

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 432  
3087972

BETWEEN JASON TRIGG  
Applicant

AND NEW WORLD INVESTMENTS LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person  
Lizandra Baily, counsel for the Respondent

Investigation Meeting: 28 September 2020 in Christchurch by video conference

Submissions Received: 9 October 2020 from the Applicant  
16 October 2020 from the Respondent

Date of Determination: 21 October 2020

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] Jason Trigg and Shawn Rayson in his capacity as a director of New World Investments (“NWI”) on 24 October 2019 entered into a Record of Settlement pursuant to section 149 of the Employment Relations Act 2000 (“the Act”) that was signed by a Ministry of Business Innovation and Employment (“MBIE”) mediator confirming that the parties understood sections 148A, 149(1) and (3) of the Act.

[2] Further, the mediator affirmed that the parties had been informed that 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 Trigg claims that Mr Rayson for NWI subsequently breached clause 10 of the settlement agreement by disclosing the existence of the settlement agreement and denigrating him in public.

[4] Clause 10 of the settlement agreement stated:

These terms of settlement and all matters relating to your employment shall remain confidential and are not to be discussed with any other parties. The parties agree not to speak ill of each other in future and speak of each other only in favourable terms.

[5] The latter sentence of the above clause is commonly referred to as a ‘non-disparaging’ provision and the extent of what constitutes disparagement and how the Employment Court has interpreted such is of general assistance <sup>1</sup> but I observe that the clause I am now considering is written in plain terms and capable of being easily understood by laypeople.

[6] Mr Trigg sought as a remedy that a penalty be imposed on NWI on the basis that he suffered further hurt and humiliation and that the breach was likely to impact his future employment prospects.

[7] The Authority has jurisdiction to deal with Mr Trigg’s claim under s 133(1)(b) of the Act<sup>2</sup> as s 149(4) states:

A person who breaches an agreed term of settlement to which subsection (3) applies is liable a penalty imposed by the Authority.<sup>3</sup>

[8] Mr Rayson on behalf of NWI denied the alleged breach and the extent of such.

## **Issues**

[9] As a remedy Mr Trigg claimed a penalty be imposed for the breach of the agreement and he identified the confidentiality and non-disparaging components as being breached. Mr Trigg belatedly in his submission filed after the investigation meeting, sought personal damages for distress and humiliation and defamation but I am unable to consider these claims

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<sup>1</sup> See *Lumsden v Sky City Management Limited* [2017] NZEmpC 30 at [37] and *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [70].

<sup>2</sup> Section 133 (1) Employment Relations Act 2000 states at (1) The Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act – (b) for a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.

<sup>3</sup> Section 149 Employment Relations Act 2000.

due to both their timing and the fact that the Act does not provide for such remedies in this context.

[10] The issues for determination are:

- i. Was the confidentiality of the settlement agreement breached?
- ii. Did Mr Rayson on behalf of NWI disparage Mr Trigg?
- iii. If I find in Mr Trigg's favour, is a penalty appropriate and what proportion of this should be paid to the Crown.

### **The Authority's Investigation – was there a breach?**

[11] The investigation, because of Mr Rayson's current domicile in Canada, was conducted by video link. I heard evidence from Mr Trigg, Mr Rayson and Marc Gardiner a former co-worker and current employee of NWI. Megan Trigg (Mr Trigg's sister) provided a written statement but did not appear.

[12] I will only disclose the details of the settlement agreement necessary to determine the breach issue.

### **Evidential Issues**

[13] A significant problem NWI's counsel alluded to was that Mr Trigg's case was based upon a transcribed conversation that Mr Trigg had had with a third party that was partially recorded. The third party, who need not be named and I refer to as Mr X, did not give evidence. Whilst this meant that the evidence could not be tested by cross examination, Mr Rayson was provided with the transcript and a recording of the conversation. The Authority notes the concerns as legitimate and they go to the weight and credence I shall place on Mr Trigg's and other witnesses' recollection of the conversation and the context of such. Counsel for NWI also in submission pointed to some inconsistencies and belatedly questioned the validity and timing of the recording and the credibility of such. I have weighed those factors against the evidence provided by both parties.

**When did Mr Trigg become concerned about a potential breach of the settlement agreement?**

[14] Mr Trigg says that on the evening of 13 December 2019 he attended a local pub in a West Coast town at around 10 pm with his sister and Mr Gardiner to celebrate his birthday. Whilst waiting to play pool, Mr X approached the party and introduced himself saying he was a tradesman in the building industry who had recently returned to the town and was trying to establish a small business. Mr X then asked where Mr Gardiner worked. Mr Gardiner confirmed his place of employment and Mr X commented that he knew the business owner, named him “Shawn” and that he was the new owner.

