

NOTE: An order prohibiting publication of the name of the parties and other evidence identifying the parties is made in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 181
5547814

BETWEEN P
 Applicant

AND Q
 Respondent

Member of Authority: Robin Arthur

Representatives: Matthew Ward-Johnson, counsel for the Applicant
 Respondent in person

Investigation Meeting: 28 May 2015 in Tauranga

Further information: 5 June 2015 from Applicant and 12 June 2015 from
 Respondent

Determination: 22 June 2015

THIRD DETERMINATION OF THE AUTHORITY

- A. The Respondent (referred to as Mr Q in this determination) has breached his obligations of confidentiality given in a certified settlement agreement made between him and the Applicant (referred to as P).**
- B. Under s137 of the Employment Relations Act 2000 (the Act) and from the date of this determination Mr Q must comply with those obligations, including by observing the more detailed terms of the compliance order set out in paragraph [50] of this determination.**
- C. Under s133 and s149(4) of the Act, and within 28 days of the date of this determination, Mr Q must pay to the Authority (for**

transfer to the Crown account) a penalty of \$6000 for his breach of the terms of the certified settlement agreement.

D. Within 28 days of the date of this determination Mr Q must pay P \$15,000 as a contribution to its legal costs.

Order prohibiting publication of the names of parties and identifying details

[1] An earlier Authority determination, issued on 24 March 2015, made interim orders on this matter and included an order prohibiting publication of the names of the parties and other evidence identifying the parties.¹

[2] In light of conclusions now reached about the substantive issues, the terms of that order are confirmed on a permanent and on-going basis under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). As a result the Applicant may be identified only as a local authority – referred to as P in this determination – and the Respondent may be identified only as an information technology specialist previously employed by P. The Respondent is referred to as Mr Q in this determination. Two witnesses and one other person mentioned in this determination are also to be referred to by initial letters as using their real names would make it easier to identify P and Mr Q. The letters used do not relate to the actual name of any party or person.

The employment relationship problem

[3] P and Mr Q made a settlement agreement, dated 10 June 2014, to resolve an employment relationship problem. At their request a Ministry of Business mediator had certified the agreement under s149 of the Act on 20 June 2014. The mediator's certificate confirmed he had explained, and each party had confirmed they understood, that the agreement was final, binding and enforceable and that a party who breached one or more of its terms was liable to a penalty in the Authority.

¹ [2015] NZERA Auckland 85.

[4] Under the terms of the agreement Mr Q's employment by P formally ended on 2 September 2014 although he had not worked since he was placed on special leave and then suspended in March 2014.

[5] By an application to the Authority in March 2015 P alleged Mr Q had breached terms of the settlement agreement by publishing certain information in emails to various people and on a website. The emails directed recipients' attention to a video recording accessible through the website. The video showed Mr Q talking about his view of events that P said were subject to confidentiality obligations in their settlement agreement.

[6] P sought orders requiring Mr Q to comply with the agreement, pay a penalty and pay its legal costs. The Authority made interim orders in the determination referred to earlier. A further determination requiring additional action by Mr Q to comply with those orders was issued on 2 April 2015.²

[7] Mr Q's reply to P's claims sought to re-examine the events that had led to a disciplinary investigation of him by P in March 2014 and the circumstances of negotiations in June 2014 that had led to the end of his employment under the terms of the certified settlement agreement. He said that even if a "*violation*" of the settlement terms was proven, the agreement was "*null and void*" because he had signed it "*under duress*". He also disputed whether information he published about his view of events – through the video posted on the website that he had publicised by sending emails to officers at various local authorities – was within the scope of the confidentiality terms. He said the information related to a criminal investigation of him (in which the Police later dropped the two charges laid) and was not about the "*employment investigation and/or resulting disciplinary process*" that was expressly declared as confidential in the agreement.

The issues

[8] The issues for determination were:

- (i) In light of Mr Q's allegation of duress, and despite its certification under s149(3) of the Act, was the settlement agreement enforceable; and

² [2015] NZERA Auckland 104.

