

Attention is drawn to the order prohibiting publication of certain information in this matter

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 420
5388486

BETWEEN	NOVA ENERGY LIMITED Applicant
AND	MICHAEL MITCHELL First Respondent
AND	NATIONAL ENERGY LIMITED Second Respondent
AND	ALAN MITCHELL Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Tony Stevens and Rob Cahn, Counsel for the Applicant Paul Wicks, Counsel for the Respondents
Submissions:	12 September 2013
Determination:	16 September 2013

DETERMINATION OF THE AUTHORITY (No. 4)

- A. Under s160(1)(e) of the Employment Relations Act 2000 (the Act), the Authority's investigation meeting on this matter is not open to:**
- (i) any person (other than the Authority member, the parties, their counsel and such witnesses that the Authority member considers should be present at the time) while any witness is being questioned about the confidential commercial information of Nova Energy Limited (Nova) or parties' counsel are making submissions concerning that information; and**

(ii) **any person employed by or associated with any entity in commercial competition with Nova or any broker operating in the gas or electricity retail market.**

B. Under clause 10 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) are prohibited from publication until this order is revoked or varied by further order of the Authority.

C. Orders regulating the Respondents' access to and use of further briefs of evidence and associated documents to be filed by Nova are as advised to the parties in the Authority Member's Minute dated 12 September 2013 and are in addition to orders made by earlier determinations of the Authority in this matter.

Application for orders controlling public access to Authority investigation meeting and access of Respondents and others to the Applicant's evidence

[1] This determination provides reasons for orders made by the Authority after considering written submissions lodged by the representatives and after hearing oral argument from them by telephone conference on 12 September 2013. The orders were made orally and also set out in a Minute sent to the representatives later that day ("the 12 September Minute").

[2] Nova Energy Limited (Nova) asked the Authority to exercise its discretionary power under s160(1)(e) of the Employment Relations Act 2000 (the Act) to decide that the investigation meeting about Nova's claims against Michael Mitchell, National Energy Limited and Alan Mitchell should not be in public. Nova is seeking an award of extensive damages and penalties for the use by the Respondents of its confidential information.

[3] In documents lodged for the Authority investigation Michael Mitchell has admitted he kept certain confidential information of Nova at the end of his employment with it and subsequently used that information for his own commercial

purposes. He and the other Respondents, through counsel, opposed closing the investigation meeting to the public but indicated they would not oppose the Authority using its power (also under s160(1)(e) of the Act) to exclude “*certain persons*”, in this case being anyone employed by a competitor of Nova or any broker operating in the gas and electricity retail market. They submitted such “*tailored*” orders could reasonably and appropriately address Nova’s concerns rather than a “*blanket*” order.

[4] Nova said its case required the lodging of witness statements and documents that revealed its key confidential information, including highly sensitive and closely-guarded details of price, cost and margins. This information would also be discussed in the Authority’s investigation meeting through questioning and cross-examination of the witnesses. In essence, Nova’s argument for the orders sought was that it was not just – in a case about the misuse of its confidential information by a former employee, and the costs and consequences to it of that – for the company to have to publicly expose its valuable, commercially-sensitive data (which could then be used by competitors and others in the market in which it operates) in order to be heard on the issues of whether it has suffered loss and is entitled to damages and penalties as a result of the Respondents’ actions. Such a process, it submitted, “*would, or at least could, render the relief sought futile*”.

[5] By joint memorandum of counsel, the parties had also sought orders to control access to and use of information in further witness statements yet to be lodged by Nova. Those statements were to comprise both witness statements in reply by Nova managers (responding to witness statements from Michael Mitchell and Alan Mitchell) and also statements from an expert witness and a Nova manager regarding matters of quantum and relevant to Nova’s claim for damages and other remedies.

[6] Those proposed orders were in addition to orders given earlier in Determinations No 2 and 3 in this matter.¹ The earlier orders also governed the access that the Respondents had to witness statements already lodged and other information provided to their counsel by way of discovery.

¹ [2013] NZERA Auckland 180 and [2013] NZERA Auckland 226.

