

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 129
5396638

BETWEEN ASIA-PACIFIC FOOTBALL
ACADEMY LIMITED
Applicant
AND MARTIN ALLEN
Respondent

Member of Authority: Helen Doyle

Representatives: Julia Shallcrass, Counsel for Applicant
Kerry Smith and Jackie Behrnes, Counsel for Respondent

Investigation meeting: 26 June 2013

Submissions Received: On the day

Date of Determination: 27 June 2013

DETERMINATION OF THE AUTHORITY

Unless there are further orders or directions made by the Authority:

- A The respondent is to provide the information set out in paragraph one and two of the directions notice and information set out in paragraph 14 of this determination by close of business 5 July 2013 to the Authority and Ms Shallcrass for inspection.**
- B The applicant is to lodge and serve its evidence and a bundle of supporting documents by 12 July 2013.**
- C The respondent is to lodge and serve evidence and supporting documentation by 26 July 2013.**
- D Costs are reserved until after there has been a substantive determination.**

Employment Relationship Problem

[1] The Authority deals in this preliminary determination with requests for further information and the timetabling of evidence for an investigation meeting scheduled for 6, 7 and 8 August 2013.

[2] A meeting was held with counsel for this purpose and the Authority was assisted by memorandum and submission from counsel.

[3] It is helpful to briefly set out the nature of the problem the applicant wishes the Authority to resolve.

[4] The applicant alleges that the respondent breached the settlement agreement with the applicant which provided, amongst other matters, that the respondent would remain bound after the termination date by the express and implied terms of the employment relating to confidential information, intellectual property and protection of business.

[5] On 22 April 2013, during a telephone conference with the Authority at which time the investigation meeting dates were set, the Authority made a number of directions for the supply of information including two that have not at the time of the preliminary meeting been complied with by the respondent. The contents of the two paragraphs in question were discussed at some length during the telephone conference and the Authority was of the view that there was agreement to the contents. They are as follows:

1. *Mr Allen to provide a list of names that he can remember of all football players from APFA who have been invited to attend trials, received offers, or who have signed up to attend training through Burnley in Christchurch. APFA's previous players include those who have attended Junior Development Programmes, weekly programmes, trials or camps.*
2. *Mr Allen is to provide the email addresses from his computer records of the recipients who are or were players*

with APFA (of the flyer attached to the statement of problem) including those enrolled in the APFA Junior Development Programme or any young players that attended a weekly programme, camp or trial with APFA in 2012. He is to also provide email addresses of any APFA players that he sent to Burnley for Burnley to forward flyers onto.

[6] The respondent as expressed by Mr Smith, on further consideration has difficulty with providing that information and says:

- (a) The applicant is undertaking a fishing expedition that reverses the onus of proof and law of discovery;
- (b) The Authority cannot force disclosure of information where the party is seeking penalties;
- (c) The information that the respondent is required to provide to the Authority is confidential to Burnley Football Club Academy Australasia (Burney FCAA); and
- (d) The respondent did not supply names and contact details to Burnley FCAA.

[7] The respondent also wants further and better particulars from the applicant. Most have been requested already in correspondence between the counsel but Mr Smith said in his memorandum that the requests had not been answered and/or there was a delay in answering and the answers were insufficient or incomplete for example the word *includes* is used before the answer. Briefly I set the matters out as follows:

- (a) Which APFA players received the Burnley flyer;
- (b) Which players have ended with their association with APFA to go to Burnley and when;
- (c) Who are APFA's clients and former clients;
- (d) What is the intellectual property alleged to have been used or misused;
- (e) How has Mr Allen breached the intellectual property of APFA;
- (f) What is the confidential information alleged to have been used or misused;

- (g) How has Mr Allen breached the confidential information of APFA;
- (h) What is the loss or damage suffered;
- (i) There has been a refusal to confirm that APFA's allegations of solicitation of APFA clients and former clients are restricted to named individuals and/or schools;
- (j) The applicant will not confirm that APFA's allegation of misuse of intellectual property is confined to the strength and conditioning programme prepared by Lincoln University for APFA;
- (k) There has been no confirmation that Mr Allen has solicited listed suppliers to APFA;
- (l) The respondent wants financial information to be able to properly prepare a response.

The Issues

[8] The Authority needs to determine the following issues:

- (a) Should the Authority require the respondent to provide the information requested at paragraphs one and two of the notice of direction.
- (b) If the answer is yes then should this be done before the applicant lodges its evidence?
- (c) Should the applicant provide the further and better particulars to the respondent now or wait until after the applicant's evidence is provided.