- (ii) If the agreement was enforceable, did what Mr Q published (in his emails, website and video) breach the confidentiality terms of the certified agreement?
- (iii) If Mr Q's actions had breached the terms of the agreement, were orders for a penalty and compliance required and, if so, what should they be?
- (iv) Depending on the outcome, should either party contribute to the reasonably incurred costs of the other party?
- (v) Should the orders already made prohibiting publication be continued, varied or lifted?

The investigation

[9] In investigating and determining these issues I have considered written and oral evidence, taken under oath or affirmation, from P's legal services manager (referred to as Ms R); a general manager of P (referred to as Ms S) who had participated in the disciplinary meeting and some of the settlement process with Mr Q and his lawyer (referred to as Mr T); and Mr Q. During the investigation meeting both parties had the opportunity to put additional questions to witnesses and I heard oral closing submissions from P's counsel and Mr Q.

[10] At the conclusion of the investigation meeting I gave an oral indication of preliminary findings under s174B of the Act and made arrangements for the parties to lodge further evidence and submissions about the costs issue before a written determination on all issues was completed and issued.

[11] In addition to the usual Authority investigation meeting, this matter has required a relatively high level of case management, reflected in five Minutes issued to the parties between 20 March and 18 May 2015. Matters dealt with in those Minutes included:

- (i) Directing the parties to mediation (held on 9 April date without resolution); and
- (ii) declining to issue a request from P for a summons to be served on Mr T – who had assisted Mr Q during P's disciplinary inquiry and in settlement negotiations with P – for Mr T to give evidence to the Authority investigation (including by disclosing his file for services provided to Mr Q) because Mr Q had not waived his client privilege

and consequently I considered Mr T's professional obligations of privilege and confidence meant he was unlikely to be able to give useful evidence;³ and

- (iii) arranging for Ms S to give evidence by video link; and
- (iv) allowing Ms S to lodge an amended witness statement (removing some references she had made in an earlier version of her statement to the content of without prejudice discussions); and
- (v) declining a request from Mr Q for four managers of P to be issued with summonses to give evidence to the Authority investigation (because the apparent intention of the summonses was for them to be required to evidence about matters outside the scope of issues for determination); and
- (vi) declining a request from Mr Q for Mr T to provide him with copies of documents that Mr T held under the terms of an undertaking that Mr T had given to P (because a memorandum lodged by Mr T, in response to a query from me, indicated the request was outside the terms of that undertaking); and
- (vii) declining a request from Mr Q to videotape the investigation meeting (because it was not for a purpose necessary for the investigation); and
- (viii) declining to hear evidence from two other witnesses, arranged by Mr Q, about their experiences at P (because it was not relevant to the issues to be determined).

[12] As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, has expressed conclusions on issues necessary to dispose of the matter, and has specified orders made as a result.

Was the settlement agreement enforceable?

[13] Mr Q advanced two grounds on which the final, binding and enforceable terms of the certified settlement agreement should not have full effect on him and his activities. Firstly, he argued that he had agreed to it under “*duress*”. Secondly, he suggested he got no ‘consideration’ for entering the confidentiality obligations.

³ Rule 13.7, Rules of Conduct and Client Care for Lawyers.

[14] I have concluded neither ground was established as a matter of fact or law.

[15] Mr Q was placed on special leave from 10 March 2014 after P identified some concerns about his actions at work that it considered required investigation. He was suspended on pay on 18 March. Mr Q maintained throughout that the investigation was sparked by criticisms he had made about a manager and about that manager's capability for the role, rather than by any wrongdoing by Mr Q.

[16] In early May P began a disciplinary process that led to a disciplinary meeting on 3 June. The time taken between the beginning of the investigation and that meeting was due, in part, to a Police investigation of Mr Q's access to P's computer system while he was on special leave (before he was suspended). He used that access to delete some data from P's computer storage system. The Police investigation included executing a search warrant at the home of Mr Q and his partner.

[17] At the 3 June disciplinary meeting Mr Q and his lawyer Mr T initiated settlement negotiations. Mr Q's evidence to the Authority was that he "*elected*" to leave P. He had suggested "*an exit package*" because he "*had had enough*" of the issues raised in the investigation and he did not want to come back to work for P. He said the Police search of his home on 25 March 2014 (in which laptop computers and other digital equipment were seized) had added to his stress and his decision to seek a settlement agreement.

[18] Settlement negotiations were completed by Mr T and P's lawyer and finalised at a meeting attended by Mr Q, Mr T and P's representatives on 10 June. Mr Q recalled that he had signed the agreement at Mr T's offices and that a Ministry of Business mediator had later spoken to him by telephone. As confirmed by the mediator's certificate, the mediator had explained the effect of the agreement to him.

[19] While Mr Q said he had felt under 'stress' from the employment investigation and disciplinary process, the evidence about the circumstances in which he began and concluded discussions for the settlement agreement came nowhere near establishing that he signed it under a level of 'duress' that might render its terms – as he suggested – 'null and void'. Experienced legal counsel represented Mr Q throughout the process

and Mr Q's agreement to the settlement terms was checked and certified by a mediator. Mr Q suggested P had threatened to suspend him without pay but the evidence was that he was, in fact, kept on the payroll throughout the months of the investigation when P could (arguably) have opted to use a term of his employment agreement that allowed it to stop paying him after two weeks. What P's submissions described as the "*bullish*" tone and content of emails he sent P's managers during the investigation also demonstrated that Mr Q was in no apparent sense overborne by their actions.

[20] Mr Q's video included a misleading statement that he had entered confidentiality agreements with P that did not benefit him "*in any way*". However the terms set out in the record of settlement also plainly demonstrated that, on an objective reading, P provided adequate consideration for the confidentiality obligations agreed to by Mr Q.

[21] Generally Authority determinations on issues arising from settlement agreements endeavour to maintain the on-going confidentiality of those terms where such confidentiality was part of the arrangement made. In the present case P and Mr Q had agreed the terms of settlement and "*the fact that a settlement has been reached*" were to remain strictly confidential to them and their advisors. This determination, however, has had to disclose the fact of settlement and some of the terms in order to give the reasons for the conclusions reached in it.

[22] The agreement included terms in which Mr Q promised to keep certain matters confidential and P agreed to pay him salary entitlements for certain periods and compensation under s123(1)(c)(i) of the Act. The resulting payment amounted to tens of thousands of dollars. It was money paid in return for a promise about future behaviour (that is keeping certain things confidential). It was a clear exchange of something for something – the simplest explanation of the legal concept of consideration. The full and final nature of the bargain made, with neither party able to pursue claims around employment issues, was also of mutual benefit and further consideration for the agreement reached.

[23] The result was Mr Q had entered an agreement on the terms described in s149(3) of the Act and from which he had established no grounds to be excused:

- (a) those terms are final and binding on, and enforceable by, the parties; and*
- (b) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*
- (c) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.*

If enforceable, was the confidentiality term of the agreement breached?

[24] P's case – summarised at its simplest – was that Mr Q made a deal, took the money but did not keep his promises.

[25] However Mr Q advanced three arguments (broadly paraphrased here) that his activities – in setting up a website, posting a video on it and sending emails advertising the site and video – were not breaches of his confidentiality obligations. Firstly, he argued the information referred to was outside the scope of the terms – as it was about the criminal investigation of him (on charges that were subsequently withdrawn) rather than “*the employment investigation and/or resulting disciplinary process*” referred to in the agreement. Secondly, he argued that the information he used was now in the ‘public domain’ so was no longer confidential and consequently not within the scope of his confidentiality obligations. Thirdly, he argued any confidential information he had revealed that was not covered by those two excepted categories (of being about the criminal investigation and now in the public domain) amounted only to a minor or technical breach of his obligations.

[26] The following excerpts from the terms of the agreement were relevant to considering those arguments (emphasis added):

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 on 3 June 2014 and/or 10 June 2014 ... shall remain, as far as the law allows, or [P] policy requires, **strictly confidential** to the parties and ... their ... advisers.*
3. *The parties expressly acknowledge the **NZ Police investigation** into [Mr Q] **continues** and [P] is obliged to co-operate with that investigation.*
4. *This agreement is a full and final settlement of any and all claims [Mr Q] may have, now or in the future, in relation to and arising from his employment and/or the termination of it. [P] will discontinue its current disciplinary process and will not make any claim against [Mr Q] in relation to the issues it has raised to date in that process.*

6. ... *[Mr Q] and [P] agree that no statement will be made to any staff at [P] or any other third party about the reason for the termination of [Mr Q's] employment until his employment end date ...and from that date any statement will be limited to a termination by redundancy.*
11. *[Mr Q] expressly acknowledges and agrees that clause 14 (confidential information and non-disclosure) of his IEA continues to apply despite the termination of his employment. [Mr Q] further agrees that this obligation of confidentiality includes and extends to disclosures to [P] staff (past and present) and to:*
- ...
- 11.2 *any and all information and/or data related to his employment at [P] ... regardless of whether or not that information ... 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) [Mr Q's] own position in response to any issue raised with him during the course of the investigation and/or the resulting disciplinary process.*
12. *[Mr Q] further agrees ... not to disseminate or disclose to any third party (verbally or otherwise) ...investigation data provided to him during [P]'s employment investigation and ... any other information ... related to his employment at [P] ... whether or not that information ... relate[d] to the employment investigation*

[27] The clause 14 confidentiality term from Mr Q's employment agreement referred to was:

You agree to maintain strict confidentiality with respect to the services and duties performed for [P]. You will not disclose to any person, firm, corporation or entity, any trade information acquired through [P] 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 [P], 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.

[28] Also relevant was the subject matter of the two charges filed by the Police at the local district court on 13 October 2014 and withdrawn, with the court's leave, by the crown prosecutor on 4 February 2015.

[29] Mr Q was charged with two offences under the Crimes Act 1961 – one of damaging or interfering with a computer system and another of accessing a computer system without authorisation. Both charges related to activities of Mr Q after he was placed on special leave. He admitted he had entered P's system by remote access

from home and deleted data from a storage system. His argument (in much paraphrased form) was that the deleted data was confidential information other local authorities had provided for a shared services IT project – in which he was involved as an IT network specialist – and he was obliged to delete it to protect that information from being seen by anyone else at P. He was suspended from work (and had his remote electronic access to P’s computer system removed) after P’s managers became aware of his deletion of the data. Mr Q argued that he had obligations to those other local authorities involved in the shared services project that were not covered by his employment relationship with P. It was an argument that was, I have concluded, entirely incorrect because he was an employee of P at all times during his work on the project and his participation in that project, even when providing services to those other authorities, was in his capacity as P’s employee. He was not paid by, or in any other contractual relationship with, those other authorities.

[30] Mr Q referred to the Police investigation, and the charges laid and then withdrawn, as “*the criminal investigation*”. His video was a 35-minute speech to camera by him that, according to what he said in it, was recorded on the day that the charges were withdrawn. A typewritten script of the video, prepared by P’s lawyer and lodged as evidence for the Authority investigation, comprised eight pages. I relied on that transcript in preparing this determination but had also watched the video on Mr Q’s website before internet access to it was disabled in compliance with the Authority’s interim orders in this matter.

[31] Mr Q had publicised his website and video by sending emails in early March 2015 to some staff and elected members of P and to staff at nine other local authorities with the subject heading: “*What happened to [Mr Q] in 2014*”. This extract from those emails has omitted or changed references to the shared services IT project and Mr Q’s website address:

Do you recall me?

I was in the [P] IT department and had a lot of involvement with [the IT project] getting setup. I suddenly disappeared about midway thru 2014.

If you do you might be interested in the [P] sequences 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.

Any way go to [hyperlink for 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 [P].

