IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

[2014] NZERA Auckland 218
File Number: 5445206

	BETWEEN	ERIN BURKE Applicant
	AND	EMPLOYERS AND MANUFACTURERS ASSOCIATION (NORTHERN) INCORPORATED Respondent

Member of Authority:	David Appleton
Representatives:	Emma Miles, Counsel, for the Applicant Richard Upton, Counsel, for the Respondent
Investigation Meeting	On the papers
Submissions received	26 May 2014 from the Respondent 3 June 2014 from the Applicant
Date of Determination:	6 June 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

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[1] The respondent has applied for a non-publication order, and for an order that the public be excluded from the Authority's substantive investigation into the applicant's personal grievance which will take place 22 to 24 July 2014. The applicant largely opposes the respondent's applications.

Background

[2] Ms Burke is a solicitor specialising in employment law who was employed by the respondent between August 2010 and August 2013. She has raised personal grievances for unjustified constructive dismissal and unjustified disadvantage in her employment, together with allegations of breaches of good faith, of her individual

employment agreement, of the Minimum Wage Act 1983 and of the Health and Safety in Employment Act 1992.

[3] The respondent is a membership organisation that provides professional services to businesses based in the North Island. A material part of the services consists of advice on employment relations and employment law, and advocacy on behalf of the businesses in the Employment Relations Authority and the Employment Court. Ms Burke was one of a small number of lawyers employed by the respondent to provide these services.

[4] A key allegation which forms part of Ms Burke's case revolves around the fact that her remuneration package was structured so that she received commission in respect of certain fees charged by the respondent to its members. She asserts that her opportunities to earn the commission were increasingly curtailed when the client base that was allocated to her diminished from around 1,100 members to around 400 members during the course of her employment.

[5] Ms Burke alleges that this reduction in her client base had an adverse impact upon her remuneration and was partly due to the alleged actions of one of the respondent's consultants, whose actions were known to the respondent, but which the respondent did not prevent. She says that this ongoing adverse effect on her remuneration and the respondent's refusal or failure to address it directly led to her resignation.

[6] It follows that a significant aspect of the evidence that will need to be considered in the substantive investigation of Ms Burke's complaints involves an analysis of, inter alia, which members were allocated to Ms Burke when she joined the respondent, whether Ms Burke lost a significant number of those clients to the consultant, or in other ways, and the reasons for such a migration of clients, if it occurred.

The respondent's applications

[7] The respondent seeks determinations from the Authority that:

> *1. Pursuant to s.160(1)(e) of the Employment Relations Act 2000 (the Act) the Authority's investigation meeting not be open to any person (other than the Authority member, the parties, their counsel and such witnesses as the Authority member considers should be present at that time);*

> *2. Pursuant to clause 10(1) of Schedule 2 of the Act the evidence given or pleadings filed in this matter (which includes briefs of evidence, the Statement of Problem, the Statement in Reply and all associated documents pertaining to these proceedings) are prohibited from publication until this order is revoked or varied by further orders of the Authority; and/or*
>
> *3. Pursuant to clause 10(1) of Schedule 2, the following information is not published in the Authority determination (or at any other time):*
>
> *(i) with the exception of the Applicant's base salary and associated commission structures, the precise monetary details of all remuneration and increases offered to the Applicant;*
>
> *(ii) all specific monetary figures pertaining to the remuneration details for the Respondent's other employees;*
>
> *(iii) all details of fees charged by or on behalf of the Respondent to any client;*
>
> *(iv) all details of fees charged to the Respondent by its consultants;*
>
> *(v) all details of fees paid by the Respondent to its consultants;*
>
> *(vi) all client names (which, if required, can be referred to by letters bearing no relationship to their actual names);*
>
> *(vii) all details of fees generated by solicitors (included but not limited to the Applicant) on behalf of the Respondent.*

[8] Mr Upton, on behalf of the respondent, asserts that there are reasons that are both real and substantial for suppressing the publication of evidence and excluding the public from the investigation meeting. Mr Upton points out that one of the pieces of evidence disclosed is a full list of clients that was served by the respondent. He submits that that information is subject to legal professional privilege and is strictly confidential. He says that that privilege is absolute and must be safeguarded. Mr Upton submits that granting the orders sought achieves that safeguard.

[9] Mr Upton also asserts that the remaining information is confidential by its very nature, including salary information and revenue generated. Mr Upton asserts that disclosing this second category of confidential information has the potential to cause real risk, as it will be of interest to both the respondent's staff and its competitors. He refers to the risk of the respondent's employees comparing their respective salaries internally, which would prejudice the respondent's operations. He

also points to the risk of competitors using the salary information to *buy* (effectively, poach) the respondent's staff.

[10] With respect to billing information, Mr Upton states that inferences would be able to be drawn from the quantum of an invoice payable by a particular member as it would enable third parties to gauge the level of service that a client required. In addition, he says that disclosing the information would enable competitors to determine the respondent's pricing and revenue which would undermine the respondent's commercial position.

[11] In addition, some of the information disclosed involves a consultant who has a contractual relationship with the respondent and that disclosing financial information in respect to that consultant is unfair to him as he is not a party to the matter, or even a witness.

[12] Mr Upton asserts that any harm that might result if the applications are not granted is probable, not just possible, citing the principle enunciated by His Honour Judge Couch in *Oldco Pty (NZ) Ltd v. Houston* [2006] ERNZ 221.

[13] Mr Upton asserts that the respondent is not seeking to have the final determination *closed to the public* nor to have the identities of the parties or the general claims made against the respondent suppressed. He asserts that the orders sought would not in any way compromise Ms Burke's desire for public vindication or protection of her professional reputation.

[14] Mr Upton submits that there are no viable alternative means of protecting the confidentiality and privilege of the information that will be considered by the Authority. He states that the evidence in question reaches across the entire factual matrix of Ms Burke's claims and the confidential information is entwined in almost all aspects of the evidence. He says that a mechanism to conceal the particulars of it by giving clients *noms de plume* would be unworkable as the information is too broad for that. This is because the investigation is scheduled over three days and involves a number of witnesses. Mr Upton also asserts that closing particular parts of the investigation meeting would be unworkable and would not allow the investigation to flow.

[15] Mr Upton submits that there will be no witness for the respondent whose evidence will not, at least, touch on the confidential information in some way.

Ms Burke's submissions

[16] Ms Miles, on behalf of Ms Burke, states that Ms Burke agrees to a limited number of *documents/information* being protected from publication by use of name substitution and similar appropriate methods, but opposes any non-publication order in relation to the remainder of the information and opposes the public being excluded from the investigation meeting.

[17] Ms Miles emphasises the law in relation to the principle of open justice, citing the Court of Appeal case of *Clark v. Attorney-General* [2005] NZAR 481 (CA).

[18] Ms Miles also strongly opposes the granting of the orders on the basis that vindication and protection of Ms Burke's professional reputation is central to her quest for justice.

[19] Ms Miles suggests that matters can be dealt with in a relatively simple manner as follows:

(a) The respondent be in charge of producing a joint bundle of documents;

(b) That the joint bundle be split into two, one containing open information, the other containing confidential information;

(c) Information in the agreed bundle containing confidential information would be referred to in non-specific terms. It is understood that Ms Miles' suggestion is that this could occur during the course of the investigation meeting;

(d) Publication of any of the material in the confidential agreed bundle can be referred to in the Authority's determination in non-specific terms; and

(e) The meeting can be closed to any identified competitors, but only when the information being questioned or discussed is truly commercially sensitive, being a trade secret and where it cannot be referred to in non-specific terms.

The issues

[20] The Authority must determine the following issues:

(a) What, if any, information should be subject to a prohibition from publication order;

(b) Whether the Authority's substantive investigation meeting should be closed to the public; and

(c) If the Authority's substantive investigation meeting is not to be closed to the public, how reference to confidential information is to be managed.

What, if any, information is to be made subject to a prohibition from publication order?

[21] Clause 10(1) of Schedule 2 of the Act provides as follows:

> ***10 Power to prohibit publication***
>
> *(1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.*

[22] It is not uncommon for the Authority to issue prohibition from publication orders in respect of parts of the evidence that has been lodged with it, or which has been the subject of testimony before it. Commonly, the sort of information that is subject to such orders comprises confidential information relating to third parties who are not a party to the employment relationship problem before the Authority. However, this can also extend to parties where the information has such a quality of confidentiality (such as personal medical information) that it is not in the overall interests of justice for that information to be made public.

[23] I am satisfied that there was a number of categories of information in this matter that have already been disclosed between the parties and to the Authority which is of the nature of confidential information which belongs to third parties who are not a party to the employment relationship problem under investigation.

The respondent's clients

[24] A significant amount of that information relates to the clients of the respondent. No doubt the respondent has many hundreds, if not thousands, of members, many, if not most, of which would not be adverse to it becoming known that they hold membership of the respondent. However, the evidence that will need to be considered by the Authority relates not simply to members of the respondent, but a

subset of that membership; namely, businesses which have sought employment law and/or employment relations advice from the respondent in its capacity as a specialist in employment law and employment relations. I shall call that sub set of members, *clients* for the purposes of this determination.

[25] It is a very well established principle of legal practice, which the respondent conducts by way of its specialist team of employment lawyers, that information relating to the clients of a legal practice must be kept confidential. The rules are enshrined in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Chapter 8 of the Rules deals with confidential information and Rule 8 declares that, as a principle, the following:

> *A lawyer has a duty to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.*

[26] There is a footnote to Rule 8 which states as follows:

> *Information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.*

[27] Rule 8.1, headed *Duration of Duty of Confidence* states:

> *A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.*

[28] Rule 8.2 sets out when a lawyer must disclose confidential information, which includes when disclosure is required by law, or by order of a Court or by virtue of the lawyer's duty to the Court. Rule 8.3 makes clear that, where a lawyer discloses information under this rule, it must be only to an appropriate person and only to the extent reasonably necessary for the required purpose.

[29] The New Zealand Law Society's on line Guidance Note on Client Care also makes clear that a lawyer's client care responsibilities include the requirement of protecting the client's privacy and ensuring appropriate confidentiality.

[30] I am satisfied that the requirement of confidentiality imposed upon a legal practice includes protecting the identity of that client. This is not opposed by the applicant, I believe.

[31] It follows that, not only must the identity of the respondent's clients be protected from dissemination, but also any other information in relation to a client must be kept confidential, including the reason for the client seeking a consultation, the details of the advice sought and given, and the fees charged to that client. Therefore, all information of this nature that has been disclosed hitherto, and that is likely to be disclosed in the future, including by oral testimony, is subject to an order of the Authority that its publication is to be prohibited.

Remuneration details of the respondent's employees other than the applicant

[32] The respondent also seeks prohibition from publication order in respect of the salaries earned by the respondent's employees, including *precise monetary details of all remuneration increases offered to* the applicant.

[33] I agree that information relating to the pay of an employee of the respondent who is not a party to these proceedings is confidential information belonging to that individual and should not be disclosed to the wider public if such information is not necessary to further the interests of justice. I am satisfied that disclosing such information to the public is not in the interests of justice.

[34] I therefore confirm that all such information is the subject of a prohibition from publication order.

Remuneration details of the applicant

[35] However, I do not believe that it is necessary to extend such an order to cover the remuneration details of the applicant herself. It is a core part of her claim that she had to resign because her remuneration was adversely affected by the conduct of a consultant and by the failure of the respondent to protect her from that conduct. Ms Burke was also subject to negotiations with the respondent in relation to changing the structure of her remuneration, which she did not accept. It is understood that Ms Burke relies upon these negotiations, in part at least, to found her constructive dismissal claim.

[36] I believe that it is an essential part of the subject matter of the investigation for this information to be disclosed, as otherwise it is unlikely that that part of the determination will be comprehensible.

[37] Furthermore, the disclosure of this information will not assist any competitors from poaching Ms Burke as she no longer works for the respondent. It is also not likely to cause resentment amongst existing employees as, it is understood, Ms Burke was on a differently restructured remuneration package.

[38] Overall, therefore, I believe that the interests of justice favour this information being available to the public, and so I decline to extend the prohibition from publication order to details of Ms Burke's remuneration, including increases offered to her.

Fees charged by and paid to the respondent's consultants

[39] With respect to the disclosure of details of fees charged by and paid to the respondent's consultants, this falls into the same category of information as details of the remuneration of the respondent's employees who are not parties to the proceedings, and, for the same reason, should not be disclosed.

[40] The prohibition from publication order is therefore extended to this information.

Fees generated by the respondent's employees

[41] It is less clear whether information relating to fees generated by each particular employee of the respondent should be subject to a prohibition from publication order. In some legal practices such information is shared amongst fee authors in order to encourage lawyers to generate more fees, in the spirit of competition. They are not generally shared outside of the firm though.

[42] No particular information has been given by Mr Upton about how such information is treated within the respondent organisation, but I infer from the fact that he includes this category of information in his application for prohibition from publication that such fee information is not shared between employees. It is also possible that the publication of such information could give competitors of the

respondent an advantage, as it would enable them to estimate the total fee income of the service.

[43] It is not clear at this stage how important such evidence will be in the investigation of the substantive complaints raised by Ms Burke. However, at this stage, I am prepared to extend the prohibition from publication order to such fee information on the basis that the order covers the same fee information in relation to consultants. At this stage I exclude from this order fees generated by Ms Burke, as that information forms an integral part of her case.

The evidence given or pleadings filed in this matter

[44] I turn now to the application that *the evidence given or pleadings filed in this matter* should be prohibited from publication until further revocation or variation by further orders of the Authority. The ambit of this aspect of the respondent's application is framed far too widely in my view. If taken literally, then every aspect of Ms Burke's claim and the respondent's defence to it would have to be suppressed. Such an approach could only be contemplated in the most secret of cases and is clearly inappropriate in this case.

[45] Furthermore, this aspect of the application is unnecessary given the other orders that I make in this determination, which extend to relevant information in the pleadings and briefs of evidence. I therefore, decline to grant the order as framed by the respondent.

Should the public be excluded from the substantive investigation meeting?

[46] Section 160(e) of the Act provides:

> ***160 Powers of Authority***
> *(1) The Authority may, in investigating any matter,—*
> *...*
> *(e) decide that an investigation meeting should not be in public or should not be open to certain persons.*

[47] This is one of the more difficult aspects of this application as the principles of open justice, in accordance with which the Authority operates, would be undermined, at least in part, if such an order were granted.

[48] Ms Miles directs me to *Clark v. Attorney-General* in which the Court stated, at [42]:

> *The principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances.*

[49] Ms Miles also draws my attention to *Oldco Pty Ltd* in which Judge Couch stated, *obiter*, at [58]:

> *It is a fundamental principle of our legal system that, with some exceptions created by statute, Court proceedings should be held in public unless there are good and sufficient reasons to do otherwise. Such instances will be unusual and comparatively rare. The reasons for suppression of evidence or exclusion of the public from a hearing must be real and substantial. The seriousness of the harm which might result will be a factor in assessing the degree of likelihood required to justify an order but it will generally not be enough that an adverse consequence is possible rather than probable.*

[50] The issue that the Authority must consider in answering this question is, first, whether there are real and substantial reasons for excluding the public, which will involve a consideration of the nature of the information together with consideration of whether there are alternative ways of protecting confidential information from being disclosed.

[51] I have already analysed the nature of the information that is to be kept confidential, when considering the prohibition from publication orders and explained why I consider those categories of information subject to those orders to be necessary of protection. I therefore turn to consider what methods exist to protect that information as an alternative to excluding the public.

[52] Ms Miles suggests that the confidential information can be referred to during the investigation meeting by way of non-specific references. For example, client names could be substituted by saying *company A* or *company B*, and so forth. Comparative remuneration and charge out rates could be referred to by way of percentage differences or dollar differences. Ms Miles also suggests a dual agreed bundle approach, one being closed and one being open.

[53] It is my view that information relating to employee's salaries and consultant's fee income could be dealt with by way of circumlocution and adopting the closed bundle approach, as suggested. This is because that information would need to be referred to relatively rarely and is relatively self contained. The risk of adverse consequence would be possible rather than probable.

[54] However, I have severe doubts that it is appropriate or practicable to seek to refer to clients of the respondent by way of *noms de plume*. Whilst this is achievable where a handful of clients are likely to be referred to, in this case, a key part of Ms Burke's claim is that there is a steady attrition in her client base from around 1,100 to around 400. I anticipate that it will be necessary to investigate which of these clients disappeared from Ms Burke's client base (if her allegations are accurate) and the reasons for that occurring. This may involve inquiring about several dozens of clients. Given that the starting base of Ms Burke's allegation is in the region of 1,100 clients, that would require, potentially, numbering every single client or giving every single client a *nom de plume*. This strikes me as being effectively unmanageable.

[55] Whilst it may be achievable during the preparation of briefs of evidence to refer to several dozens of clients by numbers to be cross referenced to a list of clients in a closed bundle, in the live situation of an Authority investigation, where witnesses will be giving evidence in response to questions raised by the Authority, opposing counsel and their own counsel, the risk of one of the witnesses inadvertently disclosing the identity of one or more of the respondent's hundreds of clients is, in my view, considerable. This would lead to a breach of the duty of confidentiality owed to the affected client if the inadvertent disclosure was done by a member of the respondent, or indeed by Ms Burke herself, as she has an ongoing duty of confidentiality towards the clients she advised. The risk of an adverse consequence eventuating is, I believe, probable and not merely possible.

[56] Even if such a risk did not eventuate, the solution suggested by Ms Miles on behalf of Ms Burke would, in my view, considerably extend the time taken in the investigation meeting, which would render it inefficient and increase the costs of both parties.

[57] I do not accept that Ms Burke will not be able to achieve vindication (if she was successful at the substantive investigation) if the public were excluded from the investigation meeting. The determination will set out in detail her claims and the

respondent's actions. The determination would be readily available to the public at large once it is published.

[58] In my view, there is no practical alternative but to exclude the public from the investigation meeting during the period when evidence is to be given about Ms Burke's client base and how it changed over time. At this stage, it is not possible to decide whether that evidence can be restricted to only part of the investigation meeting or not.

[59] Accordingly, I order that the public be excluded from the investigation meeting of the Authority in the expectation that that order may be able to be varied once it becomes clearer to what extent evidence relating to the clients of the respondent can be restricted to part only of the investigation meeting. I give leave for Ms Burke to apply for a variation of this order once all the evidence (including briefs of evidence) have been served and lodged.

Orders

[60] .I order prohibition from publication orders in respect of the following information:

a. The identities of the respondent's clients;

b. All information relating to the services rendered and fees charged to any identifiable client of the respondent;

c. Remuneration details of all employees of the respondent, save the applicant;

d. Details of fees generated by employees of the respondent, excluding the applicant; and

e. Details of fees charged by and paid to the respondent's consultants.

[61] I also order that the public be excluded from the substantive investigation meeting pending clarity about the extent to which evidence relating to the clients of the respondent can be restricted to part only of the investigation meeting.

Costs

[62] Costs are reserved until the substantive investigation has taken place.

David Appleton
Member of the Employment Relations Authority