

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 242
5420477

BETWEEN G.L. FREEMAN HOLDINGS
 LIMITED
 Applicant

A N D DIANE LIVINGSTON
 Respondent

Member of Authority: M B Loftus

Representatives: Tim McGinn, Counsel for Applicant
 Robert Thompson, Advocate for Respondent

Investigation meeting: 26 November 2013 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 27 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, G L Freeman Holdings Limited (“Freemans”), asks the respondent, Ms Livingston, be required to pay a penalty for having breached a term in her employment agreement regarding confidentiality.

[2] Initially Freemans also sought a compliance order requiring Ms Livingston return any confidential information and/or other company property she may have, but that was withdrawn during the investigation.

[3] Ms Livingston denies the alleged breach.

Background

[4] Ms Livingston was employed as a receptionist/office administrator at a hotel owned and operated by Freemans.

[5] She had a written employment agreement. Contained therein, and pertinent to this dispute, is a provision which reads:

Confidentiality

16.2 *During the course of employment, the Employee may receive and handle knowledge and information relating to the Employer's business or clients which is considered confidential. The Employee shall not, either directly or indirectly, use or disclose such information which has or may be acquired during the course of employment with the Employer, concerning the business affairs, property, or customers of the Employer. This clause applies to all information whether or not it is recorded or memorised and includes information which is or may be of use to any competitor of the Employer.*

[6] Clause 16.2 is followed by another which states its effect continues after cessation.

[7] On or about 19 July 2012 Ms Livingston resigned. She failed to give six weeks' notice as required by her employment agreement. Freemans disputed her ability to do so and sought a penalty in the Authority. The claim was heard by the Authority on 9 May 2013 (see [2013] NZERA Christchurch 90).

[8] During the hearing Mr Freeman, the sole director and shareholder of the applicant company, noticed Ms Livingston had copies of company trading data.

[9] He raised the issue and the documents were returned forthwith. However the fact Ms Livingston had them led to the present application. It also led to a complaint to the police who did not pursue the issue.

Determination

[10] This is an application for the imposition of a penalty for a breach of an employment agreement. In particular Freemans say, and this was confirmed by answers given in the hearing, the purported breach relates solely to clause 16.2.

[11] Ms Livingston accepts she had the documents, which she was responsible for compiling. Her excuse is Mr Freeman challenged their accuracy (and here the parties

agree there was originally a note to that effect but it is thought to have disappeared when the documents were with the police). She was busy at the time so chose to make copies which she took home to check. Having ascertained her calculations were correct she forgot about the documents and, as a result, inadvertently retained them.

[12] Clause 16.2 recognises an employee may receive confidential information about Freeman's business. It goes on to say the employee shall not then **use or disclose** that information (emphasis is mine).

[13] Mr Freeman was asked whether he had any evidence Ms Livingston had disclosed any of the information in question. His answer was no. He was then asked whether he had evidence Ms Livingston had used the information. Again the answer was no.

[14] As already said, the clause requires use or disclosure. Mr Freeman's answers confirm there is no evidence either has occurred. It is therefore difficult to conclude there has been a breach of the express terms of the agreement.

[15] The matter does not, however, necessarily end there. In essence the argument for Freeman's is notwithstanding the words of the clause possession itself is either a use or a breach warranting a penalty. I do not agree.

[16] The words of the clause say what they say. They require use or disclosure. There is no evidence of disclosure and I conclude possession is not, in itself, a use.

[17] Possession is neither mentioned nor contemplated in clause 16.2. Nor is it mentioned elsewhere in the employment agreement. There is not even a requirement a departing employee return any employer property in his or her possession. Furthermore, and when questioned about the issue, Mr Freeman conceded he had never issued instructions company property and documents could not be taken home. His answer was it had never even crossed his mind to do so.

[18] The word use is in the employment agreement as a verb. As a verb its definition includes phrases such as *cause to act or serve for a purpose; bring into service; exploit for ones own ends* (Concise Oxford Dictionary, Clarendon Press, Oxford). These phrases indicate an active use is required as opposed to the passive act of retention as occurred her. As was confirmed by Mr Freeman's answers, there is no evidence of active use.

[19] There was also an accusation Ms Livingston had the documents for what Mr Freeman contends was an improper purpose. He claims that when answering questions about why she had the documents during the May investigation, Ms Livingston responded *by saying that she had kept copies of the accounts in case I made allegations against her concerning the accounts* (paragraph 7 of Mr Freeman's brief of evidence).

[20] When questioned, Mr Freeman resiled from the accusation. He now says the response was limited to a statement *she appreciated she should not have the documents* and he accepted he cannot swear to the accusation in his brief.

[21] For the above reasons I conclude Ms Livingston, whilst in possession of the documents, neither used nor disclosed them. She has not therefore breached the provision of clause 16.2 and it therefore follows that there shall be no penalty.

[22] Even if the above conclusion were wrong I note a penalty is for the purpose of punishing deliberate and wilful wrongdoing. Ms Livingston's excuse for having the documents remained undisturbed. It is difficult to conclude an attempt to complete a work task at home constitutes deliberate and wilful wrongdoing, especially in the absence of an instruction precluding it. In other words, and even if there had been a breach, it would not have resulted in the imposition of a penalty.

Conclusion

[23] For the above reasons the application is dismissed.

[24] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority