

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 481
5415514

BETWEEN RICHMOND SERVICES
 LIMITED
 Applicant

A N D JAN SUSAN BRACEWELL
 Respondent

Member of Authority: T G Tetitaha

Representatives: P Shaw, Counsel for Applicant
 J Cook, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 2 July 2013 from Applicant
 26 June and 2 July 2013 from Respondent

Date of Determination: 18 October 2013

DETERMINATION OF THE AUTHORITY

Orders

- A The previous non-publication order made on 15 April 2013 is set aside.**
- B An order is made prohibiting publication of any information or details which may lead to the identification of any clients of Richmond Services Limited including the information contained in Schedule “A”.**
- C Jan Susan Bracewell is directed to return to Richmond Services Limited the confidential information set out in the schedule attached hereto and any other confidential information of Richmond Services Limited.**
- D Rachel Rolston is directed to return to Richmond Services Limited the confidential information set out in the schedule attached hereto and any**

other confidential information of Richmond Services Limited she may hold.

- E. Costs are reserved. If costs are sought, the parties seeking costs shall file submissions within 15 days of the date of this determination. The other party has 15 days thereafter to reply.**

Employment relationship problem

[1] Richmond Services Limited seeks a permanent injunction preventing a former employee, Jan Susan Bracewell, from disclosing or using its confidential information including client information and an order for its return. None of the affected clients have consented to Ms Bracewell retaining their information.

[2] At a teleconference on 10 June 2013 the parties agreed Ms Bracewell took the client information disclosed in affidavits filed by Ms Bracewell and her representative, Rachel Rolston, and the information was confidential. The confidential information is set out in the attached Schedule "A".

[3] The previous non-publication order made on 15 April 2013 is set aside.

[4] A order is made prohibiting publication of any information or details which may lead to the identification of any clients of Richmond Services Limited including the information contained in Schedule "A".

[5] Ms Bracewell disagrees and asserts she has the right to possess the confidential information pursuant to the Protected Disclosures Act 2000 and Crimes Amendment Act 2011. She submits the clients are "vulnerable persons" and Richmond Services Limited employees are guilty of gross negligence.

Issues

[6] There is a single issue for determination namely, is Ms Bracewell lawfully entitled to possess the confidential information?

[7] If she is not lawfully entitled to it, interim orders for its return shall issue. If she is entitled to retain the information, this application shall be dismissed.

Facts

[8] Richmond Services Limited (Richmond Services) provides community mental health and disability support services. Ms Bracewell was employed as a community support worker providing day-to-day support to clients with mental health issues. She had access to sensitive and confidential information about the clients, including medical information.

[9] Ms Bracewell disagreed with decisions made by Richmond Services regarding care of certain clients. She raised various complaints about the staff/client rostering system and client care between June 2011 and February 2013.¹

[10] In February 2013 she referred two concerns about client care with the Chief Executive Officer, Barbara Disley. She alleged, amongst other things, client A was vulnerable and had been twice sexually assaulted. Staff at Richmond Services based in Tauranga had not done anything about this.

[11] Ms Bracewell sought advice from a District Health Board employee providing copies of the confidential information. This employee advised a crime had been committed. Ms Bracewell laid a complaint with the Police against the Richmond Services staff involved.² She also provided confidential information about client A to her family.

[12] She resigned on 28 February 2013.

[13] In March 2013 a reporter from the DominionPost contacted Richmond stating he was investigating claims by former workers that one of their clients had been sexually assaulted while in their care.³

[14] Client A was informed by Richmond Services and became distressed about the disclosure of her information.

[15] Richmond Services wrote to Ms Bracewell asking her to confirm she did not possess confidential information and requested to return it. If they did not receive confirmation further action may arise.⁴

¹ Respondents Bundle of Documents (RBD) Documents 2 to 8

² RBD Document 9

³ Applicants Bundle of Documents (ABD) Document 12

⁴ ABD Documents 7 to 10

[16] Ms Bracewell replied by letter the same day stating “get stuffed bring it on”. Ms Bracewell further alleges she was entitled to disclose the information under the Protected Disclosures Act 2000 and Protected Disclosures Policies.⁵

[17] Richmond Services disagrees and now seeks the above orders.

Legal Framework

[18] The Protected Disclosures Act 2000 sets out the rights of an employee (including former employees) to disclose information about serious wrongdoing in or by that organisation. Even if the employee believed upon reasonable grounds but that belief was mistaken, the disclosure remained protected. An employee must disclose information in the manner provided by internal procedures established by the organisation for receiving and dealing with information about the serious wrongdoing.⁶

[19] Richmond Services have a Protected Disclosures Policy (PDP).⁷ The PDP defined serious wrongdoing as *an act, omission, or course of conduct that constitutes an offence at law* and set out an internal procedure for disclosure. Ms Bracewell has disclosed client information to two of the persons and bodies in the PDP. These are the Richmond Service Chief Executive Officer and the Police.

[20] Section 195A Crimes Act 1961 makes it an imprisonable offence for staff of a residence where a vulnerable adult resides who know that the victim is at risk of sexual assault because of an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies and fail to take reasonable steps to protect them. “Vulnerable adult” means a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person (s2).

Is Ms Bracewell lawfully entitled to possess the confidential information?

[21] Ms Bracewell submits she is entitled to possess and disclose Richmond Services clients information because she has followed the PDP and is legally entitled by the Crimes Amendment Act 2011 to fully investigate and remedy what she

⁵ ABD Document 11

⁶ Sections 3(1), 6 and 7 Protected Disclosures Act 2000

⁷ Applicant’s bundle of documents (ABD) Document 4

believed to be very serious and possibly criminal wrongdoing by Richmond Services. She has complied with her lawful obligations. She refers to the need to retain the information for future disclosures to *a member of the Crown and the Medical Council of NZ* pursuant to s10 Protected Disclosures Act 2000.⁸

[22] Richmond Services disagrees. It submits Ms Bracewell does not own and has no right to take or retain the confidential information.

[23] The purpose of the Protected Disclosures Act 2000 is *facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation ... by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing.*⁹ Facilitation of disclosure and investigation of serious wrongdoing does not require Ms Bracewell to retain confidential information about Richmond clients. She is capable of making complaints without having recourse to the confidential information of clients. It should then be left to the appropriate authority to investigate and obtain any necessary information.

[24] Ms Bracewell has already complained unsuccessfully to the Police, Ombudsman and the Richmond CEO. A Richmond Services psychologist has reviewed client A and determined she was not a “vulnerable person”. The Police interviewed client A and Richmond staff. They determined Richmond had fulfilled its obligations under s195 and 195A Crimes Act 1961. The Police then concluded Ms Bracewell did not have lawful possession of the confidential information. It forwarded the copies she supplied to them back to the District Health Board.¹⁰ The Ombudsman advised it had no jurisdiction to deal with her complaint.¹¹ Both the Ombudsman and Police recommended she complain to the Health and Disability Commissioner. No evidence of the outcome of that complaint is before the Authority.

[25] There was no client consent to Ms Bracewell retaining and disclosing their information to the District Health Board employee, family or other body. A consent form was signed by client A for Richmond Services to release her information to the

⁸ Reply to Applicants Submission from Jan Bracewell para. 4

⁹ Section 5

¹⁰ RBD Document 11

¹¹ RBD Document 12

family and other bodies noted therein.¹² This is not authority for Ms Bracewell to do so.

[26] There is evidence Ms Bracewell, more probably than not, disclosed confidential information about client A to the DominionPost. There was no basis whatsoever for this to have occurred. This was in flagrant breach of client A's legal rights. Similarly there was no consent for Ms Bracewell to disclose client A's confidential information to any of the above bodies.

[27] The Authority determines Ms Bracewell has no right to possess or use this information and it must be returned to Richmond Services Limited.

[28] Accordingly the Authority makes the following orders:

- A. The previous non-publication order made on 15 April 2013 is set aside.
- B. An order is made prohibiting publication of any information or details which may lead to the identification of any clients of Richmond Services Limited including the information contained in Schedule "A".
- C. Jan Susan Bracewell is directed to return to Richmond Services Limited the confidential information set out in the schedule attached hereto and any other confidential information of Richmond Services Limited she may hold.
- D. Rachel Rolston is directed to return to Richmond Services Limited the confidential information set out in the schedule attached hereto and any other confidential information of Richmond Services Limited she may hold.
- E. Costs are reserved. If costs are sought, the parties seeking costs shall file submissions within 28 days of the date of this determination. The other party has 15 days thereafter to reply.

T G Tetitaha
Member of the Employment Relations Authority

¹² There is a consent form for Richmond Services to release client information to family/whanau
RBD Document 13

Schedule "A"

[List of confidential information]