

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 101  
5366912

BETWEEN CANTERBURY EDUCATION  
SERVICES SOCIETY LIMITED  
Applicant  
AND GEOFFREY GILLAM  
Respondent

Member of Authority: Rachel Larmer  
Representatives: Linda Ryder, Counsel for Applicant  
Dean Kilpatrick, Counsel for Respondent  
Investigation Meeting: On the papers  
Submissions: 09 May 2012 Respondent's submissions  
16 May 2012 Applicant's submissions  
21 May 2012 Respondent's submissions  
22 May 2012 Applicant's submissions  
Determination: 23 May 2012

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**DETERMINATION OF THE AUTHORITY**

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- A The Authority has jurisdiction to determine Canterbury Education Services Society Limited's claim that Mr Geoffrey Gillam has breached contractual confidentiality obligations.**
- B Mr Gillam's strike out application is dismissed.**

**Employment Relationship Problem**

[1] This is an application by Mr Gillam to strike out Canterbury Education Services Society Limited's (CES's) substantive claim that he has breached his post termination of employment confidentiality obligations. Mr Gillam says that CES's claim is a tort action over which the Authority lacks jurisdiction because it does not have jurisdiction to hear any action founded upon a tort.

[2] If his strike out application is unsuccessful, then Mr Gillam seeks to counterclaim against CES for its alleged breach of the Deed of Settlement signed by the parties on 7 September 2011 (the DoS). If his counterclaim is successful, Mr Gillam seeks an order that CES comply with the DoS. He also seeks indemnity costs.

[3] CES provides accounting and financial services to schools. Mr Gillam was employed by CES as its Financial Services Manager from 1988 until his employment ended on agreed terms on 29 July 2011. The catalyst for Mr Gillam's agreed exit was CES's restructuring of his position.

[4] In its substantive proceeding CES alleges that in October 2011 Mr Gillam retained and/or used its confidential information in breach of the confidentiality provisions in;

- a. His Individual Employment Agreement (IEA) dated 31 August 2000;
- b. A Record of Settlement (RoS) dated 20 July 2011 which was entered into under s.149 of the Employment Relations Act 2000 (the Act);
- c. The DoS.

[5] If its breach of confidentiality claim succeeds, CES seeks:

- a. Damages for the alleged breaches of the IEA and DoS;
- b. That the maximum penalty of \$10,000 be imposed on Mr Gillam for each breach of the RoS;
- c. Indemnity costs.

[6] This determination addresses the jurisdictional issue only.

## **Issues**

[7] The issues for determination are:

- a. Is the applicant's claim a tort action?
- b. If not, does the Authority have jurisdiction to determine CES's claims that in October 2011 Mr Gillam:

- i. Breached his contractual confidentiality obligations as set out in clause 15 of his IEA; and
  - ii. Breached the confidentiality provisions in the RoS; and
  - iii. Breached the DoS.
- c. Does the Authority have jurisdiction to determine Mr Gilliam's counterclaim that CES breached the DoS?
- d. If so, does it have jurisdiction to order compliance with the DoS, which is the remedy Mr Gillam seeks should CES be found to have breached it?

**Is the applicant's claim a tort action?**

[8] Mr Kilpatrick submits that CES's breach of confidence claim is a tort action.

[9] I do not accept that. CES has not pleaded a breach of tort. It has claimed that Mr Gillam breached the confidentiality provisions in his IEA, the RoS, and the DoS. CES's claims therefore relate to alleged breaches of contractual obligations. The Authority has jurisdiction over an employment relationship problem which involves breach of contract claims if such claims relate to or arise out of an employment relationship.<sup>1</sup>

[10] It is not disputed that CES and Mr Gillam were in an employment relationship. I also consider that all of the contractual documents which CES allege Mr Gillam has breached were related to and arose out of the employment relationship, because they would not have been entered into *but for* the employment relationship.<sup>2</sup>

[11] Even if the *but for* test is not the correct approach,<sup>3</sup> I still consider the essential character of CES's breach of contract claims is found entirely within the employment relationship, which is consistent with the test adopted by the full bench of the High

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<sup>1</sup> S.5 ERA.

<sup>2</sup> The "but for" test was adopted by the Employment Court in *Waikato Rugby Union v New Zealand Rugby Football Union* [2002] 1 ERNZ 752.

<sup>3</sup> See obiter by Court of Appeal in *Kennedy v Rolling Thunder Motor Company Limited* [2010] NZCA 582.

Court in *BDM Grange Ltd v Parker*<sup>4</sup> for determining whether a matter fell within s161(1)(r) of the Act.

**Does the Authority have jurisdiction to determine CES's alleged breach of the IEA claim?**

[12] Mr Gillam submits:

- a. The Authority's jurisdiction over the breach of IEA claim is excluded by the High Court decisions in *BDM Grange Ltd v Parker*<sup>5</sup> and *Pain Management Systems (NZ) Ltd v McCallum*<sup>6</sup> because it only has jurisdiction over breach of confidence claims which are based on a breach of an employment agreement arising from wrongdoing by an employee during their employment;
- b. The RoS excludes the Authority's jurisdiction to determine the breach of the IEA claim;
- c. The DoS excludes the Authority's jurisdiction to determine the breach of the IEA claim.

[13] The Authority has specific jurisdiction under s.161(1)(b) of the Act to determine matters related to a breach of an employment agreement.

[14] The confidentiality clause in Mr Gillam's employment agreement dated 31 August 2000 stated that his confidentiality obligations continued after the termination of his employment.<sup>7</sup>

[15] Section 161(1)(b) of the Act gives the Authority jurisdiction over a claim that Mr Gillam's actions after his employment ended<sup>8</sup> breached his contractual confidentiality obligations<sup>9</sup> because the confidentiality term in his IEA continued to apply after the termination of his employment.

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<sup>4</sup> [2006] 1 NZLR 353, at [66].

<sup>5</sup> *Supra*.

<sup>6</sup> HC Christchurch CP72/01, 14 August 2001.

<sup>7</sup> Clause 15 IEA.

<sup>8</sup> i.e. in October 2011.

<sup>9</sup> As per clause 15 IEA.

[16] The Employment Court in *Mayne v Polychem Marketing Limited*<sup>10</sup> recognised that an express confidentiality term prohibiting the disclosure of confidential information after the employment has ended continues in force and can be enforced (say by way of breach of contract proceedings) notwithstanding that all of the other terms of the IEA may have expired.

[17] Mr Gillam's strike out application therefore requires the Authority to determine whether its specific jurisdiction under s161(1)(b) of the Act has been excluded by:

- a. the two High Court cases relied on by Mr Kilpatrick; and/or
- b. the full and final settlement provisions set out in clause 2 of the RoS; and/or
- c. the settlement provisions in the DoS.

*Do the High Court cases relied on by Mr Gillam exclude the Authority's jurisdiction under s161(1)(b) of the Act?*

[18] I find the two cases relied on by Mr Kilpatrick do not exclude the Authority's jurisdiction under s.161(1)(b) of the Act to determine whether Mr Gillam breached his IEA because neither case is relevant to the issues which require determination in CES's substantive proceedings.

[19] *BDM Grange*<sup>11</sup> can be distinguished from the present case because it involved a breach of confidence claim relating to a director, not an employee. Although the director had also been an employee his employment agreement had not contained an express confidentiality clause, unlike Mr Gillam's IEA.

[20] *Pain Management*<sup>12</sup> can also be distinguished, as per the Employment Court's decision in *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)*<sup>13</sup>, on the grounds it involved tortious actions and contractual claims unrelated to the

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<sup>10</sup> [2012] NZEmpC 60.

<sup>11</sup> Ibid 4.

<sup>12</sup> Ibid 6.

<sup>13</sup> Ibid 2.

employment contract and which were remote from the employment relationship. CES's claim is directly based on an alleged breach of the IEA.

*Does clause 2 in the RoS exclude the Authority's jurisdiction under s161(1)(b) of the Act?*

[21] Mr Kilpatrick submitted that clause 2 in the RoS settled all employment related claims, including any future claims, which therefore excludes the Authority's jurisdiction to determine the breach of IEA claim.

[22] The RoS contains two potentially conflicting clauses. Clause 2 is a general full and final settlement clause, whilst clause 9 expressly continues Mr Gillam's contractual and common law confidentiality obligations. The Authority is required to determine which clause should prevail.

[23] Clause 2 of the RoS states:

This is a full and final settlement of all matters between the parties arising out of their employment relationship, including all claims known or unknown at the time this settlement was entered into. This settlement discharges all claims, whether past, present or future, and is to be construed in its widest sense.

[24] Clause 9 states:

The Employee undertakes to comply with his obligations of confidentiality pursuant to his employment agreement and at common law.

[25] Clause 9 clearly expressly imposes an express continuing obligation on Mr Gillam to comply with his confidentiality obligations, so I find clause 9 takes precedence over clause 2.

[26] The parties obviously intended Mr Gillam's confidentiality obligations to continue. I consider this continuing confidentiality obligation implies that the parties did not intend to exclude CES's rights to pursue future claims relating to an alleged breach of confidentiality.

[27] If clause 2 took precedence over clause 9 there would have been no point to clause 9 because CES would not have been able to action any alleged breach of confidentiality.

[28] I find that clause 2 in the RoS does not preclude the Authority from determining the breach of confidentiality claim based on the IEA in so far as it relates to Mr Gillam's actions in October 2011.

*Does the DoS exclude the Authority's jurisdiction under s161(1)(b) of the Act?*

[29] Mr Kilpatrick submitted that the DoS resolved any alleged breach(es) of the IEA, which meant the Authority lacked jurisdiction to determine the breach of IEA claim.

[30] In August 2011 CES claimed Mr Gillam had breached the RoS by failing to comply with his contractual and common law confidentiality obligations. Mr Gillam denied that. The alleged breach of the RoS was resolved by the parties entering into the DoS.

[31] The DoS identified:

- a. What information was CES's confidential information;
- b. What Mr Gillam could and could not do in operating his new business which competed with CES;
- c. That the confidentiality provisions in the IEA and RoS would continue.

[32] The relevant provisions in the DoS state:

Clause 6: The parties agree that the terms of this Deed are in addition to the terms of settlement in the Record of Settlement dated 20 July 2011.

Clause 7: This agreement is in full and final settlement and an enforceable settlement of the matters alleged arising from Geoffrey's letter to various parties which included CES's clients dated 15 August 2011.

[33] I consider the DoS settled the issues associated with Mr Gillam's letter dated 15 August 2011 only. I find it did not compromise CES's ability to pursue alleged

breach of confidentiality claims which arose in future (i.e. after 7 September 2011). The alleged breach of the DoS claim is based on Mr Gillam's actions in October 2011, which I find were not compromised by the settlement provisions in the DoS.

[34] In the DoS the parties expressly provided that the RoS would continue to apply, and the RoS expressly held Mr Gillam to his contractual and common law confidentiality obligations. I therefore conclude that the DoS did not extinguish Mr Gillam's ongoing confidentiality obligations.

[35] I find the DoS does not exclude the Authority's jurisdiction under s.161(1)(b) of the Act to determine CES's breach of the IEA claim in so far as it relates to Mr Gillam's actions in October 2011.

**Does the Authority have jurisdiction to determine CES's alleged breach of the RoS claim?**

[36] Mr Kilpatrick submits the Authority does not have jurisdiction to award damages for a breach of the RoS.

[37] Although not expressly stated, Mr Kilpatrick's submission seemed to imply that because an award of damages was not a potential remedy, then it followed that the Authority lacked jurisdiction to determine the breach of RoS claim. If that was his intention, then I do not accept that submission.

[38] CES does not seek damages for the alleged breaches of the RoS.

[39] The Authority has the power under s.149(4) of the Act to impose a penalty for a breach of a s.149 RoS. It also has the power under s.151 of the Act to order compliance with a s.149 RoS.

[40] CES does not seek compliance. Instead it seeks a penalty for each alleged breach of the RoS. The Authority has jurisdiction under s149(4) of the Act to award such a penalty if it determines the RoS was breached.

[41] Although Mr Kilpatrick did not specifically submit that the DoS excluded the Authority's jurisdiction to determine the alleged breach of the RoS claim, he did make that submission in relation to the alleged breach of the IEA claim, so it is necessary to address it again when considering whether the Authority has jurisdiction in relation to the RoS claim.

[42] I find that:

- a. The DoS only settled issues related to Mr Gillam's 15 August 2011 letter;
- b. CES's alleged breach of the RoS claim only relates to Mr Gillam's actions in October 2011;
- c. The DoS dated 7 September 2011 did not compromise future claims so it does not preclude CES taking action over Mr Gillam's actions in October 2011;
- d. The DoS did not extinguish Mr Gillam's ongoing confidentiality obligations because the terms of the DoS were expressly stated to be in addition to the RoS. I consider that indicated the parties intended that the RoS would remain effective and therefore enforceable.

[43] I find the Authority has jurisdiction to determine CES's alleged breach of the RoS claim.

**Does the Authority have jurisdiction to determine CES's alleged breach of the DoS claim?**

[44] Mr Kilpatrick relied on the recent Employment Court decision in *Wade v Hume Pack-n-Call Limited*<sup>14</sup> in support of his submission that the Authority did not have jurisdiction to determine the breach of DoS claim because it was not a s.149 settlement.

[45] Mr Kilpatrick also submits that the breach of DoS claim did not arise out of the employment relationship because the DoS was entered into after the employment relationship ended. He said the DoS therefore arose out of a breach of confidence.

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<sup>14</sup> [2012] NZEmpC 64.

[46] I consider *Wade* can be distinguished. It involved a claim by an employee for a compliance order that the employer pay what the employee alleged remained outstanding under a non mediated settlement entered into by the parties during the employment relationship. The employee was effectively seeking to enforce the recovery of an alleged debt by use of a compliance order.

[47] The Employment Court in *Wade* held the Authority did not have jurisdiction to order compliance with a settlement which was not a s.149 mediated settlement because it did not fall within the provisions of s.137(1)(iii) of the Act, which meant it could not be enforced under s.151 of the Act. I consider *Wade* focused on the Authority's jurisdiction to enforce a non s.149 settlement, rather than on its ability to investigate an employment relationship problem<sup>15</sup> involving a non s.149 settlement.

[48] CES's claim is not for enforcement of the DoS. Rather its claim is that:

- a. Mr Gillam breached the DoS; and
- b. It should be entitled to damages for such breach(es).

[49] The Employment Court in *Kerr v Associated Aviation (Wellington) Limited*<sup>16</sup> held the Authority had jurisdiction to determine a claim involving an alleged breach of a settlement which was not a mediated settlement under s.149 of the Act. *Kerr* involved a claim that (among other things) the former employer had breached the confidentiality provisions of the non s.149 settlement.

[50] Although the Court held that the non s.149 settlement was *two stages removed* from the employment relationship, it nevertheless held that the Authority had jurisdiction under s.161(r) of the Act because *the settlement had its origins in the employment relationship*.

[51] I find that the breach of DoS claim relates to and did arise out of the employment relationship because it involves contractual obligations imposed under

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<sup>15</sup> Such as a claim that the settlement had been breached.

<sup>16</sup> [2005] ERNZ 632

the IEA which survived the termination of employment and therefore remained enforceable notwithstanding that employment relationship had ended.

[52] I consider the DoS sought to enforce contractual confidentiality obligations imposed under the IEA and RoS. It was not a contract entered into in order to compromise a tort action for breach of confidence. Nor did it extinguish Mr Gillam's ongoing post termination of employment confidentiality obligations.

[53] I therefore find the Authority has jurisdiction to determine whether Mr Gillam's actions in October 2011 breached the DoS.

**Does the Authority have jurisdiction to determine Mr Gillam's counterclaim that CES breached the DoS?**

[54] The Authority has jurisdiction to determine Mr Gillam's counterclaim against CES for its alleged breach of the DoS for the same reasons it has jurisdiction to determine CES's alleged breach of the DoS claim.

**Does the Authority have jurisdiction to order compliance with the DoS?**

[55] The Employment Court in *Wade*<sup>17</sup> made it clear the Authority did not have jurisdiction to order compliance with a settlement which was not a mediated settlement under s.149 of the Act.

[56] I find that if Mr Gillam establishes that CES breached the DoS, the Authority does not have jurisdiction to order CES to comply with the DoS, which is the sole remedy sought by Mr Gillam.

[57] Accordingly, the Authority does not have jurisdiction to determine Mr Gillam's application for a compliance order.

**Summary**

[58] I find the Authority:

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<sup>17</sup> Ibid 14.

- a. Does have jurisdiction to determine CES's breach of confidentiality claim arising from Mr Gillam's actions in October 2011 which is based on alleged breaches of the IEA, RoS, and DoS;
- b. Does have jurisdiction to determine Mr Gillam's counterclaim that CES breached the DoS;
- c. Does not have jurisdiction to determine Mr Gillam's claim for a compliance order should it find that CES breached the DoS.

[59] Mr Gillam's application to strike out CES's claims for want of jurisdiction is dismissed. The substantive investigation meeting set down for 11-13 June 2012 will proceed as scheduled.

#### **Costs**

[60] CES as the successful party is entitled to costs. Costs are reserved pending resolution of this matter.

**Rachel Larmer**  
**Member of the Employment Relations Authority**