[32] The hyperlink in Mr Q's emails connected to the website, which also referred to the expected release dates for two further videos on 20 April and 25 April, and included this statement:

This website has been setup to enable dissemination of information related to the performance of [P], 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 new frontier of council shared services.

Scope of the agreement

[33] The text from the emails and the website, quoted above, refer expressly to 'management failings' and the 'performance' of P in a manner that I have concluded any reasonable, objective reader would take to refer to the entirety of the events following on from the investigation of Mr Q that P began in early March 2014, and was not limited to the laying of the Police charges until their withdrawal in early February 2015 (that Mr Q called the 'criminal investigation').

[34] A closer reading of what Mr Q said in his video confirmed this view. He described it as "*hopefully [filling] in some of the pieces of the puzzle that up until now have been missing*". His speech included details about changes in P's IT management structure through 2012 and 2013, arrangements for the shared services project, the beginning of the employment investigation on 10 March and his activities in deleting data of other councils from P's storage system on 11 March.

[35] He also made references that clearly breached the requirement of clause 11.3 of the agreement not to disclose "*his own position in response to any issue raised with him*" during the employment investigation and disciplinary process. During that process he blamed his direct manager for instigating the investigation and for what he saw as inadequacies caused by changes in the IT department. In the video he referred to "*a degrading work environment from my point of view anyway directly related to [his direct manager]*". He also repeated his position about the investigation by stating that "*on the 10th March when I was asked in the afternoon to stay at home while they*

carried out an investigation I was pretty well of the opinion that this was a pointless witch hunt”.

[36] The issue of the deletion of data had been raised with Mr Q in the investigation. He carried out that activity on 11 March and he was suspended on 18 March after P’s managers became aware of what he had done. It was a live issue throughout the investigation and was ‘information’ that – in the wording used in clause 12 of the settlement agreement – related to the investigation and disciplinary process that he had agreed “*not to disseminate or disclose to any third party (verbally or otherwise)*”.

The ‘public domain’ excuse

[37] Mr Q has gathered information about P’s employment investigation and the Police charges by using the provisions of the Local Government Official Information and Meetings Act 1987 (LGOIMA), the Police disclosure regime to defendants, and his personal rights of access to the court file.

[38] He has then argued that he is able to use information gained through LGOIMA and the contents of the court file because his access requests have bought that material into the public domain. On that logic he took the view the information was now ‘public’ and his use of it was no longer subject to the confidentiality obligations he entered into through the settlement agreement.

[39] It was a flawed argument. Mr Q may be entitled to personal access to official information and records held about him under various principles expressed in our official information and privacy legislation. However that access for him personally was not the same as what he called “*information being put into the public arena*”. He remained, in the use of such information, subject to the confidentiality obligations he entered into with P not to disclose information about the employment investigation and disciplinary process (which included the subject of his deletion of data from P’s storage system and about which the criminal charges were laid). Finding an alternative source or route of access for the information did not release him from the freely-entered obligations to which he had entered (and for which he had taken the payment offered).

[40] Neither was he released from those freely-entered obligations by an alternative ‘public rights’ argument, relying on the New Zealand Bill of Rights Act 1990 (NZBORA), that Mr Q had suggested might protect his actions. While s14 of NZBORA affirms Mr Q’s public right to impart information and opinions of any kind in any form, he chose to fetter his own public right by exercising his private and personal right to enter a legally-binding agreement (where he undertook to keep certain information confidential in return for the payments made to him).

[41] Section 6 of NZBORA directs the Authority to prefer a meaning consistent with that statute when interpreting Mr Q’s obligations under the Employment Relations Act. A restriction on his s14 NZBORA rights – imposed by enforcing the confidentiality terms he had agreed to under s149 of the Employment Relations Act – was within the justified limits permitted by s5 of NZBORA. Mr Q voluntarily agreed to limit his freedom of expression by entering an agreement that also contained benefits for him, so enforcing his adherence to that obligation was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.

