

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 327
3049332
3056572

BETWEEN ESPRESSO NINJA 2011
 LIMITED
 Applicant in 3049332
 Respondent in 3056572

AND KEVIN TURNER
 Applicant in 3056572
 Respondent in 3049332

Member of Authority: Michele Ryan

Representatives: Phil Mitchell, counsel for Espresso Ninja 2001 Limited
 Kevin Turner representing himself

Investigation Meeting: 27 March 2019

Submissions Received: 28 March 2019 from Espresso Ninja 2011 Ltd

Date of Determination: 4 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties in this matter each claim the other has breached a record of settlement agreed between them, and certified by a mediator on 22 March 2018 pursuant to s 149 of the Employment Relations Act 2000. Both parties seek a compliance order and penalties. Espresso Ninja (2011) Ltd (Espresso Ninja) also seeks costs.

The Authority's investigation

[2] An investigation meeting was held on 27 March 2019 to investigate each party's claims. Mr Martin Caughley, as one of two directors of Espresso Ninja, attended the

Authority's meeting as did Mr Turner. Mr Turner's son, Craig Turner, who was employed by Espresso Ninja until late 2016 was also present at the Authority's investigation and answered questions from the Authority. Mr Daniel Burford, who currently provides contracting services to Craig Turner has also worked for Espresso Ninja in the past. He and his partner, Ms Clare Matheson both provided evidence to the Authority.

The issues

[3] The Authority is required to determine whether one or both parties has breached the record of settlement. If either party has caused a breach I will need to determine whether the breach (or breaches) warrants the imposition of a compliance order and/or penalties.

The Record of Settlement

[4] Despite the parties' agreement to keep the terms of the record of settlement confidential, it is necessary to set out the provisions relevant to one or both parties' claims, as follows:

2. The Employer will pay the Employee [a sum of money] pursuant to s 123(1)(c)(i) of the Employment Relations Act.
...
6. This agreement is full and final settlement of all matters related to the employee's employment with the employer, and the cessation thereof.
...
8. The terms of this agreement and all without prejudice discussions leading up to settlement are and shall remain strictly confidential to the Parties except as required by the law or as necessary for the purposes of complying with or enforcing this agreement.
9. Neither party shall speak ill of the other.

Summary of relevant information leading to the parties claims

Espresso Ninja's claim against Mr Turner

[5] Espresso Ninja alleges Mr Turner breached confidentiality by referring to a payment to settle their differences, and/or he spoke ill of the company and its directors in two email sent on the evening of 29 November 2018.

[6] The first email was sent by Mr Turner at 6.51 pm to a lawyer acting for Espresso Ninja in a dispute between it and Mr Turner's son, Craig. It is not necessary to detail that matter, but it prompted Mr Turner to draft an email which included the following:

My name is Kevin Turner
 I am emailing you to insist that you discontinue your contact and demands of
 Craig Turner

...
 Martin settled out of Court an employment dispute in my favour with me and
 payed me a sum of money, under the terms of that agreement ...

[7] The email went on to state that he would return to the industry and “*give full knowledge of the lies and miss treatment that he subjected me and my son too*” if Espresso Ninja, through the actions of Mr Caughley, continued “*down that path*”. Several critical comments were made about Espresso Ninja, and Mr Caughley personally.

[8] Almost an hour later Mr Turner he sent a second email to Espresso Ninja’s business email address. The email advised he had sent an email to “*your lawyer informing them that we will not put up with this behaviour from you*”. He referred to Mr Caughley’s conduct in derogatory terms and concluded the message stating: “*I will fight you tenaciously as I did before to stop your continued lack of respect for the actual law*”.

Findings on Espresso Ninja’s claim

[9] For the following reasons I am not persuaded either email demonstrates a breach of the record of settlement.

[10] As noted, the first email was sent to Espresso Ninja’s solicitor. Mr Caughley says the lawyer who received the email was not involved with the issues that led to, or resulted in, the record of settlement. I am satisfied however that the email was received by the solicitor at a time when she was acting as an authorised agent for Espresso Ninja.

[11] The law regarding principal and agent treats the agent as if it is the principal itself. It follows that the lawyer cannot be considered as having received the email as a third party or separate to her role as an agent of Espresso Ninja. She received the email on behalf of Espresso Ninja and therefore no breach of confidentiality can have occurred in the instance.

[12] Nor am I persuaded the second email breached the record of settlement. The email was sent to Espresso Ninja and began with the opening statement “*Hello Martin*”. Mr Caughley’s testimony was that management and administrative staff are able to read emails sent to the address, but there was no evidence that a staff member had read the email at issue. Further, the content of the email itself does not demonstrate a breach of any term contained in the record of settlement.

Mr Turner's claim against Espresso Ninja

[13] Mr Turner alleges says Mr Caughley has, in breach of the record of settlement, spoken ill of him on numerous occasions. He points to three separate examples to illustrate his claim.

Example 1

[14] Mr Turner says that in late 2018 he met several (unnamed) people who work in the coffee industry. He says when introduced he was told by them that they knew who he was. Mr Turner considers it likely that Mr Caughley must have spoken to these people in a negative way about him.

Finding

[15] There is no evidence to link the statements made to Mr Turner as originating from Espresso Ninja. Mr Turner accepts he made no further inquiry with the people concerned as to how he became to be known to them, what exactly had been conveyed to them or by who. The example does not establish Mr Turner's claim.

Example 2

[16] The next instance involves Mr Daniel Burford. Mr Burford says in 2017 and perhaps early in 2018 Mr Caughley had spoken negatively about Mr Turner to him and in the presence of other people. He says this occurred on more than one occasion.

Finding

[17] Mr Burford properly conceded when questioned, that the instances he referred to in evidence occurred before the date on which the record of settlement was signed. He advised that the last time he had spoken with Mr Caughley, prior to the initiation of proceedings in the Authority, was early March 2018. Mr Burford's evidence does not establish a breach of the settlement agreement.

Example 3

[18] The final incident occurred relates to event that occurred 3 weeks prior to the Authority's scheduled investigation. Mr Turner says that at Mr Caughley's insistence, he was prevented from attending an industry event hosted by an important promoter. The event was held at Espresso Ninja's Wellington premises. Mr Turner considers that it is doubtful

that the promoters would have precluded him from invitation had Mr Caughley not have said something disparaging about him.

[19] Mr Caughley says that when he agreed to have Espresso Ninja hold the event, he was asked by the promoters whether there were any issues of concern that might arise. He says he asked that Craig Turner not be invited on the basis that their dispute may cause some difficulties. Mr Caughley says when the list of invitees was later produced Kevin Turner (and his wife) had been removed from the invitee list.

[20] There is also further evidence that the promoters met with Craig Turner and Mr Burford prior to the event at issue. Mr Burford's evidence is that the promoters advised him later that it was an "unhappy event, regarding the Turners" but that they did not advance any further detail as what had been said to them. Craig Turner advises that the promoters advised him that he and his parents were not invited to the event "for various reasons" but did not expand on these.

Finding

[21] I accept Mr Turner was upset to be excluded from the promotional event but I find Mr Caughley's explanation regarding the discussion with the promotor as credible. As with the previous examples there is insufficient evidence to establish Espresso Ninja spoke ill of Mr Turner.

Summary of findings

[22] Neither party has established a breach of the record of settlement by the other. Each party's claim is dismissed.

[23] Given the findings above, costs lie where they fall.

Michele Ryan
Member of the Employment Relations Authority