IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 590
3053392

	BETWEEN	PAUL GRAHAM LESTER Applicant
	AND	BARTONS FURNISHERS LIMITED First Respondent
	AND	TRENT BARTON Second Respondent
Member of Authority:	Michele Ryan	
Representatives:	David Balfour, advocate for the Applicant Duncan MacKenzie, counsel for the Respondent	
Investigation Meeting	On the papers	
Submissions Received	4 July 2019 from the Applicant 10 July 2019 from the Respondent	
Date:	15 October 2019	

DETERMINATION OF THE AUTHORIY

Employment Relationship Problem

[1] The employment relationship problem between the parties concerns whether a compliance order and penalties should be ordered against the first and/or second respondent for breach of a term contained in a Record of Settlement.

The issues

[2] The Authority is required to determine:

(i) whether one or both of the respondents are liable for the breach of the Record of Settlement;

(ii) should a compliance order be made;

(iii) should a penalty be awarded.

The events leading to the breach

[3] Mr Paul Lester and the first respondent, Barton Furnishers Ltd (BFL), are parties to an agreed Record of Settlement signed on 17 October 2016 pursuant to s 149 of the Employment Relations Act. Amongst other terms, the parties agreed "*Neither would speak ill of the other"*, and that the terms therein would remain confidential between them.

[4] On 31 January 2019, Mr Lester placed, on a local community Facebook page, a post concerning the theft of a family member's bike.

[5] The sole director of the first respondent, Mr Trent Barton, responded to the post using his personal Facebook account. I do not intend to replicate the comments made, but on any analysis these were disparaging of Mr Lester's character and the effect of his actions. The post concluded with a statement that Mr Lester's current predicament may be his just reward for past conduct. I need to note also that the post was removed from the community Facebook page within half an hour after it was inserted, but am satisfied Mr Barton was not involved with that activity and I shall return to this matter.

[6] A statement of problem was lodged with the Authority on Mr Lester's behalf shortly thereafter.

Was there a breach and if so who is liable?

[7] On behalf of the respondents, it is submitted that the agreement to curtail how the parties spoke of each other was for the purpose of providing Mr Lester with a fair opportunity to obtain alternative employment. It is then said that the content of the post does not link the parties to an employment relationship.

[8] I agree the post makes no overt statement to the prior relationship. But, accessed objectively, I am satisfied that anyone who read the post and aware of the employment relationship would likely form an adverse, and potentially incorrect, view as to grounds on

which the relationship ended. I am satisfied the contents of the post breached the settlement agreement.

[9] In the statement of reply it was submitted that BFL did not make the comment, rather the post was made by Mr Barton personally. It is then said that Mr Barton was not a party to the Record of Settlement and therefore cannot have been in breach of it. I do not accept that is a correct statement of the law.

[10] Section 149(4) provides: *Any person who breaches an agreed term of settlement … is liable to a penalty imposed by the Authority.* In *Musa v Whanganui District Health Board*[1] the Court refused to limit the interpretation of the word 'person' to mean a 'party' to an agreed term of settlement.[2] It noted that to be liable for a penalty for a breach of a term of settlement the person must know both of the fact of a settlement and of the relevant terms of that settlement.[3]

[11] In any event, despite posting the statement through Mr Barton's personal Facebook account, the content of the post itself relates to matters that could only be known to BFL with Mr Barton acting as its human agent. It follows that BFL is the entity liable for the breach.

Should a penalty be ordered?

[12] Neither party referred to the matters set out at s 133A that are relevant to assessing whether a penalty should be ordered and, if so, the quantum of a penalty order. I have considered those matters together with the principles enunciated by *Allan Nicholson v Matthew Ford*[4] and commented where appropriate.

[13] I have first considered whether a penalty should be ordered.

[14] Settlement agreements serve an important mechanism by which parties can resolve employment relationship problems. If parties are able to breach their agreements without consequences the force and value of settlement agreements generally will diminish. BFL's breach is unacceptable and I am satisfied the imposition a penalty is appropriate.

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1 [2010] ERNZ 120
2 Above at [55]
3 Above at [57]
4 [2018] NZEmpC 132

[15] Next I must assess the quantum of the penalty, noting that the maximum penalty that may be ordered against a company for a breach of a Record of Settlement is $20,000 (pursuant to s 135(2)(b) of the Act).

[16] An interesting feature of the case concerns the events which led to Mr Barton's post and Mr Lester's application.

[17] In the statement of reply and in Mr Barton's sworn affidavit, detailed reference is made to the originating post written by Mr Lester. Mr Barton says the post denigrated a definable class of citizens and had racial undertones. He accepts he was intemperate in his response, but says the nature of the Mr Lester's post was offensive.

[18] During a case management conference the Authority asked the applicant's representative to provide a copy of Mr Lester post. That material was later said to be no longer be accessible.

[19] It remains unclear why Mr Lester retained a copy of Mr Barton's post but not his original post. It is further notable that Mr Lester's sworn affidavit is silent as to Mr Barton's concerns and the circumstances in which both posts were ultimately taken down.

[20] The comments made by BFL through Mr Barton were deliberate, but it has been difficult to access the seriousness of that action, and its corresponding impact, in isolation to the events that preceded it. In the absence of disclosure of the post leading to breach or any information from Mr Lester on that matter I must approach my assessment as to quantum with caution.

[21] On balance I find the severity of the breach to be relatively slight. It is clear the visibility of the post in the public domain was fleeting at best. Mr Lester says he found Mr Barton's comments "*embarrassing and humiliating as well as untrue*" but no additional evidence was provided to demonstrate the post had caused tangible harm.

[22] There is no evidence that BFL has engaged in prior similar conduct.

[23] A proportionate penalty in all the circumstances of this case is $600. I direct $300 is to be paid to Mr Lester. The remaining $300 is to be paid to the Authority and thereafter paid into the Crown bank account.

Summary of findings

[24] Bartons Furnishings Ltd is ordered to:

(a) comply with the terms of the s 149 Record of Settlement;

(b) reimburse Mr Lester the sum of $71.56 as the filing fee paid to bring this claim;

(c) pay a total penalty of $600.00 – payment is to be made no later 14 days after the release of this determination with $300 payable to Mr Paul Lester and $300 to the Crown via the Authority.

[25] Costs are reserved.

Note: This determination has been issued two working days outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.[5]

Michele Ryan
Member of the Employment Relations Authority

[5] Employment Relations Act 2000, s 174C(4)