

Determination Number: WA 107/07  
File Number: 5045450

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

*Under the Employment Relations Act 2000*

BETWEEN                      David Balfour (Applicant)

AND                              Central Hawkes Bay Support and Counselling Service  
   Inc (Respondent)

Member of Authority:      P R Stapp

Representatives:            Kerry Single for Applicant  
   Bill Calver for Respondent

Investigation Meeting:     Napier, 12 June 2007

Determination:              31 July 2007

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] David Balfour has claimed that his previous employer (CHBSC) breached a confidentiality provision in a settlement signed off by a mediator from the Department of Labour. He says that on 5 August 2005 he became aware of documents in his previous employer's possession. He says he had no knowledge of the documents until they were disclosed after his employment.

[2] Mr Balfour has claimed the creation, existence, disclosure and use of these documents held by his previous employer were prejudicial, and that his employer did not act in good faith when it did not disclose the documents to him earlier.

[3] He has alleged his previous employer has acted dishonestly and colluded with the ACC and Police to deceive him.

[4] Proceedings were brought against him by the ACC and he was found not guilty of fraud. Mr Balfour seeks the costs he was put to in having to defend himself in the District Court. He says that the cost was a directly caused by the respondent keeping and giving a copy of the settlement and other documents under a search warrant and that the documents should have been destroyed or kept secure. He has claimed \$10,150.

[5] In the statement of problem Mr Balfour had been seeking that all documentation held by the respondent that related to him be given to him. My understanding is that this is now not required because Mr Balfour has the documents. He is seeking compensation under s 123 1 (c) (i) of the Employment Relations Act (the Act) and costs.

[6] The respondent has challenged the Authority's jurisdiction under s 161 to proceed with the allegations and says that any personal grievance is out of time under s 114 of the Act. It also contends that a personal grievance is prohibited by s 103 of the Act since Mr Balfour is no longer an employee of the respondent and none of his terms and conditions of employment survive the ending of the relationship, save for the terms of settlement as a matter of contract.

## **Issues**

[7] I can summarise the issues as follows. Has the respondent breached the confidentiality provision of a record of settlement signed off by a mediator from the Department of Labour when documents, including the record of settlement, were handed over to the Police under a search warrant? Has the respondent breached any obligation of good faith to the applicant? Does the Authority have jurisdiction to consider a personal grievance claim? Can the Authority award costs associated with other Court proceedings if such costs were caused by the respondent in unreasonable circumstances?

## **The Facts**

[8] Mr Balfour was employed by Central Hawkes Bay Support and Counselling Inc as a social worker from 12 January 2004. He says that during his interview he advised Diana Petersen the President that he had RSI and she recorded it.

[9] In early March 2004 Diana Petersen, CHBSC President, was contacted by an investigator from ACC who was conducting an inquiry into Mr Balfour. Ms Petersen and the investigator met on 3 March 2004 and she says she confirmed Mr Balfour was an employee and not a volunteer.

[10] During May and June 2004 Mr Balfour was absent from work with an aggravated back injury. He returned to work on reduced hours and the parties attended mediation provided by the Department of Labour on a disciplinary issue over an unclosed door.

[11] On 1 July 2004 Mr Balfour left his employment with CHBSC under agreed terms of settlement signed off by a mediator from the Department of Labour. The agreed terms had a provision that the terms of the settlement and all matters discussed in mediation would remain confidential. Also, the agreed terms were expressed to be in “full and final settlement of all matters between the parties and relating to the employment and the termination thereof”.

[12] A few weeks later Mrs Petersen was contacted again by the ACC investigator. He was making further enquiries about Mr Balfour. She says she could not give him any details. As a result there was a suggestion that a search warrant would be needed to obtain information about Mr Balfour and his employment with CHBSC. She also informed the investigator that she had Mr Balfour’s details in a file at home. She told the Authority that she took the file home because there was no safe place to keep it at the workplace and because there were problems with Mr Balfour at work. The Police then telephoned Mrs Petersen to arrange executing a search warrant. This was done at her home address and documents were seized at the premises, although the name on the warrant for the place that the documents could be seized from was a different place to Mrs Petersen’s home.

[13] It was not until 2 August 2005 that Mr Balfour discovered through document discovery for the District Court hearing that the settlement had been seized along with other documents relating to the period of his employment that referred to him personally and that he says he had never seen before. His advocate then raised a personal grievance that was denied by the respondent since the parties had concluded a full and final mediated settlement on 1 July 2004.

### **Determination**

[14] Mr Balfour is no longer an employee of the respondent and none of his terms and conditions of employment survive the ending of the relationship, save for the terms of settlement as a matter of contract. Also the settlement was agreed in “full and final settlement of all matters between the parties and relating to the employment and the termination thereof”. Thus, Mr Balfour cannot succeed with a claim of personal grievance and a breach of good faith. This rules out any remedy for compensation under s 123 (c) (i) of the Act. This also impacts on other evidence that I heard, and have not had to give any weight to, concerning Mr Balfour’s relationship with ACC, banking his pay and any need for a workplace assessment; all of which Mr Balfour and Mrs Petersen had different points of view on.

[15] A question does arise whether or not the employer has breached its obligation to Mr Balfour when documents he says he knew nothing about have come to light after the settlement was reached. In this case the settlement was all embracing as full and final and the confidentiality applied to all matters discussed in mediation. Mr Balfour risked the possibility that other matters could come to light and he took the risk of settling on terms that were full and final. Thus he cannot rely upon them for a personal grievance on a cause of action coming to his notice after such a settlement. That was his risk.

[16] I accept Mrs Petersen’s defence that as President of the respondent she believed that to keep the documents secure (without security available at the work place) she needed to take the documents home and place them in her safe. I am satisfied that this is a defence to her position on the matter. It also appears that she tried to keep her information on Mr Balfour confidential, while leaving a clear impression with the ACC and Police that she was in possession of some documents,

without telling them what the documents were. Thus a search warrant was executed on her at her home by prior arrangement made as to her availability. It is quite understandable that Mr Balfour is suspicious and critical of her action. However, I am satisfied she told the truth at the time, which is nothing less than what would be expected.

[17] Furthermore Mrs Petersen had to comply with a search warrant involving the Police and I accept she did what she believed she had to do in such circumstances without inviting trouble from the Police. This is a defence that I accept.

[18] Finally the record of settlement is open to scrutiny for enforcement and to meet any legal requirements even although it is confidential. Therefore it is more than possible access to such a document will be required in certain circumstances for reporting, enforcement and any legal requirements that parties are answerable for.

[19] Mr Balfour has raised a question about the search warrant's accuracy and breaches of privacy. They are not matters in the Authority's jurisdiction since the employment has ended and Police actions are not subject to the Authority's scrutiny.

[20] I conclude that without any wilful and deliberate conduct in being a party to ACC's enforcement role that CHBSC cannot be held liable for costs between Mr Balfour and the ACC in the form of damages.

[21] Therefore the applicant's claim for a breach of confidentiality and a breach of good faith and damages must be dismissed

## **Orders**

[22] The applicant's claims are dismissed.

**Costs**

[23] Costs are reserved.

P R Stapp  
Member of the Authority