

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 485
5458952 & 5461955

BETWEEN ZOE CUMMING-STEWARD
Applicant in 5458952 and
Respondent in 5461955

AND TWENTY FIVE STATION
LIMITED T/A LAW DEBT
COLLECTION
Respondent in 5458952 and
Applicant in 5461955

Member of Authority: Robin Arthur

Representatives: Danny Gelb, Advocate for Zoe Cumming-Steward
Natalie Tabb, Counsel for Twenty Five Station Limited

Investigation Meeting: 11 July 2014

Determination: 27 November 2014

DETERMINATION OF THE AUTHORITY

- A. Zoe Cumming-Steward breached the confidentiality term of a settlement agreement she made with Twenty Five Station Limited (TFSL) and must pay a penalty of \$750 under s 149(4) of the Employment Relations Act 2000 (the Act).**
- B. Under s 136(2) of the Act the penalty is to be paid to TFSL but may be offset against the value of a \$2000 instalment of a compensation payment, due under the settlement agreement, that TFSL has not yet made to Ms Cumming-Steward.**
- C. The instalment payment, presently held on trust by a solicitor at the Authority's direction, is to remain held on trust until any issue of costs is determined by the Authority.**

Employment relationship problem

[1] Both Zoe Cumming-Steward and Twenty Five Station Limited (TFSL) applied to the Authority for orders in relation to whether they each had met their obligations under an agreement they made on 21 March 2014 to settle an employment relationship problem. The Authority investigated their respective applications jointly.

[2] TFSL operates a debt recovery business from offices in Manurewa and trades under the name Law Debt Collection. Ms Cumming-Steward worked for TFSL between April and September 2013.

[3] The terms on which their employment relationship problem was settled were certified by a mediator under s149 of the Employment Relations Act (the Act) so could not be brought before the Authority apart from enforcement purposes. The settlement agreement bound both parties, who were each liable to a penalty under s149(4) of the Act for any breach of the settlement terms.

[4] The first of the agreed terms was worded as follows:

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

[5] Ms Cumming-Steward said TFSL was late paying the second instalment of an amount due to her under a term of the agreement. She anticipated, at the time of her application to the Authority, that TFSL would not pay the third instalment because it believed she had broken the confidentiality of the settlement by telling another person about its terms. She sought an order requiring TFSL to comply with the settlement agreement by paying the third instalment (in the sum of \$2000) to her and an order imposing a penalty on TFSL for breaching the agreement.

[6] TFSL said it had delayed payment of the second instalment (due on 30 April 2014) because it received a report that Ms Cumming-Steward had broken the confidentiality requirement. It sought an order for a penalty against her – to be paid to TFSL – that would completely extinguish or offset the value of the third instalment due to be paid to her on 31 May 2014.

[7] In a case management conference with the parties' representatives on 29 May I made arrangements for TFSL to pay \$2000 to an independent solicitor and for that sum to be held on trust in an interest bearing account pending further orders of the Authority. David Liu, a partner of Yu Lawyers, subsequently confirmed to the Authority that he received the funds from TFSL and undertook to hold the funds undisbursed pending the Authority's orders.

The investigation

[8] At the investigation meeting I heard oral evidence, given under oath or affirmation, from five witnesses:

- (i) Janine Hair, a property administrator who worked at a real estate business in the same building as TFSL's office, who said that, during a brief conversation at the Murphy's Law Irish Bar in Drury on Sunday, 13 April 2014, Ms Cumming-Steward revealed details of her settlement agreement with TFSL.
- (ii) Derryn Mayne, the principal of the real estate business and sister of Ms Hair, who said Ms Hair had told her in the following week about what Ms Cumming-Steward said on 13 April.
- (iii) Dariean Johnstone, a friend of Ms Cumming-Steward, who said she was present during the conversation between her friend and Ms Hair on 13 April but did not hear Ms Cumming-Steward say what Ms Hair claimed she had said.
- (iv) Ms Cumming-Steward, who denied revealing the terms of the settlement agreement to Ms Hair.
- (v) John Campbell, a principal of Law Debt Collection, who said he believed the business was harmed by Ms Cumming-Steward talking to Ms Hair, including a reduction in requests by real estate businesses to have his firm enforce tenancy debts.

