

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 29
5535291

BETWEEN JACKS HARDWARE AND
TIMBER LIMITED trading as
MITRE 10 MEGA (Mosgiel
and Dunedin)
Applicant

AND ROBERT BEENTJES
Respondent

Member of Authority: Christine Hickey

Representatives: Diana Hudson, Counsel for the Applicant
Robert Beentjes, Respondent in person

Submissions received: Orally at the investigation meeting and by email from
Mr Beentjes on 3 and 22 February 2015.

Determination: 2 March 2015

DETERMINATION OF THE AUTHORITY

- A. Robert Beentjes is ordered to comply with clause 2 of the Record of Settlement between the parties entered into on 10 September 2014.**
- B. Robert Beentjes must pay a penalty of \$2,500.00 with \$1,500.00 to be paid to Jacks Hardware and Timber Limited and \$1,000.00 to be paid to the Authority (for transfer to the Crown Account) within 28 days.**

Employment relationship problem

[1] A Record of Settlement (the Agreement) was signed under s.149 of the Employment Relations Act 2000 (the Act) on 10 September 2014. The parties to the Agreement are Robert Beentjes and Jacks Hardware and Timber Limited (Jacks Hardware). The Agreement was signed by Mr Beentjes and by Neil Finn-House, the Chief Executive Officer and authorised signatory for Jacks Hardware.

[2] The Agreement was also signed by a mediator from the Mediation Services of the Ministry of Business, Innovation and Employment (MBIE).

[3] The Settlement Agreement 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 that they understood the agreed terms:

- (i) were final, binding and enforceable; and
- (ii) could not be cancelled; and
- (iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] Although the Agreement contained a confidentiality clause because this claim is about a breach of the Agreement it is important that I set out the relevant clauses of the Agreement here:

2. *Neither party will speak ill of the other to a third party, including any reference to the principals/directors of the Employer.*

...

5. *This is in full and final settlement of all matters between the Applicant and the Respondent arising out of their employment relationship.*

[5] Jacks Hardware lodged an application with the Authority on 19 December 2014 seeking orders that:

- (i) Mr Beentjes comply with the terms of the Agreement by ceasing to make negative statements that undermine Jacks Hardware, its staff, customers or the principals and directors to any third party.
- (ii) Mr Beentjes repay the money paid to him by Jacks Hardware pursuant to the Agreement.
- (iii) Mr Beentjes pay a penalty pursuant to s.149(4) of the Act to be paid directly to Jack Hardware under s.136(2) of the Act.

Issues

Did Mr Beentjes' texts breach clause 2?

[6] Mr Beentjes agrees that in December 2014 he sent texts to a staff member who had been his manager while he was employed by Jacks Hardware, at least one of

which¹ ‘spoke ill’ of the director of Jacks Hardware. The staff member was a third party to whom Mr Beentjes ‘spoke ill’ of the director.

[7] That text was in breach of clause 2 of the Agreement and Mr Beentjes describes himself as having made *an error of judgement* in referring to the director in derogatory terms.

[8] For the sake of completeness I note that the staff member was not a willing recipient of Mr Beentjes’ texts which were numerous. That staff member did not reply to Mr Beentjes or in any way encourage Mr Beentjes to breach the Agreement. A number of the texts sent to the staff member were more properly referred to the Police and that is what happened. Mr Beentjes has been spoken to by the Police and has ceased sending texts to that staff member.

[9] In addition to a text ‘speaking ill’ of the director, Mr Beentjes’ texts ‘speak ill’ of the staff member he had sent them to, such as calling him an *arsehole* and *greedy* and accusing him of having lied, in his capacity of Mr Beentjes’ manager while he was employed at Jacks Hardware. Mr Beentjes implies the staff member was asked to lie (by a manager or the owner of the business) or decided to because of his personal ambition.

[10] Mr Beentjes also ‘speaks ill’ of another unnamed staff member, the least of which reference calls him a *sycophantic sociopath* and impliedly accuses Jacks Hardware of hushing up and sweeping under the carpet the nasty allegations he makes against that employee. Mr Beentjes also impliedly threatens to disseminate more widely the *great story* (by email) his view of that person and Jacks Hardware’s behaviour in dealing with that person.

[11] Mr Finn-House at paragraph [13] of his witness statement says that texts sent since 9 February 2015 *do not contain material directly in breach of the record of settlement*. I disagree. The texts that refer to what Mr Beentjes thinks of two staff members’ behaviour and Jack’s Hardware’s response to that are in breach of clause 2 as they refer to events leading up to the situation that led to the Agreement being

¹ “The assault on me from ... has been injurious, illegal and immoral ... but you’re not the sociopath that ... is”.

entered into in very negative terms and do amount to ‘speaking ill’ of Mr Beentjes’ former employer.

Should Mr Beentjes pay back the money paid to him?