Not a minor or technical breach

[42] Even if Mr Q had been correct that some of the information used in his emails, website and video had properly only referred to the ‘criminal investigation’, not the employment and disciplinary process, and that he was entitled to use information from documents he got through the court and LGOIMA requests, there were still specific references to matters covered by the confidentiality obligations.

[43] He referred to the existence of a ‘confidentiality agreement’ – which he accepted in the Authority investigation was a reference to the settlement agreement. It was a clear and deliberate breach of the term where he had expressly agreed to keep “*the fact that a settlement has been reached*” strictly confidential. He expressed strident views about P’s management structure and changes and the facts of the employment investigation (from being asked to ‘stay at home’ from 10 March 2014) and his deletion of data from P’s computer storage system, and gave his reasons for having done so. What he said expressly breached the term of the agreement whereby he agreed to keep his “*own position*” confidential. This term, at clause 11, expressly

referred to the obligation extending to disclosures to other past and present staff of P but Mr Q publicised his video by sending emails (containing a hyperlink) directly to such staff.

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

Should compliance orders be made?

[45] The evidence, particularly that directly from Mr Q, established that P should be granted orders requiring him to comply with the terms of the settlement agreement. It established he had deliberately breached those terms and was, in the absence of such orders, likely to continue to do so (based on his interpretation of the facts and applicable law).

[46] Mr Q's actions had denied P the benefit of finality and certainty that it reasonably expected would have resulted from the settlement agreement.

[47] Mr Q's website indicated that he had intended to post further videos about his view of events and further information he gained from what he considered public sources, including an interview with a Police officer about what had happened in his case. He also confirmed in his evidence at the Authority investigation that he wanted to pursue private criminal prosecutions against members of P's staff. His statement had also referred to different rules applying to information that he had gained from the Police (which included notes from the employment investigation meetings). P had supplied such information to the Police and was entitled to do so under the term of the settlement agreement that referred to its obligation to co-operate with the Police's on-going investigation at the time the agreement was made. Mr Q's view on his entitlement to release information gained through other sources increases the likelihood of further breaches.

[48] The Authority's role is to determine problems such as P's claim about Mr Q's breaches of their settlement agreement according to the substantial merits of the case without regard to technicalities.⁴ In this case the substantial merits lie with P having the benefit of the agreement it made with Mr Q. It was an agreement that also had benefits for him – both money and the ongoing confidentiality obligation that applies to P as much as him. Ironically Mr Q was keen to make use of some of the contents of the documents he obtained from the Police but redacted a paragraph from two of those documents that he lodged as evidence in the Authority investigation. Both redactions were from statements two managers at P had given to Police investigators and provided some details of the substance of an accusation about Mr Q that arose during P's disciplinary inquiry. In answer to a question at the Authority investigation as to why he had obscured those two paragraphs, Mr Q said their contents "*could be damaging to me*" and were not relevant to the Authority investigation. However I considered the reality was he did not want those particular details potentially put into the 'public domain' by being included in an Authority determination as they were likely to be embarrassing for him or put him in a poor light. In that way he sought to continue the benefit to him of the confidentiality provided by the settlement agreement at the same time as his other actions have deprived P of some of that benefit to it.

[49] Plainly put, what Mr Q has done has been an attempt to further prosecute his sense of grievance about how his employment ended, despite the full and final nature of the settlement agreement he entered (and the money he took for it). When this was put to him in questioning during the Authority investigation, he denied that was so. However he also described what he had done "*as a process to heal from this damage done which was unnecessary if [P] had engaged their brains*". He referred to being upset by the 25 March Police search of his house (shared with his partner and daughter), an event that occurred before the 10 June settlement agreement was made. The agreement's terms, stated to be in full and final settlement of any and all claims Mr Q might have, now and in the future, included a payment to him under s123(1)(c)(i) of the Act, that is compensation for humiliation, loss of dignity and injury to feelings. Despite the supposed finality of those terms Mr Q has sought collateral means to pursue his former employer, and managers within that organisation.

