

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 72
5392332
5394761

BETWEEN ALICE KIWA, JANELLE
KIWA and HAYDEN CLARK
Applicants

A N D PHIL'S PLACE LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: M Whitehead, Advocate for Applicants
S Grice, Counsel for Respondent

Investigation Meeting: 25 February 2014 at Tauranga

Submissions Received: 25 February 2014 from Applicants
25 February 2014 from Respondent

Date of Determination: 3 March 2014

ORAL DETERMINATION OF THE AUTHORITY

- A. The counterclaim for breach of contract pursuant to s134(1) Employment Relations Act 2000 is dismissed.**
- B. An order pursuant to s160(1)(f) Employment Relations Act 2000 Mr Whitehead no longer continue acting for the applicants in this proceeding.**

Employment relationship problem

[1] This is the written record of an oral determination of a counterclaim and application delivered on 25 February 2014. The respondent filed a counterclaim alleging the applicants' breached a confidentiality clause in their employment agreements, pursuant to s.134(1) Employment Relations Act 2000 (the Act). The

breach occurred through statements made by their current advocate, Max Whitehead, to the media on or about October 2013. As a consequence it also applied for an order Mr Whitehead no longer continuing acting given his involvement in the counterclaim. The Authority had directed at an earlier teleconference the counterclaim and application as to representation were to be dealt with first.

[2] The applicants deny there was any breach, or alternatively that they instructed Max Whitehead to make the comments in breach of their agreements. They were prepared to continue without legal representation.

Issues

[3] The issues for determination are:

- a) Whether there was a breach of clause 16 of the applicants' employment agreements by statements made by Mr Whitehead to the media in October 2013 and
- b) What orders should flow, including damages (if any) and orders about the applicants' future representation?

Facts leading to the dispute

[4] All of the applicants were confirmed they were aware of and understood the below clause 16 in their employment agreements:

*16. **Confidentiality:** The Employee shall treat as confidential, and must not disclose, any confidential information (eg information of a confidential nature relating to the Employer, its business or customers of the business) that the Employee becomes aware of in the course of employment. The Employee undertakes not to disclose any details regarding the Employer and associated entities including but not limited to its financial affairs, Phillip Hugh Witschke-Rudd's contact details or any details that may identify him to the public, to any person during the term of employment. This restriction shall continue to apply after termination of your employment.*

[5] None of the applicants were aware of any house rules which explicitly forbade staff from speaking or commenting to media or any outside organisation about their employer. They were generally aware there was a ban on speaking to media and outside organisations.

[6] On or about 16 August 2012 the respondent's lawyers became aware of the media obtaining information from disgruntled staff. The respondent wrote to the applicants' previous representative reminding them of their confidentiality obligations.¹

[7] In or about October 2013 Mr Whitehead was contacted by various media. Articles allegedly quoting him were published in the *Herald On Sunday*, *Bay of Plenty Times* and *Sun Live*.² The articles included the following comments:

- Confirmation he was representing three applicants in a hearing with Phil's Place Limited;
- That the applicants had tried mediation and had been unsuccessful;
- *"The situation is in the midst of negotiation and I am a bit apprehensive to give any information"*;
- *"I will be in touch with the lawyers tomorrow and hopefully we will be able to discuss things in a more beneficial way"*;
- The issues are believed to be about the way the three employees were dismissed from the restaurant.

[8] The respondent became aware of these articles and filed the counterclaim and application before the Authority today.

Was there a breach of clause 16 of the applicants' employment agreement?

[9] The respondent submits there has been a breach of the second part of clause 16. This bars an employee from disclosing *"any details regarding the employer and associated entities ..."* and is not limited to the specific terms detailed thereafter, such as its financial affairs and Mr Rudd's contact details or details that identify him to the public. It says these comments disclosed details regarding the employer. It also submits this clause is not restricted to information gained during the employee's employment. It therefore applies to any post-employment dispute with the respondent as this is information about the employer covered by the clause. It

¹ Letter Cooneys Lees Morgan to D Gelb dated 16 August 2012, document KK1 statement of problem received 10 September 2012.

² Article *Herald on Sunday* 27 October 2013; *Bay of Plenty Times* 28 October 2013; and *Sun Live* 28 October 2013

submitted the applicants would have instructed Mr Whitehead to make the statements because they were seeking to leverage settlement.

