

NOTE: An order prohibiting publication of the name of the parties and other evidence identifying the parties is made in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 85
5547814

BETWEEN P
 Applicant

AND Q
 Respondent

Member of Authority: Robin Arthur

Representatives: Matthew Ward-Johnson, counsel for the Applicant
 Respondent in person

Investigation Meeting: On the papers

Determination: 24 March 2015

DETERMINATION OF THE AUTHORITY

- A. Publication of the name of the parties and other evidence identifying the parties is prohibited pending the Authority's full investigation and determination of the claims by P against Mr Q.**
- B. The interim injunction sought by P requiring certain actions by Mr Q is granted on the terms stated in this determination and in reliance on an undertaking as to damages lodged by P.**
- C. Pending the Authority's determination of P's application for penalties and a compliance order, arising from alleged breaches by Mr Q of a settlement agreement made with him and certified under s149 of the Employment Relations Act 2000, Mr Q must:**
- (i) immediately desist from publicising his website (identified**

- in paragraph 3.3 of P's statement of problem dated 16 March 2015) and the link to his video on that website; and**
- (ii) within 48 hours of the date of this determination, disable access for any other person to the website and video; and**
 - (iii) immediately cease communication by any means, on matters subject to his confidentiality obligations, with:
 - (a) employees and elected members of P; and**
 - (b) with any other third party, including the local authorities identified in paragraph 3.5 of P's statement of problem dated 16 March 2015; and****
 - (iv) immediately comply with his obligations of confidentiality in his settlement agreement with P dated 10 June 2014.**

D. Costs are reserved

Order prohibiting publication of the names of parties and identifying details

[1] This matter concerns alleged breaches of a settlement agreement made and certified under s149 of the Employment Relations Act 2000 (the Act). The terms of the agreement included obligations to keep confidential certain information or categories of information. Of my own volition I considered an order prohibiting publication – for the moment – of the names of the parties and identifying details was necessary to uphold the confidentiality obligations agreed between the parties.

[2] The order, under clause 10 of Schedule 2 of the Act, has been made pending the Authority's full investigation and determination of this matter and remains in place until varied or revoked by the Authority. Meanwhile the Applicant may be identified only as a local authority. It is referred to as P in this determination. The Respondent may be identified only as an information technology specialist previously employed by P. He is referred to as Mr Q in this determination. (The letters used do not relate to the real name of either party.)

The employment relationship problem

[3] P lodged an application to the Employment Relations Authority seeking penalties and compliance orders against its former employee, Mr Q. His employment with P ended on 2 September 2014.

[4] On 5 March 2015 Mr Q sent emails to employees at a number of local authorities and some councillors asking them to use a hyperlink to view a website on which he had posted a video recording about what he called “*management failings*”. P said the content of those emails and the video recording breached confidentiality terms in a settlement agreement made with Mr Q on 10 June 2014. Those terms also relied on a confidentiality and non-disclosure clause in Mr Q’s employment agreement with P that continued to apply after his employment ended.

[5] An Authority investigation meeting to consider P’s application has been notified for 28 May 2015.

[6] Pending that hearing P sought interim orders requiring Mr Q to take down the website on which he had posted his video and – in relation to matters subject to his confidentiality obligations – to stop communicating with the employees and elected members of P, to stop communicating with people at nine other local authorities and to comply with confidentiality obligations referred to in the settlement agreement, a written personal undertaking he gave dated 4 June 2014, and his former employment agreement.

[7] P sought those interim orders on an urgent *ex parte* basis. Given the coercive nature of such orders, and the potential for serious legal and financial consequences for Mr Q if they were made but not obeyed, I declined to determine that part of P’s application on an *ex parte* basis. Instead P carried out an Authority request for personal service of the application on Mr Q who then attended, with P’s counsel, an urgently convened case management conference by telephone. In that conversation I made timetable directions for hearing P’s substantive application and provided Mr Q with an opportunity to provide written submissions in response to P’s application for interim orders. He lodged his written response on 23 March 2015. P’s counsel, in turn, responded to that statement on the same day. Because the orders sought by P

amounted to an interim injunction application, I also required P to lodge an undertaking to damages, which it did.

[8] I have determined the interim orders application on the papers taking account of the submissions from Mr Q and P, the undertaking as to damages lodged by P, and evidence in an affidavit lodged by P's legal manager (including relevant documents lodged with it). I have omitted the name of that deponent as it would more readily identify P.

The grounds for an interim injunction

[9] The Authority has jurisdiction to issue an interim injunction in a matter related to an employment agreement.¹ The present matter related to confidentiality obligations in Mr Q's employment agreement with P that survived the termination of his employment and were confirmed in his personal undertaking and the settlement agreement.

[10] In considering P's application for an interim injunction, on the terms sought, the Authority had to consider three questions:

- (i) Did P have an arguable case that Mr Q had breached confidentiality obligations owed to it and that the Authority would likely grant the orders sought after its investigation of the substantive issues (on penalties and a 'permanent' compliance order)?
- (ii) Where did the 'balance of convenience' lie between the date of this determination and the Authority's determination of the substantive issues, which was really a question of the relative inconvenience – in the sense of detriment or injury – during that period for Mr Q of bearing the burden of interim orders weighed against the possible or actual damage to P of his alleged breaches of confidentiality?
- (iii) Where did the overall justice lay between the two parties meanwhile?

¹ Section 162 of the Employment Relations Act 2000 and *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 at [66].

(i) an arguable case?

[11] The test of an arguable case, for the purposes of an interim injunction, concerned whether the party seeking that order had some reasonable prospect of success on its argument, not a certainty. The test is applied on the assumption that the evidence provided in the affidavit of P's legal manager would be established in the Authority's eventual investigation.

[12] I concluded P's application met that threshold for the following reasons.

[13] Mr Q's employment agreement – at clause 14 – included this confidentiality clause:

You agree to maintain strict confidentiality with respect to the services and duties performed for [P]. You will not disclose to any person, firm, corporation or entity, any trade information acquired through [P] including, but not limited to, computer programmes, software, forms and documents, training manuals and techniques, products, services, the identities of the current, past and prospective customers, prices charged by [P], marketing and sales plans, financial information and any other information in intellectual property both during the term of this Agreement and after its termination. This restriction shall cease to apply to knowledge or information which may come into the public domain without there being a breach by you of this restriction.

[14] The settlement agreement he entered into with P included a term stating that the terms of settlement and the fact that a settlement was reached would “*remain, as far as the law allows, ... strictly confidential to the parties and ... their professional, legal and financial advisors*”. This determination, by its nature, has had to disclose elements of those terms but has done so only to the extent necessary.

[15] Clause 11 of that agreement expressly acknowledged and agreed that the confidentiality clause of Mr Q's employment agreement continued to apply despite the termination of his employment. He further agreed this obligation included and extended to “*disclosures to [P's] staff (past or present)*” and to all information provided to him during an employment investigation of him and “*any and all information and/or data related to his employment at [P]*” as well as his “*own position in response to any issue raised with him during the course of the investigation*”.

[16] In clause 12 Mr Q also agreed:

*... not to disseminate or disclose to any third party (verbally or otherwise)
... investigation data provided to him during [P]'s employment investigation and ... any
other information ... related to his employment at [P] ... whether or not that information
... relate[d] to the employment investigation*

[17] Under another clause he agreed he was liable for any legal costs incurred by P in addressing any breach of clauses 11 and 12 by him.

[18] The settlement agreement also incorporated the terms of the written personal undertaking dated 4 June 2014 in which, among other things, Mr Q agreed he was bound by confidentiality under clause 14 of his employment agreement.

[19] Despite those terms Mr Q sent emails to some staff and elected members of P and staff at nine other local authorities with the subject heading: “*What happened to [Mr Q] in 2014*”. In quoting the following extract from those emails I have omitted or changed references to the name of a particular IT project and a website address. With those changes it read:

Do you recall me?

I was in the [P] IT department and had a lot of involvement with [the IT project] getting setup. I suddenly disappeared about midway thru 2014.

If you do you might be interested in the [P] sequences of events that lead to what has been a very costly process with a sad ending. The video documents the management failings, money that was spent, the NZ Police involvement and other matters around what happened behind my sudden departure.

