

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 13
5308887

BETWEEN	LIVING EARTH LIMITED Applicant
A N D	BARRY KNIGHT Respondent

Member of Authority:	James Crichton
Representatives:	Andrew Shirnack, Counsel for Applicant David Beck, Counsel for Respondent
Investigation Meeting	6 and 7 September 2011 at Christchurch
Date of Determination:	23 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Living Earth) alleges that the respondent (Mr Knight) has breached the terms of a settlement agreement dated 2 March 2010 and breached statutory obligations of good faith. Mr Knight denies the allegations.

[2] Living Earth employed Mr Knight as the Manager of its Christchurch composting facility. The employment relationship became troubled and the parties attended mediation on 2 March 2010 at which they agreed, amongst other things, to bring the employment relationship to an end on certain terms and conditions.

[3] Material terms of the settlement agreement between the parties were that Mr Knight was to cease his employment on 30 March 2010 and that he was to surrender all company property in his possession on the termination of the employment.

[4] In addition, Mr Knight's written individual employment agreement contained the usual express terms such as the obligation to diligently and faithfully serve Living Earth, to not use, divulge or communicate information belonging to Living Earth, keeping confidential Living Earth's information and not copying Living Earth's property for personal use or the benefit of third parties.

[5] The essence of Living Earth's complaint is centred on an allegation that Mr Knight, in breach of the foregoing obligations, caused Living Earth to purchase two data sticks on his last day of employment and then downloaded material belonging to Living Earth on those data sticks so that he could remove that material from Living Earth's premises when he ceased the employment.

[6] To remedy this alleged default, Living Earth seek *inter alia* the return of the compensatory payment made pursuant to the record of settlement, the return of the contribution to Mr Knight's costs, also from the record of settlement, the reimbursement to Living Earth of its costs in the forensic analysis required in the prosecution of the claim against Mr Knight together with penalties for each breach payable to Living Earth and solicitor client costs.

Non publication order

[7] Some of the matters put into evidence by the parties during the preparation for, and the hearing of these proceedings are, or might be, commercially sensitive. Living Earth requested that the Authority make non publication orders in respect of such material. That application is not opposed.

[8] Accordingly, pursuant to Schedule 2, clause 10(1) of the Employment Relations Act 2000, the Authority directs that the material listed below may not be published:

- (a) Appendices E, F, G and H attached to the affidavit evidence of Mr George Fietje
- (b) Annexures G, H, I, J and K to Mr Fietje's witness statement of 5 November 2010
- (c) Appendices 13 and 14 to Annexure C of the witness statement of Michael Edward Spence dated 17 September 2010

(d) Attachments 4 to 12 inclusive to Mr Knight's additional brief of evidence dated 25 August 2011

Issues

[9] It will be convenient if the Authority considers the following matters:

- (a) Did Mr Knight purchase data sticks?
- (b) Was data downloaded onto those data sticks?
- (c) Did that data turn up on Mr Knight's personal computer?
- (d) Did the data sticks get returned?
- (e) Is there evidence of Mr Knight improperly using Living Earth information?

Did Mr Knight purchase data sticks?

[10] It is common ground that on 30 March 2010, Mr Knight arranged for Living Earth to purchase two USB "Imation Swivel" devices ("data sticks"). This date was to be Mr Knight's last day in the employment.

[11] Again, it is accepted that Mr Knight personally went to the office products supplier Office Max and picked the data sticks up. Mr Knight said in his evidence that the reason that he did that was because he wanted to copy on to the data sticks material to be delivered to a Living Earth client that he had worked closely with, the Christchurch City Council. The data that he was allegedly copying on to the data sticks included the facilities operations manual belonging to Living Earth. In his oral evidence to the Authority, Mr Knight emphasised that the copying of material on to the data sticks was required in order to assemble the material for the client.

[12] However, Living Earth point out that Christchurch City Council never received any information on data sticks, Mr Knight himself said that the work was never completed by him and despite Mr Knight's suggestion that somebody else in the organisation may have downloaded the material after he left, there is no evidence before the Authority to confirm that view although the Authority is satisfied Mr Knight's suggestion is perfectly feasible. It is true the person that Mr Knight thought might have downloaded material on to the data sticks denied doing so in her oral

evidence at the Authority's investigation meeting but there was other evidence heard by the Authority which suggested any number of staff had access.