⁴ Section 157(1) of the Act.

In answer to other questions he confirmed he also wanted to take private prosecutions against staff of P, in a process that he said could take “years”.

Orders

[50] Under s137 of the Act and from the date of this determination Mr Q is ordered to comply with all his obligations under the terms of the certified settlement agreement between him and P, dated 10 June 2014, including by (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 P; 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 P.

[51] If Mr Q fails to comply with the requirements of this order, P has the right under s138(6) of the Act to apply to the Employment Court for the exercise of its powers in such circumstances. Under s140(6) the Court’s powers include ordering a prison term of up to three months, imposing a fine of up to \$40,000 and ordering sequestration of the property of the person in default.

Should a penalty be imposed?

[52] P sought the imposition of a ‘significant’ penalty on Mr Q for his breaches of the terms of the certified settlement agreement.

[53] Mr Q was liable for a penalty under s149(4) of the Act. Setting the appropriate level of such a penalty required an assessment of the harm done by his breaches, the importance of bringing home to Mr Q that his behaviour was unacceptable, the importance of deterring others, Mr Q’s culpability and whether his actions were technical and inadvertent or flagrant and deliberate.⁵ Other factors in the assessment include the number of breaches (whether one-off or repeated), the attitude

⁵ *Xu v McIntosh* [2004] ERNZ 448 at [47] and [48] (EC).

of Mr Q and any remorse shown by him, steps taken to address or remedy any breach, and consistency with the range of penalties imposed in other comparable cases.⁶

[54] Mr Q's actions caused harm to P. It incurred the time and expense of taking legal action over the breaches. Ms R's evidence was that what Mr Q had said and done in breach of the agreed terms meant P managers had to spend some time addressing queries raised by some of its elected members and some staff of P (referred to directly or indirectly in Mr Q's video) had required assistance from an industrial psychologist as a result of the distress caused to them by his comments.

[55] Mr Q showed no remorse over the breaches and continued to believe his behaviour was acceptable. Although he had complied with the requirements of the Authority's interim orders (which remained in place to the date of this determination), he had not otherwise sought to address or remedy the breaches. He was entirely culpable for his actions. They were deliberate and carefully carried out in full knowledge of his obligations.

[56] There were multiple breaches by Mr Q rather than a single event. He prepared and posted the website and the 35-minute video. By email he contacted a range of people at P, at other local authorities and at some other entities with whom he had contact through his IT work.

[57] There was a strong public interest in imposing a significant penalty on Mr Q as a deterrent to other parties who might chose not to honour confidentiality obligations entered into under s149 certified settlement agreements. Ministry of Business statistics show its employment relations mediators certified more than 11,000 settlement agreements under s149 of the Act in 2013 and 2014. Although no data is kept on the proportion of such agreements that include agreed confidentiality terms, the percentage is anecdotally said to tally more than 95 per cent of all agreements certified. If breaches such as those made by Mr Q 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

⁶ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZ EmpC 41 at [18] and *Tan v Yang* [2014] NZEmpC 65 at [32].

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.

[58] Penalties awarded for breaches of agreed terms in certified settlement agreements in the last two years ranged from \$300 to \$5000 and related to widely varied circumstances. The particular circumstances of the deliberate breaches carried out by Mr Q put his actions at the top end of the range in comparable cases. Those breaches were not the result of a single action or on a single occasion but resulted from a series of calculated steps in preparing his video and website and publicising that material through emails to many people in his target audience. Arguably each step of that process triggered liability for a separate penalty but I have concluded a global penalty should be imposed for the bundle of breaches. In light of the need to bring home to him that his behaviour was unacceptable, his lack of remorse, the harm done to P and the public interest in deterring others from similar breaches I concluded a global penalty of \$6000 was warranted for Mr Q's multiple breaches of his confidentiality obligations.

[59] P did not seek an order for some or all of any penalty imposed be paid to it. Accordingly I have ordered Mr Q to pay the penalty of \$6000 to the Authority, for transfer to the Crown account, within 28 days of the date of this determination.

