



## The Facts

[3] A former employee of the applicant, who was also a member of the respondent, raised a number of personal grievances with the applicant, and also filed statements of problem with the Authority over those grievances. In mediation, the parties came to a resolution of those grievances by way of a record of settlement under s.149 of the Act, with the applicant and the respondent both recorded as parties to that record of settlement as the respondent and second applicant respectively.

[4] There were many clauses to the agreed terms of settlement of the employment relationship problem, but the relevant ones are as follows:

1. *These terms of settlement (save for the agreed statement set out in 8 below) and all matters discussed at mediation shall remain strictly confidential to the parties.*
8. *The respondent and the second applicant will jointly issue a statement to all staff as set out in the attachment to this settlement document. This will be done by way of notice to all staff.*

[5] Subsequently, the head of an umbrella union, of which the respondent is a member, decided that he would prepare an article on the ex-employee's issues with the applicant, for publication in the umbrella union's newsletter. In the meantime, a member of the respondent approached the head of the umbrella union with concerns about their employment with the applicant. The head of the umbrella union gave that person 20 copies of the draft article, to distribute as they saw fit.

[6] The draft article set out in some detail the claims originally raised by the former employee against the applicant, the fact that the matter was settled in mediation on confidential terms and the agreed joint statement. This draft article had been prepared by the head of the umbrella union following consultation with the secretary of the respondent, who checked it for accuracy and who later approached the former employee to see whether she wished to be named in the umbrella union's newsletter. She did not.

[7] Subsequently, the umbrella union published the article in its newsletter of September 2009, which was unchanged from the draft except for the deletion of the former employee's name. Subsequently, the president of the applicant union provided a copy of the previously published article to a local newspaper (together with a media release) in preparation for the investigation meeting of the Authority.

[8] At the investigation meeting the chief executive officer of the applicant made it clear that it was important to it, when attending mediation and resolving the former employee's claims of personal grievance that the parties maintain confidentiality, particularly when provided for in the terms of settlement. He believed that this had been breached by the publication of the article, which exposed details of the dispute that had been settled in mediation and was critical of the applicant. He was also concerned that matters set out in the grievances and other matters discussed in mediation would now become the subject of *staff gossip or innuendo*. Avoiding this was the purpose of the agreed statement in clause 8, he stated.

[9] As a result of the publication, the applicant is now reluctant to enter into mediation on any matter with the respondent.

### **Determination**

[10] There have been two publications of the disputed article subsequent to the filing of the applicant's statement of problem. If there was any doubt that the respondent was unaware of the applicant's objections to its actions before the publication of the article in the umbrella union's newsletter there can be no doubt about that in relation to the publication to the newspaper the week before the investigation meeting.

[11] I conclude that the respondent union was clearly party to the first two publications of which the applicant is concerned, first because of the union secretary's role in checking the publication for accuracy and thus aiding and abetting publication, as well as supporting its publications and being a member of the umbrella union, with the president of the respondent union and the head of the umbrella union working hand-in-glove on this matter as in many others. I therefore simply do not accept that the head of the umbrella union would have published the articles in issue without the respondent's secretary's consent and approval of its content. In any event the respondent, through its president, was clearly responsible for the publication to the local newspaper.

[12] The record of settlement is to be interpreted according to its tenor. There was evidence given about the intentions of the parties in entering into the settlement but they are not relevant as an aid to interpretation, in the absence of ambiguity, where the parties' views differ, as they necessarily do in this case. Thus while I have no doubt

that the applicant considered that it was effectively putting the matters in dispute behind the parties by settling them, and that it genuinely believed that the respondent would be unable to publish the issues before the parties that led to the raising of the grievances, that is not relevant if the record of settlement must be interpreted differently on its face, particularly as the respondent does not hold to the same interpretation.

[13] Significantly, the settlement agreement does not provide any clause such as *neither party shall henceforth refer to the issues in dispute* or that the statement to staff would be *the sole publication involving either party*, or any other term to such effect. If it had, the issue would not be in any doubt. Rather, such a term needs to be implied into the agreement.

[14] There is no allegation that the respondent had breached clause 1 by disclosing any of those parts of the terms of settlement that are to remain strictly confidential to the parties. There is no evidence (and there would be real difficulty in obtaining such evidence) that the respondent has breached the requirement in clause 1 for all matters discussed at mediation to remain strictly confidential to the parties, in the sense of the Authority ever being able to determine whether the respondent had disclosed matters that were actually discussed during the course of the mediation. On the one hand, it would seem superfluous to provide (in mediated terms of settlement) that all matters discussed in mediation shall remain confidential, when that is required anyway by s.148. On the other hand, if the parties intended that the subject matter (rather than the mere fact that certain matters were discussed at mediation) of matters discussed at mediation would remain confidential as a term of settlement, there would be significant hurdles (following the judgement of the Court of Appeal in *Just Hotel Ltd v Jesudhass* [2007] ERNZ 817) in obtaining evidence of what was discussed at mediation. I prefer the interpretation that the parties chose to re-emphasise the statutory confidentiality of matters discussed in mediation, because of the statutory restrictions on obtaining evidence of what was discussed in mediation and the absence of any particular clause which could have ensured events occurring before mediation and settlement could never again be referred to, as explained above.

[15] I have considered whether the word “matters” discussed at mediation contained in the parties’ settlement agreement might mean the legal definition of a matter, namely the substantial facts forming the basis of a claim for the proceedings

before a Court or Tribunal. However, given the fact that mediation operates in an informal environment and records of settlement are not always prepared by lawyers, I prefer the wider definition of “matters”, at least in this case, being issues discussed at the mediation.

[16] Confidentiality to the level claimed by the applicant can not be implied through clause 8, a simple clause that there would be a joint statement to staff. It therefore follows that it can only be implied as a necessary implication of the joint effect of all those three statements.

[17] I conclude that it is not a natural or necessary implication of those two clauses in the record of settlement that any party is unable to refer to the (disputed) acts which gave rise to the grievances. The events referred to in the publications existed prior to and independent of mediation. Similarly, just because there was an agreed statement in clause 8, that was never said to be the only statement that could be made, and it can not be implied as such from the written terms of settlement. As noted above, it was open to the parties to address the issue of publication of those disputed claims by way of more restrictive clauses, but they did not do so. Since the respondent has therefore not breached the terms of the settlement, there are no grounds for claiming a breach of good faith. I therefore find against the applicant and dismiss its claims.

[18] There are several implications, however, for the respondent, over its actions, which it might have cause to consider. First, it has lost the trust of the applicant, which no longer wishes to deal with it in mediation. Second, as the parties must both be aware, at some point their relationship will need to return to a more positive state, as otherwise the respondent’s members will be likely casualties, which is why the thrust of the Employment Relations Act is on building productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship.

[19] In the absence of any new claims of the sort which led to the personal grievances being raised in the first place, the respondent should therefore address whether its continued publication of these historical allegations is in the interests of it and its members.

**Costs**

[20] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**