

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 136/09  
File Number: 5280493

BETWEEN Plumbers, Gasfitters and  
Drainlayers Board  
Applicant

AND Phillip Routhan  
First Respondent

AND Chapman Tripp  
Second Respondent

Member of Authority: Denis Asher

Representatives: Geoff Davenport for the Board  
Pheroze Jagose and Jane Keane for the Respondents

Investigation Meeting Wellington, 17 September 2009

Submissions On the day

Determination: 18 September 2009

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**INTERIM DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] By way of an application for urgency filed on 16 September 2009 the Board seeks an interim injunction requiring Mr Routhan to immediately return all files and documents (including computerised records) that belong to the Board or relate to its business, including any such material held on behalf of Mr Routhan by any third party including the second respondent.

- [2] In his statement in reply received on 17 September Mr Routhan says amongst other things that the documents he has are copies of material held by the Board, that other than under the Protected Disclosures Act 2000 he has not disclosed any documents sourced from the Board other than to his solicitors, the documents are all held on his instructions by his solicitors for their advice to him in relation to his employment by the Board, he is due to attend an interview on 18 September with an independent investigator into various issues raised against him by the Board and his ability to prepare for and constructively participate in the investigation would be materially hampered by the applicant's demand for return of all documents.
- [3] Because of the urgency attending this problem the parties have not attempted mediation.

### **Background**

- [4] Since 2006 Mr Routhan has been the registrar or chief executive of the Board. It is a statutory appointment made under s 13 of the Plumbers, Gasfitters and Drainlayers Act 2006, in which capacity he is the principal advisor to the Board.
- [5] Mr Routhan has been suspended on full pay while an investigation is conducted into issues of potentially serious concern in respect of his conduct.
- [6] Mr Routhan has confirmed through letters from his solicitors that he or the second respondent is holding Board documents, including personnel files relating to other Board staff and documents from files relating to the business of the applicant.
- [7] The Board has instructed Mr Routhan to return the documents and all copies of the same but he has refused to do so. Mr Routhan accepts the documents are the property of the Board.

### **Applicant's Position Summarised**

- [8] The documents belong to and are the property of the Board.
- [9] The Board has repeatedly sought their return.

- [10] Mr Routhan remains an employee and his employment agreement requires him to comply with the instructions of the Board (e.g. clause 1.2 of attachment A to the statement of problem).
- [11] Mr Routhan has no lawful right to refuse the instruction.
- [12] None of his actions are in any way authorised by the Protected Disclosures Act.
- [13] The assertion that the return of the Board's own property will disclose legal advice is a nonsense and misapplies relevant case law.

### **Respondent's Position Summarised**

- [14] The documents in Mr Routhan's possession are also in the Board's possession.
- [15] Mr Routhan's ability to participate in (today's) independent investigation will be materially hampered by the return of the documents "*(whether originals or copies)*" (par 1.7 statement in reply).
- [16] In exercising his responsibilities Mr Routhan has become aware of:
- i. serious wrongdoing, in terms of the Protected Disclosures Act 2000, in or by the Board;*
  - ii. apparently systemic gasfitting certification failures ... ;*
  - iii. apparent substantial failures by the Board's employees ... ; and*
  - iv. apparent material non-disclosure to him on enquiry of the Board's employees ... as to their performance of certification and associated disciplinary complaint work.*

(par 2.3 statement in reply)

- [17] In pursuit of these matters Mr Routhan took Board documents home and worked on them outside of normal hours.

- [18] Mr Routhan has since July 2008 been subjected to a sustained campaign by members of the present Board to undermine him in his role.
- [19] By letter of 3 June he was advised by the Board he was the subject of a disciplinary investigation. In preparation for the investigation he communicated with his solicitors and provided copies of relevant documents sourced from the Board, so as to obtain legal advice and representation.
- [20] A number of the documents sourced from the Board presently in his solicitors' possession clearly indicate the subjects on which he has been seeking confidential legal advice. These subjects are privileged from disclosure: *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NCA 350: Mr Routhan does not waive that privilege.
- [21] No interim relief is justified or warranted.

### **Discussion and Findings**

- [22] It is accepted by the parties that the interim injunction order sought only impacts Mr Routhan and not the second respondent.
- [23] The Authority has the power to grant injunctions: *Credit Consultants Debt Services NZ Ltd v Wilson* (No 2) [2007] 1 ERNZ 205, pars 46-47 & 66.
- [24] During the Authority's investigation counsel for Mr Routhan, Mr Pheroze Jagose confirmed there was no argument that the provision of documents by his client to his solicitors was protected by the Protected Disclosures Act.

### **Legal Tests**

- [25] The relevant questions to be answered for the grant of interim injunction/compliance orders are well established: *Allright v Canon New Zealand* AC unreported, Couch J, 3 December 2008, 47/08:
- a. Whether there is an arguable case for substantive relief.
  - b. Whether there is an adequate alternative remedy.

- c. If not, where the balance of convenience lies.
- d. What the overall justice of the case requires, taking all aspects of it into account.

[26] The facts summarised above, which are largely undisputed, support the Board's claim it has a seriously arguable case, that Mr Routhan is failing to comply with a lawful instruction and the retention of the documents is jeopardising its business and staff morale. The Board has a legitimate claim to the return of its property which Mr Routhan is refusing to return.

[27] Retention of the documents is not justified by the fact that they are all or largely all copies: *C E Elley Limited v Wairoa-Harrison* (1987) 1 NZELC 95,620.

#### **Adequate Alternative Remedy**

[28] I do not see – nor do I understand it to be argued by the respondent – that there is any alternative remedy available to the Board.

#### **Balance of Convenience**

[29] The balance of convenience plainly lies with the Board as Mr Routhan is able to access relevant documentation arising out of employment relationship problems by, if necessary, applying to this Authority to make use of s. 160 of the Act. I note here that Mr Routhan had considerable time to seek the documentation by requesting it of the Board as he enjoyed 15 days notice of its investigation of his conduct.

[30] In the meanwhile the loss of this documentation (a list of which only being provided to the Board today) undermines the applicant's ability to perform its statutory functions and needlessly violates the privacy of other employees.

#### **Overall Justice**

[31] It would be profoundly inequitable of the Authority to condone Mr Routhan's unauthorised removal of Company property by acceding to his argument that

their return would somehow disclose the nature of the legal advice he has sought and been provided. Much of that advice can any way be conjectured on and anticipated by experienced counsel from the exchanges to date between the parties.

[32] Mr Routhan also enjoys a substantial defence should the Board proceed to make findings in respect of his conduct if he has been denied access to its relevant documentation.

[33] The avenues available to Mr Routhan to legitimately access relevant documentation held by the Board in respect of any issue between himself and the applicant is such that the overall justice requires the granting of the application sought.

### **Determination**

[34] Consistent with the resolution sought in the Board's statement of problem at par 4.1 (i) I make an interim injunction requiring Mr Routhan to return forthwith to the applicant all files and documents that relate to any staff member or any consultant of the Board and any files and documents including computer files that relate to any business of the Board including any such documents or copies held on behalf of him by any third party including the second respondent.

[35] Costs are reserved.

**Denis Asher**  
**Member of the Employment Relations Authority**