Should Mr Q pay costs to P and if so, on what basis?

[60] The settlement agreement included the following term relevant to costs:

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

[61] Having succeeded in establishing the alleged breaches of the agreement and gaining the orders sought, P sought an order for costs in reliance on that term on an 'indemnity' basis – that was with Mr Q being liable for its full costs for expert fees and legal costs, not just the usual tariff basis ordinarily applied by the Authority.

[62] P submitted the settlement term allowing recovery of any costs was meant to have a deterrent effect analogous to a *Calderbank* offer. As Mr Q had entered the agreement after taking legal advice from experienced counsel and had deliberately breached its terms, P submitted indemnity costs were warranted and appropriate.

[63] Its costs to address, respond and deal with Mr Q's breaches of confidentiality were said to have totalled more than \$86,000. Invoices and supporting records provided showed legal fees of more than \$61,500, specialist IT fees of more than \$19,000 and fees for an industrial psychologist of more than \$5500.

[64] Mr Q submitted he should be awarded costs of \$25,900 for his "*time taken in responding to a vexatious claim*" with P also made to pay a penalty of \$20,000 "*due to the past background in employment matters and the vexatious nature of this claim*".

[65] P was entitled to an award of costs in light of its success in gaining orders sought. I have accepted its submission that application of the Authority's usual daily tariff was not appropriate. However exercise of the discretion in determining costs in this case did not support an automatic award of all costs claimed. Other relevant factors for consideration were the overall policy that awards should be modest and not increased to punish an unsuccessful party or to express disapproval of that party's conduct, that costs must be reasonably incurred, and whether a party had the means to meet an award of costs.

[66] P's evidence did not establish the necessity for the level of the fees incurred for the IT forensic specialist or the industrial psychologist, or the need for such external assistance rather than relying on expertise from among P's existing IT and HR personnel. I have not read the reference in the settlement agreement term to "*any*" costs incurred as allowing P to claim reimbursement of *all* expenses resulting from how it chose to deal with Mr Q's actions in breaching his obligations.

[67] In relation to legal fees actually incurred I considered some should be excluded from the necessary assessment, including arrangements for and attendance at mediation, attendances related to media coverage of the Authority's interim determination, arrangements for Ms S to give evidence by Skype, and applying (unsuccessfully) for Mr T to be summonsed to attend the Authority investigation. While that left an amount probably still in excess of \$50,000 reasonably incurred as

costs directly related to the Authority investigation, I concluded a reasonable and suitably modest contribution to that amount was \$15,000.

[68] The conservative amount of \$15,000 related to costs required for what I took to be the equivalent of a two day investigation meeting – that time comprising one full-day investigation meeting in Tauranga on 28 May, a notional half-day on the interim application dealt with on the papers, and a further notional half-day for participation in the relatively high level of case management required in this case (as noted in [11] above).

[69] The award of \$15,000 for the notional equivalent of a two-day investigation meeting is an upward adjustment of a little more than twice the usual and current daily tariff of \$3500.⁷ Such an uplift of the tariff was also justified in light of Mr Q's conduct in responding to P's application to the Authority. Much of what he said in reply sought to 'relitigate' the substance of matters covered by the full and final settlement agreement and unnecessarily extended the time and effort required from P for the Authority's investigation.

[70] The evidence about Mr Q's ability to pay costs supported such an award as within his means. He said he and his partner owned a 8.5 acre rural property (that included a plant nursery and a kiwifruit orchard) purchased around 10 years ago for around \$700,000 with a remaining mortgage of about \$250,000. The property was on the market with hopes of achieving a price of around \$1.15 million. He had not taken up new paid employment after the end of his work at P but had done some work on their property (which included care of plants and picking kiwifruit).

[71] Accordingly, in exercise of the Authority's discretion to award modest costs on an assessment of the relevant principles and factors and within 28 days of the date of this determination, Mr Q must pay P \$15,000 as a reasonable contribution to its costs.

Robin Arthur
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 at [46].