[9] Ms Hair and Ms Mayne both attended the investigation meeting under witness summons and gave oral evidence in response to questions. TFSL had an opportunity to lodge a witness statement from Ms Hair but failed to do so by the date set in the Authority's timetable directions for the investigation. There were then competing allegations between Mr Campbell and Ms Cumming-Steward's representative, Mr Gelb, about whether contact that Mr Gelb subsequently had with Ms Mayne (seeking further information) had resulted in her stopping Ms Hair from giving evidence. To

avoid the prospect that relevant evidence might not be provided to the Authority investigation I adjourned an earlier notified investigation meeting to a later date and had witness summonses issued for the attendance of both Ms Hair and Ms Mayne. Ms Hair's evidence was central to the question of whether Ms Cumming-Steward had breached confidence. Ms Mayne's evidence was relevant to the allegation by TFSL that Ms Cumming-Steward's supposed breach had contributed to a loss of business for TFSL from Ms Mayne's real estate business.

[10] Karen Campbell, the director of TFSL and wife and business partner of Mr Campbell in the Law Debt Collection business, was also expected to give evidence. She lodged a witness statement but on the day before the investigation meeting, through counsel, provided a medical certificate stating that she would be absent from work due to illness on the day of the investigation meeting and was not able to attend. Mr Campbell attended the investigation meeting instead and questions to him covered much of what was said in Mrs Campbell's witness statement. In his evidence he confirmed that Mrs Campbell had been at TFSL's offices twice on the previous day.

[11] In addition to oral evidence from the witnesses given in answer to questions from me and the parties' representatives, the representatives provided closing submissions on facts and legal issues. As permitted by s174 of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[12] The issues for resolution were:

- (i) Did Ms Cumming-Steward breach the confidentiality term of her settlement agreement in a conversation with Ms Hair on 13 April 2014?
- (ii) If so, should a penalty be imposed for that breach, and if so, of what amount, and should some or all of such a penalty be paid to TFSL?
- (iii) If there was no breach by Ms Cumming-Steward, should a penalty be imposed on TFSL for late payment of some of the second instalment and non-payment of the third instalment of sums due under the settlement

agreement, and if so, of what amount and should some or all of such a penalty be paid to Ms Cumming-Steward?

- (iv) Should either party contribute to the costs of representation of the other party?

[13] Orders regarding the \$2000 held on trust were also necessary in light of whatever determination was reached on those issues.

The standard of proof and credibility in assessing evidence

[14] The factual dispute over whether Ms Cumming-Steward did or did not tell Ms Hair about the terms of the settlement agreement had to be resolved on the civil standard of the balance of probabilities, that is what was more likely than not to have happened. The necessary assessment relied primarily on the evidence of three witnesses present at the time and place of that conversation – Ms Hair, Ms Cumming-Steward and Ms Johnstone. I also had to consider the credibility of Ms Hair’s evidence in relation to the possibility (as suggested in closing submissions by Ms Cumming-Steward’s representative) that Ms Hair was influenced by some association or friendship with Mrs Campbell or the secretary of Mr and Mrs Campbell at TFSL or some business association or friendship between Ms Mayne and Mr and Mrs Campbell.

[15] There was no reliable evidence of any such influence on the evidence of Ms Hair. Her workplace was in the same building as TFSL and shared an outdoor break area – referred to as ‘the picnic table’ – where some staff went when taking work breaks. She had talked with both TFSL’s secretary and Ms Cumming-Steward there on various occasions. Ms Hair saw Mrs Campbell at the premises each day but said they “*talked about the weather*” and nothing else. Ms Hair knew from conversations with Ms Cumming-Steward at the picnic table that she was not happy at work and felt she was unfairly treated. Ms Hair denied that she had learned from TFSL’s secretary about the settlement agreement or its terms. She did, however, tell the secretary that she had seen Ms Cumming-Steward on 13 April and that Ms Cumming-Steward had referred to getting a pay-out. The secretary relayed that story from Ms Hair to Mrs Campbell who told Mr Campbell. Mr Campbell then went to see Ms Hair at the real estate business, asked for more details and asked if she would make a statement about

what Ms Cumming-Steward told her. Mrs Campbell later visited Ms Hair at her office and Ms Hair signed a statement (written out by Mrs Campbell) that included the following description of what Ms Cumming-Steward was said to have told Ms Hair on 13 April:

“Zoe stated that she won her case against Law Debt and that she was awarded \$6000 plus her legal expenses and that she now had to deal with Law Debt herself because her lawyer no longer was involved.”

