

[4] That statement was emailed to all WIFT members and posted on the WIFT website.

[5] Ms Newborn and her representative both sought the removal of this statement and the statement was removed after about 24 hours.

[6] Ms Newborn contends that the statement “*included confidential details of the process by which this settlement had been reached*”.

[7] The evidence before the Authority discloses that Ms Newborn had herself commented on the matter of her departure by a memorandum to members dated 14 September 2012, three days before the letter complained about. Ms Newborn’s circular to members has this of relevance to say:

With very heavy heart I write to say I am leaving. Unfortunately with severe funding shortfalls the position of executive director is no longer viable.

The issue

[8] The only issue for determination in this case is whether, by doing what it did, WIFT breached the law. There is no question there was a statement made by WIFT referring to the departure from its service of Ms Newborn; the question for the Authority is whether that statement fell within the terms of the confidentiality exclusion, or not.

[9] WIFT acknowledges the statement was made, stands by the statement as being an accurate reflection of what actually happened and contends that the statement is not caught by the confidentiality requirements of s.148 of the Employment Relations Act 2000 (the Act) because it refers only to the fact of the settlement and does not describe or refer to the terms of that settlement.

Determination

[10] There is no dispute on the facts in this case. The only issue is whether what WIFT did was within the terms of the law or not. Importantly, WIFT maintains that its statement by the Chair was in response to Ms Newborn’s own statement which predated the Chair’s letter by some three days.

[11] Ms Newborn's own communication dated 14 September 2012 confirms that she is leaving the organisation (the heading to the message is "*Executive Director leaving*"), it confirms that she is sad about leaving, and it makes clear that "*with severe funding shortfalls the position of executive director is no longer viable*".

[12] The Authority's conclusion from this message is first that Ms Newborn indicates that she is leaving the role of executive director, that she is sad to be leaving the position and that the position is no longer viable because of the organisation's funding shortfall. A reasonable person receiving this message would conclude that the position of executive director had been disestablished or was in the process of being disestablished, as a consequence of the funding shortfall.

[13] WIFT says that the message Ms Newborn complains about from the WIFT Chair was effectively made in response to member inquiries after receipt of Ms Newborn's own message. As the Authority has already noted, it considers a reasonable person reading Ms Newborn's circular would conclude that the executive director position had been disestablished. What the WIFT message conveys is first that there were consultations between Ms Newborn and WIFT, second that the executive director position was declared redundant, third that there were confidential negotiations with Ms Newborn and her representative and fourth that those negotiations had been successfully concluded with a settlement to Ms Newborn and that the organisation wishes her well.

[14] WIFT maintains that, in effect, all of that information is in the public domain whereas Ms Newborn maintains that all of it is not in the public domain.

[15] So far as Ms Newborn is concerned, the implication from that message from the WIFT Chair is that she has engaged with the employer on a voluntary basis and then left the organisation with a payout.

[16] The Authority considers that Ms Newborn has already put into the public domain the fact that her position has effectively gone so the information in the WIFT letter that the position had been "*declared redundant*" is not new information. It might be contended that it contains the additional gloss of a redundancy as distinct from the disestablishment of the position in an abstract sense, but the practical reality is the same; the position has gone and so the occupant of the position may no longer be employed. But as the Authority has already noted, it is satisfied that Ms Newborn

has already provided that information anyway, both by confirming her own departure and by indicating that the position is “*no longer viable*”.

[17] What is new is the contention that WIFT “*consulted*” with Ms Newborn. By saying that consultation took place, does WIFT establish that it has breached the terms and conditions of s.148 of the Act? The Authority answers that question in the negative. For an employer to say that it has consulted with an employee is to do no more than confirm that the employer is conforming with the requirements of the law. All good and fair employers informed by the good faith principle in the Act, consult with their employees, particularly in relation to the disestablishing of positions. Indeed, that is a statutory requirement in s.4 of the Act and it is difficult to see how confirmation that that has happened can breach WIFT’s obligations.

[18] The next aspect is the observations of WIFT that it “*entered into confidential negotiations*” with Ms Newborn and then reached a settlement with her. Again the question arises whether these observations, referring as they do to a common process when there is a redundancy or a disestablishing of a position, place WIFT in breach of its obligations. Again the Authority concludes that they do not.

[19] WIFT specifically refers to “*confidential*” negotiations which emphasises the requirement that neither party may furnish the terms of those negotiations to outsiders. Again, the Authority is influenced by the entirely usual nature of the matters referred to in the communication. Where a position is disestablished and the person occupying that position has left, an employer confirming that it has concluded a leaving arrangement on confidential terms with that person conveys no more than one would expect of a good and fair employer. Ms Newborn herself has already indicated both that the position she was in has gone and that she has left that position and left the organisation, so there can be little doubt about the general context. What is more, Ms Newborn has identified the reason for the position disappearing and therefore for her departure as a funding shortfall which of course, as with a redundancy situation, is effectively a no fault situation where neither of the principal protagonists can be blamed for the inability to maintain the position.

[20] Looking at the issue in the round, the law protects the terms of a settlement but not the fact of a settlement. If it is contended, as it might be, that the Chair of WIFT went further in her observations than simply confirming the fact of a settlement, the Authority is satisfied that what she has done is refer only to matters that are already in

the public domain, or are not specifically protected by the law. In order to fall within the terms of s.148 of the Act, the matter complained of must comprise:

... any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of a mediation or comprise the terms of settlement of the agreement between the parties.

[21] What WIFT's statement comprises is essentially the briefest of comments about the nature of the process that the parties undertook to get to the point at which there was a settlement and that process, described with the degree of generality, is an absolutely stock standard process which any outsider familiar with the employment relations jurisdiction would recognise.

[22] In summary, the Authority is not persuaded that anything that WIFT said in the complained about communication falls within the terms of s.148 of the Act. To describe in a general way the process by which a matter had been amicably resolved without giving any details about the nature of that resolution is not, in the Authority's opinion, a breach of the statute.

[23] Of course, many parties, when faced with difficult situations around restructuring, include in their settlement agreement a form of words to be used to explain the position to outsiders. That is a process which the Authority commends to parties because it obviates the kind of difficulty created in the present case.

Costs

[24] Costs are reserved, but the Authority does observe that while the respondent employer has been completely successful, the attendances from counsel would have been modest, given the sensible way in which the parties have conducted this matter, and the notion that costs might lie where they fall is commended to the parties in the hope that no issue about costs will arise.

James Crichton
Member of the Employment Relations Authority