IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 150
5424422

	BETWEEN	GEOFFREY CAMPBELL Applicant
	A N D	KERNOHAN ENGINEERING LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Clare Needham, Counsel for Applicant Kay Chapman, Advocate for Respondent
Investigation meeting:	19 July 2013 at Nelson
Submissions Received	At the hearing
Date of Determination:	24 July 2013

INTERIM DETERMINATION OF THE AUTHORITY

A. **The parties are directed to attend mediation urgently by and I understand that will take place on 25 July 2013.**

B. **The application for an interim injunction restraining the respondent from continuing with its disciplinary process is not granted.**

C. **The Authority directs (by consent) that the respondent provide a copy of the applicant's human resources file by 4 p.m. on Tuesday 23 July 2013.**

D. **The respondent has now clarified the range of e-mails that it wishes to obtain copies of and the respondent will provide those as soon as it is able to do so and if possible within the statutory time frame. The provision of the information is not necessary prior to mediation or the continuation of the disciplinary process but is**

necessary prior to any substantive hearing of the applicant's claims.

E. Any further issues in relation to disclosure that are unable to be resolved between the parties can be referred to the Authority for directions as necessary. Therefore, a compliance order requiring the respondent to comply with its obligation to act in good faith in relation to supplying relevant information is not necessary. The application for a compliance order is declined.

Application for interim injunction and/or compliance order

[1] Geoffrey Campbell is the General Manager of Kernohan Engineering Limited. He has been employed in that role for approximately 5½ years.

[2] On 12 July 2013 Mr Campbell lodged a statement of problem with the Authority claiming that has been unjustifiably disadvantaged in his employment and that the respondent has treated him in a manner incompatible with good faith and trust and confidence. He claims that the respondent's disciplinary process has its genesis in a breach of an employer's obligation of good faith because it began with what he considers to be unlawful surveillance of his work e-mails.

[3] Mr Campbell also claims that there is a *dispute* about the interpretation of clause 14 of his individual employment agreement relating to conflicts of interest and therefore it is premature and prejudicial to him for his employer to be entitled to continue its disciplinary process.

[4] By way of remedy Mr Campbell has applied for an interim injunction restraining the respondent from taking any further steps in its disciplinary process pending mediation which the parties had agreed to attend on 20 August 2013. Ms Needham submits that the applicant agreed to attend mediation on that date on the basis that the respondent's disciplinary process would be suspended and that the mediation would deal with his dispute about the meaning of clause 14 of his employment agreement.

[5] Initially there was a misunderstanding between the parties with the applicant believing that that respondent had agreed to suspend it disciplinary process pending mediation. However, the respondent did not agree to this.

[6] In addition to an interim injunction, or in the alternative, Mr Campbell also seeks a compliance order that the respondent comply with its obligation to act in good faith and treat him justifiably in relation to his employment. Mr Campbell has asked for those two matters to be determined urgently.

[7] He also seeks remedies of:

(a) A declaration that he has been unjustifiably disadvantaged in his employment by the way the investigation and disciplinary process has proceeded to date;

(b) An order that the respondent pay him $20,000 in compensation for humiliation, distress and injury to his feelings; and

(c) An order that the respondent pay his medical and legal costs arising out of this matter.

[8] The respondent resists the interim injunction and the compliance order, and the substantive claims.

[9] In effect, Mr Campbell seeks to postpone the disciplinary process, particularly any decision-making, pending mediation which as at 19 July 2013 had been set down for 20 August 2013, but is now to take place on 25 July 2013.

[10] Mr Campbell is concerned that if the respondent continues with its disciplinary process he will be dismissed before he has all the information he seeks and before his dispute about the meaning of clause 14 of his employment agreement can be discussed and perhaps agreed on in mediation.

Background

[11] On 15 May 2013, Matthew Kidson, one of the two directors of the respondent, handed Mr Campbell a letter containing a number of allegations. In summary, the allegations were that Mr Campbell had:

- Acted in breach of clause 14 of his employment agreement and that he had breached his obligation to act in good faith by failing to devote his contracted hours of work exclusively to his employer's business by using company time and resources for operating a business and gaining information and parts for two personally owned vehicles, and

- Used the employer's confidential information for personal gain,

- Deliberately concealed his personal interest in the provision of goods to his employer, and

- Implicated a colleague into deceiving and misleading the employer.