[16] It appeared Ms Hair did not know or understand that signing the statement would result in any further involvement by her in what became a dispute between TFSL and Ms Cumming-Steward. Ms Mayne was also clearly annoyed that she and her business were brought into the matter as a result of allegations from Mr and Mrs Campbell that Ms Cumming-Steward’s disclosure had resulted in TFSL losing tenancy debt collection work from Ms Mayne’s business. The result was that – in my assessment of their oral evidence at the Authority investigation meeting – neither Ms Hair nor Ms Mayne exhibited any preference for, or predisposition towards, TFSL.

[17] In assessing the evidence on the issues for resolution I also concluded little weight could or should be given to what Mr Campbell because the allegations he made about Ms Cumming-Steward were unsubstantiated. He alleged that, after leaving TFSL’s employment, Ms Cumming-Steward had (in some unspecified way) damaged its reputation and caused it to lose collection business from real estate agents in the neighbourhood, including Ms Mayne’s firm. His allegation was not supported by the evidence of Ms Mayne (who was in the best position to describe the actual facts in respect of her own business). Mr Campbell conceded his allegation was pure speculation. Similarly he accused Ms Cumming-Steward of knowing (and, by inference, colluding with) a person or persons who had entered TFSL’s premises and stolen a charity donation box from the reception counter during the time she was employed. Again, there was no evidence to support the allegation or inference.

Did Ms Cumming-Steward breach the confidentiality of the settlement agreement?

[18] Ms Cumming Steward said she and Ms Johnstone had called into the bar for lunch on 13 April. Relatives of Ms Cumming-Steward owned the bar and she often went there. Ms Cumming-Steward saw Ms Hair leaving as she and Ms Johnstone

arrived at the bar. Ms Hair and Ms Cumming-Steward had not seen one another or talked since Ms Cumming-Steward had left TFSL in September 2013. Ms Hair was with some family members (which Ms Hair's evidence established were her mother and her daughter). Ms Hair paused to talk and asked how Ms Cumming-Steward was. Ms Cumming-Steward said she told Ms Hair that she was still looking for work but did not mention the settlement agreement with TFSL or make any reference to any amount of money she was to be paid.

[19] Ms Johnstone's account corroborated Ms Cumming-Steward's evidence. She said she was standing about a metre away and heard the entire conversation clearly. She said she did not hear Ms Cumming-Steward mention winning her case or an amount of money.

[20] While I accepted Ms Johnstone's evidence was sincerely given, I could not discount the real possibility that she did not pay attention to the entire content of a conversation that she was not taking part in. If she was momentarily distracted she may well have missed the few words (that Ms Hair said were spoken at the end of the conversation) in which Ms Hair said Ms Cumming-Steward had referred to winning her case and getting paid a settlement amount.

[21] Ms Hair said Ms Cumming-Steward had "*begun to walk off*" but then came back and "*quickly said that she had won her case against John [Campbell]*" and would be paid a certain amount in instalments (and naming the exact total amount).

[22] On the balance of probabilities I considered Ms Hair's account was more likely than not to be true for two reasons. Firstly, she had no apparent reason to lie or even take an interest in the matter and it was only by a chance comment to TFSL's secretary that her conversation with Ms Cumming-Steward later came to the attention of Mrs and Mr Campbell. Secondly, it was quite likely that Ms Cumming-Steward might confide in Ms Hair because she had talked with Ms Hair at the 'picnic table' about her unhappiness when working at TFSL. In that context, and on the spur of the moment, it was likely Ms Cumming-Steward disclosed those details to Ms Hair without any thought that TFSL would come to know of the conversation. It was, more likely than not, a spontaneous rather than deliberate disclosure but nevertheless one that breached the terms of the settlement agreement.

