IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 102
3017796

	BETWEEN	JKL Applicant
	AND	OPQ LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Greg Cain and Sophie Pidgeon, Counsel for Applicant Blair Scotland, Counsel for Respondent
Investigation Meeting:	18 September 2017 at Wellington
Submissions Received:	At the investigation meeting with continuing input from both parties up to and including 29 September 2017
Determination:	9 October 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The Applicant has raised a number of claims with the Authority. These include allegations of unjustified disadvantage, breach of contract and failure to pay money due (though some of the alleged debts may relate to the Applicant's activities as the owner and director of two companies which contracted to provide services or product to the Respondent).

[2] The Respondent denies the claims have validity and/or if some do they were not raised within applicable statutory timeframes.

[3] The above dispute has also given rise to various issues the Applicant wants determined on an interim basis. The Respondent opposes the granting of the orders sought.

Background

[4] The Applicant has, for some years, been employed by the Respondent in a senior role to which various changes have occurred since his initial engagement. The two most pertinent to his claims were:

a. A decision to have some of the Applicant's duties performed by a company of which he is the sole director and shareholder though the Applicant asserts this arrangement remains an essential part of his employment;

b. A restructuring of the Respondent's business which resulted, from the Applicant's perspective, in various outcomes which were disadvantageous to him.

[5] As part of the process that led to the restructure the Respondent obtained the services of Peter Churchman QC, then a Barrister and now a Judge of the High Court. Mr Churchman was tasked with reviewing a number of issues including, for example, governance and management controls, day to day strategic and operational management and planning, financial practices and processes, inventory management and health and safety practice and compliance.

[6] The Applicant was interviewed as part of Mr Churchman's review. He says he agreed to this as he understood the quid pro would be receipt of a copy of the resulting report. That has not occurred though the Applicant believes the reports content influenced the restructure. The Respondent denies that and adds the very reason it engaged Mr Churchman, as opposed to a management consultant, was so his advice would be legally privileged. The Respondent has, throughout, maintained a view the report is privileged and refused to provide a copy to the Applicant.

[7] Shortly after the implementation of some changes that at least in part resulted from Mr Churchman's report one of the Respondent's owners became aware of what he considered irregularities in respect to the whereabouts of one of the Respondent's products which it correctly describes as a significant asset. After further investigation one of the Respondent's managers wrote to the Applicant alleging the Applicant may have allowed said asset to be removed from the Respondent's ownership/possession

without the Respondent's permission and/or misled the Respondent as to its whereabouts.[1]

[8] The Applicant replied via his lawyer. He confirmed the asset was no longer in the Respondent's possession but claimed its Directors were well aware of that and the circumstances giving rise to its removal. The Respondent, having considered this, chose to suspend the Applicant while it investigated further.

[9] Further correspondence followed and this included the raising of further allegations of possible wrongdoing. These include:

a. an allegation of further financial impropriety though the amount involved is significantly less than that related to the significant asset;

b. improper use of the Respondent's IT system;

c. an allegation the Applicant was abusive toward an employee of an allied company; and

d. irregularities in respect to two other significant assets though these remain in the Respondent's possession.

[10] Here it should be noted the Applicant concedes there is no reason why the Respondent should not be allowed to continue with its inquiries in relation to the allegations regarding IT use and employee abuse. They therefore play no part in the outcome of this application.

[11] In respect to the other allegations a further complication arises from the fact the owner whose inquiries sparked the initial disciplinary investigation subsequently reported his concerns to the Serious Fraud Office (SFO). That resulted in the SFO commencing an investigation and the issuing of a search warrant. It was executed in a very public place.

[12] The warrant allowed for a search for *…any documents (electronic or hard copy) or other thing that may be relevant to the investigation or may be evidence of any offence involving serious or complex fraud*.[2]

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[1] Letter dated 17 July 2017

[2] Search Warrant issued pursuant to section 10 of the Serious Fraud Office Act 1990 and dated 10 August 2017 at [2(b)]

Determination

[13] Through this interim application the Applicant seeks:

a. An order the Churchman report be disclosed to him prior to any decision being made on the Respondent's misconduct allegations;

b. *An interim injunction restraining the Respondent from proceeding with its disciplinary inquiry, so that no further steps are taken to progress it, until the Churchman report has been disclosed to the Applicant*;

c. *An interim injunction restraining the Respondent from proceeding with its disciplinary inquiry, so that no further steps are taken to progress it, until the later of:*

i. *the Serious Fraud Office ('SFO') concluding its investigation and confirming it will not be laying any charges; or*

ii. *any charges that may be laid by the SFO or the Police have been dealt with by the Court in which they are laid*.[3]

[14] In addition to the above there is now an application for non-publication orders, if only on a temporary basis. That is also resisted by the Respondent.

[15] There were also, in the initial lodging's, additional applications such as a request the parties be ordered to mediation and, as raised by the Respondent, an order a computer then in the Applicant's possession be returned. Time has overtaken these issues and they no longer need be considered.