- Deliberately and knowingly misrepresented his position to third parties for personal gain by using the employer's e-mail address and/or signature block for his own business and threatening the employer's insurer with withdrawal of business due to a personal issue.

- Deliberately misled or deceived third parties by failing to declare his personal interest in a transaction.

- Breached clause 1.3 of his employment agreement that obliges him to support the business at all times and carry out his duties in a professional manner and maintain high works standards by in work time and on the respondent's e-mail system receiving and forwarding pornographic images and racist jokes.

- Colluded with a colleague to prevent a Kidson Construction[1] employee from gaining experience with the respondent as part of his apprenticeship.

[12] In the letter the respondent claims that in carrying out the above allegations Mr Campbell has breached the obligation of trust and confidence implied into his employment agreement.

[13] The letter also advised Mr Campbell that when Mr Kidson considered any possible outcome, he would take into account the fact that Mr Campbell was in a

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1 Of which Mr Matthew Kidson is the general manager.

senior leadership role (with a great deal of responsibility and autonomy) and that therefore trust and confidence was of paramount importance in the employment relationship.

[14] The letter went on to say that the allegations could constitute serious misconduct and a potential outcome of the investigation could be dismissal. However, the respondent would not be in a position to decide on the outcome until he had had the opportunity to hear from Mr Campbell and fully consider and investigate Mr Campbell's explanations.

[15] On 16 May 2013 Mr Campbell sought medical assistance and was diagnosed with depression for which he has received treatment. Mr Campbell considers that the allegations included in the 15 May 2013 letter were a significant factor in the deterioration of his mental health. Mr Campbell received a medical certificate which certified that he was unfit for work for 23 days from 16 May 2013. He received a further medical certificate on 12 June 2013 in which his doctor certified that he was medically unfit for work for four working days from 17 June 2013.

[16] No further steps were taken in the investigation or disciplinary process while Mr Campbell was off work unwell. However, there was correspondence between Mr Kidson and Mr Campbell's first lawyer, Garry Barkle. On 7 June 2013, Mr Barkle advised Mr Kidson that Mr Campbell had decided to retain alternative legal representation.

[17] Mr Campbell has complained to the Privacy Commissioner that the respondent has breached the Privacy Act by collecting personal information about him; in particular collection of information from emails Mr Campbell sent using his work email address. The Privacy Commissioner has written to the respondent advising that it is investigating Mr Campbell's complaint and the respondent through its representative, Ms Chapman, has responded to the Privacy Commissioner[2].

[18] Mr Kidson does not dispute that he sought assistance from Computer Concepts Limited to access all Mr Campbell's emails that were stored on the Kernohan IT system. He gained that access on 18 April 2013. He found a large number of emails

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[2] The Authority does not have jurisdiction to deal with the Privacy Act complaint. However, any result of that may be relevant to substantive proceedings.

which he consulted with Ms Chapman about. Mr Kidson instructed Ms Chapman which resulted in the letter dated 15 May 2013 containing the allegations.

[19] Mr Campbell returned to work on 24 June 2013. Also on 24 June Ms Chapman received a letter from Mr Campbell's new solicitor, Karin Thomas. Further correspondence ensued between Ms Thomas and Ms Chapman. However, it was not possible to arrange a face to face meeting for Mr Thomas to give his explanation to the respondent in person.

[20] On 2 July 2013, Ms Thomas emailed Ms Chapman confirming that Mr Campbell's response to the allegations would be forwarded in writing the following day. On 3 July 2013, by way of letter from Ms Thomas, Mr Campbell responded in writing to the allegations. The same letter informed Ms Chapman that the applicant had requested that the Mediation Service set up mediation with a view to resolving the employment relationship problem between the applicant and the respondent.

[21] On 8 July 2013, Ms Thomas emailed Ms Chapman expressing her surprise that the respondent intended to continue with making a decision on the allegations against Mr Campbell on the basis of the information that was available prior to mediation being held.

[22] Mr Campbell has been offered opportunities to meet with the respondent to provide any further response he wishes to make to the allegations but has so far declined to do so based on his understanding, and desire, that the disciplinary process would be postponed until after mediation.

Determination

[23] As usual in cases on interim injunctions, I have investigated the application by considering the affidavits lodged by both parties, annexed relevant documents and by hearing submissions from both parties. I held the investigation meeting on 19 July 2013 in Nelson.

[24] While some of the facts have been canvassed in the process the findings I express in this determination are solely in relation to the claim for interim injunction. Final findings of fact and law will only be made once I have had an opportunity to fully test all of the relevant evidence.

[25] I am grateful to Ms Chapman and Ms Needham for their focused submissions and general co-operation with the Authority in working through a number of practical issues related to disclosure and attendance at mediation.

[26] The usual principles relating to interim injunctions apply. In *Wackrow v Fonterra Co-operative Group Limited* Judge Shaw of the Employment Court stated[3]:

> *The Court must be satisfied that there is an arguable case that there is a threat of conduct by the respondent which is unlawful. An injunction is:*
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> > *"…only available for the protection of a legal right or to prevent the infringement of a legal right"*[4].
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> *If an arguable case is made out the matter comes down to a consideration of where the balance of convenience lies; whether other remedies are available to the plaintiff and the overall justice of the case.*

[27] The central question to be determined is whether it is arguable that the respondent will be infringing Mr Campbell's legal right or legal rights if it continues with its disciplinary process, which may result in Mr Campbell's dismissal, before mediation takes place.

[28] Ms Needham submits that Mr Campbell is not seeking a *quia timet* injunction because he seeks to pause not to stop the respondent's disciplinary process. I disagree. A *quia timet* injunction is not concerned with stopping an invasion of rights which is already in progress but considers the infringement of a right which is threatened or of which there is good reason for apprehension[5]. That is exactly what Mr Campbell seeks to do. The anticipated threat is Mr Campbell's dismissal.

[29] To obtain a *quia timet* injunction, Mr Campbell would have to establish that it is reasonably imminent that the respondent will infringe a right he has. Ms Needham submits that if the respondent is permitted to continue with its disciplinary process, it will do so unjustifiably and with a lack of good faith and it is likely that the result will be Mr Campbell's dismissal.

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3 *Stephen Wackrow v Fonterra Co-operative Group Limited* AC 32/04 at paragraph [26]

4 *Armourguard Rescue Services Ltd v New Zealand Public Service Association (Inc.)* [1989] 2 NZILR 405 at 408

5 *Kumar v. Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61, at 67

[30] Generally a *quia timet* injunction to stop or postpone a disciplinary process is not granted in the absence of the likelihood of prejudicing an employee's right to silence and against self- incrimination when criminal charges are pending or already made in relation to subject matter common to the employment process and the criminal charges. Even then the Authority and the Court are reluctant to intervene in an employer's right to conduct an investigation or a disciplinary process.

[31] In the case of *Snowden v Radio New Zealand Ltd* Judge Shaw of the Employment Court said:

> *Investigation or disciplinary meetings about employment relationship problems are held constantly and employees are entitled to be represented and assisted at them. The fairness or otherwise of these meetings is able to be independently scrutinised by the Employment Relations Authority and the Court. There are countless determinations and judgments concerning acceptable standards of procedural fairness. If, at the end of the day, there is dissatisfaction with the process or indeed the substantive outcome of the meeting an employee has statutory remedies to rely on.*
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> *Nor do I accept that a meeting cannot be held until disclosure is completed. The disclosure is sought for the purposes of preparing for the hearing of grievances before the Court*[6]

[32] There is a line of cases that suggest that an employer should not continue with a disciplinary process which may result in a dismissal if that dismissal arises out of a dispute about the meaning of part of the employment agreement. That is:

> *Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal. In the dismissal situation, the leading case is Sky Network Television Ltd v Duncan [1998] 1 ERNZ 354*[7]

[33] Ms Needham submits that the applicant and the respondent have differing interpretations of what clause 14.2 of the employment agreement means. She submits that is a dispute as defined in s.5 of the Employment Relations Act 2000 and therefore s.129 of the Act applies. Section 129(1) states:

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6 [2004] 2 ERNZ 238 at paragraphs [46] and [47]

7 *NZ Institute of Fashion Technology Aitkin* [2004] ERNZ 340 at paragraph [66]

> *Where there is a dispute about the interpretation, application or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute in accordance with Part 10.*

[34] Part 10 of the Act establishes procedures and institutions to determine disputes and other employment relationship problems. The mediation service, the Authority and the Employment Court are all available to help to resolve disputes about employment agreements.