Should the Authority require the respondent to provide the information requested at paragraphs one and two of the notice of direction

[9] The Authority understood during the telephone conference that the respondent was agreeable to providing the information in paragraphs one and two of the notice of direction. It accepts that is no longer the case. There is no formal disclosure procedure in the Authority but the Authority can rely on its power under s 160(1)(a) of the Employment Relations Act 2000 to call for evidence and information from other parties.

[10] The first matter for the Authority is the relevance of the material. I am satisfied that the information requested in paragraph one and two of the notice of direction is very relevant to the problem before the Authority and will assist it in its investigation and determination. There is some basis for the applicant's view that emails were sent to players with a flyer by the respondent from his personal email address. I do not consider the request in the nature of a fishing expedition or an attempt to reverse the onus of proof.

[11] I turn to whether the Authority can ask for disclosure of information where the other party is seeking penalties. The Authority was referred to the Employment Court judgment in *New Zealand Baking Trades etc Union (Inc) v Foodtown Supermarkets Limited* [1992] 3 ERNZ. That was a matter decided before the Employment Relations Act 2000 came into force. There is a more recent obiter statement of Chief Judge Colgan in the Employment Court judgment of *Johann Aarts v Barnados & Ors* [2013] NZEmpC 85 that the position of provision of documents where a penalty is sought in the Authority may arguably be different than in the Employment Court because of the investigative nature of the Authority and its ability to determine the evidence that it will consider. The difference it was stated in that case lies in control of the Authority to determine whether, and, if so, how documents supplied by it are to be used including in penalty proceedings.

[12] The information requested I have found is relevant to the investigation the Authority will undertake. Damages as well as penalties are claimed by the applicant. The Authority under s 160 (2) of the Act may take into account such information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. I do not find in these circumstances the request for information should be resisted on the ground advanced by the respondent that penalties are sought. That ground is not made out.

[13] The third reason advanced by the respondent as to information should not be provided is that it is confidential to Burney FCAA. The information is requested on the basis that it is relevant to a claim against the respondent that he breached employment obligations that survived termination. There seems some evidence that the emails were sent from his own email address to players. The Authority can, if requested, make appropriate orders as to confidentiality. If there are difficulties with authorisation then counsel for the respondent are to immediately advise the Authority

what those difficulties are and to whom the request for provision of the information should be directed. I do not find that the ground of confidentiality is a sound one to resist provision of the information.

[14] Finally on this matter Ms Shallcrass said that whilst Ms Behrnes in her letter of 11 June 2013 advised that name and contact details were not supplied to Burney FCAA by Mr Allen she wanted such confirmation to include details about names and provision of contact details to any contact associated with Burney FCAA including Graham McMann. That is not unreasonable and that should be provided.

[15] I find that the information requested in paragraphs one and two of the directions notice be provided to the Authority and Ms Shallcrass by close of business Tuesday 5 July 2013 for inspection including further information on the matter in para. 14.

[16] Ms Shallcrass is to lodge and serve the applicant's evidence and a bundle of supporting documentation by 12 July 2013 to provide the applicant's evidence.

Should the applicant provide the further and better particulars to the respondent now or wait until after its evidence is provided

[17] As I mentioned to Ms Behrnes and Mr Smith at the conclusion of the preliminary meeting it seemed sensible to return to the relevancy of the further and better particulars after the evidence of the applicant is lodged and served but before the evidence of the respondent is lodged and served. My view on that matter on reflection remains unchanged. Ms Shallcrass says that some information requested will be provided in the applicant's evidence see memorandum at para. 26 (a) to (c). Some of the information requested may or may not be relevant following receipt of the evidence. For example the respondent wants to know who are APFA's clients and former clients. The entire list seems highly unlikely to be relevant. The only relevant clients will be those who are relied on by the applicant in evidence to support allegations of breach. The nature of the financial information required to be provided may also change depending on the evidence.

[18] If after the applicant's evidence is lodged the respondent requires further information then counsel for the respondent may return to the Authority if the parties are unable to reach agreement themselves.

[19] The respondent is to lodge evidence and supporting documentation by 26 July 2013. If further time is required, or the respondent is of the view that he is disadvantaged then counsel should advise the Authority at the earliest opportunity.

Costs

[20] I reserve the issue of costs until after the substantive matter is determined.

Helen Doyle
Member of the Employment Relations Authority