[13] However, even Mr Fietje, the General Manager of Living Earth, readily acknowledged that if Mr Knight was up to no good, and for instance copying documents for an illicit purpose, it would be much more likely that he would have concealed the purchase of the data sticks. Here, it is common ground that Mr Knight arranged for the data sticks to be purchased on Living Earth's corporate account with Office Max and even took the trouble to go to Office Max himself to collect the data sticks personally. None of that behaviour just described suggests an improper motive or any desire to camouflage the nexus between Mr Knight and the purchase of the data sticks. If Mr Knight had an improper purpose in obtaining the data sticks, surely he would have gone to the trouble of concealing the purchase and not being so plainly connected to the acquisition of the data sticks.

Did confidential material get downloaded on to the data sticks?

[14] Again, it is common ground that the evidence discloses that on the day that the data sticks were purchased, they were used to copy confidential material belonging to Living Earth. In his evidence to the Authority, Mr Knight has this to say:

These [he means the data sticks] were to be used to load data for the revision of Facilities Operation Manual including an asset management plan revision containing a large number of digital photos to be given to the CCC [Christchurch City Council].

[15] Forensic analysis of the data sticks and another similar device shows that a significant number of files belonging to Living Earth were downloaded on to the devices, but there were also a significant number of other files belonging either to the Christchurch City Council or to Mr Knight personally, in the sense that they were email messages sent to or from his Living Earth email address but also material such as personal tax returns and GST returns and curriculum vitae.

[16] It follows that of the two data sticks purchased by Mr Knight using Living Earth's account at Office Max, both were used, according to the forensic analysis, to download information on what was expected to be Mr Knight's last day of employment and the information downloaded included both Mr Knight's personal material and intellectual property belonging to Living Earth.

[17] So while there is no question that property belonging to Living Earth was downloaded on to the data sticks, the real question is what purpose that copying of material was to serve. A subsidiary question, but equally important, is who was responsible for the physical act of using the data sticks to copy the data. While it is common ground that the evidence discloses that confidential material belonging to Living Earth is on the data sticks, and Mr Knight acknowledges that his intention in buying the data sticks was to enable precisely that to happen (but for a proper purpose), Mr Knight denies that he himself was responsible for copying the data. He says in his evidence to the Authority:

I did not download the files from Living Earth's laptop on 30th March 2010 as alleged.

[18] The reason that Mr Knight did not download anything on that day was that, to quote his oral evidence to the Authority, *all the information wasn't ready.*

[19] The fact remains that the forensic analysis of the data sticks confirms that the range of material identified above was downloaded on 30 March 2010 and that that material included a whole lot of personal material of Mr Knight's. In principle, there is nothing improper in an employee removing personal material from an employer's computer. What is puzzling in the present case is that given Mr Knight's denial that he did not download anything on 30 March 2010, who was it then that downloaded his personal material on to one of the data sticks. Mr Knight himself in cross examination at the investigation meeting accepted that no one else would be likely to be much interested in his personal information. The Authority considers that it is possible that another staff member downloaded all the material on Mr Knight's work computer, using the data sticks, in the belief that was what the data sticks were for.

What happened to the data sticks?

[20] The evidence is clear that the data sticks were purchased by Living Earth, collected by Mr Knight, and returned to Mr Knight's office at Living Earth in Christchurch. Mr Knight says that he did nothing further with them and that he left them there when he ceased employment a few days later.

[21] That evidence is challenged by Living Earth's witnesses. Ms Penny Joss, a Claims Administrator with Living Earth in Christchurch, describes in her evidence to the Authority how she arranged the order of the data sticks on Mr Knight's

instruction, observed him leave the building and return with the data sticks and then she says that she saw Mr Knight inserting the data sticks into his computer. She says they were in the computer for *around half an hour* before Mr Knight removed them and placed them in his pocket.

[22] There was a reasonably robust attempt to disturb Ms Joss' evidence by counsel for Mr Knight and the Authority's conclusion is that while her views were honestly held, a number of factors suggest some caution in placing too great a reliance on her evidence. The first and most important is that her evidence was only sought by Living Earth in June or July 2010, that is some three months after the events in question. She made no contemporaneous notes of the events at the time, for the obvious reason that she was not then aware of the significance of them. Ms Joss described how a solicitor acting for Living Earth took her to a café in June or July 2010 *sat me down and asked me a series of questions* about the events of 30 March. Ms Joss said that she remembered as much as she could from that day.

