

(b) After termination, she obtained employment with the Invercargill City Council through an employment agency called Enterprise Recruitment; it is submitted she would have included in her resumé and other documentation the identity of her immediately previous employer.

(c) Such evidence would be relevant for the purposes of the proceeding.

[31] It is submitted for Ms Nelson that the documents sought for disclosure are irrelevant to the identity issue, having regard to principles that apply when considering the identity of a correct employer in previous cases, such as *Colosimo v Parker*. These principles include:

- The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in issue).
- The standard of proof is on the balance of probabilities.
- The question of who the employer was must be determined at the outset of the employment.
- It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties; the question to be

2 (citations omitted).

asked is who would an independent but knowledgeable observer have said was the employer?

- Failure to notify or make an employee aware of the identity of the employer is not conclusive.

[32] It is submitted that what Ms Nelson wrote would not assist the objective assessment which the Court will need to undertake. The fact she may have written “Haldeman LLC” was equivocal, because it was her belief this was Mr Katavich’s trading name in New Zealand.

[33] It is submitted that what is relevant is what passed between the parties, rather than what was communicated to third parties.

[34] Ultimately, it is likely that the Court will need to consider a range of evidential points so as to determine the identity of the employer. Part of the analysis may require credibility assessments of the witnesses who are called. At this early stage I conclude that what Ms Nelson said to the third parties after the termination of her employment could be relevant for credibility purposes.

[35] On that basis, I direct disclosure of the information described in [29]

above, within 21 days.

[4] Mr Katavich, who is the first defendant in the cross-challenge and who has advanced the application on behalf of the present plaintiff, has asserted that although three documents have been discovered by Ms Nelson, they do not amount to compliance with the Court’s order. The first, he says, is a printout from a LinkedIn account which refers to “Facts and Information” as having been Ms Nelson’s employer. The second is from a resumé issued on 20 October 2012, which is after Ms Nelson was employed by Invercargill City Council (ICC) via Enterprise Recruitment and so was not used to obtain a position with ICC. The third is a covering letter of 25 July 2012, where Ms Nelson refers to her “existing” employment with ICC, so that it does not show what ICC was told about her previous employment prior to the employment.

[5] Mr Katavich said the question of what Ms Nelson stated as to referees when applying for employment was relevant to the issue as to whether his communication with ICC was solicited. He also asserted that it is within Ms Nelson’s power to issue a request under the [Privacy Act 1993](#) for relevant documentation from both the above entities. Finally he suggested the Court should also issue an order requiring ICC and/or Enterprise Recruitment to provide relevant documents under r 8.21 of the High Court Rules.

[6] In his affidavit of 12 January 2015, Mr Katavich enlarged on the foregoing. As well as annexing the documents which have been disclosed by Ms Nelson he attached copies of pages from websites of ICC and Enterprise Recruitment, suggesting that when applications for employment are made to those entities a resumé and cover letter must be attached in the case of an application to ICC; and that a resumé needs to be attached and information should be provided for “verbal referencing” in the case of recruitment by Enterprise Recruitment.

[7] Ms Nelson filed a statement of defence denying the assertions made by

Haldeman LLC in its application. She also filed an affidavit deposing that on

17 November 2014 her lawyer emailed counsel who were then acting for the defendants, a copy of the relevant documents; the three documents described above. Ms Nelson further pleads that she does not have any other documents in either of the categories she was ordered to disclose.

[8] In her affidavit, Ms Nelson goes on to state that the issue with regard to the ordered disclosure seems to be whether she called her employer “‘Tony Katavich’ or

‘Facts and Information/Haldeman LLC’”. She accepts that after the termination of her employment she referred to her employer as having been Facts and Information and not Mr Katavich, as was evidenced in each of the disclosed documents. She says that she is also

sure that this is what she would have done when she applied for work with ICC through a recruitment agency.

[9] Finally, she says that if there were any other relevant documents she would have disclosed them; she states she does not have any other documents to disclose.

[10] Mr Katavich then filed submissions. He contends that:

- a) There is a great deal more relevance in the documents than simply whether Ms Nelson stated her employer was Facts and Information or Mr Katavich. Whilst that is now admitted, the other “substantial issue at play is whether Ms Nelson provided Mr Katavich’s details as a reference on her resumé. This was a matter [in respect of which] the Authority saw fit to award Ms Nelson \$15,000.” In short, it is submitted that the documents are “highly relevant” to the proceedings.
- b) It is asserted that Ms Nelson has failed to preserve the documents, and that there is now a question as to when documents were deleted from Ms Nelson’s computer. Accordingly, the Court should consider ordering Ms Nelson to surrender her personal computer and cell phone for forensic examination.
- c) It is also open to Ms Nelson to request documents from the agencies previously mentioned.