[16] The parties are essentially in agreement with respect to the law relating to interim injunctions. The evidence is introduced by untested affidavit and from there I must address:

a. Whether the Applicant has an arguable case;

b. If so, where does the balance of convenience lie; and

c. What does the overall justice require?

[3] Interlocutory application dated 18 August 2017 at 1(a), (b) and (c)

[17] I shall consider the first two issues, production of the Churchman report and whether or not disciplinary action should be stayed pending its production, together. I see them as intertwined.

[18] While I accept, for reasons which shall be explained when considering the Applicants other claims, that he has an arguable case I conclude there are factors which mitigate against making the orders sought in respect to production of the Churchman report and/or staying the process pending production there-of. They are factors which do not easily lend themselves to explanation by answering the questions posed in [16](b) and (c) above.

[19] The request I preclude a continuation of the disciplinary process until after production of the Churchman report and/or order its production, faces two obstacles. The prime impediment is the first request appears, I conclude, to be in the nature of a *quia timet* application.

[20] That such as order is extremely unlikely to be granted is confirmed via a number of Court decision. A recent enunciation of the rationale is *Ports of Auckland Ltd v Carl Findlay.*[4] At [41] the Court said:

> There is an interest in progressing employment processes in a timely manner without unnecessary interruption and legal wrangling, until final decisions and outcomes with substantive impact are known.

[21] If the report is not legally privileged but its content relevant, a failure to produce it and allow the Applicant to comment on relevant material may well have a negative effect on the Respondents defence of any subsequent decision detrimental to the Applicant. That said, and until the outcome and the manner in which a decision is reached, is known, it is difficult to say wrong has occurred.

[22] The above passage from the Court, [20], leads me to conclude, at least in respect to the Churchman report, the Respondent should be allowed to continue the process as it sees fit. It is only upon conclusion I can consider whether it was wrong and there should be some negative repercussions.

[23] The second problem is an order the report be produced appears proximate with one of discovery. The Authority has no power in that regard. What it does have is the

[4] [2017] NZEmpC 45

power to order the disclosure of documents it considers relevant and which may assist its investigation.[5] Until the respondent's processes are complete, and the scope of any subsequent inquiry/investigation is known, it is difficult to conclude whether or not the Churchman report is relevant.

[24] That said, the parties agreed I should be able to look at it without passing it to the Applicant and his representative. Having done so I have to advise my initial reaction is the Churchman report does have the potential to be highly relevant to issues that may find themselves being canvassed in a substantive hearing before the Authority (though that of course awaits a determination as to exactly what those issues are). There can be little doubt some of the content influenced or informed the restructure and will be relevant should that be challenged as something giving rise to a disadvantage to the Applicant.

[25] I also have to be cognizant of the fact the letter calling the Applicant to a disciplinary meeting alleges one of the allegations is he *misled and/or deceived* the Respondent's directors. It is also alleged there was a breach of the duty of fidelity. Inherent in these allegations is an implication the Respondent can no longer trust the Applicant. There is also content in the Churchman report which could be considered as suggesting some individuals have questioned some of the Applicants actions and with that his integrity and the Respondent's ability to trust him.[6] Again, and depending on what eventually transpires, these may become highly relevant.

[26] Finally there is the possibility the Respondent may, having considered my comments, provide a partially redacted version which may again alter a final conclusion about relevance.

[27] The above comments also raise the question of whether or not the report is legally privileged. Having considered the submissions and the reports content my conclusion is the answer is no.

[28] First I note Mr Cain's submission regarding a requirement the result of any procurement of legal services was intended to be confidential.[7] Here I note there is no reference to intended confidentiality or privilege in either the terms of reference

[5] Sections 160(1)(a) and 160(2) of the Employment Relations Act 2000
[6] Examples include the section covered by [93] to [96] and [101] to [105]
[7] Section 54(1)(a) of the Evidence Act 2006

which define what Mr Churchman was to provide or the report itself. Similarly there are no ancillary documents or e-mails which enunciate such intent.

[29] To that I add the fact the report appears bereft of what one would consider legal advice. It contains what was sought which was advice concerning commercial and environmental issues that may impact on the business and the way it was being run.

[30] This raises Mr Cain's reference to a House of Lords case[8] and its subsequent adoption in New Zealand.[9] Privilege requires a relevant legal context which, as already said, does not appear to exist here. Advice covering a wide range of business matters such as was sought here does not attract privilege in the absence of a relevant legal context.

[31] Notwithstanding my decision not to order distribution of the Churchman report to the Applicant, the Respondent may wish to consider my conclusion and how it now wishes to treat the report. I accept that may include a challenge which the following conclusion allows time for.

[32] The above conclusions leave the question of whether or not the disciplinary process should be halted pending advancement of the SFO's inquiries. As already said I conclude the Applicant has an arguable case. There must be questions about the restructuring and the rationale for it. There must also be questions about whether implied criticism of the Applicant's integrity and business practices influenced the outcome and whether that was appropriate. The same may apply to the outcome of any further disciplinary enquiry should that, at some point, proceed.

[33] There are also some intriguing issues about the relationship between the Applicants business interests which will in turn influence questions about money's owing. None of these can be properly considered without a substantive investigation.