[35] Mr Campbell's statement of problem did not claim that he has a dispute about the interpretation of his employment agreement.

[36] Ms Thomas' letter of 3 July 2013 presents Mr Campbell's explanations and response to the allegation that he has acted in contravention of clause 14.2 of his employment agreement. However, the fact of the existence of a dispute as defined by s.5 of the Act is not overtly identified or mentioned in that letter or in any of the other correspondence that passed between the parties prior to my investigation meeting on 19 July 2013.

[37] The argument that a there is a dispute about the interpretation of clause 14.2 was raised for the first time in Ms Needham's submissions at the investigation meeting.

[38] Mr Campbell has an arguable case that the covert process involved in the collection of information from the computer system was a breach of the employer's obligation to act constructively and in a communicative manner.

[39] In assessing where the balance of convenience lies I need to consider the relative situations of the parties. That is, what is the potential effect on Mr Campbell if an injunction is not granted compared to the potential effect on the respondent if it is granted?

[40] If the injunction is not granted the employer's disciplinary process will proceed. The outcome is as yet uncertain.

[41] As a part of this consideration I need to ask if an alternative remedy is available to Mr Campbell. Mr Campbell obviously wishes for matters to be dealt with in good faith and not to result in his dismissal. However, if the disciplinary process goes ahead before mediation and Mr Campbell is dismissed, or subject to some other outcome that he disagrees with or considers unjustified, he has available to him the

Authority's processes and potential remedies, including application of an urgent consideration of interim reinstatement.

[42] However, Ms Needham submits that Mr Campbell's mental health is in a precarious state and that for that reason the alternative remedy is unsuitable. Also, if Mr Campbell is dismissed even if he is later reinstated or otherwise vindicated by the Authority's processes the damage to his reputation will be unable to be remedied.

[43] Mr Campbell is back at work and is being medically treated for his depression and anxiety, treatment which is no doubt necessary for the foreseeable future whether or not the disciplinary process occurs now or after mediation on 14 August 2013. Any particular effects on him such as humiliation, injury to feelings or loss of dignity are able to be dealt with by an award of compensation.

[44] Ms Chapman submits that the respondent has not breached its duty of good faith to Mr Campbell. She submits that the respondent is in the process of carrying out a legitimate disciplinary process as a result of serious concerns it has. She submits that it has the right to manage the disciplinary process and reach a decision about whether the allegations are substantiated or not, and to decide what action to take. I accept that proposition. The Authority is extremely reluctant to intervene in an employer's right to conduct an investigation and disciplinary process. It is not necessary in this case and I do not do so.

[45] I consider that the alternative remedies available to Mr Campbell in relation to potential dismissal and to the unjustified disadvantage and breach of good faith claims, and any potential claims, are adequate in the circumstances.

[46] I consider that the balance of convenience favours the respondent being able to continue with its disciplinary process. However, that does not entirely resolve matters.

[47] I need to stand back and assess the overall justice of the case from a global perspective.

[48] The respondent is aware now, if it was not previously, that the applicant contends there is a dispute over the meaning of clause 14.2 of his employment agreement. That is a factor the employer must consider in proceeding with the disciplinary process.

[49] Mr Campbell has the possibility of further Authority processes available to him if he considers the outcome of the disciplinary process to be unjustified.

[50] The overall justice of the case is for the disciplinary process to continue with the employer fully aware of its obligations to act fairly and reasonably towards Mr Campbell and in good faith.

Costs

[51] Costs usually follow a party's success; in this case the respondent is the successful party. I reserve my decision on costs in the hope that the parties may agree on those between themselves. If not the respondent has 30 days from the date of mediation to make an application for costs and the applicant has 14 days to lodge a memorandum in response.

Christine Hickey
Member of the Employment Relations Authority