

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 412  
3051534

BETWEEN	PACHELL INDUSTRIES LIMITED Applicant
AND	JOHN WELTON Respondent

Member of Authority:	Vicki Campbell
Representatives:	Kent Duffy for Applicant Lou Yukich for Respondent
Investigation Meeting:	11 July 2019
Oral Determination:	11 July 2019
Record of Oral Determination:	12 July 2019

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**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

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- A. Mr Welten breached the terms of the Record of Settlement dated 14 December 2018.**
- B. Mr Welten is ordered to immediately comply with the terms of the Record of Settlement dated 14 December 2018.**
- C. Within 28 days of the date of this determination Mr Welten is ordered to pay a penalty of \$800 into the Authority for subsequent transfer of \$400 to a Crown bank account and \$400 to Patchell Industries Limited.**

**D. Costs are reserved.**

**Prohibition from publication**

[1] I prohibit from publication the terms of the Record of Settlement between the parties dated 14 December 2018 except for clauses 1 and 5.

**Employment relationship problem**

[2] Patchell Industries Limited and Mr Welten attended mediation on 14 December 2018. They resolved their differences and entered into a Record of Settlement (the settlement agreement) under s 149 of the Employment Relations Act 2000 (the Act). The settlement agreement was certified by a Mediator employed by the Ministry of Business, Innovation and Employment under s 149(3) of the Act.

[3] The settlement agreement records:

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

...

5. Neither party shall make disparaging remarks about the other.

[4] Patchell Industries claims Mr Welton has breached both terms of the settlement agreement. It seeks compliance orders and the imposition of penalties against Mr Welton.

**Issues**

[5] In order to resolve Patchell Industries' application I must determine whether Mr Welten breached the settlement agreement and if so whether compliance orders should be made and/or whether penalties should be imposed.

[6] As permitted by s 174E of 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 as a result. It has not recorded all evidence and submissions received.

### **Alleged breaches**

[7] It was common ground at the investigation meeting that Mr Welten was in dispute with Patchell Industries prior to attending mediation on 14 December. I find it is more likely than not that before Mr Welten attended mediation members of his team knew about the dispute and that Mr Welten was negotiating with Patchell Industries.

[8] From the evidence I have seen and heard I have concluded that the items being negotiated were not known to any of Mr Welten's team members.

[9] Mr Welten told me he received two photos from Patchell Industries about two days before the mediation took place. He says he showed these photos around the workplace telling his colleagues that they showed the trivial nature of Patchell Industries actions.

[10] After mediation had been completed Mr Welten returned to the workplace to collect his tools, personal belongings and to say his goodbyes to his work colleagues.

[11] Patchell Industries says that when he returned to the workplace he disclosed to members of his team information which breached the settlement agreement. In particular it says Mr Welton disclosed that the parties had negotiated a pay-out at almost 200% more than he had asked for and when showing members of the team the photo's told them that this is how he was worked out of his job.

[12] Mr Welten denies he has breached the record of settlement.

### **Confidentiality**

[13] Two employees approached the Production Manager separately and made written statements on 17 December confirming their verbal advice that Mr Welten had advised them he had been paid money and asked to leave.

[14] I have concluded on the balance of probabilities it is more likely than not that Mr Welten did advise team members that he had been paid money. Mr Welten has acknowledged that he did discuss the settlement although he says he did so with only one of his team members.

[15] Mr Welten told me he told the team member that his union advocate had secured him double the settlement he was originally offered. He told me at the investigation meeting that the discussion occurred in the context of him providing information on union membership to the team member.

[16] In all the circumstances I am satisfied Patchell Industries has established Mr Welten breached the confidentiality term of the settlement agreement.

### **Disparaging comments**

[17] It was common ground that Mr Welten showed his team members copies of two photos when he returned from mediation. At the investigation meeting he told me he did this to reiterate that the matters starting everything off were trivial. He told me that the message he was conveying was that others could do similar and end up in the same situation. That situation being his sudden departure from the workplace.

[18] Mr Welten conceded that his approach could indirectly put the company in a negative light but says it was not intentional. I do not accept that. I find it is more likely than not that Mr Welten wanted his colleagues to know that if they conducted themselves in a similar “trivial” way they too could lose their jobs.

[19] He was certainly successful in conveying his message. Two colleagues, concerned about their continued employment, approached the Production Manager to seek assurances that their jobs were secure.

[20] The Court has defined disparage as meaning:<sup>1</sup>

(a) Bring into discredit or reproach upon; dishonour; lower in esteem;

(b) Degrade, lower in position or dignity; cast down in spirit; and

(c) Speak of or treat slighting or critically; vilify; undervalue, deprecate.

[21] I am satisfied that in the present circumstances Mr Welten’s comments were disparaging and constitutes a breach of the settlement agreement. The message he conveyed to his colleagues discredited Patchell Industries and were negative. The

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<sup>1</sup> *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30 at[36].

practical effect of Mr Welten's actions was to diminish the reputation of Patchell Industries in the eyes of the two employees who approached the Production Manager.

### **Compliance Order**

[22] Although there is no evidence of any ongoing breach, for the sake of completeness, under s 137 of the Act Mr Welten is ordered to immediately comply with the terms of the Record of Settlement dated 14 December 2018.

### **Penalties**

[23] Patchell Industries has established Mr Welten breached the settlement agreement and he is liable to a penalty as a result of his actions.<sup>2</sup> In setting a penalty I have had regard to the factors set out in s 133 of the Act and been guided by the case law for their application but have described the reasons for the penalty figure reached in summary form only.<sup>3</sup>

[24] The objects of the Act promote mediation as the primary problem-solving mechanism. There is a strong public policy interest in upholding compliance with the terms of records of settlement certified under s 149 of the Act. Settlement agreements are made to be kept. I consider a penalty to be necessary in this case to express disapproval of the breaches and to deter other parties to such settlement agreements from breaching their terms.

[25] Mr Welten's actions in breaching the record of settlement were deliberate. His actions indicate that he attempted to work around the terms of the record of settlement but the overall effect was that he was in breach.

[26] I am satisfied his actions were of limited extent. The breaches were confined to the comments he made on the afternoon of 14 December. I find the disclosure to his work colleague about doubling the original offer was in relation to him attempting to sell the benefits of union membership and was inadvertent.

[27] There has been no repetition. The damage was limited to the two upset employees who approached the Production Manager. The Production Manager quickly sorted any concerns with assurances that their jobs were safe.

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<sup>2</sup> Employment Relations Act 2000, s 149(4).

<sup>3</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment* [2019] NZEmpC 12 at [19].

[28] There is no evidence Mr Welten has previously breached any settlement agreements or been penalised for doing so.

[29] Considering the nature and extent of the breaches and limited damage I have taken a global approach and consider an appropriate level of penalty to be \$800. This is a modest penalty and equates to 4% of the total penalties of \$20,000 that could be imposed for the worst cases.

[30] Patchell Industries has asked for the whole or part of the penalty to be paid to it under s 136(2) of the Act. Patchell Industries says it has been put to time and expense and the inconvenience of having employees take time off work to attend the investigation meeting. I accept it is appropriate for 50% of the penalty to be paid to Patchell Industries.

[31] Within 28 days of the date of this determination Mr Welten is ordered to pay a penalty of \$800 into the Authority for subsequent transfer of \$400 to a Crown bank account and \$400 to Patchell Industries Limited.

### **Costs**

[32] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Patchell Industries shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Welten shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[33] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards. I record here that the investigation meeting took half a day including the issue of this oral determination.

Vicki Campbell  
Member of the Employment Relations Authority