

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 494
3153701

BETWEEN	AG TECHNOLOGY NZ HOLDINGS LIMITED Applicant
AND	GARETH WILD First Respondent
AND	RURAL TRAINING SOULTIONS NZ LIMITED Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Nathan T C Batts, counsel for the Applicant Benjamin Wong, counsel for the Respondents
Submissions:	26 October 2021 from the Applicant 29 October 2021 from the Respondent
Investigation Meeting:	On the papers
Determination:	9 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, AG Technology NZ Holdings Limited (ATHL), is seeking a penalty on the basis that Mr Gareth Wild, (First Respondent), and Rural Training Solutions NZ Limited (Rural Training) (Second Respondent), initially failed to adhere to clause 2 of a mediated settlement agreement (the Record of Settlement).

[2] ATHL claim that it was only after it had issued proceedings in the Authority for compliance that the Respondents met their obligations in accordance with the terms of the Record of Settlement.

Relevant Background

[3] An employment dispute arose between AG Technology and its former employee, Mr Wild, arising from Mr Wild's alleged non-compliance with the non-solicitation terms of his individual employment agreement. Mr Wild had set up and was trading as Rural Training, he is the director and joint shareholder.

[4] The dispute was brought to the Authority, was granted urgency, and directed to urgent mediation which took place with a mediator appointed by MBIE on 5 October 2021.

[5] The mediation was successful in resolving the dispute on the terms set out in the Record of Settlement signed by the parties on 5 October 2021.

[6] The Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act) and signed by the Applicant and by Mr Andre Syben, a director of ATHL. The Record of Settlement was also signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 5 October 2021

[7] Clause 2 of the Record of Settlement states:

The Respondents, Gareth William Wild and Rural Training Solutions NZ Limited (or any employee, contractor or agent thereof) agree that from the date of this agreement and for a period of three calendar months they will not provide any training services whatsoever to individuals, companies or any other entity whose training will be funded by Primary ITO (PRITO) in the North Island of New Zealand. During the same three month period the Respondents agree not to advertise or promote in any way that they offer funded PRITO training in the North Island of New Zealand.

[8] Clause 3 of the Record of Settlement also has relevance and states:

For the avoidance of doubt, during the three month period referred to at paragraph 2 above, the Respondents are able to provide training services to any private paying individual, company or entity within the North Island of New Zealand, and the Respondents are able to provide training services funded by PRITO in the South Island of New Zealand.

[9] The Record of Settlement 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 they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[10] On 8 October 2021 Mr Syben looked at the website and Facebook page of Rural Training. ATHL was concerned that the Rural Training website and Facebook page advertised that Rural Training offered PRITO funded training courses, but made no distinction of the fact that this was only available in the South Island.

[11] That same day, ATHL's lawyers contacted Mr Wild's lawyers and asked them to inform Mr Wild of his obligations under the Record of Settlement.

[12] There was no change to Rural Training's website or Facebook page over that weekend and on Monday 11 October 2021 ATHL's lawyers again contacted Mr Wild's lawyers to emphasise that the breach of clause 2 of the Record of Settlement was still ongoing. Having obtained no resolution, on 12 October 2021 ATHL's lawyers wrote again to Mr Wild's lawyers.

[13] There was a response from Rural Training on 13 October 2021 in which it was stated that it did believe that any advertisement or promotional material breached clause 2 of the Record of Settlement.

[14] In the letter from its lawyers dated 13 October 2021 it was stated that Rural Training:

Promoted that it is a contracted provider for PRITO funded micro credential training, but falls short in specifically stating where the training is provided.

Any requirement to specifically state that Rural Training provides PRITO funded micro-credential training only in the South Island is against the terms of the Agreement and would give potential clients a false impression that they only operate in the South Island. Rural Training currently provide other training and/or courses within the North Island and provide micro-credential training to any privately funded individuals.

[15] The Respondents did agree in the 13 October 2021 letter to update the 'About Us'/'What We Do' section of the website to remove references to its Te Awamutu based classroom and to learning onsite which would: "stop any confusion, or any assumptions that Rural Training provides PRITO funded micro-credential training in the Waikato or North Island region."

[16] The Respondents did remove the references to the Te Awamutu classroom from its website, but made no other changes.

[17] ATHL wrote to the Respondents on 14 October 2021 stating that simply removing references to a classroom in Te Awamutu did not make it clear to potential trainees that Rural Training is unable to offer PRITO funded training in the North Island. ATHL outlined the required changes to the website so that it would comply with the Record of Settlement terms.

[18] On 18 October 2021 ATHL applied to the Authority seeking that a compliance order be issued against the Respondents. A case management conference (CMC) was held with the Authority on 20 October 2021 during which a timetable was set down for the filing of a statement in reply and submissions in respect of the compliance application.

[19] Following the CMC changes were made to the Second Respondents website which ATHL considers comply with the Record of Settlement. On that basis a compliance order is no longer sought, however ATHL is still seeking a penalty and costs on an indemnity basis.

[20] The Respondents claim that at no time did any advertisement or promotional material of its contradict the terms of the Record of Settlement. The Respondents further submit that any penalty, if awarded, should be minimal

Issues

[21] The issues which had been brought before the Authority are whether or not:

- The Respondents breached clause 2 of the Record of Settlement;
- A penalty should be awarded; and
- Costs should be awarded on an indemnity costs basis.

Note

[22] The parties agreed to the Authority determining these issues based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Did the Rural Training website breach the Record of Settlement prior to 20 October 2021?

[23] The Record of Settlement states in clause 2 that:

- a) Mr Wild and Rural Training will not for three months after 5 October 2021 provide any training services whatsoever to individuals, companies or any other entity which will be funded by PRITO in the North Island; and
- b) That Mr Wild and Rural Training agree not to advertise or promote in any way that they offer funded PRITO training in the North Island.

[24] There is no evidence before the Authority that Rural Training has provided any PRITO funded micro credential training in the North Island.

[25] Turning to consider whether or not the Rural Training website and Facebook posts have breached the terms of the Record of Settlement I note that whilst the website of Rural Training did not specifically state that PRITO funded micro credential training would be provided in the North Island, I find that a reasonable person seeking such funded training in the North Island would be of the impression that this would be provided by Rural Training throughout New Zealand because no geographical indication to the contrary is mentioned in the promotional material.

[26] Certain obligations of the employment agreement between the parties outlast the ending of the employment relationship, in this particular case the non-solicitation clauses. The Record of Settlement represents an agreement between the parties reached in good faith to resolve the perception that Mr Wild operating as Rural Training was breaching the non-solicitation clauses.

[27] Having considered this matter I am satisfied that the Respondents initially was not complying with the terms of the Record of Settlement.

Penalty

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

[29] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[30] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith and fidelity.

[31] I address the penalty claim in accordance with the steps set out in *Borsboom and Preet PVT Limited*.¹

¹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

Preet step 1: nature and number of the breaches

[32] This step relates to assessing whether or not it is appropriate to regard breaches of the same nature as one claim in order that they may be globalised in order to ensure that they are both reflective of the nature of the breach and set at a realistic level.

[33] In the circumstances of this case there were two breaches in respect of the promotional material on the website and the Facebook page. It is appropriate to regard these as one breach.

Preet Step 2: Severity of the breaches

[34] In accordance with this step I must also consider additional factors of culpability and deterrence.

[35] ATHL submits that the Record of Settlement was in resolution of proceedings brought by it to uphold Mr Wilds' individual employment agreement. It submits that the purpose of clause 2 of the Record of Settlement was to uphold its business relationships with PRITO which was the primary reason it brought the proceedings to enforce Mr Wild's individual employment agreement.

[36] ATHL submits that by Rural Training continuing to advertise in breach of the Record of Settlement, the breach potentially drew trainees in the North Island away from it and to Rural Training.

[37] It further submits that in aggravation, the Respondents were given opportunity prior to proceedings being brought to resolve matters. On that basis, the breach must be characterised as wilful, given the repeated reminders that the Respondents were given.

[38] The Respondents submit a breach of the Record of Settlement, if any, has been minimal, and their actions have been justified in order that they could retain their ability to work and earn a living. On that basis it is submitted that no penalty should be awarded to ATHL.