[15] Mr X then addressed Mr Gardiner saying he couldn't have worked there very long. Mr Gardiner responded by indicating to the contrary that he had worked for the business for over six years. Mr Gardiner, Mr Trigg and Ms Trigg recollect that Mr X then alluded to Shawn having had to dismiss someone and pay them to resolve matters. The conversation then uncomfortably halted and the conversation subject changed.

[16] Mr Trigg says he decided to stick around after the pool table encounter and he approached Mr X at around 11:25 pm and asked him if he could talk outside on the pretence of getting a business card from him. Mr X went to his car and returned with his card and during a conversation between the two outside the pub he disclosed that he was entitled to undertake limited building tasks involving foundation work, trusses and framing and roofing – Mr X then showed some pictures of a container shed he claimed to have built for a local church group.

[17] Mr Trigg recorded the conversation and provided this and a transcript to the Authority and Mr Rayson.

[18] Whilst I have to consider the extent to which Mr Trigg led the conversation, the pertinent areas of concern for him were that:

- Mr X claimed that he had a direct conversation with Mr Rayson concerning his friend buying another property or business (a situation Mr Trigg was aware of).

- When pressed about what Mr Rawson had said to him, Mr X said “he had to pay someone a lot of money to get them out because he didn’t like how they were running it”.
- When pressed further, Mr X said Mr Rawson told him “he wasn’t happy with their management ship [sic]”
- Mr Rayson then told Mr X that he had to “pay them a lot of money to terminate the contract”.

### **Mr Rayson’s response**

[19] In response, initially in a statement in reply filed in the Authority on 5 February 2020 and prior to being provided with the recording, NWI’s counsel indicated:

The respondent has no knowledge of the transcript provided by the applicant or the alleged conversation, and therefore denies the alleged conversation took place.

The respondent has not heard any recording.

Mr Rayson admits that he spoke to a person in a bar in approximately November 2019:

- generally about problems and issues in management
- generally about issues in running a business
- generally about issues with employees
- about the fact he had previously had an employment dispute and he had to pay a settlement sum.

The respondent denies:

- Mentioning Mr Trigg in this conversation;
- He discussed any terms of Mr Trigg’s settlement agreement;
- He talked unfavourably about Mr Trigg’s performance;

The respondent has not breached clause 10 of the settlement

[20] In written evidence that Mr Rayson confirmed as accurate, he repeated the above and then says he discussed his learning the nuances of doing business in New Zealand and the challenge of acquiring a new company with the person he met in the bar. Then in specific response to the transcript claim that he had disclosed he had cause to get rid of an employee by paying them out, Mr Rayson states:

I don't recall the specific words but I may have told him that I have had an employment dispute with an employee before and that in order to avoid court proceedings we ended up paying a settlement figure. I would not have mentioned any details of who, or when that might have occurred.

[21] In being questioned at the investigation meeting however, Mr Rayson denied having any conversations with Mr X and said he had no idea who he was. Mr Rayson then related a conversation he could recall having in the pub concerned with a male and female couple as he said one of them was Canadian and he discussed generally doing business in New Zealand and the nature of his business in the town.

[22] Mr Rayson then recalled someone in his proximity holding a pool cue and arguing with a woman and suggested that this person may have overheard the conversation. When pressed, Mr Rayson conceded he discussed getting rid of an employee and having to pay them out but was clear that he did not identify Mr Trigg.

[23] Mr Rayson indicated that despite the town being a small community he had otherwise not been approached by anyone to discuss Mr Trigg's circumstances and had not been approached by prospective employers of Mr Trigg.

### **Assessment**

[24] Before turning to what Mr Trigg perceives as the impact of the above disclosures on him, I must conclude on the very limited evidence whether any material breach of the settlement agreement has occurred.

[25] In assessing the evidence given, including the specificity of Mr X's comments in the transcript and the vagueness and contradictions in Mr Rayson's responses that I did not find credible, I find on the balance of probabilities that:

- i. Mr Rayson did have a conversation with Mr X.
- ii. Mr X was made aware of the nature of Mr Rayson's business.
- iii. That Mr Rayson did generally disclose that he had cause to end someone's employment.
- iv. That he had impliedly entered into a settlement agreement to avoid court proceedings.
- v. The above involved paying the departing employee a sum of money.
- vi. Mr Rayson had been generally dissatisfied with that employee's management of his business.
- vii. He did not name Mr Trigg.

