Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 226
5400880

	BETWEEN	G Applicant
	A N D	H Respondent

Member of Authority:	M B Loftus
Representatives:	Karina Coulston, Counsel for Applicant Michael Guest, Advocate for Respondent
Investigation meeting:	11 April 2013 at Timaru
Submissions Received:	Multiple exchanges, including additional evidence, tendered up to and including 18 June 2013
Date of Determination:	1 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application seeking penalties against the respondent, H, for various breaches of the statutory duty of good faith and the obligation of trust and confidence he owes the applicant, G.

[2] The response is the claim is an unjustified and inappropriate attempt to dissuade H from giving evidence before the Employment Court which is precluded by virtue of the fact the claims have been considered and determined in another jurisdiction.

[3] The evidence in question was to be given for an ex-colleague, Z, who faced an Employment Court challenge against a favourable decision he obtained against G in the Authority.

Background

[4] G is a long established business which was bought by its current owners during the second quarter of 2011. H, a qualified accountant, was, at the time, already employed as the financial controller. Upon G's acquisition of the business H's employment was transferred on the same terms and conditions.

[5] Contained therein is the requirement that:

> *Except in the proper performance of your duties, you must not disclose (directly or indirectly) any information or knowledge regarding the affairs of* [G]*'s business, its employees, or its customers. This requirement continues after you cease working for* [G].

[6] G claims the above requirement, along with the statutory duty of good faith, was breached on three occasions.

[7] The first breach concerns a letter sent to H on 2 June 2011. It came from G's managing director and was addressed to, and intended for, the former chief executive officer. It was only sent to H as its author had not yet attained access to the internal email system. H was asked to print it on letterhead and return it so it could be delivered to the intended recipient.

[8] G claims H subsequently passed the letter to Z, for Z to use in his proceedings against G.

[9] H accepts the letter was sent to him for printing which he did. He says the following day the letter's author asked for a further copy which he (the author) passed to Z. H says he obtained a further copy as part of an electronic file sent to him in January 2012 when he was preparing evidence for Z's case. Z subsequently commented he wished he still had a copy to which H said he did. H then sent a copy, thinking little of furnishing something he was aware Z had already been given.

[10] On 8 August 2011, H gave two months' notice of his resignation. He intended departing on 7 October 2011.

[11] On 24 August 2011, H attended a meeting involving both colleagues and external parties. Unknown to others present, he recorded the meeting. Subsequently he passed an 11 minute extract of the recording, which exceeded an hour, to Z and his advocate. They then used it as evidence in Z's claim and it became a cornerstone on which the claims success turned.

[12] H says the environment altered under the new owners. H taped the meeting as he felt threatened. He wanted evidence should he take a personal grievance, given a constructive dismissal claim was in his mind at the time.

[13] Subsequently, and notwithstanding the original notice period, G told H his services were no longer required and he was to depart with effect 22 September 2011. He did.

[14] The following day, 23 September 2011, H accessed G's computer network which, according to G, he was no longer entitled to do.

[15] H accepts he accessed the system from G's laptop, the retention of which G had authorised. He claims he did so to confirm his network access had been properly cancelled and when he found it hadn't, he contacted Fujitsu who oversaw the network to advise them and ensure he was disconnected. He claims that was as far as he went and denies accessing any files. Later that day, and according to him on Fujitsu's advice, he again tried to enter the system and confirmed the disconnection had occurred. The records show his access was limited to a few minutes and there is no evidence of what, if anything, was actually accessed. A subsequent argument has arisen as to whether this lack of evidence is due to the fact the wrong hard-drive was later examined.

[16] In May G laid a complaint with H's professional body – the New Zealand Institute of Chartered Accountants. The complaint concerned four issues – the first is not before me but the other three complaints are identical to those raised with me and for which G seeks the imposition of a penalty.

[17] The New Zealand Institute of Chartered Accountants Act 1996 gives the Institute the power to discipline and sanction members. In this instance it concluded that H, by passing the recording, had breached the Institute's rules. The same conclusion applied to the letter but the accusation of inappropriate behaviour in relation to computer access was dismissed.

[18] The Institute issued a severe reprimand and made an order for costs against H. It did, however, suppress his identity.

Determination

[19] There was a significant degree of evidence canvassed at both the investigation meeting and through subsequent correspondence. A lot of it constituted an attempt to relitigate Z's claim but that has been determined elsewhere. A reconsideration of Z's claim by me is totally inappropriate.

[20] What I must consider is three accusations which G says warrant the imposition of a penalty. H accepts he committed all three alleged infractions but contends the circumstances do not warrant the imposition of a penalty.

[21] Again these issues generated a significant level of submission but most is again irrelevant to the first issue I must determine. That is the prime defence which is the matter has already been the subject of a complaint in another jurisdiction. A decision has been made and a penalty imposed which means the defence of *res judicature and issue estoppel* applies.

[22] H claims G is therefore precluded from pursuing the claim in this jurisdiction. I agree.

[23] With one partial exception there can be no doubt the issues raised before me are identical to those raised with the Institute of Chartered Accountants. The partial exception arises from the debate about whether or not the examination of the wrong hard-drive raises the possibility of a previously undetected breach in respect to the computer access.

[24] I conclude the answer is no. There is still no evidence H accessed files he had no right to access. Indeed, I have sympathy with his claim G cannot claim he was precluded from accessing the system in any event. He was still within his notice period and while G had purported to cut the period short, his claim he had yet to receive his final pay was unchallenged. He therefore appears to have remained an employee and there is no evidence he was told he could not access the system through a computer G allowed him to retain so he could review data contained therein.

[25] That returns me to a conclusion the claims before me mirror those considered by the Institute of Chartered Accountants.

[26] Essentially I accept the submission proffered by Mr Guest on 30 May 2013 and which is significantly more detailed than the brief extract copied in 27 below. The New Zealand Institute of Chartered Accountants Act 1996 gives the Institute the power to discipline in a judicial setting. The same power is bestowed in the authority via the ability to penalise which is what I am being asked to do here.

[27] As was said in *Re Minter Ellison Rudd Watts, ex parte Hampton* High Court Christchurch, 20 July 2012, Associate Judge Osborne:

> *The principle upon which the doctrines of res judicata and of issue estoppel turn is that stated by Lord Maugham LC in New Brunswick Railway Co v British & French Trust Corporation Ltd.*
>
> > *"If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons…"*

[28] That, I conclude, is what is occurring here. For that reason the claim should fail.

Suppression

[29] On 26 November 2012 I issued a determination temporarily suppressing the identity of the parties ([2012] NZERA Christchurch 259).

[30] The order was based on H's assertion this claim was based on allegations which had already been litigated and determined in another jurisdiction. Having heard the substantive matter I have concluded H's earlier assertion has merit. That means the rationale underlying the grant of the temporary order remains and for that reason I conclude it appropriate suppression continue on a permanent basis.

[31] Pursuant to clause 10(1) of the second schedule of the Employment Relations Act 2000 I therefore prohibit from publication the names of the parties and witnesses.

Conclusion and orders

[32] For the above reasons I conclude the application should be dismissed.

[33] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority