Employment Court of New Zealand

Bracewell v Richmond Services Limited [2013] NZEmpC 245 (17 December 2013)

Last Updated: 7 January 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 245

ARC 91/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for stay of proceedings in the Employment Relations Authority

BETWEEN JAN SUSAN BRACEWELL Plaintiff

AND RICHMOND SERVICES LIMITED Defendant

Hearing: 17 December 2013 (Heard at Auckland)

Appearances: Dr Jane Cook, agent for plaintiff

Penny Shaw, counsel for defendant

Judgment: 17 December 2013

ORAL JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The plaintiff, Jan Bracewell, has challenged by hearing de novo the determination1 of the Employment Relations Authority (the Authority) issued on 18

October 2013 requiring her to return specified documents to her former employer, Richmond Services Limited (Richmond). Ms Bracewell has also applied for an order staying execution of the Authority's orders. This judgment decides what is to happen about enforcement by Richmond of the Authority's orders until the challenge

can be heard and decided. That hearing is unlikely to be before late May 2014.

1 [2013] NZERA Auckland 481.

[2] There is no dispute between the parties that the documents at issue in the case contain confidential information about clients of Richmond which is a provider of community mental health and disability support services.

[3] The Authority's orders relate only to copies of documents held by Ms Bracewell and do not extend to the use by her of any of the confidential information contained within those documents. It is common ground that Ms Bracewell had conveyed that confidential information to others, albeit by her account in good faith and in circumstances protected by law. She wishes to be able to continue to do so although she says she will not do so until her challenge is decided in this Court. Ms Bracewell fears that if she is required to return the documents to Richmond as the Authority ordered, they may be altered or disposed of or otherwise dealt with in a way that Ms Bracewell fears will not allow them to be used to persuade competent authorities of serious misconduct by and within Richmond towards its clients.

[4] There may be some difficulties with the Authority's determination which was said by it to have been delivered "On the

papers" (I assume without an investigation meeting) although there is evidence of a number of telephone conference calls involving the parties' representatives and the Authority Member. These and other matters will need to be addressed at the substantive hearing of the challenge. They include the puzzling and contradictory references in the body of the determination to Richmond seeking "a permanent injunction" against Ms Bracewell (at [1]) and to the fact that it would make "interim orders" for the return of confidential information if she was not entitled in law to obtain the documents (at [7]).

[5] The Authority's determination does not make clear the juridical basis for the orders that it made directing the return to Richmond of "... confidential information set out in the schedule attached hereto and any other confidential information of Richmond Services Limited ...". There is no reference in the Authority's determination, for example, to the relevant provisions of Ms Bracewell's employment agreement if this covered expressly the matters of retention and/or use of Richmond's confidential information, or of any implied terms if these were not so expressed. There is no explanation in the Authority's determination why it apparently made injunctive orders as opposed to statutory compliance orders.

[6] Although the Authority did not set out its power to make the orders that it did, except perhaps by recording that Richmond had sought "a permanent injunction", I have some doubts about the appropriateness of prohibiting breaches of collective agreements by injunction. I do, however, consider that the Authority would have possessed a relevant power, at least arguably, under s 137(2) of the Employment Relations Act 2000 (the Act) whereby the Authority may, by compliance order, require someone to do something to prevent further non- compliance with an employment agreement.

[7] Assuming, for the purposes of this hearing, that an "employment agreement" includes a collective agreement, there is, however, another difficulty with categorising the Authority's orders as being compliance orders. That is, the Authority failed to comply with one essential ingredient of a s 137 compliance order in that it did not specify when the order was to be complied with. It is arguable also that the Authority may not have found, at least sufficiently clearly, the existence of a breach of the plaintiff 's employment agreement which is another necessary constituent of a compliance order.

[8] Those will, however, be matters for the substantive hearing if they are still in issue then.

[9] The starting point of the inquiry must be the relevant employment agreement provision relied on by the defendant in the Authority. It is a clause in a collective agreement which I think can safely be said covered Ms Bracewell's employment by Richmond. The Court now has a copy of this collective agreement which is undated and is simply called the Richmond Collective Agreement. The parties to it were Richmond New Zealand Trust Limited (to which I assume the defendant is the successor) as employer, and the National Union of Public Employees Inc (NUPE) and the Service & Food Workers Union Nga Ringa Tota Inc (SFWU) as the union parties. It appears from assurances given to me by Dr Cook that, at the relevant times, Ms Bracewell was a member of the SFWU and that her work with Richmond was covered by the collective agreement. The term of the agreement was from the date of its ratification (which is not identified) until 1 November 2012. I will assume, in the absence of advice to the contrary that the collective agreement

continued in force under s 53 of the Act for the period covered by the relevant events in this proceeding.

[10] Clause 18 provides:

18.1 During the course of employment, employees may receive and handle knowledge and information which is considered to be confidential. Accordingly, employees will not, either directly or indirectly, use or disclose to any person any information which has or may be acquired during the course of employment with the employer, concerning the employer's operations, business affairs, property or clients.

18.2 This clause will not prevent employees from making appropriate ethical/professional disclosures regarding individual patient clinical status and associated legal issues.

18.3 This clause applies to all information whether or not it is recorded or memorised and includes information which is, or may be, of use to any competitor of the employer or a competitor of the employer's clients.

18.4 This restriction will apply throughout an employee's employment with the employer and after the termination of employment without any limit in point of time. However, the restriction will cease to apply to such confidential knowledge or information which may become publicly known without breach of this instruction on the part of the employee.

[11] Clause 18.1 arguably covers confidential client information. Clause 18.2, however, contemplates an exception to the blanket prohibitions otherwise in cl 18 to exempt "appropriate ethical/professional disclosures regarding individual patient clinical status and associated legal issues". Clause 18.4 extends the cl 18.1 obligations for an indefinite period after the termination of employment.

[12] Finally, there is no express requirement in cl 18 or elsewhere in the collective agreement which requires the return of documents containing confidential information to the employer as the Authority purported to direct.

[13] The Authority's determination appears to have turned on the very narrow point of Ms Bracewell's entitlement in law to retain what was agreed to be confidential information which was the property of Richmond as her former employer. Indeed,

in her challenge, the plaintiff has reiterated the same bare

assertion and accepts that if she is not entitled in law to retain this confidential information, then she has no case and must return the documents to Richmond.

[14] The plaintiff claims that there are a number of statutory justifications for her retention of this confidential information in circumstances of current ongoing inquiries into her complaints against Richmond that are now being investigated by the Health and Disability Commissioner and the Medical Council of New Zealand. Those statutory bases of her justification to retain the documents are said to be s 195A of the Crimes Act 1961, the Protected Disclosures Act 2000, the Privacy Act

1993, the Employment Relations Act 2000, the Health Information Privacy Code

1994, and cl 18.2 of the plaintiff's former employment agreement with Richmond.

[15] The case focuses on one particular Richmond client who is described in the Authority's determination as "client A" and to whom I will continue to refer in the same way. Ms Bracewell says that if client A is a "vulnerable adult" pursuant to s 195A of the Crimes Act, then she (the plaintiff) is entitled in law to retain and disclose to appropriate others, in appropriate circumstances, the confidential documents relating to client A. Ms Bracewell appears to accept that if client A is not a "vulnerable adult" as defined, then she (the plaintiff) is not entitled to retain and use that confidential information.

[16] There is a significant leap of logic, even if the plaintiff is correct about criminal or other liability by Richmond and/or other persons, from that position to the plaintiff's proposition that she is entitled, indeed even required, by law to retain the confidential information herself. None of the statutory or other instruments to which Dr Cook took me and that are relied on by the plaintiff and set out above, addresses that question, let alone appears to say what the plaintiff contends.

[17] Not unassociated with this are my substantial doubts about the correctness of the plaintiff's submission that she must be able to retain the confidential documents to enable her to prepare for her challenge. This statement by the plaintiff puts in issue propositions of law which do not depend for their resolution on the contents of the documents. Rather, they raise issues including the correct interpretation of a provision of the Crimes Act and whether, as a former employee of the defendant, the

plaintiff is entitled to resist the documents' return to it. In these circumstances, it is still difficult to understand the plaintiff's submission that she must retain the documents themselves if she is to be permitted fairly to prepare for her challenge.

[18] In favour of the defendant's position is what I accept is the risk of misuse of the documents or of the information that they contain pending the hearing and decision of the challenge. The documents have already been reviewed by competent authorities including the local District Health Board and the Police. Copies of them are currently with other competent authorities including the Health and Disability Commissioner and the Medical Council of New Zealand. It seems to me to be inherently improbable in light of other widespread retention of copies by other responsible authorities, that if the plaintiff's copies of the documents were to be returned to Richmond, it would then either destroy or alter these as Ms Bracewell fears. Despite not being able to be established by evidence, I accept that Ms Bracewell may nevertheless have genuine fears of that outcome.

[19] It is arguable for the plaintiff that her complaints to the Police and the District Health Board of serious neglect of patients and of the commission of a criminal offence, were not an unlawful disclosure of the confidential information that underlies those complaints. Indeed, cl 18.2 of the collective agreement contemplates such exceptions, as might public policy considerations even absent an express exception such as cl 18.2.