## **Finding**

[26] Taking the above factors into account and examining what the parties consented to in the settlement agreement at clause 10 and the context of such, where Mr Trigg rightly claimed that he forwent the opportunity of litigation in favour of a compromise settlement with attendant benefits, I find Mr Rayson breached both the confidentiality of the agreement by discussing its existence (albeit in general terms) and broadly its provisions. Mr Rayson also spoke ill of the person he entered the agreement with in a manner that had he thought more carefully about it, may have easily led to Mr Trigg being identified.

[27] Having accepted Mr Trigg was not named by Mr Rayson in the exchange I have to assess fairly what the impact of the breach would be. I make the point that even if I had accepted Mr Rayson's "second version" of his breach i.e. that he was possibly overheard in a public place, my finding that there was a breach would be the same and ironically this version would have been more serious with greater potential for Mr Trigg being identified in a small community.

[28] The problem for Mr Rayson is that once he made the disclosure however generalised, he had no control over how the 'information' would be disseminated and associated with Mr Trigg given the significantly public prominence of his business, its small number of employees and the context of a small isolated community that he conceded was prone to rumour-spreading.

[29] I however, accept that as counsel has submitted for NWI, there was no evidence advanced by Mr Trigg of the information being disseminated on a wider basis other than speculation and he did not obtain a further statement from Mr X.

### **Was the breach finding sufficient to cause Mr Trigg potential harm?**

[30] In a nutshell – yes, but Mr Trigg advanced no compelling evidence that it had done so beyond Mr X's knowledge of the situation. Having said that, I do find that Mr Trigg is genuinely outraged and understandably anxious about the possible ongoing impact of the breach.

### **Is a penalty appropriate?**

[31] In assessing this I have to make clear that there is a significant public interest in ensuring the integrity of a s 149 settlement agreement. The existence of a confidentiality provision and a non-disparaging provision were very valuable items for both parties wishing to move on from a dispute and from Mr Trigg's perspective, he is right to be concerned that Mr Rayson breached both terms by making a 'random' disclosure to someone he now cannot even name.

[32] I reject the suggestion that no breach occurred as Mr Trigg was not specifically mentioned – the terms of the agreement do not extend to allowing a party to generally discuss the fact of settlement and the circumstances of such, which is what Mr Rayson has admitted to doing.

[33] Two breaches have been established that each attract potential maximum penalties of \$20,000 per breach. The maximum potential total penalty that could be imposed on Mr Rayson is \$40,000, being \$20,000 maximum per breach.

### **Assessment factors under s 133A of the Act**

[34] The first issue I have to consider is whether this was a deliberate or intentional breach designed to lower Mr Trigg's reputation in the community.

[35] On balance, having heard the evidence and considered contextual factors I do not think this to be the case. I consider the breach was 'thoughtless' as to the consequences rather than calculated to do specific harm.

[36] Nevertheless, I do have to balance the above assessment as to motive, with the obligation Mr Rayson was under in a settlement agreement that was clearly expressed, was explained to him by the mediator and easily complied with and, he is by his own admission, a very experienced businessperson.

[37] I also have to assess that NWI benefited from the settlement that prevented litigation and the ongoing costs and stress of such.

[38] I also take into account the paucity of information other than distress caused to him that Mr Trigg has advanced and that he did not present as a vulnerable applicant and the fact that NWI has not been involved in any previous breach action. As such, I am minded to consider that the penalty I can impose for each breach should be largely of a deterrent nature.

[39] Taking into account the totality of the situation, the time that has elapsed, and without further harm to Mr Trigg and Mr Rayson's seeming belligerence on not appreciating the consequences of his actions or apologising, I consider a modest penalty approach is appropriate and imposing such I have considered a submission that NWI is currently trying to sell a business that is struggling due to the impact of Covid factors.

[40] I order a penalty of \$1,500 for the breach of confidentiality and \$2,000 for the breach of the non-disparaging provision. On the total of the penalties I deem it equitable for \$3,000 to be awarded to Mr Trigg and \$500 to the Crown.

### **Outcome**

[41] **Overall I have found that New World Investments Limited breached two provisions of the s 149 settlement agreement and:**

- a. For the breach of the confidentiality provision a penalty of \$1,500 is imposed.**
- b. For the breach of the non-disparaging provision a penalty of \$2,000 is imposed.**
- c. New World Investments Limited must pay Jason Trigg and the Crown the sums below:**
  - i. \$3,000 to Jason Trigg;**
  - ii. \$500 to the Crown;**
  - iii. \$71.56 filing fee to be paid to Jason Trigg.**

### **Costs**

[42] Costs are at the discretion of the Authority and here Mr Trigg was successful in his claim seeking penalties be imposed for breaches of a settlement agreement. However, he represented himself in the proceedings so no award of legal costs is appropriate but I have found that Mr Trigg is entitled to recover his filing fee as above.

David G Beck  
Member of the Employment Relations Authority