

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 663  
3060775

BETWEEN JOHN AND CYNTHIA  
CHAMBERLAIN t/a MISS FEAVER  
FLORIST  
Applicant

AND SHIRLEY BRUNING  
Respondent

Member of Authority: Helen Doyle

Representatives: Jeremy Daley, counsel for the Applicant  
Paul Mathews, advocate for the Respondent

Investigation Meeting: 30 August 2019

Submissions and Further Information Received: Further information received 4 September 2019  
Submissions received 4 and 11 September 2019 from the Applicant  
Submission received 9 September 2019 from the Respondent

Date of Determination: 18 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**A I have not concluded on the balance of probabilities from the evidence that Shirley Bruning breached the record of settlement entered into between the parties under s 149 of the Employment Relations Act 2000.**

**B There is no order for compliance.**

**C I have reserved the issue of costs and set a timetable for an exchange of submissions.**

### **Employment Relationship Problem**

[1] John and Cynthia Chamberlain trade as Miss Feaver Florist. Mr and Mrs Chamberlain entered into a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) with their former employee Shirley Bruning.

[2] The agreed terms of settlement were signed by a mediator employed or engaged by the Ministry of Business Innovation and Employment (MBIE) on 16 October 2018. In signing the agreed terms of settlement, the mediator confirmed that the parties understood the effect of sections 148A and 149(1) and (3) of the Act. He confirmed the parties had advised no minimum entitlements had been foregone in reaching the settlement under s 148A of the Act. Further that he had explained the terms of the settlement are final and binding on and enforceable by the parties and that they may not be cancelled and except for enforcement purposes no party may seek to bring the terms before the Authority. The mediator signed the agreed terms of settlement satisfied that knowing the effect of subsection 149(3) of the Act the parties affirmed their request that he do so.

[3] Mr and Mrs Chamberlain in their statement of problem lodged with the Authority say that Ms Bruning breached the terms of the record of settlement by disclosing the terms to third parties and denigrating them and the business to third parties, business competitors and clients. It was alleged there were breaches of clause 1 and 4 of the record of settlement.

[4] Mr and Mrs Chamberlain sought an order in the statement of problem that Ms Bruning comply with the record of settlement and pay a penalty of \$11,000 together with costs. The penalty claimed was reduced in final submission to \$7,500.

[5] Ms Bruning denies breaching the record of settlement in any way. She alleged in the statement in reply by way of counterclaim that Mr Chamberlain had made several approaches to her current employer and that she would like the Authority to investigate the nature of the approaches and whether they were in fact a breach of the record of settlement.

[6] Mr and Mrs Chamberlain denied that Mr Chamberlain breached the terms of the record of settlement.

### **One Breach and the Counterclaim Withdrawn**

[7] Shortly after the Authority investigation meeting Mr Mathews withdrew the counterclaim.

[8] In final submissions Mr and Mrs Chamberlain withdrew the claim for a breach of the non-disparagement provision in clause 4 of the record of settlement.

### **The issues**

[9] The issues for determination are as follows:

- (a) Was there a breach of clause 1 of the settlement agreement that provides as follows?

These terms of the settlement, and the events giving rise to the settlement, (including all meetings, telephone discussions and correspondence regarding this settlement) shall remain, so far as the law allows, confidential to the parties and non-negotiable.

- (b) If there was a breach of the record of settlement then should there be an order for compliance and should there be an award of a penalty and if so, in what quantum?

### **Was there a breach of the record of settlement?**

[10] The Authority heard evidence from a number of witnesses. Mr Chamberlain gave evidence. Ms Bruning also gave evidence. The other witnesses were mainly work colleagues from Ms Bruning's new place of employment after she left employment with Mr Chamberlain including her new employer. I shall refer to those witnesses by their first names only.

[11] I will only disclose in this determination the details of the terms of settlement that I find necessary to do so.

## **Evidential Issues**

[12] Mr Daley raises concerns in final submissions about some of the evidence. The Authority has noted those concerns. Many of the concerns are about evidence peripheral to the main issue for the purposes of this determination. I will only address these concerns if it is necessary to do so.