[11] Counsel for Ms Nelson filed submissions in reply stating:

- a) Ms Nelson had complied with the Court’s disclosure order; indeed she had gone further in her affidavit, accepting Mr Katavich’s point that she had referred to her employer at that time as being the company, and not Mr Katavich personally. There was no better evidence for assessing credibility on this point than Ms Nelson’s own admission on this issue.
- b) However, it was now said that disclosure was relevant for a different reason, namely whether the Authority was incorrect when it determined that Mr Katavich made “unsolicited contact” with Ms Nelson’s subsequent employer, the ICC. It was noted that Mr Katavich says that his contact with ICC was not unsolicited because she had actually listed Mr Katavich as a referee.
- (c) Ms Nelson had instructed counsel that she did not list Mr Katavich as a referee in her job applications. It was submitted the Court could take into account the inherent unlikelihood of her doing so, since at the time she applied for work with the ICC he had only recently dismissed her for not having invited him to a social event, for being a Nazi sympathiser, and for falsifying her resumé. She had already raised her personal grievance and had lodged her claim with the Authority. It was submitted it would be absurd to suggest that she would have invited subsequent employers to speak to Mr Katavich in those circumstances.
- (d) Further, there had been evidence before the Authority in the form of an email from the Human Resources Department of the ICC to the effect that Mr Katavich’s contact was unsolicited.³
- (e) There was no evidential basis for the submission made by Mr Katavich and it should be disregarded.
- (f) Accordingly, the Court should decline to exercise its discretion under [s 139](#) of the [Employment Relations Act 2000](#) (the Act).

Discussion

[12] As is apparent from my judgment of 24 October 2014,⁴ the reason that an order of disclosure was made was because there was an issue as to the correct identity of the employer. I observed that it is likely the Court will need to consider a range of evidential points so as to determine the issue. It was explained that part of the analysis may require credibility assessment of the witnesses who are called, and that at this early stage what Ms Nelson said to third parties after the termination of her employment “could” be relevant for credibility purposes.

[13] But the post-employment conduct will form only part of the evidence which must be considered. The primary evidence will relate to the circumstances leading to the formation of the employment agreement. I set out the relevant principles that apply when considering the identity of a correct employer as summarised in *Colissimo v Parker*.⁵ The parties will need to focus on those principles, and in particular the principle that the identity of the employer must be determined as at the outset of the employment.

[14] Ms Nelson has admitted that following the termination of her employment she referred to her employer as being the company and not Mr Katavich personally.

[15] Given that admission, I consider it unnecessary to require Ms Nelson to obtain copies of documents from third parties, or to direct that a third party should be

³ *Nelson v Katavich* [2013] NZERA Christchurch 35 at [113].

⁴ *Nelson v Katavich* above n 1.

⁵ *Colissimo v Parker* (2007) 8 NZELC 98, 622 (EmpC) at [28]-[37]: see the extract at [3] above.

ordered to disclose documents or that her computer and cell phone be examined, when documents thereby obtained would not advance that issue.

[16] The plaintiff through Mr Katavich has now raised a new ground to support a contention that further discovery is needed and that there should be a compliance order. That relates to the circumstances which led to Mr Katavich to write an email to the Human Resources Department of the ICC on 2 August 2012.

[17] The Authority recorded that Mr Katavich had said in evidence that he sent this email because the company had received a phone message asking for a verbal reference in respect of Ms Nelson but that, he decided to provide the reference in writing by email using the email address on the ICC website because his staff had not taken a proper message.

[18] The Authority had before it an email from a Human Resources officer of the ICC stating that the reference had not been requested. The Authority accordingly found Mr Katavich had sent his email unsolicited and deliberately in order to damage Ms Nelson's reputation with the Council and to put pressure on her.

[19] This finding was one of the matters the Authority took into account when determining that \$15,000 should be awarded for her humiliation, loss of dignity and injury to feelings caused by her dismissal and the post-termination conduct on the part of her former employer.

[20] The Court was not asked to consider this issue when the disclosure order was made, and was not a reason for making the order.

[21] In the plaintiff's statement of claim, it is accepted that "the reference was not requested by the Council. It was requested by way of a telephone message, likely to have been from the recruitment agent who placed the defendant in the role at the Council. Mr Katavich provided the reference to the Council as he did not have the contact details of the agency."⁶

[22] In the defendant's amended statement of claim in the cross-challenge, it is pleaded that "Mr Katavich wrote an unsolicited email to the Human Resources Department at the Invercargill City Council referring to Ms Nelson."⁷

[23] For the purposes of the present application, counsel for Ms Nelson states he has taken instructions on this matter; those instructions have been recorded in the formal submission which has been placed before the Court on Ms Nelson's behalf. It records that she denies that Mr Katavich was referred to as a referee for the purposes of her job application. In addition Ms Nelson has pleaded that the email was unsolicited. She will carry the burden of proof of that assertion.

[24] This matter can be explored further at the hearing if the presiding Judge considers it appropriate. As was submitted for Ms Nelson, a relevant factor will be whether it is likely Ms Nelson would have provided Mr Katavich's name as a referee in the particular circumstances. It may be, however, that the statements Mr Katavich chose to make will be of more relevance. It was that content which was the particular matter of concern for the Authority. These are all issues on which both parties can be questioned, if need be. I am not persuaded that a compliance order is appropriate on this ground.

Conclusion

[25] The plaintiff's application for a compliance order is dismissed.

[26] Costs in respect of the application are reserved to be dealt with following the substantive hearing.

B A Corkill

Judge

Judgment signed at 4.00 pm on 24 February 2015