[23] The witness also told the Authority, entirely innocently, that her brief of evidence had been prepared by the lawyer and not by her.

[24] Ms Joss told the Authority that she was certain that 30 March was the day that Mr Knight asked her to order the data sticks (and that tallies with the documentary evidence before the Authority together with Mr Knight's own evidence), but that she was ... *not sure if he downloaded the material this day or some other day*. When pressed by counsel for Mr Knight, Ms Joss was evidently unsure about what date downloading took place.

[25] Finally, Ms Joss, in her evidence to the Authority, claimed to have a clear line of sight between her desk and Mr Knight's desk (despite some evidence about sightlines being obscured by pot plants) but she did confirm to the Authority that she was working all the time that these events were allegedly going on and was not just occupied in watching what Mr Knight was or was not doing. She told the Authority that principally she would have been typing during the period in question.

Did material from the data sticks get on to Mr Knight's personal computer?

[26] According to Living Earth's computer expert, Mr Knight accessed Living Earth's confidential information on his personal home computer via the data sticks. It is suggested that this first happened in April 2010. In order for this to happen of

course, the data sticks would need to be in Mr Knight's possession. Living Earth invites the Authority to conclude that because the forensic computer analysis allegedly demonstrates that these data sticks were connected to Mr Knight's personal computer after the termination of his employment, Mr Knight must have removed the data sticks from the office.

[27] Mr Mike Chappell, a forensic computer consultant engaged by counsel for Living Earth, produced a table for the Authority which allegedly shows the dates and times at which Mr Knight accessed material from the two subject data sticks on his personal computer.

[28] Mr Knight's evidence is first, that he used his personal computer for work purposes during the employment and accordingly a large number of Living Earth documents would have been available to him on his own computer. As a matter of fact, Mr Knight was based for employment purposes in Christchurch, but lived in Timaru and so there would have been a greater need perhaps than usual for him to have access to work material.

[29] As to the specific allegation that he accessed the data sticks in question using his own computer after the employment ended, Mr Knight gave evidence via a fresh brief of evidence dated 26 August 2011 in which he says that he received two data sticks in the mail without any covering note or letter. He says that these items arrived in May 2010 and that what he did was connect them to his personal computer, establish that Living Earth material was on them and then send them back to Living Earth in Christchurch. That evidence is inconsistent with the forensic consultant's evidence that Mr Knight's personal computer was used to access Living Earth material a month earlier in April though.

[30] Mr Knight told the Authority that at the time that he received these two data sticks in the mail, he did not think that they were the ones that he had purchased earlier on 30 March. Notwithstanding that earlier conclusion, at the investigation meeting Mr Knight thought that the data sticks he had received in the mail were in fact the ones that he had purchased through Living Earth on 30 March.

[31] A further curiosity is that Mr Knight's evidence that he sent the data sticks he had received by mail back to Living Earth, cannot be confirmed. This is because Living Earth say they never received them, despite Mr Knight's contention that he

couriered the data sticks back to Living Earth but not addressed to anyone in particular. Ms Leslie Chisholm was the Office Administrator at Living Earth in Christchurch. Her evidence to the Authority was that she invariably opened the mail coming in to the Christchurch office and that she was not absent during the period that Mr Knight says he sent these items back. Ms Chisholm's evidence is unequivocal that she received no such package. Nor is there evidence from anybody else at Living Earth in Christchurch that such a package was received.

[32] What Ms Chisholm does say, though, is that she had occasion to telephone Mr Knight (with whom she had a good relationship apparently) on 7 May to tell him that Living Earth could not find the data sticks which he had authorised the purchase of on 30 March and Ms Chisholm asked Mr Knight if he knew where the data sticks were. She remembers Mr Knight saying something to the effect that he had them and would send them back. Mr Knight's evidence on the point is that he simply purchased two new similar data sticks and sent them back. The evidence from Living Earth is plain that that package was received from Mr Knight.

[33] It is equally clear that the contents of that package plays no part in this tale because those data sticks were newly purchased by Mr Knight (on his own admission) and were not in any way involved in the present proceedings.

Were the subject data sticks returned to Living Earth?

[34] We have already established that Mr Knight's evidence is that he returned to Living Earth two separate packages of data sticks, one in response to Ms Chisholm's telephone call to him of 7 May when he returned brand new data sticks without any information stored on them, and one in relation to his evidence that he received data sticks with information on them relating to Living Earth in the mail and simply sent them back.

[35] Of those two sets of data sticks, the brand new data sticks without information on them play no part in this story and the other data sticks which Mr Knight says he returned to Living Earth were apparently never received so the Authority can take that episode no further.

[36] However, the data sticks purchased by Living Earth on Mr Knight's instruction on 30 March 2010 did turn up. They were found in the flammable store container at the Christchurch Living Earth site on 8 November 2010. Mr Lance

Flack, who had become the Christchurch Manager of Living Earth after Mr Knight, received a call on that morning from Mr Fietje who told him that two text messages had been received by a staff member indicating where these data sticks would be found. Mr Flack went down to the flammable store container (which apparently was maintained unlocked) and found the items.

[37] They were subjected to forensic analysis by Mr Chappell, who identified first that each of the connection plugs had been deliberately damaged, presumably to try to prevent access to the data on them.

[38] Of the three data sticks found in the flammable store container, two were identified as the two purchased by Living Earth on Mr Knight's instruction on 30 March and the third one was unrelated to the present proceedings and indeed had no data on it. Notwithstanding that, the corrupted data stick was equivalent to a data stick that was connected to the computer used by Mr Knight at Living Earth but had first been connected to that computer more than 12 months before the events in contention.

[39] The real question is how the data sticks got into the flammable store contained in the first place. Living Earth encouraged the Authority to conclude that Mr Knight or his agent put them there in order to somehow throw Living Earth off the scent. It is suggested that the damage to the connecting part of the data sticks was done in the belief that that would prevent the data sticks from being read. Further, so the argument goes, because Living Earth would by then have received its data back (by the return of the data sticks) it might be persuaded to take matters no further.

[40] But that argument is completely implausible. If Mr Knight had wished to, as it were, cover his tracks, it would have been far more sensible for him to have ensured that the data sticks got nowhere near Living Earth. Mr Knight, although not as computer literate as a younger person might be, clearly had some considerable knowledge of computer use and it seems inconceivable that he would have imagined that by returning data sticks with damaged connectors, Living Earth would not have been able to decipher what was on those data sticks, if it had chosen to.

[41] Accordingly, I reject Living Earth's contention in that regard, as completely fanciful. In the Authority's view, it is much more likely that somebody else, unconnected to Mr Knight, returned the data sticks to the storage shed either in a

mistaken belief that it would assist Mr Knight or alternatively in the belief that it might get him into trouble.

Did Mr Knight use any information improperly?

[42] It is absolutely clear from the evidence before the Authority that Mr Knight has never been identified to make improper use of any of the confidential information belonging to Living Earth.

[43] Mr Knight's unchallenged evidence is that he had no continuing interest in the particular nature of Living Earth's business, has had no contact with Living Earth's clients since the termination of his employment, no contact with the construction company involved in the project, and his employment continues elsewhere (remote from Christchurch) and in a different field entirely.

[44] It follows that if Living Earth's conclusions are to be believed, Mr Knight has gone to a huge amount of trouble (but with the greatest respect, in a manifestly incompetent way) to copy confidential information from its source and retain it for no apparent purpose whatever. That seems an extraordinary strategy to adopt for a plainly intelligent man.

What can the Authority conclude?

[45] Living Earth want the Authority to accept that Mr Knight has been fundamentally dishonest, that his evidence was a tissue of lies made up to protect himself and that his credibility in this matter is in question. The Authority does not agree. In the Authority's view Mr Knight presented as straightforward and honourable, if significantly bemused by the various allegations flung at him.

[46] Mr Knight said he bought the data sticks for work purposes, did not download anything onto them and left them in the office when his employment ceased. Living Earth's evidence of Mr Knight being seen downloading material onto the data sticks, and removing the data sticks from the office was seriously undermined at the investigation meeting and the Authority prefers not to rely on it. On the balance of probability, the Authority's view is that Mr Knight's evidence on these aspects is truthful. As has already been noted, if Mr Knight was determined to misuse company property, surely he would have had the sense not to openly buy data sticks on the company account.