### **When did Mr Chamberlain become aware of a possible breach of the record of settlement?**

[13] Mr Chamberlain says he became aware of a possible breach of the confidentiality provision in the record of settlement when he was talking to Ms Bruning's new employer Carolyn at the flower market. The evidence about the exact date of this discussion was unclear. I conclude it was in all likelihood before another one of Carolyn's employees Lee-Anne sent Mr Chamberlain a text message on 21 November 2018. Mr Chamberlain said that he was advised by Carolyn that she had heard that Mr Chamberlain had paid Ms Bruning a sum by way of an out of court settlement. The amount was the same amount that was in the record of settlement.

[14] In his oral evidence Mr Chamberlain said that he understood from the discussion that Carolyn had been told by another one of her employees, Susan, about what had been paid. I accept that understanding as very likely because it is in line with a letter from Mr Daley to Ms Bruning dated 26 November 2018 and the statement of problem lodged.

[15] In the first letter dated 26 November 2018 to Ms Bruning Mr Daley sets out the "known breaches to date." It was set out that Ms Bruning told Lee-Anne that she had been paid the sum in the record of settlement. Further that similar comment was made by Ms Bruning to Susan who in turn disclosed the information to Carolyn who in turn advised Mr Chamberlain. A penalty was sought in that letter for \$7,500.

### **Did Ms Bruning breach the record of settlement after 16 October 2018?**

[16] The main issue for the Authority in this matter is whether there were disclosures made by Ms Bruning in breach of clause 1 of the record of settlement. Ms Bruning denies that there were. Disclosures were alleged to have been made to Lee-Anne, Susan and Carolyn.

[17] The record of settlement was signed by Ms Bruning on 5 October 2018, Mr Chamberlain on 15 October 2018 and the mediator on 16 October 2018.

[18] There was an earlier “on the record” acceptance of an offer for the same amount that was paid in the record of settlement in an email from Mr Mathews dated 2 October 2018. It was agreed that a record of settlement was then to be drafted. It appears likely that on the basis the offer was accepted a conference call with the Authority was cancelled. Mr Mathews refers to that in the 2 October 2018 email to Mr Chamberlain’s counsel.

*Lee-Anne’s evidence*

[19] I cannot be satisfied from the evidence that any disclosure to Lee-Anne was made after 16 October 2018. Ms Bruning denies saying anything whatsoever to Lee-Anne about her settlement. She agrees however that the detail in the text and email Lee-Anne sent to Mr Chamberlain were correct. Ms Bruning suggested that Mr Chamberlain must have told Lee-Anne referring to a meeting they had at a mall after Lee-Anne had sent her text message providing such an opportunity. Mr Chamberlain denies that and I cannot be satisfied from the evidence that occurred.

[20] It was very clear to the Authority from the oral evidence that Ms Bruning and Lee-Anne did not get on. The evidence supports a major issue arose between them at work on 13 October 2018 after which they did not work together again. I find it very unlikely that Ms Bruning would have said anything to Lee-Anne on or after that date about her settlement. I find it likely that if they said anything at all to the other it was not about disclosure of confidential information. Trust had clearly evaporated between the two as at 13 October 2018 and quite possibly before this date.

[21] The Authority is left unclear from Lee-Anne’s evidence what date she recalls the disclosure about the settlement occurred. Her focus appeared to the Authority to be more on what was disclosed rather than when. In support of that there is no reference in either her text message or email to Mr Chamberlain about the date of the conversations she said she had with Ms Bruning about the settlement.

[22] Mr Daley recognised in his submissions a possibility that the disclosure to Lee-Anne may not have occurred after 16 October 2018. He submits that Ms Bruning is estopped from advancing a defence that she made the disclosure to Lee-Anne prior to 16 October 2018.

[23] Mr Daley relies on an Employment Court judgment in *Singh v Wellington Rudolf Steiner Trust*<sup>1</sup> in support of that argument. That judgment is about whether there was accord and settlement. The circumstances in that matter were that it was only at the point of reference to a mediator for signing Ms Singh said that she was not prepared to proceed with the settlement. She then lodged claims for unjustified disadvantage, suspension, breach of good faith and duress. Ms Singh had been paid funds and had received a reference under the settlement and not returned these. The Trust was found to have relied on the representations and promises in the settlement and that it had altered its position to the extent it would be inequitable to allow the plaintiff to go back on her word. She was precluded therefore from pursuing her claims.

