IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

BETWEEN	TIC-TAC-TOE EDUCARE LIMITED Applicant
AND	MARY-ANN THOMAS Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Sandra Pope for Applicant Graham Ogilvie, Advocate for Respondent
Investigation Meeting:	2 October 2013 at Hamilton
Determination:	16 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1]   On 14 February 2013 a Record of Settlement (the Settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, Tic-Tac-Toe Educare Limited (Tic-Tac-Toe), and the Respondent, Ms Mary-Ann Thomas.   The Settlement was signed by Ms Sandra Pope on behalf of Tic-Tac-Toe and by Ms Thomas. The Settlement was also signed by a Mediator employed by the Ministry of Business, Innovation and Employment.

[2]   The issue which has been brought before the Authority by Tic-Tac-Toe is that Ms Thomas had not complied fully with clause 1 of the Settlement, which states:

> 1.   *These terms of settlement and all matters discussed at mediation*
> *shall remain, as far as the law allows confidential to the parties.*

[3]   The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

        a.   were final, binding and enforceable; and

        b.   could not be cancelled; and

        c.   could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4]   Ms Pope, Director of Tic-Tac-Toe, claims that Ms Thomas breached clause 1 of the Settlement by divulging the terms of the Settlement to an outside party.

[5]   Ms Pope said that on 21 March 2013 she had become aware that Ms Thomas had disclosed the details of the Settlement to Ms Dehlia Bourke, a previous client of Tic-Tac-Toe, who had made the details known to an employee of Tic-Tac-Toe, Ms Tina Virtue.

Background Facts

[6]   Tic-Tac-Toe is an early childhood day care centre for children aged 0 – 5 years. Ms Thomas commenced employment with Tic-Tac-Toe in July 2012 and had assisted Ms Pope in setting up Tic-Tac-Toe which was a new day care centre at that time.

[7]   In December 2012 Ms Thomas was dismissed by Tic-Tac-Toe. Subsequent mediation between Ms Pope and Ms Thomas resulted in the Settlement.

[8]   In accordance with clauses 5, 6 and 7 of the Settlement, Tic-Tac-Toe agreed to pay Ms Thomas sums of money by way of payment of various invoices and compensation pursuant to s 123(1)(c)(i) of the Act, in addition to relinquishing a right to be refunded an overpayment of holiday pay by Ms Thomas. The total sum of monies itemised under clauses 5, 6 and 7 totalled approximately $7,000.00.

[9]   On 21 March 2013 Ms Virtue said that she had been working at Tic-Tac-Toe when Ms Bourke arrived to collect her son who at that time attended the day care centre. Ms Virtue said Ms Bourke informed her that she had met Ms Thomas who had told her that she been paid the sum of $7,000.00 by Tic-Tac-Toe.

[10]   Ms Virtue said she had been surprised by this statement and had observed to Ms Bourke that her understanding was that mediation and its outcome was confidential, to which Ms Bourke had responded that she had been unaware of this.

[11]   Ms Virtue said she had been concerned by the information provided by Ms Bourke concerning the payment which had been to Ms Thomas as Ms Pope had told her that

mediation had been a confidential process, and as a result she had telephoned Ms Pope to inform her what had happened as soon as Ms Bourke had left Tic-Tac-Toe on 21 March 2013.

[12]   Ms Pope said that following the telephone call from Ms Virtue, when she had arrived at Tic-Tac-Toe the next day, she had spoken to Ms Virtue about what had been said to her, and said that she had also been informed by Ms Pam Cotter, the Tic-Tac-Toe Cook, that Ms Bourke had also discussed with her the payment made to Ms Thomas as a result of the mediation.

[13]   Ms Thomas said that, prior to attending mediation, she had spoken to a number of people about her dismissal and the fact that she was going to be attending a mediation meeting.

[14]   Following the mediation Ms Thomas said that she had indicated in response to questions that her claim had been resolved, but she had not revealed how much money she had received as a result of the mediation process as she had been aware of the need to comply with clause 1 of the Settlement.

[15]   Ms Thomas had a close friendship with Ms Bourke and said she had assisted her in obtaining casual relief day care employment at Tic-Tac-Toe, however she denied that she had told Ms Bourke the outcome of the mediation, or that she had mentioned any sum of money to her.

[16]   Ms Pope said the news about the Settlement payment to Ms Thomas had spread quickly to the rest of the Tic-Tac-Toe employees and she had been bombarded by questions. After telephoning the mediation service for advice, Ms Pope had filed a Statement of Problem with the Authority on 23 August 2013.

Determination

[17]   Ms Thomas was a close friend of Ms Bourke and had assisted her in obtaining relief day care employment at Tic-Tac-Toe. The amount stated by Ms Bourke to have been paid to Ms Thomas as a result of the mediation was $7,000.00. This amount approximates to the cumulative amount payable in accordance with clauses 5, 6 and 7 of the Settlement.

[18]   From the evidence available to the Authority, I am satisfied that Ms Thomas had breached clause 1 of the Settlement.

[19]   The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and

therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[20]   Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[21]   It is consequently in the public interest to impose a penalty which will act a deterrent to others who may contemplate engaging in such behaviour. However in determining this matter I take into consideration Ms Thomas's submissions concerning her financial situation.

[22]   I am accordingly persuaded that a penalty in the sum of $1,000.00 is appropriate in the circumstances.

Payment of the penalties to Tic-Tac-Toe

[23]   In accordance with the observation of the Employment Court in *Xu v McIntosh[1]*, whether a penalty is paid to the victim of the breach should be decided with respect to the degree of harm suffered as a result of the breach.

[24]   I consider that Tic-Tac-Toe has suffered some harm as a result of the rumours about the Settlement payment and by the subsequent withdrawal of Ms Bourke's child form the Tic-Tac-Toe day care centre.

[25]   In the circumstances I consider it appropriate that a proportion of the penalty awarded is paid to Tic-Tac-Toe. Ms Thomas is ordered to pay Tic-Tac-Toe $500.00 of the $1,000.00 penalty, the remaining $500.00 to be paid to the Crown.

Costs

[26]   As Tic-Tac-Toe was not legally represented, there is no order for costs.

[27]   I order that Tic-Tac-Toe be reimbursed for the Authority's filing fee by Ms Thomas in the sum of $71.56.

Eleanor Robinson
Member of the Employment Relations Authority

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[1] [2004] 2 ERNZ 448