Starting principles

[7] In *Anderson v The Employment Tribunal* – an Employment Court decision given in 1992 about an order of the former Employment Tribunal that suppressed all evidence in a personal grievance hearing on contended grounds of commercial sensitivity – the Court summarised the applicable general principle as being that:²

[e]xcept and to the extent that an Act of Parliament expressly provides otherwise, Courts and Tribunals in New Zealand are required to dispense justice in public ... [and] may not sit behind closed doors ... [and] may not exclude members of the public or the press from attendance ...

[8] However, unlike the Employment Tribunal in 1992, the Employment Relations Authority does have an express statutory power under s160(1)(e) of the Act to decide an investigation meeting should not be in public or should not be open to certain persons.

[9] In *Davis v Bank of New Zealand* the Court suggested the Authority’s powers under s160 of the Act to reach determinations in a quite different manner from the Employment Tribunal meant “[t]he presumption all evidence should be given in public and freely reportable may ... not have the force that it had in relation to the Employment Tribunal”.³

[10] But those powers of the Authority are discretionary powers. They must be exercised in a manner that is consistent with the Authority’s other statutory obligations – including complying with the principles of natural justice and acting reasonably – and consistent with general legal principles applicable to a quasi-judicial investigative body.⁴

[11] The initial presumption remains that expressed by the Court in *Oldco PTI (New Zealand) Limited v Houston*.⁵ The particular decision concerned whether the Authority should have agreed to Oldco’s request to close an investigation meeting to

² *Anderson v Employment Tribunal* [1992] 1 ERNZ 500, 509.

³ [2004] 2 ERNZ 511 at [15] and [16].

⁴ Sections 157(2) and 173(1) of the Act. See for example *Kloeten v Combined Tanning Supplies Limited* [2011] NZERA Auckland 520 and *Hemimatenga Warena Rau v Waikato-Tainui Te Kauhanganui Incorporated* (ERA, AA 57/10, 9 February 2010).

⁵ [2006] ERNZ 221.

the public because Oldco feared public knowledge of sensitive financial information could cause a loss of confidence in its business. The Court stated:⁶

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.

[12] In that case the Court noted Oldco had not disclosed to the defendant, the Authority or the Court any evidence of the type Oldco said would cause the damage that it feared might occur.

[13] In *Anderson* too, while emphasising that the mere assertion of commercial sensitivity was not enough, the Court referred to case law where the courts accepted that the general rule of evidence being given in public must “yield” if such an approach would not result in justice being done in the circumstances of a particular case.⁷

[14] In *Skope Enterprises v Consumer Council* Justice Cooke accepted and applied a principle expressed in a nineteenth century English Court of Appeal case that where a public hearing might have the result of rendering futile the relief sought in the claim, it would be proper to hear the case *in camera*.⁸

Particular circumstances

[15] In the present case there was no doubt that the information to be disclosed in evidence has the necessary character of confidentiality and includes data which are commercially sensitive trade secrets. Although Nova has yet to lodge its reply briefs and an expert witness statement (that are expected to canvas details of prices, margins and the costs associated with Nova winning back or retaining customers approached by the Respondents), customer lists relating to some of this activity have been lodged with the witness statement of Nova’s Commercial and Industrial Sales Manager Stephen Troughton. A statement of admitted facts lodged in the Authority by the

⁶ *Oldco*, above, at [58].

⁷ *Anderson*, above, at pp 511,512 and 522-3.

⁸ [1973] 2 NZLR 399 (SC) citing *Mellor v Thompson* (1885) 31 Ch D 55.

respondents also accepts that Michael Mitchell kept, and the respondents later used, “*admitted confidential information*”.

[16] In an affidavit lodged in support of the orders sought Mr Troughton described the evidence to be lodged by Nova to prove its damages claim as exposing its entire commercial customer base for natural gas. He said it was “*a substantial multi-million dollar market, into which Nova has invested considerable resources*” and some key details to be disclosed in evidence (about bottom line pricing and costs) were known only to managers, not Nova’s front-line sales staff. He described the risk in this way:

If Nova’s competitors have some or all of the confidential information that is being considered in evidence that I have seen in this proceeding, they could use that information to target identifiable Nova customers, focus on areas/targets where they can compete with Nova’s pricing/costs, and tailor products and their approach to undercut Nova’s bottom line and undermine Nova’s relationship with its customers.

[17] After reviewing the documents already lodged by the parties and considering the written submissions and oral argument of counsel for both parties, I was satisfied that the orders set out at the head of this determination were an appropriate use of the Authority’s power under s160(1)(e) of the Act to provide legitimate protection to Nova as a party with the least necessary reduction in the open administration of justice. I was not satisfied that it was necessary to go further and close the entire meeting to all members of the public (apart from competitors and brokers) as there are issues in the case – such as the terms of Michael Mitchell’s employment agreement, an exit agreement and a restraint of trade – where evidence about confidential information will not arise directly or, if it does, can be managed by closing that section of the meeting when required.

[18] My reasons for the measures adopted are as follows:

(i) *close meeting to competitors and brokers*

[19] Although there was no evidence that any competitor would in fact or did intend sending observers to the meeting, I accept that it would not be just for a competitor to use such an occasion to glean Nova’s confidential information. Such a competitor could not otherwise legally gain access to such information without Nova’s permission. It is not in the public interest for the otherwise open

administration of justice to be misused in that way. The potential seriousness of the harm, unlooked for and not caused by Nova, that could result from such an activity by a competitor is a sufficiently real and substantial reason to exclude that class of person from the investigation meeting.

(ii) close meeting to all public when questioning witnesses about Nova's confidential information

[20] The commercial information of Nova can also legitimately be protected by closing the investigation meeting to anyone other than the necessary witnesses, counsel and parties when witnesses are to be questioned about the specific details or interpretation of that information and when counsel are making submissions about it. While such a process may be a little inconvenient in some parts of the investigation meeting, it retains open access (except for competitors and brokers) to those parts of the meeting considering other issues in the case.

[21] Similar orders are made in suitable cases in the courts. A recent example is found in orders made in an interlocutory judgment of the Employment Court that, during the hearing, the parties would refer to information contained in confidential commercial documents only by general description but if more detailed reference was required, that would be done “*before a closed courtroom (save for the defendant's counsel, the plaintiff's counsel, any of the plaintiff's witnesses, the presiding judge and the court registrar)*”.⁹

(iii) Prohibition on publication of evidence lodged

[22] Prohibition on publication of the pleadings and evidence lodged to date complements existing orders made in the earlier determinations in this matter, including an order sealing the Authority file.¹⁰ There is more evidence to be lodged – comprising reply statements from Nova's witnesses, an expert's statement on quantum issues and a bundle of relevant documents – which is expected to contain further confidential commercial information. While this prohibition order presently covers that expected evidence and the statement of problem, statement in reply,

⁹ *Air New Zealand Limited v Grant Kerr* [2013] NZEmpC 116 (25 June 2013).

¹⁰ [2013] NZERA Auckland 180 at [6].

witness statements and associated documents already lodged, the scope of the order will need to be reassessed so that it covers only the material that contains confidential commercial information. That exercise is best done when all the material is lodged but the wider order at this stage guards against inadvertent release of that information meanwhile. I expect that at the beginning of the Authority's investigation meeting (or at least by its end) the order would be varied by identifying more specifically those documents or parts of documents within its scope.

Other orders

[23] Other orders set out in the 12 September Minute relate specifically to how the parties will deal with access to the content of an expert witness' evidence and associated spreadsheets and arrangements for certain information in the evidence, by consent, not to be disclosed to the Respondents. This largely complements earlier orders agreed by the parties and made by the Authority governing preparation of evidence for the investigation. However should, during the course of the investigation, it be necessary for such confidential information to be disclosed to one or more of the Respondents during questioning, counsel will seek the approval of the Authority member to do so. The Authority member may consider, after discussion with counsel for both parties on an 'in chambers' basis, whether such disclosure and questioning is necessary for the overall fairness of the investigation.

Robin Arthur
Member of the Employment Relations Authority