

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 140
3040411

BETWEEN Q LIMITED
 Applicant

AND F
 Respondent

Member of Authority: Andrew Dallas

Representatives: Scott Wilson and Jonny Sanders, counsel for the
 Applicant

Investigation Meeting 26 September 2018 at Christchurch

Date of the Determination 26 September 2018

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

Employment Relationship Problem

[1] Q Limited has applied to the Authority ex parte in the afternoon of 25 September 2018 for an interim injunction restraining F from using, disclosing or copying confidential information of Q Limited alleged to have been acquired by F during his employment.

[2] Q Limited seeks an order that F return all of the information and copies of it belonging to it.

[3] Q Limited say that F has breached cl 20 of his employment agreement in that he has retained confidential information, stated he is not subject to cl 20 and has declared an intent to disclose confidential information to third parties.

[4] The application proceeded on the basis of affidavit evidence provided by an authorised officer of Q Limited. An undertaking as to damages was also provided.

[5] The application for an interim injunction was made on an urgent ex parte (without notice) basis. While some consideration was given to dealing with this matter on a “Pickwick” basis¹, however, ultimately due to the particular circumstances of the matter, I resolved to deal with the application ex parte. This is one of those very rare cases where I have been persuaded by the affidavit evidence that urgent intervention was necessary. If F was given notice of the application, the consequent delay must be weighed against threats to disclose confidential information by F and his clear knowledge disclosure may have far reaching consequences for Q Limited.

[6] F was employed by Q Limited, an industrial services company on and from 19 July 2018. His employment agreement contains a confidentiality clause which relevantly provides:

20. Confidential Information

20.1 For the purposes of this clause, Confidential Information means any knowledge or information you may acquire or may have already acquired during the course of your employment by the Employer concerning the business, operations, affairs, property, customers, clients, staff, suppliers or principals of the Employer and shall include, but shall not be restricted to, programmes, client contact information, partner and staff personal details, suppliers and supplier contact information, procedural details, financial information, client lists, computer discs and information stored on such discs, payment arrangements, prices, rates, marketing strategies and initiatives, and all methodologies. The provisions of this clause shall cease to apply to information which enters the public domain other than that directly or indirectly entered through your failure to observe its terms.

20.2 You shall during the continuance of employment and after its termination (howsoever occasioned):

20.2.1 Not disclose any Confidential Information to any person other than a person authorised by the Employer to receive it;

¹ Meaning, in effect, F would have been given notice of Q Limited’s application and provided with a limited scope to respond. See, as to the term and concept, *Pickwick International Inc. (G.B.) Limited v Multiple Sound Distributors Limited* [1972] 3 All ER 384

20.2.2. Use your best endeavours to prevent the disclosure or publication of any Confidential Information;

20.2.3 Not use any Confidential Information to your own benefit as distinct from the benefit of the Employer;

20.2.4 Not use or attempt to use any Confidential Information in any manner which may injure or cause loss whether directly or indirectly to the Employer; and

20.2.5 Not turn your personal knowledge or influence over any employees, clients, suppliers, customers, or contractors of the Employer to your own benefit or indirect benefit.

20.3 The terms and conditions of this Agreement shall remain confidential between the Employer and you and shall not be disclosed by you without the written consent of the Employer.

[7] In the affidavit evidence the officer of Q Limited says:

- (i) Q Limited undertakes work for third parties, including agencies of the state, which requires, among other things, for it to hold and access highly confidential and sensitive commercial information;
- (ii) F is employed by Q Limited in a senior health and safety role;
- (iii) F has access to the material identified in (i) above;
- (iv) F has, prior to the current allegations made against him, disclosed confidential information to third parties, including on social media, in breach of his contractual obligations;
- (v) F has been reminded of contractual obligations regarding confidentiality by Q Limited on several occasions;
- (vi) Q Limited indicated the commencement of a disciplinary investigation into F's confidentiality breaches on 21 September 2018;
- (vii) Seemingly in direct response, F issued an email to Q Limited on 23 September 2018 advising of his intention to disclose information to third parties;
- (viii) The email F stated: "I have no guilt as to my actions, as per my employment contract ... it is reasonable in this instance to disregard confidentiality";

- (ix) The email also stated “[Q Limited] should lose that contract”;
- (x) Via subsequent text message F sought a “quick and clean exit” from Q Limited and requested payment of a sum of money;
- (xi) Q limited is concerned F is motivated to follow through with his threats; and
- (xii) Serious loss and damage will be suffered by Q Limited if F follows through with threats to disclose confidential information including loss and damage to Q Limited’s reputation.

Jurisdiction

[8] The Authority is required to consider and apply the tests for an interim injunction.² I am satisfied the jurisdiction exists under s 161 of the Employment Relations Act (the Act) for the Authority to make the orders sought under s 162 of the Act.³

Arguable case

[9] I am satisfied from the affidavit evidence, untested as it is, that there is an arguable case that F has breached clause 20 of his employment agreement in that he has retained confidential information. I am also satisfied that there is an arguable case that he has threatened to disclose that information.

Balance of convenience

[10] I find that the balance of convenience weighs strongly in favour of granting the interim orders sought by Q Limited. Based on affidavit evidence, there will be significant inconvenience to Q Limited and a risk of significant damage if the orders sought are not made and the confidential information is disclosed.

Other remedies

[11] I am not satisfied that damages would be sufficient to remedy the breaches.

² See, *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Union* [1991] 1 ERNZ 886

³ As confirmed by the Court in *Credit Consultants Debt Services NZ Ltd v Wilson (No.2)* [2007] ERNZ 205at [66]

Overall justice

[12] Standing back and looking at the totality of the matter, I am satisfied that overall justice favours the making of orders for a reasonably limited period until (a) the parties can resolve their employment relationship in mediation and seek discharge of the orders or (b) the Authority can hear from both parties and determine matters.

Orders

[13] I make the following orders taking into account the undertaking as to damages:

- (a) I order that the names of the parties not be published;
- (b) An interim injunction is issued to restrain F until further order of the Authority from:
 - (i) using confidential information of Q Limited in any way other than as authorised by Q Limited.
 - (ii) disclosing any of the confidential information of Q Limited to any person, organisation or third party.
 - (iii) copying any material containing any confidential information of Q Limited.
- (c) F is further ordered to return all of the information and copies of it, if any, belonging to Q Limited by **4.00pm, Friday 28 September 2018** at the offices of Duncan Cotterill, Level 2, Duncan Cotterill Plaza, 148 Victoria Street, Christchurch.
- (d) F must provide an affidavit to Q Limited via its solicitors at their offices by no later than **4.00pm on Thursday 4 October 2018** deposing to:
 - (i) his compliance with (c) above;
 - (ii) the identity of any person, organisation or third party to whom F has provided details and/or copies of any confidential information;
 - (iii) the identity and location of every computer and data storage device on which the confidential information has been or is stored;

- (iv) The use made by F of the confidential information, identifying which information was used, the manner in which it was used, the purpose for which it was used and what date it was used.

(e) F is to comply with clause 20 of his employment agreement.

[14] The orders that the Authority has made are to take effect immediately and will remain in force until further order. The parties are directed to attend mediation on **Friday 5 October 2018 at Christchurch.**

[15] In the event mediation does resolve this employment relationship problem, the parties may apply to the Authority for a variation or discharge of the orders or such further orders as they believe appropriate. The Authority may convene an investigation meeting at short notice to consider any applications. F is to attend any meeting and may be represented. The Authority may call for further evidence from Q Limited or evidence from F at, or prior to, that meeting.

[16] The Authority directs Q Limited to serve F personally and by email with this Determination, a copy of the application and all other documents including the Affidavit lodged in the Authority on 25 September 2018.

[17] The parties may contact Authority Officer Nick Boag via phone on 03 964 7850 or via email on nick.boag@era.govt.nz if a case management conference or further advice is required about the orders made.

Costs

[18] Costs are reserved

Andrew Dallas
Member of the Employment Relations Authority