[47] The forensic analysis seems to suggest that the data sticks were used by someone to copy material from the computer that Mr Knight used at Living Earth, and, if the computer clock is correct, this happened on 30 March. But there is no evidence before the Authority that that someone was Mr Knight; all the forensic evidence suggests is that someone dumped all the data from Mr Knight's work computer onto the two data sticks that were subsequently identified as the two that Mr Knight purchased. There is nothing to suggest that someone was him save for the evidence of Ms Joss which the Authority has already indicated it prefers not to rely on. Mr Knight's own evidence is unequivocal, that he did not copy the data. One of Living Earth's witnesses maintained that anyone, including Auckland head office staff, had access to Mr Knight's office when he was not there, and by his own evidence Mr Knight habitually left his computer operating when he was away. If, as seems likely, the download did happen on 30 March, that was supposed to be Mr Knight's final day and he says he was in and out all day (although that is challenged by Living Earth's witnesses) but it is common ground that there were farewell functions for him that day, which he attended, leaving his office vacant.

[48] Next, Living Earth started a search for the two data sticks purchased on 30 March which resulted in a call to Mr Knight and his response by sending in two brand new data sticks. More or less contemporaneously, Mr Knight says (and the Authority accepts) that the two data sticks originally purchased on 30 March were sent to Mr Knight's home. Living Earth protest first that Mr Knight sent brand new data sticks when first asked about them, as if that is somehow suspicious. But it is consistent with his evidence that he bought the two data sticks on 30 March and they were not used by him; he may well have thought a *good will* gesture to a former employer, as he once described it, was appropriate if the originals had been lost. Second, Living Earth doubt that Mr Knight received the two used data sticks in the mail, and they derive comfort from the fact that those used data sticks, which Mr Knight says he returned to Living Earth never showed up. But they did turn up at Living Earth eventually, months later in the flammable store container at Living Earth's Christchurch premises. None of what we know is inconsistent with Mr Knight's evidence that he had them sent to him by mail, that he ascertained what they were, and then sent them back to Living Earth.

[49] Finally Mr Knight denies that he is responsible for putting the used data sticks into the flammable store container at Living Earth's Christchurch facility. Again,

why would he do this if he was trying to avoid the scrutiny of his former employer? It seems far more likely that his return package of the used data sticks was intercepted by someone at Living Earth and placed in the flammable store container at some appropriate point. Certainly it would have been far more difficult for Mr Knight (as someone not still connected with Living Earth) to place the package in the flammable store container; Mr Knight worked in a different city and lived in another city again.

[50] But even if this suggested analysis is mistaken, either in whole or in part, the fact remains that there is no evidence that Mr Knight misused any information belonging to Living Earth. The most that can be alleged for the employer is that Mr Knight may have had access to material owned by the employer (and that is denied) but there is nothing to suggest he did anything improper with that material. And the Authority is satisfied that is fatal to Living Earth's claim. The essence of their allegations is that he breached his statutory duty of good faith and his contractual duties in regard to confidentiality. Dealing with the latter first, the confidentiality clause in his employment agreement proceeds on the footing that the employee may not, after the employment, convey details of the employer's business to others, make copies of the employer's documents for the employee's own use or the use of third parties. There is no evidence before the Authority that Mr Knight has done any of those things. At worst, if Living Earth's view is to be preferred, he has retained material but there is no evidence he has used it for any purpose which would seem to be required by the plain words of clause 13.3:

This also includes an undertaking not to copy any of the above material for personal use or use by any other unauthorized persons.

[51] In relation to the wider allegation of a breach of statutory good faith, the Authority is not persuaded that the claim is made out either. In *Northern Distribution Union v Carter Hold Harvey Ltd* [2011] ERNZ 822, a full bench of the Employment Court said:

Good faith has more to do with notions of honesty, frankness and what lawyers call bona fides rather than adherence to legal rules... Good faith is more about the spirit than the letter of the law.

This is a case where, on the Authority's analysis, there is no evidence of a lack of *bona fides* by Mr Knight. There is nothing suggestive of deviousness nor any attempt to mislead. Nothing Mr Knight has been shown to have done could properly be judged as undermining his basic duty of fidelity and fair dealing. Even on Living Earth's analysis of Mr Knight's behaviour, there is still no evidence that Mr Knight has done anything improper with the material they say he has illicitly retained, either for his own purposes or for the benefit of third parties. In those circumstances, it is difficult to conclude that Mr Knight has breached his duties, duties which, on Mr Knight's evidence, he took most seriously. In those circumstances then, the Authority's judgement is that the spirit of the law as referred to by the Employment Court in judgement just referred to, is with Mr Knight.

Determination

[52] For reasons earlier advanced, Living Earth's claim against Mr Knight fails.

Costs

[53] Costs are reserved.

James Crichton
Member of the Employment Relations Authority