

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2018] NZERA Auckland 218  
3023445 & 3026412**

BETWEEN                      BRIDGETTE JOHNSTONE  
   Applicant & Respondent

AND                              KINETIC EMPLOYMENT  
   LIMITED  
   Respondent & Applicant

Member of Authority:        Eleanor Robinson

Representatives:              Paul White, Counsel for Bridgette Johnstone  
   Blair Edwards Counsel for Kinetic Employment Limited

Submissions received:        14 July 2018 from Bridgette Johnstone  
   12 July 2018 from Kinetic Employment Limited

Determination:                17 July 2018

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1] Ms Bridgette Johnstone, was employed as a Consultant with Kinetic Employment Limited (KEL) from April 2016.

[2] KEL provides contract, temporary and permanent recruitment services across all industries, focusing on the business support, sales and marketing and corporate sectors.

[3] Ms Johnstone resigned from her employment with KEL on 2 October 2017 with her last day of employment being 27 October 2017. Ms Johnstone is claiming unjustifiable disadvantage arising from the delay in payment of commissions and holiday pay entitlements by Kinetic.

[4] KEL by way of counter-claim, is claiming that Ms Johnstone has breached the express terms of the individual employment agreement (the Employment Agreement) which restricted her post-employment activities in respect of:

- A business operating in competition with KEL; and

- Dealings with clients and customers of KEL (including solicitation of, and interference with such clients) subsequent to Ms Johnston's employment ending.

[5] KEL also claims that Ms Johnstone breached the implied duty of fidelity, the express confidentiality terms of the Employment Agreement, and Kinetics' IT policy by emailing, whilst still employed, Kinetics' confidential information to her personal address and to another party.

[6] Witness summons were issued pursuant to an application by Kinetic in respect of named witnesses who were required to attend the Authority Investigation Meeting scheduled to take place on 24 to 26 July 2018 and to bring and produce at that time for forensic examination:

- All computer systems in their possession or control;
- All passwords and other information, tools or devices necessary to access and copy for the Authority and Respondent/Applicant in order to review the computer systems; and
- Documents (electronic and hard copy) containing any confidential information belonging to KEL in their control or possession.

[7] The issue now before the Authority for determination is whether or not the Authority has acted outside its jurisdiction by issuing the witness summons.

[8] In particular Mr White, on behalf of Ms Johnstone, claims that the summonses issued by the Authority constitute a search order as granted by the High Court pursuant to the High Court Rules.

[9] Mr Blair, on behalf of KEL, claims that the witness summons are within the Authority's jurisdiction and do not constitute a search order.

### **Determination**

[10] The Authority's power to issue witness summons arises pursuant to s 160 of the Employment Relations Act 2000 (the Act) which states at s 160 (1):

- (1) The Authority may, in investigating any matter;-

- (a) call for evidence and information from the parties or from any other person;
- (b) Require the parties or any other person to attend an investigation meeting to give evidence;
- (c) ...
- (d) In the course of an investigation meeting, fully examine any witness;
- (e) ...
- (f) Follow whatever procedure the Authority considers appropriate.

[11] Schedule 2 of the Regulations to the Act is also pertinent to this issue. Schedule 2 (5) states:

**5 Witness Summons**

- (1) For the purpose of any matter before the Authority, the Authority may, on the application of any party to the matter; or of its own volition, issue a summons to any person requiring that person to attend before the Authority and give evidence.
- (2) The summons must be in the prescribed form, and may require the person to produce before the Authority any books, papers, documents, records, or things in that person's possession or under that person's control in any way relating to the matter.

[12] One of the matters for determination by the Authority is whether or not Ms Johnstone breached the post-employment terms of the Employment Agreement by, inter alia, emailing KEL's confidential information to named individuals in respect of whom the summons have been issued.

[13] Accordingly the summonses are pertinent to assessing the liability aspect of this issue.

[14] In investigation of the claim that Ms Johnstone has breached the express post-employment clauses of the Employment Agreement, I consider that forensic examination of the computer systems of the summonsed individuals will be relevant to this issue. It may also assist in determining the liability part of the Authority's investigation.

[15] I note that the Authority is not like other courts and tribunals. It has unique powers of investigation, which the Employment Court has recognised as making the formal principles less applicable.<sup>1</sup>

[16] I determine that the Authority has not acted outside its jurisdiction by issuing the witness summonses.

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<sup>1</sup> *Davis v BNZ* [2004] 2 ERNZ at para [16] per Shaw J

## **Further Arrangements**

[17] I accept that there is real concern on the part of those summonsed individuals that such an examination will intrude upon their own confidential information and that they have a right to privacy in that respect.

[18] I find that these concerns can be addressed by having an appropriate computer forensic expert appointed, noting that arrangements have been made with Mr Brent Whale to fulfil this role.

[19] I have already made it clear that the forensic examination is to be limited to KEL's confidential information only. However to add further allay concerns, I consider that it would be of assistance to agree a procedure between the Authority and Counsel for the examination of the computer evidence at a conference call which will take place on Monday 23 July 2018.

[20] Such a procedure should include agreement as to a list of agreed search words or terms, the analysis of information discovered in the search, and to agreement as to the confidentiality of information held on the summonsed individual's computer systems.

[21] The conference call will also consider whether or not to commence the liability issue part of the investigation within the scheduled Investigation Meeting on 24 to 26 July, or to adjourn and reschedule the liability investigation meeting to a date to be agreed at the conference call.

[22] Counsel for the parties are to contact the Authority to confirm their availability for the conference call to be held on Monday 23 July 2018.

## **Costs**

[23] Costs are reserved pending the final resolution of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**