Any way go to [hyperlink for website] to get the video with the good oil if you are interested. It will probably fill in a lot of gaps you haven't been told by [P].

[20] The IT project referred to was a regional shared services project involving a number of local authorities. Mr Q worked on that project as an IT network specialist.

[21] The hyperlink in Mr Q's emails connected to a website which referred to the expected release dates for two further videos on 20 April and 25 April and included this statement:

This website has been setup to enable dissemination of information related to the performance of [P], the NZ Police, the Crown Prosecutor and other aspects related to the criminal justice system.

It would be fair to say that I have been dismayed by the ability of all of these parties to cope with modern day complexity around IT especially with regard to the new frontier of council shared services.

[22] The website also provided a link to a video recording of around 35 minutes in length in which Mr Q referred to his previous high level of access within P's IT

system, referred to its storage and security arrangements, gave his views on the management of the particular IT project, identified various staff involved, referred to a Police investigation of allegations involving him, referred to how he was “*bound by two confidentiality agreements*”, and directed some comments to IT staff involved in with the project and to P’s staff generally.

[23] Having watched the video, and having read a transcript of it lodged with the affidavit from P’s legal manager, I was satisfied P had an arguable case that significant portions of what Mr Q said breached his enduring confidentiality obligations. On its bare content it was also clearly arguable P would eventually succeed with its application for penalties and a compliance order once the Authority was able to investigate the matter with fully tested evidence.

[24] Mr Q lodged a nine page statement in reply in response to the opportunity to make written submissions about P’s application for interim orders. Most of his reply addressed the substantive issues in P’s claim. In summary his position was that he was wrongly subjected to an employment investigation and a Police search and that his emails and video were part of efforts by him to hold those responsible to account for their actions against him. He made some points more immediately relevant on the question of whether interim orders should be granted. In summary they were:

- (i) He had signed the settlement agreement “*under duress*” so, even if he had violated its terms, the agreement would likely be found “*null and void*” anyway.
- (ii) He was entitled to publicly disclose information that was about alleged criminal matters – being the Police investigation and charges laid but then withdrawn against him – as that was “*nothing whatsoever to do with employment matters*”.
- (iii) He would not be entitled to claim much by way of damages if he was required to take down the website but the rights of citizens to the information he sought to disseminate would be affected.
- (iv) An interim order requiring compliance with his confidentiality obligations would presume, on an unproven basis, that he had not complied with those obligations.

[25] None of those four grounds were sufficient to dissuade me from the arguability of the rationale for the interim orders sought by P.

[26] Firstly, I doubt the alleged duress would be established. The agreement refers to its terms being agreed after discussions between the parties and their lawyers. It names his lawyer, who is experienced local counsel. The agreed terms – without revealing the details here – included some of considerable benefit to Mr Q as well as confirmation of his ongoing confidentiality obligations. The agreement’s certification under s149 confirmed two things – that the agreed terms were final, binding, enforceable, not able to be cancelled and not subject to appeal or review by the Authority or the Employment Court and that, before the parties signed the agreement, the mediator had checked with Mr Q that he understood that was so.² There was consequently a public interest in the Authority upholding the binding and enforceable nature of the agreed terms for long standing reasons of finality and certainty to the benefit of both employers and workers who enter such certified agreements.³

[27] Secondly, having seen Mr Q’s video and read a transcript of what he said, I considered its contents arguably went beyond the limits he described and referred to information within the scope of the confidentiality obligations about his work and the end of his employment. Mr Q, in his reply, referred to rights under the New Zealand Bill of Rights Act 1990 (NZBORA). If he intended to refer to the NZBORA s14 freedom of expression to impart information and opinions of any kind in any form, it was correct that the confidentiality terms of the settlement agreement he signed and the terms of an interim injunction would fetter such rights. While s6 of the NZBORA directs the Authority to prefer a meaning consistent with NZBORA when interpreting Mr Q’s obligations under the Employment Relations Act, I considered a restriction on those rights – imposed by enforcing confidentiality terms under s149 of the Act – was within the justified limits allowed under s5 of NZBORA. Mr Q had voluntarily agreed to limit his freedom of expression by entering an agreement that also contained benefits for him and, as such, enforcing his adherence to that obligation was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. It was strongly arguable, as P submitted, that the right to fair public disclosure was subject to contracted rights and obligations of individuals to an agreement.