[24] This matter is distinguishable. There is a record of settlement under s 149 of the Act and it is alleged that it was breached by Ms Bruning. The date for such an assessment of breach of the record of settlement is from 16 October 2019 when the Mediator was satisfied having explained the effect of 149(3) that the parties affirmed their request that he sign the agreed terms of settlement. Consistent with that is the ability in s 149(4) of the Act to impose a penalty for a breach of an agreed term of settlement.

[25] I do not find that Ms Bruning is estopped from raising a defence that disclosure if any to Lee-Anne about the settlement amount/negotiations was made before 16 October 2018. I am not satisfied from the evidence on the balance of probabilities that the disclosures Lee-Anne says were made to her were made after 16 October 2018. I do not find a breach of the record of settlement by Ms Bruning established from Lee-Anne's evidence.

#### *Susan's evidence*

[26] I turn to the evidence of Susan. Susan provided a handwritten document that set out her evidence. She set out that she used to work with Ms Bruning in the city branch one afternoon a week on a Wednesday. Her evidence was that on a Wednesday in the middle of October 2018 Ms Bruning was very happy and said while they were having lunch that her

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<sup>1</sup> *Singh v Wellington Rudolf Steiner Trust* (2017) NZEmpC 47

claim had been settled out of Court and that she told Susan how much for. Susan did not write the amount in her handwritten account. She said that Ms Bruning told her that her lawyer was not happy with the first amount and went back to get more. The figure Susan gave to the Authority did not accord with the figure in the record of settlement. In cross-examination Mr Daley put to Ms Bruning that the amount Susan referred to could have accorded with a net payment that she was to receive. Although she denied saying anything to Susan Ms Bruning agreed that it was an approximate net after legal costs.

[27] Ms Bruning says that while she used to work one afternoon a week on a Wednesday at a shop in City Centre for Carolyn, after the 13 October 2018 incident she took Lee-Anne's shift at The Palms instead and Lee-Anne went to work at City Centre for her shift. Ms Bruning was supported in her evidence about this by another work colleague Cheryl. Carolyn says that Ms Bruning only stopped working at the city store in early November 2018 when Lee-Anne stopped working. Susan in her evidence under cross-examination said that Ms Bruning stopped working at the town shop at the beginning of November 2018 which she said was a week before her birthday.

[28] Susan and Carolyn say that the disclosure about the settlement was made to them at the town shop by Ms Bruning.

[29] I asked for any further information that could assist with determining whether or not Ms Bruning continued to work at the town shop after 13 October 2018. The Authority was provided with a handwritten document recording that Lee-Anne undertook 8 hours of work each week between 4 October and 1 November 2018 and that Ms Bruning continued to work 27 hours per week for the same period.

[30] I could not be satisfied that Ms Bruning did not continue to work at the town shop after 13 October 2018.

[31] After Ms Bruning received the letter from Mr Daley dated 26 November 2018 she spoke to Susan on the phone on 27 November 2018. Ms Bruning asked Susan if she had told her how much she had received from her settlement. Susan said that she had done and told her the amount. Ms Bruning responded that was the wrong amount. Susan said to Ms Bruning in response to a question that she had not discussed the matter with Carolyn. Mr Daley had stated in his letter of 26 November that Carolyn had been advised by Susan of

the settlement amount. Ms Bruning I find in all likelihood advised Susan during the telephone call she was being taken to “Court” but that her lawyer would sort it out.

[32] Mr Daley suggests that Susan’s recollection that a discussion took place around the middle of October is consistent with a breach of the record of settlement being 17 October 2018 or thereafter.

[33] I need to be satisfied that it is more probable than not that a disclosure was made after 16 October 2018 to Susan by Ms Bruning. Susan did not give an exact date that the discussion took place with Ms Bruning. Mr Daley suggests that the date of disclosure was 17 October or thereafter but that was not Susan’s evidence. She simply referred to the middle of October. I find it more likely that the focus for Susan much like Lee-Anne was not on the date of disclosure but the fact of disclosure and there was a passage of time before she was asked to provide her account. There would be in all likelihood no appreciation by Susan of the legal significance of the mediator’s signature on 16 October 2018 or what occurred on that date.