[20] In these circumstances, Richmond's principal concern can really only be with real misuse of confidential information, that is disclosure of it to persons without a proper professional interest in it and for the purpose of the policy which may override the confidentiality of the information. I am satisfied that that concern should and can be dealt with as a condition of a stay by requiring that any further disclosure of information to or by anyone else must have the leave of a Judge. This would allow, for example, either of the current bodies before whom these matters are being investigated, to apply to the Court to have further information disclosed to them.

[21] In any event, the defendant has always been, and remains, prepared to agree to a stay on condition that the confidential documents that the plaintiff holds are transferred to, and held by, the Registrar of this Court until these proceedings have been disposed of. That, too, would provide the plaintiff with an assurance of non- destruction or non-alteration as she fears. The defendant's preparedness to agree to a stay on that condition has been consistently held out to the plaintiff but rejected by her.

[22] Although the law on stays of execution of remedies pending appeals has from time to time set out a number of tests to be applied, the overall consideration is where the interests of justice lie until the Court can finally determine the proceeding.

[23] I am satisfied that the interests of justice in this case will allow for an order for stay of execution of the Authority's substantive determination but on conditions.

[24] There will be an order staying execution of the orders of the Employment

Relations Authority in proceedings between these parties and given on 18 October

2013 on the following conditions.

1. The documents listed in Appendix A to the Authority's determination and any copies thereof (including paper and electronic copies) are to be sent to the Registrar of the Employment Court at Auckland no later than

4 pm on Thursday 19 December 2013, which documents the Registrar will hold in a sealed envelope or otherwise in a separate secure electronic file pending further order of the Court.

2. Until all copies of the documents referred to in (1) above are sent to the Registrar, the plaintiff is not to disclose them or their contents to any other person without the leave of a Judge.

3. After the documents have been sent to the Registrar as directed in (1) above, the plaintiff is not to disclose their contents or

any other confidential information about the person known as

"client A" to any other person without leave of a Judge.

4. Leave is reserved to the Health and Disability Commissioner and the Medical Council of New Zealand to apply to the Court on notice to the parties to have copies of the documents for the purposes of their inquiries into complaints made to those bodies by the plaintiff.

5. By the same date and time in (1) above, the plaintiff is to give to the Court and to the defendant her written undertaking that no further copies of those documents or their contents (paper or electronic) have been retained by her or by her agent.

[25] Despite my earlier recommendation to Ms Bracewell through Dr Cook that it would be in her interests to be represented in this litigation by a lawyer with experience in both medico-legal and employment law, the plaintiff has chosen, as is her entitlement, to retain Dr Cook as her adviser and agent. For that reason, I should say a little about the significance of the undertaking that I have required the plaintiff to give as a condition of the stay.

[26] An undertaking to a court is a solemn promise to do what is undertaken. It has the same effect as an injunction made by a court and the breach of an undertaking by its giver may have the same consequences as the breach of an injunction issued by a court. If a party giving an undertaking wishes to be relieved from that in any respect, he or she cannot do so unilaterally but must apply to the Court to be relieved of the undertaking or any part of it. If Ms Bracewell has any doubt about the undertaking that she is required to give as a condition of the stay, then I urge her to take legal advice about that as soon as possible.

[27] Pursuant to cl 12 of Schedule 3 to the Employment relations Act 2000, there is an order prohibiting publication of any name or other particular that may identify any client of the defendant and of the contents of the documents listed in Schedule A to the Employment Relations Authority's determination.

[28] There is also an order made under the same provision referred to in [27] prohibiting publication of the location in New Zealand of the facility operated by the defendant in which the plaintiff worked and in which client A resides. This judgment does not identify that area and so there is no prohibition upon publishing any of the content of this judgment.

[29] After the defendant's statement of defence has been filed and served, there will be a telephone directions conference with the parties' representatives to progress the plaintiff's challenge to a hearing. It may be appropriate, also, to review the terms of the stay that I have granted once the investigations of the Health and Disability Commissioner and/or the Medical Council of New Zealand have been concluded.

[30] Copies of this judgment are to be sent by the Registrar to the Health and Disability Commissioner and to the Secretary of the Medical Council of New Zealand for their information.

[31] The defendant is entitled to costs on this application. I do not propose to fix those costs because I have not heard from the parties' representatives about the amounts of them. The defendant is entitled to costs because it has, from the outset, proposed and otherwise been prepared to accept a reasonable and sensible interim solution, that is the orders that I have made on conditions which the plaintiff could not realistically have opposed as she has. The costs to which the defendant is entitled, when fixed, will include the reasonable costs of travel of counsel to the hearing in Auckland.

[32] I reserve leave for either party to make any further applications for orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment delivered orally at 1.18 pm on Tuesday 17 December 2013