² Section 149(3) of the Employment Relations Act.

³ See, for example, *Jacks Hardware and Timber Ltd t/a Mitre 10 Mega v Beentjes* [2015] NZERA Christchurch 29 and *Simpro Software NZ Ltd v Nuttall* [2015] NZERA Auckland 64.

[28] Thirdly, Mr Q confirmed there was little significant or irreversible damage to him if he was forced to take down his website but he was later found to be entitled to disseminate the information in his video. It was a factor relevant in the assessment of the balance of convenience, considered later in this determination.

[29] Fourthly, Mr Q was correct that the presumption he had not complied with his confidentiality obligations was not conclusively proven at this stage. However that is not the standard required for deciding whether interim orders should be made. Equally there is no presumption that interim orders will inevitably be confirmed when the matter is fully investigated and determined. Interim orders made must be obeyed but whether permanent orders are eventually put in place is determined on a different standard of evidence.

(ii) the balance of convenience?

[30] I also concluded the balance of convenience favoured P until the Authority could fully investigate and determine its application. Mr Q's comments, published by email and on his website, clearly undermined the confidentiality arrangements P believed were in place and, if left unrestricted meanwhile, would mean any damage or injury to those arrangements could only increase.

[31] Mr Q, by contrast, could relatively easily 'take down' his website and video and cease communicating with others about the information P claimed was covered by his confidentiality obligations. If P's claim was eventually found to be without substance, Mr Q could restore internet access to the website and video. For him the damage or injury suffered meanwhile would be a matter of delay in promoting his view of events to a wider audience rather than any substantial loss in achieving the effect he wished to create.

(iii) overall justice?

[32] While I concluded P had an arguable case and the balance of convenience favoured interim orders being made against Mr Q, I was also required to 'stand back' and consider the matter on an overall or global basis.

[33] Part of that assessment concerned the relative strengths and weaknesses of the parties' cases – to the extent they could be assessed from information presently available and until fully examined in the Authority's investigation.

[34] Mr Q's argument that his website and video were largely about the criminal investigation and not employment matters concerning him was weak. There was no current criminal investigation because the Police this month withdrew the charges laid. At the simplest level his comments in his video about the work he did and his reference to confidentiality agreements appeared to breach terms in the settlement agreement about not disclosing information related to his employment and not referring to the fact of a settlement agreement. However strongly held Mr Q's views were on how he was treated by P, he should be expected to observe freely-entered obligations on him that fetter the extent of what he may do and say.

[35] The terms P sought to enforce limit Mr Q's freedom to 'speak' (orally or in writing on the internet and elsewhere) to potentially interested local authority staff and politicians and other members of the wider public. I have not had to consider the issue of what his confidentiality obligations might mean, if anything, if Mr Q were asked to give evidence to a court or to respond to inquiries by other official regulatory bodies. In those latter situations, other public interests would likely prevail about what he could and should say if asked or required to do so.

[36] Meanwhile no other third party interests appeared to be significantly hindered or permanently damaged by the interim orders P sought.

[37] Overall I considered justice lay with P being granted the interim orders, both as a matter of public interest in the enforceability of the terms of settlement agreement and because, in the longer term, if P's substantive claims were not upheld by the Authority, Mr Q's ability to pursue his campaign would be delayed but not denied.

Outcome and orders

[38] For the reasons given I concluded an interim injunction should be made on the terms set out in the orders labelled B and C at the head of this determination.

[39] The permanent orders sought by P include requirements for Mr Q to delete emails he had already sent to various parties. It was not necessary for the interim orders to go so far. It was sufficient at this stage to minimise the risk of further injury or detriment by prohibiting Mr Q – in the interim – from any further communication on subjects covered by his confidentiality obligations.

Costs

[40] Costs in respect of the interim orders sought are reserved pending resolution of the substantive matter.

Robin Arthur
Member of the Employment Relations Authority