[39] I have found that there was a breach of the terms of the record of Settlement, however the Record of settlement was entered into on 5 October 2021 and compliance took place following the CMC on 20 October 2021, a period of 15 days.

[40] As already observed, there is no evidence before the Authority that Rural Training has provided any PRITO funded micro credential training in the North Island in breach of the Record of Settlement terms, and therefore that any potential trainees have been drawn away from ATHL to it. There is no evidence that any loss has been occasioned to ATHL by the breach.

[41] However I observe that despite ATHL repeatedly bringing the matter to the attention of counsel for the Respondents, no steps were taken to modify the breaches until the CMC on 20 October 2021.

[42] Nonetheless given the limited duration of the breach and the fact that no damage appears to have resulted to ATHL I find that any breach has been not significant.

Preet Step 3 – Ability and ability of the respondents to pay

[43] There is no evidence before the Authority as to the financial circumstances of the Respondents which would adversely affect its ability to pay a penalty.

Preet Step 4 - Proportionality

[44] At this step I consider the final amount of any penalty is proportional to the breaches and with other penalty actions for similar breaches.

[45] I have considered two Authority determinations which addressed penalties in respect of breaches of mediated settlement agreements. These vary in terms of the severity of the breaches but are of some assistance in ascertaining the quantum of an appropriate penalty in this case.²

[46] Having considered the importance of the place mediated settlement agreements have in the employment relationship dispute area, and the need to uphold their importance and deter others from breaching terms freely agreed between the parties, I consider a penalty of \$2,000.00 to be appropriate in this case.

[47] **I order that the Respondents pay a penalty of \$2,000.00 to the Authority to be paid to the Crown account, and of which 50% (\$1,000.00) is to be paid to ATHL. Payment is to be made within 28 days of the date of this Determination.**

Costs

[48] ATHL has applied for indemnity costs in the sum of \$6,879.00.

[49] ATHL submits that in *Reid v New Zealand Fire Service Commission (No 2)* the Employment Court held that awards of costs on a solicitor-client basis could be appropriate where the defendant had no defence yet continued to deny liability and put the plaintiff to the

² *Heffernan v Brian Stanawat Roding Limited* [2021] NZERA 161; *Tutagalevao c Stephen Wildermoth t/a Stephen Wildermoth Transport* {2021} NZERA 115; *Kim v Catharina Lion (Ki Sook Jang)* [2020] NZERA 169.

expense of proving all of the claim, and where the defendant was warned that the claim had no prospect of success, and still proceeds with the claim.³

[50] ATHL submits that the Respondents breached the Record of Settlement almost from the time it was executed. ATHL was willing to allow the Respondents a reasonable period of time to modify the Rural Training website and Facebook pages. However this period expired and the modifications had not occurred despite ATHL contacting the Respondents' counsel to request the changes be made.

[51] ATHL submits that it should not have to bear the costs of having to bring proceedings that were entirely avoidable.

[52] Costs in the Authority are normally awarded as a contribution with indemnity costs only being awarded in limited circumstances. I am not persuaded that this is such a case although an uplift in the tariff rate is indicated.

[53] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[54] Costs are at the discretion of the Authority. The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴.

[55] It is a principle set out in *PBO*⁵ that costs are modest. It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct. However costs can be increased or decreased based upon various factors including the conduct of the parties.

[56] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This matter was determined 'on the

³ *Reid v New Zealand Fire Service Commission (No 2)* [1998] 3 ERNZ 1237 at [1260].

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁵ Above n 4.

papers'. Costs normally follow the event and ATHL is entitled to a contribution towards its costs.

[57] I consider it appropriate to take the normal daily tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point. Taking all the submissions into consideration and the number of attempts by ATHL to resolve the matter prior to the investigation which I find are proper to be taken into account, I consider that \$3,500.00 is the appropriate costs award in this case.

[58] Accordingly the Respondents are ordered to pay ATHL the sum of \$3,500.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act within 14 days of the date of this Determination.

Filing Fee

[59] The Respondents are also ordered to pay ATHL the filing fee of \$71.56 within 14 days of the date of this Determination.

**Eleanor Robinson
Member of the Employment Relations Authority**