

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 226  
5388486

BETWEEN	NOVA ENERGY LIMITED Applicant
A N D	MICHAEL RICHARD MITCHELL First Respondent
A N D	NATIONAL ENERGY LIMITED Second Respondent
A N D	ALAN RICHARD MITCHELL Third Respondent

Member of Authority: Alastair Dumbleton

Representatives: Tony Stevens and Rob Cahn, counsel for Applicant  
Paul Wicks, counsel for Respondents

Investigation Meeting  
(by telephone): 22 May 2013

Date of Determination: 5 June 2013

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**DETERMINATION OF THE AUTHORITY (NO. 3)**

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**Application for variation of orders made in relation to confidentiality of written evidence**

[1] In the course of preparing for an investigation meeting briefs of evidence have been supplied by witnesses who will be presented to the Authority by the applicant Nova Energy Ltd.

[2] The Authority is investigating breaches by the first respondent Mr Michael Mitchell of confidentiality obligations, restraint of trade provisions and duties of trust and fidelity expressed or implied in an employment agreement. The Authority is also investigating the actions of the second respondent, National Energy Ltd, and third

respondent, Mr Alan Mitchell, who are alleged to have aided, abetted, instigated or incited the breaches of Mr Michael Mitchell.

[3] Until early 2012 Mr Michael Mitchell was a senior manager employed to work in the retail energy business of The Auckland Gas Company Ltd (amalgamated into Nova Energy Ltd with effect from 1 January 2013). When Mr Mitchell finished that employment he took with him a substantial amount of confidential, commercially sensitive information. In the course of the Authority's investigation he has formally admitted doing so and to using the information while working as the manager of National Energy, an energy broker. Mr Mitchell's wife is the sole director and shareholder of that company and their son Mr Alan Mitchell works for it as a sales representative.

[4] Nova alleges that the misuse of the confidential information by the respondents has harmed its business. To compensate for the loss damages of several million dollars are claimed against Mr Michael Mitchell, and penalties are claimed against National Energy and Mr Alan Mitchell to punish them for their involvement in the breaches

[5] On 9 May 2013, by consent, the Authority made orders in relation to confidentiality of documents intended to be put before it in evidence at the investigation meeting; [2013] NZERA Auckland 180. Under the orders the respondents, but not their legal representatives, are to have restrictions on their access to confidential information as defined.

[6] The orders restrict the supply of briefs of evidence of Nova's witnesses as follows;

*(a) A full copy ... to the Authority and to the solicitors and counsel for the respondents, on the basis that such documents are not to be made available to the respondents, and*

*(b) A further copy ... with Confidential Information redacted ... which will be made available to the respondents ....*

[7] Briefs of evidence have been provided for Stephen Troughton, Mahadevan Bahirathan, Terrance Barstead and Jennifer Munro. Under the Authority's orders the respondents are required to view the Bahirathan and Munro briefs only at the chambers of their counsel Mr Wicks. The copies of the Barstead and Troughton

briefs of evidence provided to the respondents have passages redacted, whereas unredacted copies have been provided by the applicant to Mr Wicks and the Authority.

[8] The respondents object to some of the redactions in the Barstead and Troughton briefs and to the limitations on access to the Bahirathan and Munro briefs. They have applied to the Authority seeking:

- (i) A direction that the respondents have unrestricted and unsupervised access to the Bahirathan and Munro briefs of evidence, without having to view them only at Mr Wicks' chambers under supervision, and
- (ii) A ruling as to whether redactions in the Troughton and Barstead briefs contain confidential/commercially sensitive information, or, if confidential, whether such information is most highly confidential information.

[9] In relation to (i) above, while he was making oral submissions Mr Wicks requested the Authority to suspend giving any directions to enable further discussion between the parties about access to the briefs of evidence.

[10] In relation to (ii) above, Mr Wicks acknowledged that the High Court routinely imposes solicitor/counsel access restrictions where confidential information is involved, but he submitted:

9. *The issue here is not the ability to restrict access to confidential information provided by way of discovery or set out in statements of evidence. The issue is whether the material contained in the briefs and asserted to be highly confidential information is indeed so highly confidential and commercially sensitive that the respondents should only receive redacted statements of evidence as currently sought by the applicants.*

[11] In respect of the evidence to be given by Mr Troughton and Mr Barstead, for the respondents Mr Wicks has acknowledged that not all redactions made in their briefs are challenged.

[12] The redacted parts that are in issue have not been challenged for relevance.

[13] In considering this application for a variation of the consent orders, I start with a presumption to be applied that every party to a matter before the Authority should be able to know what all of the evidence is that any witness gives or intends to give.

[14] To displace that presumption the Authority needs to be satisfied that there are compelling reasons for restricting or limiting in any way a party's access to evidence.

[15] In this case there is no dispute that evidence to be provided for the applicant contains material that is confidential because of its commercial sensitivity, but for the respondents it is argued that none of that evidence, as a matter of degree, is so sensitive or so confidential as to meet the high threshold required before a party should be denied access to it.

[16] It is relevant that this employment relationship problem has arisen directly from allegations that the first respondent unlawfully obtained and used confidential information of the applicant, and that the second and third respondents encouraged or assisted him. It is also relevant that the allegations are admitted by the respondents.

