen Doyle  
Member of the Employment Relations Authority