

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 63
5578529

BETWEEN WESTERN INSTITUTE OF
TECHNOLOGY AT TARANAKI
Applicant

AND DR CHRISTINE FENTON
Respondent

Member of Authority: M B Loftus

Representatives: Hamish Kynaston and Amy de Joux, Counsel for
Applicant
Caroline McLorinan and Sean Maskill, Counsel for
Respondent

Investigation Meeting: On the papers

Submissions Received: 11 May 2016 from Applicant
13 May 2016 from Respondent

Determination: 3 June 2016

**PRELIMINARY DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Western Institute of Technology at Taranaki (WITT), claims the respondent, Dr Christine Fenton, breached various terms contained in a record of settlement the parties concluded. One of the provisions Dr Fenton is alleged to have breached requires she return any of WITT's property she had in her possession including *all WITT-related files (electronic or physical)*.

[2] WITT claims Dr Fenton breached this provision when she provided information from retained files to both the Tertiary Education Commission (TEC) and

the New Zealand Qualification Authority (NZQA) some months after the agreement was concluded and which led to various investigations by those bodies.

[3] Dr Fenton claims to have returned all property and denies this alleged breach. She does, however, admit she made a protected disclosure to NZQA pursuant to the Protected Disclosures Act 2000 (the PD Act). She asserts she is not therefore liable to any civil proceeding by reason of having made that disclosure.¹

[4] Notwithstanding the fact NZQA accepted Dr Fenton's document as a protected disclosure I have already been asked to decide whether or not I considered it to have met the definition of protected disclosure² and therefore attracted protection from civil proceedings. I concluded it did but observed its content provided a prima facie indication Dr Fenton may well have used retained documents when preparing it.

[5] That observation gives rise to the present matter which is whether or not the protected disclosure should be disclosed to WITT. WITT says it should – Dr Fenton disagrees.

Submissions

[6] WIT accepts the disclosure is protected but says that does not mean it cannot see the document. It says s 160(1) of the Employment Relations Act 2000 (the Act) allows me to call for and consider relevant evidence. It says Dr Fenton's disclosure is relevant to the claim she breached her agreement.

[7] In particular WITT says:

Section 18 of the Protected Disclosures Act protects 'whistle-blowers' from civil, criminal or disciplinary actions that arise "by reason of having made or referred that disclosure of information". In other words, it protects the whistle-blower from liability for defamation, breach of confidence or other 'legal wrongs' committed in the protected disclosure itself. It does not provide immunity for legal wrongs that exist independently of the protected disclosure, but which are evidenced by it, as is the case here.

[8] WITT accepts the general and wide powers of s 160 of the Act are not so wide as to permit me to override legislative provisions which might otherwise render the

¹ Section 18 of the Protected Disclosures Act 2000

² Section 6 of the Protected Disclosures Act 2000

evidence in question inadmissible.³ It also accepts a party may assert privilege in circumstances where the common law privilege against self-incrimination is relevant.⁴

[9] It is conceded there is little judicial consideration of s 18 of the PD Act and what there is does not appear to assist. In essence WITT's argument is the PD Act does not entitle Dr Fenton to retain its property in contravention of an unrelated contractual obligation.

[10] Similarly it is argued there is no privilege against self-incrimination and no fetter on my exercising my powers under s 160 as WITT has not sought a penalty.

[11] In summary WITT notes I have, by agreement of the parties, seen the disclosure and concluded its content may be relevant to WITT's claim. It says natural justice, equity and good conscience dictate it be given an opportunity to see the document, evaluate whether or not my preliminary view has merit and if so pursue the issue. In closing WITT concedes it is only interested in those parts that may support the claim Dr Fenton withheld documents she should have returned and irrelevant content may be redacted.

[12] For Dr Fenton it is argued s 18 is all pervading and precludes the disclosure being adduced as evidence even if a legal wrong exists independently of the disclosure itself. It is submitted acceptance of WITT's narrow interpretation would mean s 18 could be outflanked and this would frustrate the purpose of the PD Act. It follows that s 160 does not allow me to order disclosure of other legislation (in this case s 18 of the PD Act) renders the evidence in question inadmissible.

[13] Reference is made to the PD Act's purpose – namely a protection scheme that will promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in organisations.

[14] Dr Fenton then submits:

If the protected disclosure is relevant to any civil proceedings, then such evidence must be inadmissible because the whistle-blower's liability to the proceedings would be, as a matter of logic and law, at least in part, 'by reason of' having made the protected disclosure.

³ *Revanjak v Wellington International Airport* [2011] NZEmpC 31

⁴ *NZ Meat Workers Union Inc v South Pacific Meats Ltd and Talley* [2015] NZEmpC 138

[15] It is argued the only way of ensuring proceedings are not *by reason of* a protected disclosure is by holding that the protected disclosure is inadmissible and requiring the applicant prove its case by other means. It follows that if the protected disclosure is the only relevant evidence then by the effect of allowing disclosure is to render the whistle blower liable to civil proceedings.

[16] This is, I conclude, a persuasive argument especially when I consider it in context with s 19 of the PD Act. Section 19 provides that every endeavour should be made to protect the identity of a protected disclosures author. In other words, and notwithstanding the fact WITT know Dr Fenton was the author of the disclosure to NZQA they would not in the normal course of events have had that knowledge. In other words they would not normally have been able to attribute the documents content to her and would then have been incapable of using it to prove its allegation in respect to the unrelated obligation.

[17] When I consider this, the submission and the law I conclude this is not a document I should order the disclosure of.

Costs

[18] Costs are reserved but for the parties benefit I express the view they should probably be dealt with as part of a final consideration after the substantive claims between them have been resolved.

M B Loftus
Member of the Employment Relations Authority