[17] In the circumstances, particularly in the way the respondents were apprehended and had to be restrained from continuing their actions, which they have belatedly admitted were unlawful, the applicant has strong grounds for believing there is a high risk that if the respondents are given access to any of Nova's confidential information they will again misuse it.

[18] Counsel, Mr Wicks and Mr Stevens, made written and oral submissions to the Authority about the contents of the redacted parts of the briefs of evidence which are the subject of this application.

[19] The nature of the redactions have been helpfully grouped into five categories by Mr Stevens:

- (i) Confidential, current or future price information;
- (ii) Confidential information relevant to margin/Nova's bottom line;
- (iii) Confidential information relevant to how the targeted counter-campaign customer group was identified, to the extent that relates to price/contract terms/margin/the characteristics of that group.

- (iv) Confidential information relevant to the commercial parameters for the targeted counter-campaign, including the parameters for the campaign, sales targets, price/offer parameters and any indications (global or otherwise) as to price across that group.
- (v) Confidential details as to Nova's internal views and position regarding the enforcement of contract terms/related customer response.

### **Determination**

[20] Having been taken by Mr Wicks and Mr Stevens in detail through the various redacted passages objected to, after considering the careful and comprehensive submissions of both counsel and considering the meaning and content of those passages, I uphold in every case the submissions of Mr Wicks and find that the high threshold has not been reached where the Authority should take the unusual step of preventing a party from knowing all of the evidence being presented, apart from evidence they accept should not be seen by them.

[21] In this case the remedies sought against the applicants are very substantial. They include damages of several million dollars as well as penalties. It should make no difference however whether the remedies are great or small, as the general principle must remain the same that a party before the law, whether in a court or tribunal, must be presumed to have a full and unrestricted opportunity to give a complete account of itself before the law is applied or administered whether ultimately to the advantage or disadvantage of that party.

[22] I find that in many instances the evidence redacted is imprecise. In relation to figures provided, some dollar values are expressed to be approximations or a 'rough calculation,' and specific *price* or *margin* confidential information is not disclosed in the redacted passages. In some instances subjective views are expressed and in others, the information is stated to be a matter of appearance, which as with many things may be dependent on 'the eye of the beholder' of that information.

[23] References to Nova's 'highest margin' and 'highest volume' in relation to customers also allows room for uncertainty as to how high is 'high', and the same with references to 'a very low margin'. Such references as there may be in the redactions to price and margin information of Nova's is insufficiently direct and

distinct to amount to highly confidential and commercially sensitive information giving rise to the risk of misuse.

[24] Similarly, references to running a ‘targeted counter-campaign’ without more and to that campaign being ‘aggressively’ pursued and in a ‘short space of time,’ are not sufficiently precise but leave room for differing interpretations as to what exactly is the intensity of retaliation or opposition being referred to. The terms ‘very substantial’ volume, and ‘reasonable’ margins are in the same category. The parameters of substantial volume are not defined with any clarity, and neither is the reasonableness of margins.

[25] A reference to ‘a standard commercial response’ implies a reaction that would be well known or well understood by commercially astute business people generally and therefore is not confidential, particularly in Nova’s industry. I cannot see how this can be regarded as so highly confidential and sensitive that there are good grounds for keeping it secret from the respondents. What is said to be ‘standard’ and ‘predictable’ seems unlikely matters that are of the highest secrecy and sensitivity.

[26] Further, in response to the submission that individual items of redacted evidence if disclosed could be fitted together as parts of a ‘jigsaw puzzle’ and allow the respondents to see the complete picture, I agree with Mr Wicks that other parts of the puzzle have probably already been available from the statement of problem and its amendments.

[27] Other confidential information learned by Mr Michael Mitchell while employed by Nova is likely to remain in his memory.

[28] Although the nature and extent of the claims brought in this case are unusual in the Authority, and although the respondents by their own admission have failed to keep information confidential when they were legally obliged to, and although they have misused that information to their advantage or potential advantage, I do not consider the respondents should be deprived of access to the redacted information in the circumstances.

[29] I consider that the respondents are entitled to know the content of the challenged redacted parts of the Troughton and Barstead briefs. The respondents are also entitled to see the strength of the evidence to be relied upon by the applicant in

relation to the issues of causation and loss at the heart of Nova's damages claim against the respondents.

[30] I give the ruling sought by the respondents and vary the consent orders accordingly to allow them to see the redacted parts of the Troughton and Barstead briefs of evidence to which objection has been taken. Other redacted parts which have not been challenged are to remain in that state in the respondents' copies.

[31] With regard to restrictions on the respondents viewing the Bahirathan and Munro briefs of evidence, the application for a direction is adjourned. The Authority is to be advised if any directions are required, or whether the parties have reached agreement about that issue.

[32] I make no ruling, at this stage at least, on the issue of whether the respondents are to be excluded from any part of the investigation meeting. I agree with Mr Wicks that for the Authority to take such a step would be extreme and unusual. If exclusion remains an issue the applicant may seek directions closer to the meeting.

[33] Costs are reserved.

A Dumbleton  
**Member of the Employment Relations Authority**