[34] I have also weighed that the settlement amount in the record of settlement had been accepted and known by Ms Bruning from 2 October 2018. There was a period of time before the record of settlement when Ms Bruning knew the matter had been settled “out of Court.” That being the case it extends the timeframe within which a disclosure could possibly have been made to Susan.

[35] There are two matters that I consider could put the discussion at an earlier time. Firstly there was the disclosure that Ms Bruning was seeking more money after an initial offer that she confirmed was made on 28 September 2018. The higher amount being accepted as at 2 October 2018. It seems objectively assessed less likely that Ms Bruning would after 16 October 2018 talk of a negotiation of that nature. It would be less relevant at that point particularly after there had been an agreement to pay that sum since 2 October 2018. It is more likely that Ms Bruning would talk about that negotiation closer to 2 October 2018 when there was acceptance of the offer for payment of the amount in the record of settlement. Ms Bruning in her evidence said that Mr Mathews called her before he accepted the offer on 2 October 2018.

[36] Secondly there is the “happiness” of Ms Bruning that the matter had settled “out of Court.” That happiness could just as likely and perhaps more likely arise from the 2 October acceptance of the offer in the circumstances of this matter than from the 16 October signature of the mediator on the record of settlement. I do weigh that there was a case management conference with the Authority scheduled for 2 October 2018 that appears to have been cancelled.

[37] There are two other matters that cause me to pause somewhat about the evidence from Susan and the timing of any disclosure. The first is the amount Susan recalls Ms Bruning advised she had settled for. Even on a net analysis it is a roughly accurate but not exact amount which could support the disclosure was at an earlier time when assessing what a settlement figure could net. The second is the inconsistency between Susan’s evidence that she said nothing to Carolyn about the settlement disclosure and what Mr Chamberlain recalls was disclosed to him by Carolyn, that it was Susan who told Carolyn what Ms Bruning had told her.

[38] I cannot be satisfied on the balance of probabilities from the evidence of Susan that Ms Bruning breached the record of settlement.

#### *Carolyn’s evidence*

[39] Carolyn said that she was told about the settlement amount in the record of settlement in late October or early November 2018 in the town shop. Ms Bruning said in her evidence that all she told Carolyn was that the matter had settled and that she was pleased and that was before the record of settlement.

[40] Mr Daley submits that Carolyn was emphatic that she was told by Ms Bruning of the quantum of the settlement and the outcome.

[41] Mr Chamberlain recalled that Carolyn told him that she was advised of the settlement amount by Susan who had been told by Ms Bruning. That was what was claimed in the statement of problem. Carolyn gave evidence pursuant to a summons but her “will say statement” that was subsequently sworn and her oral evidence was that she was told directly by Ms Bruning. If Susan had disclosed the settlement amount then it would not have been the amount in the record of settlement.

[42] Carolyn's evidence that she was directly told by Ms Bruning is in all likelihood different to what Mr Chamberlain understood from her conversation with him at the flower market.

[43] I have considered the evidence as a whole including Mr Chamberlain's evidence as to his understanding where Carolyn's knowledge arose from. I need to be satisfied to the required standard of proof that Ms Bruning disclosed to Carolyn the settlement amount in the record of settlement after 16 October 2018. I do not find on the evidence that I heard from Carolyn that I am. I am more inclined to the view that there was a change in what Carolyn said about her knowledge and its source about the settlement which impacts on the reliability and subsequent focus of her evidence as given before the Authority.

[44] I cannot be satisfied on the balance of probabilities from the evidence of Carolyn that Ms Bruning breached the record of settlement.

#### *Disclosure on Mr Mathews website*

[45] At the Authority investigation meeting Mr Daley produced a reference posted by Ms Bruning on Mr Mathews website praising him as an advocate. The concern for Mr Daley was that the reference to "you will win...monetary [sic] and son [sic] much more", showed if not a breach, a cavalier attitude. It was unclear what date that was posted although I accept in all likelihood after the settlement. It was not pursued as a breach however I accept it should be removed.

#### **Conclusions**

[46] I have not found on the balance of probabilities that Ms Bruning breached the record of settlement.

[47] I do not make any order therefore for compliance.

#### **Costs**

[48] I reserve the issue of costs.

[49] Bearing in mind the rapidly approaching holiday break Mr Mathews has until 16 December 2019 to lodge and serve submissions as to costs and Mr Daley has until 27 January 2020 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority