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Frater v Truck Stops (NZ) Limited (Christchurch) [2017] NZERA 1022; [2017] NZERA Christchurch 22 (8 February 2017)

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Frater v Truck Stops (NZ) Limited (Christchurch) [2017] NZERA 1022 (8 February 2017); [2017] NZERA Christchurch 22

Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 22
5568403

BETWEEN PHILLIP FRATER Applicant

A N D TRUCK STOPS (NZ) LIMITED Respondent

Member of Authority: Peter van Keulen

Representatives: Angela Sharma, Counsel for Applicant

Elizabeth Coats, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 23 January 2017, from the Respondent

3 February 2017, from the Applicant

Date of Determination: 8 February 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. I grant the respondent's application for non-publication, non-use and non-disclosure order.

B. Costs are reserved.

Application for non-publication, non-use and non-disclosure order

[1] In his statement of problem Mr Frater requested that Truck Stops (NZ) Limited (Truck Stops) disclose various documents to him, being documents he says are relevant to the investigation of his employment relationship problem.

[2] In a notice of direction dated 24 August 2016 I directed counsel for Truck

Stops to take instructions from Truck Stops regarding the provision of documents

requested by Mr Frater in the hope that disclosure could be resolved between the parties.

[3] Truck Stops subsequently disclosed most of the documents sought but in relation to one set of documents – monthly branch figures for 2013/2014 and

2014/2015 financial years (the Documents) – it was only willing to disclose those documents subject to Mr Frater agreeing to certain conditions. Those conditions were that:

(a) The Documents be kept confidential;

(b) Copies of the Documents would not to be forwarded to Mr Frater, but

rather he was to review the Documents at his counsel's office;

(c) The parties agree a joint application seeking non-publication orders from the Authority.

[4] Mr Frater did not agree to these conditions.

[5] Trucks Stops accepts that the information requested in the Documents forms part of my investigation into this matter and does not oppose the disclosure of the Documents per se.

[6] However, Truck Stops has applied for an order from the Authority pursuant to Schedule 2, clause 19 of the [Employment Relations Act 2000](#) (the Act) seeking to protect the information disclosed in the Documents on the basis that it is commercially sensitive.

[7] Specifically, Truck Stops requests an order be made for prohibition against the content of the Documents being:

(a) Published;

(b) Used by Mr Frater other than for the purposes of the Employment

Relations Authority claim; or

(c) Disclosed to any third party by Mr Frater including specifically, Mr Frater's current employer (Gough TWL) and any of Mr Frater's colleagues.

[8] The grounds advanced by Truck Stops in support of its application include:

(a) The information in the Documents is sensitive commercial information

about Truck Stops' business.

(b) Mr Frater now works for a direct competitor of Truck Stops and disclosure of the financial information relating to Truck Stops is likely to be harmful to it.

(c) The information is confidential to Truck Stops and its advisers. Whilst the information pertains to bonuses that are calculated for employees, employees are not provided with the broader financial information that is to be disclosed.

(d) The information is only necessary to assist the Authority with its investigation and there is no reason why the information should be used for any other purpose.

(e) Mr Frater has indicated he is unlikely to oppose the application, but he simply states the application should be made at the investigation meeting. Truck Stops submits there is no disadvantage to Mr Frater if the order is made in advance.

[9] In making the application, counsel for Trucks Stops submits that the approach requested is consistent with that taken by the Authority in similar matters such as *Lowe v Graeme Wright Transport Ltd*¹, *Barlow v Waikato Sheds Ltd*² and *Laurie v Plants North Ltd and Feva Ltd*³.

[10] Counsel for Mr Frater submits that the information sought is relevant, but Mr Frater does not know whether the information contained in the Documents is sensitive. Mr Frater does not oppose the application for non-publication and associated orders, but says that the Authority should simply address the matter at the beginning of the investigation meeting once the information in the Documents is

known.

¹ [2015] NZERA Auckland 260

² [2010] NZERA Auckland, 387

³ [2015] NZERA Auckland 226

[11] Counsel for Mr Frater states that Trucks Stop could disclose the Documents, seeking the assurances that it does with a subsequent order being made by the Authority if appropriate. However, counsel for Mr Frater could only give limited reassurances about Mr Frater not disclosing any commercially sensitive information stating that she was confident that Mr Frater would not breach any confidences.

[12] In the circumstances, it is appropriate that Truck Stops has made the application that it has given its concern over the commercially sensitive information being disclosed and the limited assurances given by Mr Frater about non-disclosure, before it discloses the Documents. I do not accept that the application should not be considered by me now before the investigation meeting. A determination one way or the other on non-publication now will enable disclosure of the Documents before the investigation meeting.

[13] Clause 10(1) of Schedule 2 of the Act confers a broad discretion on the

Authority to make non-publication orders. It states:

10. Power to prohibit publication

(1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[14] In *Lowe v Graeme Wright Transport Ltd* Member Fitzgibbon summarised the relevant considerations for a non-publication application referring to the Employment Court decision *H v A Ltd*⁴ that referenced a High Court decision, *Peters v Birnie*⁵. As Member Fitzgibbon indicates, the principle of open justice is the starting point in any case involving a request for a non-publication order. This applies in both civil and criminal proceedings and the Courts of New Zealand have emphasised the importance of freedom of speech, in both judicial proceedings and the right of the media to report fairly and accurately.

[15] Member Fitzgibbon goes on to quote Judge Inglis in *H v A Ltd* referring to the onus being on a party seeking a non-publication order to establish a proper foundation

for confidentiality. Given the paramount principles of open justice, the party seeking

⁴ [\[2014\] NZEmpC 92](#)

⁵ High Court CIV-2009-404-8199, 19 March 2010

confidentiality must point to some public interest such as particular circumstances relating to privacy of an individual to justify departure from the open justice process.

[16] Therefore in order to be satisfied that the non-publication, non-use and non-disclosure order sought by Truck Stops is appropriate I must be persuaded that there is a proper foundation for the order. And that foundation overrides the paramount principles of open justice that protect freedom of speech in this judicial process and the right of media to report fairly and accurately.

[17] In this case the foundation for a non-publication order includes:

(a) I am satisfied that the information in the Documents is commercially sensitive and should be protected, particularly in circumstances where Mr Frater now works for a competitor.

(b) An order restricting non-publication of the business sensitive information does not overly limit the freedom of speech in my investigation and the right of media to report openly and fairly on this matter. It is the detail of how the bonus is calculated based on the sensitive financial information that will not be published not anything else relevant to the determination that a bonus is or is not payable.

(c) The information contained in the Documents is only necessary to assist me with my investigation into Mr Frater's claim and there is no reason why that information should be used by anyone else or for any other purpose.

(d) And finally, Mr Frater does not oppose the application

[18] Weighing the particular circumstances I am satisfied that this foundation outweighs the principles of open justice and I grant the order sought by Truck Stops.

[19] I grant Truck Stops (NZ) Limited's application for a non-publication, non-use and non-disclosure order such that I order that the information contained in the Documents shall not be:

(a) published;

(b) used by Mr Frater other than for the purposes of his claim; and

(c) disclosed to any third party, specifically Mr Frater's current employee

(Gough TWL) and any of Mr Frater's colleagues.

[20] Costs are reserved.

Peter van Keulen

Member of the Employment Relations Authority

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