

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 180
5388486

BETWEEN	NOVA ENERGY LIMITED Applicant
A N D	MICHAEL RICHARD MITCHELL First Respondent
A N D	NATIONAL ENERGY LIMITED Second Respondent
AND	ALAN RICHARD MITCHELL Third Respondent

Member of Authority: Alastair Dumbleton

Representatives: Tony Stevens and Rob Cahn, counsel for Applicant
Paul Wicks, counsel for Respondents

Date of Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY (No.2)

Orders to preserve and maintain confidentiality

[1] The Authority has commenced an investigation into claims of breach of confidence and breach of restraint of trade provisions in an employment agreement. The breaches are alleged by the applicant Nova Energy Ltd to have been committed by the first respondent Mr Michael Mitchell, who was an employee of the applicant company. The second respondent National Energy Ltd and the third respondent Alan Mitchell are alleged to have been parties to the breaches of Mr Michael Mitchell by inciting, instigating, aiding or abetting his unlawful actions. Under the Employment Relations Act 2000 Nova Energy seeks various remedies against Mr Michael Mitchell, National Energy and Mr Alan Mitchell, including damages and penalties.

[2] The parties are preparing for an investigation meeting which will take place from 1 to 5 July 2013.

[3] Admissions made by the respondents, particularly Mr Michael Mitchell, have allowed the focus of the investigation meeting to be the extent of harm or loss suffered by Nova Energy as a consequence of the breaches, so that the damages claimed can be quantified.

[4] Disclosure of documents between the parties is being carried out by agreement and in accordance with orders made by consent in a determination issued by the Authority on 30 November 2012 – *Auckland Gas Co Ltd (now named Nova Energy Ltd) and another v Michael Mitchell and National Energy Ltd and Alan Mitchell* [2012] NZERA Auckland 429.

[5] The applicant wishes to maintain confidentiality in respect of documents it is disclosing to the respondents, while also recognising the need of the respondents to have some access to that material so that they can fully respond to the claims brought against them.

[6] Counsel Mr Stevens and Mr Wicks have provided the Authority with a memorandum recording their consent to the following orders being made in relation to confidentiality of documents:

- 6.1 Materials that the applicants say are confidential are to be treated as confidential unless the applicants confirm otherwise in writing or the Authority orders otherwise (“**Confidential Information**”).
- 6.2 The Authority’s file will be sealed and there will be no access to any Confidential Information for any external party without the express written authority of the applicant, through their solicitors.
- 6.3 The respondents and their solicitors/counsel will not have access to any Confidential Information whatsoever, except in accordance with these orders.
- 6.4 The confidentiality of documents is to be determined at the time they are provided to the respondent’s solicitors and counsel, and not before that date, and any reference to a document in another document (such as brief of evidence) is not a waiver of the confidentiality of the document referred to.
- 6.5 To the extent that these orders or the applicants authorise the respondents to access certain Confidential Information, such access will only be allowed on the following basis (“Access Conditions”):

- (i) the respondents access to any documents or records containing Confidential Information will only be at the offices of either the respondents' counsel or instructing solicitors;
 - (ii) at all times counsel or a solicitor from the respondents' instructing solicitors shall be present and observing any access;
 - (iii) the respondents are not to remove documents (including any notes made with respect to the Confidential Information being reviewed) or copies from the offices;
 - (iv) the respondents shall be able to use any device capable of transmitting information (such as telephone or tablet device) while accessing the Confidential Information, except as set out below;
 - (v) in the event that the respondents have electronic access to Confidential Information, counsel and/or a solicitor from the respondent's instructing solicitors shall supervise access at all times and ensure no communication of the documents externally is possible, and that no such communication, copying or other recording occurs; and
 - (vi) for the avoidance of doubt, these restrictions are intended to preclude copying, recording or otherwise transmitting any of the confidential information to which access is to be allowed or any summary of that information or other record whatsoever; and
 - (vii) counsel and solicitors for the respondents assume full responsibility for ensuring that there is no breach of these requirements.
- 6.6 The above Access Conditions (except for (i)) will also apply during the investigation meeting.
- 6.7 In relation to briefs of evidence the applicant will provide:
- (a) a full copy of each brief to the Authority and to the solicitors and counsel for the respondents, on the basis that such documents are not to be made available to the respondents and
 - (b) further copy of each brief with Confidential Information redacted (other than confidential information that the applicants accept should be sufficiently protected by the Access Conditions), which will be made available to the respondent pursuant to the Access Conditions.
- 6.8 With respect to documents available by way of discovery or disclosure (formally or informally):

- (a) documents in confidentiality category one and customer contracts and invoices as listed in category two in the applicants' list of documents will be made available to the respondents pursuant to the Access Conditions (but not otherwise);
 - (b) the restrictions imposed with respect to documents in category five of the applicant's list of documents (regarding the taken information on the USB stick) will continue to apply, unless otherwise agreed by the applicants through their solicitors in writing;
 - (c) any other Confidential Information provided by the applicants by way of discovery or disclosure (including any further information in category two or in categories three or four of the applicants' list of documents):
 - (i) will be available to the solicitors and counsel for the respondents on a solicitor/counsel only basis; and
 - (ii) will not be made available to the respondent unless it is agreed by the applicant, and expressly confirmed by their solicitors in writing, that a particular document or category of documents may be made available pursuant to the Access Conditions; and
 - (d) the applicants will consider any reasonable requests for the respondents to have access, subject to the Access Conditions, to any other particular documents, categories of documents or to redacted versions (omitting names and ICPs and identifying details) of reasonable samples of documents relating to a reasonable sample of the targeted counter-claim customers.
- 6.9 The solicitors or counsel for the respondents shall provide a copy of the order to the respondents, and to any individual who is to have access to any Confidential Information, before any such party is given access to any further Confidential Information. The respondents and their legal representatives, including any representative of the second respondent, shall each provide a personal undertaking to the Authority and the Applicant confirming that they will comply with this order.
- 6.10 To the extent that any party (eg the respondents or their solicitors or counsel) is allowed access to confidential information in accordance with the terms of these orders, that information is provided in strict confidence, for use in this proceeding only, subject to the terms set out in these orders.
- 6.11 Any party may apply by memorandum of counsel for a variation of these orders or clarifying any issue pertaining to confidentiality and/or access to confidential information

which the parties cannot resolve between themselves, in accordance with these orders, through their respective solicitors and counsel.

[7] The Authority makes the orders sought accordingly.

[8] The exchange of briefs of evidence is to proceed in accordance with the timetable directed.

[9] Leave is reserved for the parties to apply if necessary for further orders or directions.

A Dumbleton
Member of the Employment Relations Authority