[12] I have already told the parties that I do not consider that I can order Mr Beentjes to repay the money which Jacks Hardware paid him as agreed in the Agreement. That is largely because what Jacks Hardware wants is for Mr Beentjes to cease breaching clause 2 and to comply with clause 2 from now on. It seeks a compliance order to that effect which I have no hesitation in ordering. However, I consider that if I award the full sum back to Jacks Hardware that would render the Agreement void which is not a result that Jacks Hardware would want.

Are Mr Beentjes’ texts in breach of clause 5 of the Agreement?

[13] I do not consider that Mr Beentjes has breached clause 5 of the Agreement. Mr Beentjes’ texts raised with the staff member they were sent to the substance of his dispute with Jacks Hardware which the Agreement is in full and final settlement of. However, that staff member is not a principal or director of Jacks Hardware and texts to him discussing Mr Beentjes’ dissatisfaction with his perceived role (and that of another named staff member) in the circumstances leading Jacks Hardware and Mr Beentjes to enter into the Agreement are not Mr Beentjes attempting to raise matters with Jacks Hardware itself, the other party to the Agreement, that were settled by the Agreement.

Penalty

[14] That leads me to a consideration of a penalty for Mr Beentjes’ breaches of clause 2.

[15] Under s.149(4) of the Act an individual person, as opposed to a corporation, who breaches an agreed term of settlement to which s.149(3) of the Act applies could be liable to a penalty of up to \$10,000. The primary purpose of a penalty is to punish wrongdoing.² A further purpose is to deter future breaches by the penalised party and by others who bind themselves by entering settlement agreements signed under s.149 of the Act.

² *Xu v McIntosh* [2004] 2 ERNZ 448

[16] The Authority's power to order a penalty is discretionary and it does not automatically follow that where a breach of an agreed term has been found, a penalty must be awarded.

[17] In *Xu v McIntosh* the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.³

How much harm was caused by the breaches?

[18] I find that the harm in this case has been serious. Jacks Hardware made an assessment of its risk and the time involved in dealing with Mr Beentjes' personal grievance/s and/or other claims against it at the time it entered into the Agreement. It assessed that its time and money were better spent in entering into a full and final and confidential settlement. Mr Beentjes' accepted the terms of the Agreement and accepted a payment of the money. Jacks Hardware was entitled to consider that all matters involving it and Mr Beentjes' employment with it were over and done with for ever.

[19] Mr Beentjes' texts meant that was not the case and Jacks Hardware has had to be involved in further legal proceedings at cost of time, energy and money as well as worry about the impact on the staff member receiving the texts and support it has had to put in place for him.

Were the breaches technical and inadvertent or were they flagrant and deliberate?

[20] Mr Beentjes' suggests that his references to the director were *an error of judgment*. However, I do not accept that any of the breaches were inadvertent. In

³ Ibid, Paragraphs [47] and [48]

addition, the breaches continued after these proceedings were commenced. The Agreement terms were very clear and had been explained to Mr Beentjes by the mediator. If Mr Beentjes did not intend to abide by them he should not have entered into a settlement with Jacks Hardware.

[21] Mr Beentjes' emails to the Authority and Jacks Hardware in relation to these proceedings make it clear that Mr Beentjes remains dissatisfied with the events leading up to the Agreement and that is what has led to the texts. I consider that the breaches were flagrant and deliberate and ongoing.

How important is it to bring home to Mr Beentjes that his behaviour was unacceptable and to deter other parties from failing to comply with records of settlement?

[22] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Agreement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[23] Public confidence in s.149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements without negative consequences. It is important that parties can have confidence in the enforceability of the terms of agreed settlements.

[24] It is consequently in the public interest to impose a penalty which not only punishes Mr Beentjes for his wilful breach of the Agreement, but which will act as a deterrent to others who may contemplate engaging in such behaviour.

[25] I have found the breaches by Mr Beentjes to be significant, so the penalty should be set to reflect the Authority's disapproval of such behaviour. I determine that a global penalty of \$2,500.00 is appropriate in the circumstances for the breaches of clause 2.

Should any part of the penalty be paid to Jacks Hardware?

[26] Because of the degree of harm suffered by Jacks Hardware I consider that \$1,500 of the penalty should be paid to it and the remaining \$1,000 should be paid to the Authority for the Crown Account.

Costs

[27] Ms Hudson for Jacks Hardware has asked for costs to be reserved. I reserve costs.

[28] It may be that the parties are able to agree on costs. In the hope of saving time and cost for the parties I indicate that if I am asked to award legal costs to Jacks Hardware I would do so on the basis that I consider 2/7th of the Authority's usual daily tariff of \$3,500 (or about \$1,000) plus the filing fee of \$71.56 would likely be awarded as a reasonable contribution⁴ towards Jacks Hardware's costs.

Christine Hickey
Member of the Employment Relations Authority

⁴ Recognising the need to draft and file proceedings, attend a telephone case conference, correspond with the Authority officer, prepare witness statements and submissions as well as appear at the teleconference investigation meeting.