[23] I was not dissuaded from that conclusion by Mr Gelb's submission about an apparent inconsistency between Ms Hair's written account of the conversation and her oral evidence. In the note she signed for Mrs Campbell, Ms Hair referred to Ms Cumming-Steward having also mentioned her legal expenses but in her oral evidence Ms Hair said Ms Cumming-Steward had mentioned being paid in instalments, and left out any reference to legal expenses. I concluded little weight could be put on the difference because there was a real likelihood that Ms Hair had confused that detail as a result of various discussions she or Ms Mayne had with Mrs Campbell, Mr Campbell, TFSL's lawyer and Mr Gelb prior to the Authority's investigation. Ms Hair's account was consistent on the two fundamental points – that Ms Cumming-Steward referred to having 'won' and mentioned the dollar value of the settlement agreement or 'pay out' she got.

What penalty should Ms Cumming-Steward pay?

[24] In light of that conclusion I assessed the appropriate level of penalty Ms Cumming-Steward should pay for breaching the confidentiality term of her agreement under the usual criteria of whether any harm was caused, the importance of deterring such breaches, and whether the breach was deliberate.¹

[25] There was no reliable evidence of any actual harm caused to TFSL's business by Ms Cumming-Steward's breach. It was important to bring home to her that such a breach was unacceptable and to deter others from doing likewise. Her action was, most likely, spontaneous and careless rather than done with deliberation, and there was no evidence that it was repeated on any other occasion.

[26] A sample of similar cases where an employee has breached the confidentiality term of a settlement agreement showed penalties awarded in the range of \$750 to \$1500 paid variously to the Crown alone, split between the Crown and the former employer, or paid to the former employer alone.² In *Tic-Tac-Toe Educare Ltd v Thomas* [2013] NZERA Auckland 475 – where a former employee breached her

¹ *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48].

² *Tic-Tac-Toe Educare Ltd v Thomas* [2013] NZERA Auckland 475 - \$1000 penalty with \$500 payable to the Crown and \$500 payable to the employer; *J C Contracting (NZ) Ltd v Smart* [2013] NZERA Christchurch 101 - \$750 penalty payable to Crown; *Auckland City Couriers Ltd v Priest* [2012] NZERA Auckland 225 - \$1000 penalty payable to employer; *Associated Insulation Materials Ltd v Wileman* (ERA, 23 May 2008 AA 188/08) - \$1500 penalty payable to employer.

confidentiality obligations by revealing the settlement amount to a friend – the Authority awarded \$500 of the \$1000 penalty to the employer. I took that as a starting point in this case.

[27] I concluded disapproval of Ms Cumming-Steward's breach of the confidentiality term should appropriately be marked by a penalty of \$750 imposed under s133(1)(b) and s149(4) of the Act with the whole penalty to be paid to TFSL under s136(2) of the Act.

[28] As a result of the conclusion reached it was not necessary to consider the question of whether TFSL should pay a penalty for late or non-payment of instalments due under the settlement agreement. Its actions followed Ms Cumming-Steward's breach of the confidentiality term and the substantial merits of the case did not warrant a penalty against TFSL for what it did in response. The instalment (in the sum of \$2000), however, remained due to Ms Cumming-Steward. I concluded that the penalty of \$750 could be deducted from the value of the instalment, leaving \$1250 due to Ms Cumming-Steward under the settlement agreement. The disposition of that remaining amount (as part of the \$2000 held in an interest-bearing trust account by a solicitor pending the Authority's further direction) should however await any necessary determination of costs.

Costs

[29] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, TFSL may lodge and serve a memorandum as to costs within 14 days of the date of this determination and Ms Cumming-Steward should then lodge a reply memorandum within 7 days. No submissions will be considered outside that timetable without prior leave being sought and granted.

[30] It may assist the parties to resolve costs themselves (and then have the outcome recorded in a consent determination of the Authority) to know my preliminary view on an appropriate costs award. It is that a reasonable contribution to TFSL's costs by Ms Cumming-Steward would be \$1250, based on the tariff for a half-day investigation meeting reduced to allow for her limited financial resources and for

conduct by TFSL during the course of the matter that unnecessarily increased costs.³ The result would be that the amount due for costs and the penalty from Ms Cumming-Steward would extinguish the remaining instalment payment due from TFSL. The only other cost would be the fee for the solicitor who held the funds on trust (that I anticipate to be less than \$250) and which Ms Cumming-Steward should be required to pay as an expense.

Robin Arthur
Member of the Employment Relations Authority

³ *PBO v Da Cruz* [2005] ERNZ 808, 819-820.