[10] Oral evidence was given by each of the applicants and Mr Whitehead. Mr Whitehead believed the media already knew he represented the applicants and the existence of the dispute. All witnesses confirmed the dispute between these parties was publically known prior to Mr Whitehead's comments in October 2013. Janelle Kiwa gave evidence she had been contacted by the media prior to October 2013 and had refused to make any comment due to the confidentiality clauses.

[11] The applicants' liability for statements made by Mr Whitehead must be dependent upon the terms of the contract for service they have with him. Detail of their contract for service was unknown. It was not explored in cross-examination nor a copy of the contract produced in evidence. Janelle Kiwa had instructed another solicitor during this period – it is unknown if Mr Whitehead was instructed to act for her at all when these statements were made.

[12] The Authority was asked to infer Mr Whitehead had a 'general instruction' to make media statements to leverage settlement on behalf of these applicants. All applicants denied giving Mr Whitehead instructions to comment to the media at all. They had no idea Mr Whitehead had made these statements until after the fact. The applicants were aware of their confidentiality obligations, and it is inferred, would not have set out to deliberately breach them in any way.

[13] Mr Whitehead accepted he made the comments in quotation marks or statements similar to those. None of those statements contain the specific details prohibited by clause 16. He denied making statements about mediation, his representation or the issues. The evidence he made those statements must be inferred from the articles. The articles may be inaccurate. The respondent did not seek to produce the writer or their notes to show accuracy or corroboration. In the circumstances the Authority the evidence is equivocal.

[14] Disgruntled employees, other than these applicants, were speaking to the media about this dispute. Some of the information in the statements may have been released by these employees. The references to mediation, negotiation and the alleged issues are not unsurprising in the context of an employment dispute. These matters could have been surmised from the fact of the dispute as opposed to Mr Whitehead

making comment. These facts cannot be confidential information where they are publically known and/or usual features of this jurisdiction.

[15] This matter was pleaded as a penalty action under s.134(1) of the Act. It may have been more properly brought as an action under s.134(2) against Mr Whitehead. It was not.

[16] Standing back and considering the evidence before it, the Authority is under no doubt that these applicants did not directly or generally instruct Mr Whitehead to make the comments he made. All applicants appeared very aware of the prohibition on speaking to the media and acted accordingly. All denied speaking to the media at all. It seems improbable they would instruct Mr Whitehead to comment in breach of the terms of their agreement.

[17] The counterclaim for breach of contract pursuant to s134(1) Employment Relations Act 2000 is dismissed.

Application for order Mr Whitehead not continue acting

[18] The respondent seeks a ruling Mr Whitehead not continue to act because he was a witness and advocate in this proceeding. The Authority allowed Mr Whitehead to make submissions regarding his continuing to act. He submitted there was no longer a conflict of interest as the Authority had disposed of the above counterclaim. Although he was required to give contentious evidence, the Authority was able to regulate its own procedure from hereon to prevent any conflict of interest arising. He believed this was an attempt by the respondent to delay and dispose of another advocate. A number of advocates whom had ceased to act for these applicants in the past due to alleged conflicts of interest raised by the respondent.

[19] Mr Whitehead was a witness in the counterclaim. His evidence was contentious because it gave rise to the counterclaim. A conflict of interest arose between Mr Whitehead's interests and the applicants, especially if his actions gave rise to an actionable claim against the applicants.

[20] The Authority is empowered to “*follow whatever procedure the Authority considers appropriate*” (s160(1)(f). In carrying out its role, the Authority must “*comply with the principles of natural justice*” (s157(1)(a).

[21] As an advocate, Mr Whitehead is not subject to the rules of professional conduct governing the conduct of solicitors, nor subject to any supervisory body such as the New Zealand Law Society. This does not prevent the Authority from making directions and orders to protect public confidence in the even handed administration of justice.

[22] It is not generally appropriate for the same person to appear as both counsel or advocate and as a witness.³ Lawyers must cease to act “*if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court.*”⁴ This is the situation here albeit involving a non-legally qualified advocate. He has no dual role as both union official and advocate. His evidence provided the basis for the counterclaim against the applicants.

[23] In the circumstances the Authority orders pursuant to s160(1)(f) Employment Relations Act 2000 Mr Whitehead no longer continue acting for the applicants in this proceeding.

T G Tetitaha
Member of the Employment Relations Authority

³ *James and Co Ltd v Hughes* [1995] 2 ERNZ 432 (EmpC); *McDonald v Mason Services Ltd* [1998] 2 ERNZ 346 (EmpC); *Reid v New Zealand Fire Service Commission* [1998] 3 ERNZ 745 (EmpC) at 749

⁴ Rule 13.5.3 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008)