[34] Turning to the balance of convenience and overall justice. I note the Respondent's argument about the nature of the business, the way it is funded and given his salary is a significant component of expenditure the effect of retaining the Applicant in a non-productive capacity. I also note the Applicants response the Respondent brought these consequences upon itself by involving the SFO.

[35] In my view, however, these argument pale into insignificance when one overriding factor is considered. That is the SFO's involvement which, in my view provides an absolute answer to the issue of both convenience and overall justice.

[36] Time and again the Court has concluded a disciplinary enquiry should be placed on hold when answers that might be sought impinge upon a person's rights in the face of potential criminal action. There is, as the Court observed in *Wrackrow v Fonterra Co-op Group Limited*,[10] a strong danger of injustice which is twofold:

a. The risk of potential self-incrimination which may arise from answering questions in a disciplinary meeting where the subject matter is also subject to the SFO's inquiry; and/or

b. The injustice that may arise should the Applicant either refuse to either attend the disciplinary meeting or answer specific questions so as to avoid the potential for self-incrimination.

[37] The Respondents argument its inquiry is unrelated to that being undertaken by the SFO falls well short of convincing. In arguing this the Respondent implies the SFO deals with issues emanating from largescale financial fraud and that is not what it is interested in.

[38] I cannot agree. The issue which was reported to the SFO and which prompted its interest was the treatment of the significant asset and funds associated with it. It is that same asset, and issues pertaining to it, which were the cause of the initial summons to a disciplinary meeting. Since then further allegations have arisen which also involve alleged financial impropriety and inappropriate accounting of funds.[11] While the amounts may be significantly less there is an underlying allegation of fraudulent activity which means the SFO may well take an interest. The same applies to the two additional significant assets about which there are now issues.[12]

[39] The evidence leads to a conclusion the overlap is, as Mr Cain submits, *considerable*. That the SFO may also reach a similar conclusion and consider the additional issues is also possible. The door is left open by its advice its ...

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[8] *Three Rivers District Council v Bank of England* [2004] UKHL 48
[9] *Commerce Commission v Bay of Plenty Electricity Limited* (2006) 18 PRNZ 191
[10] [2004] 1 ERNZ 350 at [67]
[11] Paragraph 9(a) above
[12] Paragraph 9(d) above

investigation, in part, involves the circumstances round the sale of the [significant asset]. That is all we are able to confirm at this stage.[13] Neither party (and perhaps even the SFO) yet know what might constitute the other parts of the SFO's inquiry.

[40] The Applicant is entitled to see how the SFO's inquiry develops before potentially risking an injustice by participating in the Respondent's. This must be especially so when one considers the SFO's ability to compel the production of evidence and the fact it remains unknown just where its inquiry will take it.

[41] These are overwhelming grounds for finding the overall justice favours the Applicant and I note Mr Cain's reference to numerous cases of similar ilk and the fact the Employment Court appears yet to refuse such an application in similar circumstances.

[42] Finally I note such stays may be granted for a temporary period. The stay can then be revisited and a reconsideration of the situation can hopefully be informed by whatever progress the SFO may have made.

[43] For the above reasons I conclude that with two caveats I should accept the application I grant an interim injunction restraining the Respondent from proceeding with its disciplinary inquiry while the SFO progresses its inquiry.

[44] The caveats are that:

a. the order is temporary. It shall stay in effect until 26 January 2018 unless the SFO concludes its inquiry at an earlier date and either lays charges or confirms there will be none. Should neither of these events occur it for the Applicant to seek an extension to this order; and

b. This order is made in respect to the allegations concerning the disposition of assets and funds. It does not extend to the issues of IT use and staff abuse.

Non-publication

[45] There has also been significant correspondence and submission on the issue of suppression with the Applicant seeking such order and the respondent resisting them.

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[13] E-mail dated 29 August 2017

[46] Again I shall not recite those submissions. Suffice to say I have considered them and the principle of open justice which underpins our judicial system.

[47] Having done so I conclude such orders should be granted on the same temporary basis as the stay on the disciplinary process. In doing so I note the identity of some of those involved in this matter will prompt attention. I also note the accusations are such that notwithstanding the fact they are yet to be proven their very existence may well adversely affect the Applicant and his future endeavours. He is, in my view, entitled to be protected from that at least until there is evidence the allegations have substance. Finally I note there are issues about the health of family members and the effect these allegations may have on them. Again they are entitled to protection until such time as the allegations may be found to have substance.

Conclusion and costs

[48] For the above reasons I order:

a. the Respondent be restrained for continuing its disciplinary inquiry with respect to the part the Applicant played with respect to the disposition of assets and funds associated with those assets;

b. the Respondent be restrained from continuing its disciplinary inquiry into issues emanating from allegations the Applicant invited paying guests to its premises;

c. that unless the SFO act in the interim the above orders remain in effect until 26 January 2018;

d. there be an interim prohibition on publishing the pleadings filed in the Authority, any and all documents filed with the pleadings, the information contained within those documents and anything which may lead to the identification of the parties.

[49] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority