

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA AUCKLAND 166
5415784**

BETWEEN SMARTPAY LIMITED
Applicant

AND RONICE RYKEN
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Andrew Schirnack, Counsel for Respondent

Determination: 3 May 2013

DETERMINATION OF THE AUTHORITY

Application for a Compliance Order

[1] On 13 and 16 November 2012 a Record of Settlement (the Settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, Smartpay Limited (Smartpay), and the Respondent, Ms Ronice Ryken. The Settlement was signed by Mr Bradley Gerdis, Director and Shareholder of Smartpay, and Ms Ryken. The Record was also signed by a Mediator employed by the Department of Labour.

[2] The issue which had been brought before the Authority by Smartpay was that Ms Ryken had not complied fully with clause 6 of the Settlement, which states:

The Employee agrees not to use or disclose confidential and/or commercially sensitive information disclosed by her in the course of her duties by the Employer, its clients or suppliers without the Employer's prior written consent. The Employee agrees to delete the Employer's, its customers' and suppliers' confidential and/or commercially sensitive information from any personal records (such as a personal device) prior to 5pm 13 November and shall not keep copies of any such information. The Employee also agrees to

surrender to the Employer the personal diaries and workbooks (with personal material redacted if she wishes) in which she has recorded the Employer's, its customers' and suppliers' confidential and/or commercially sensitive information by 5pm 13 November.

[3] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before signing the agreement, the parties were advised and accepted they understood the effect of sections 148A in respect of entitlement to minimum entitlements, 149(1) in respect of the authority of the mediator to sign the Settlement and 149(3) of the Act which states that the agreed terms of settlement :

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Background Facts

[4] Smartpay is a supplier of Eftpos machines and equipment, primarily on a rental basis. The majority of customers enter into rental agreements for a period of 36 or 48 months duration.

[5] Smartpay provided evidence to the Authority to substantiate its claim that Ms Ryken, who is currently employed by a competitor company Nationwide, had approached several of its clients on or about the time of the renewal date of the rental agreements.

[6] The evidence establishes that Ms Ryken had admitted to one particular customer that she had known when that customer's contract with Smartpay was expiring.

[7] Smartpay submits that the use of the rental agreement expiry date information gave Nationwide a commercial advantage

[8] Smartpay also provided evidence that Ms Ryken used information about Smartpay's processes, specifically that it did not offer an on-site service, to gain a commercial advantage for Nationwide.

[9] Ms Ryken agreed that she had contacted customers of Smartpay with whom she had dealt during her employment with Smartpay on behalf of her new employer, but denied that

she had breached the confidentiality clause in her individual employment agreement with Smartpay, or the Settlement.

[10] Ms Ryken denied the breach on the basis that she had used only the information which she had in her memory.

Determination

[11] In the English High Court case *Faccenda Chicken Limited v Fowler*¹ three categories of information were established:

- a. *Information that because of its trivial character or public accessibility, cannot be regarded as proprietary confidential information;*
- b. *Information that is not confidential but assumes that status if the employee is expressly told it is confidential, or because of its character it goes without saying that it is confidential, but which once learned by the employee, becomes part of the employee's skills and knowledge. This information cannot be used during an employee's employment (without breaching the employee's obligation of fidelity), but the employee is free and able to use it as part of his or hers skills and knowledge post termination of employment; and*
- c. *Information that comprises a "trade secret" which is so confidential that even if the employee has learned it by heart, he/she cannot use it post-termination of employment.*

[12] In *Penisular Real Estate Ltd v Harris*² Tipping J observed:³

- 4 *What amounts to confidential information for this purpose is not susceptible of abstract definition. It will depend on the facts of each case. ...*
- 5 *There is now a clear trend of authority to the effect that whether one classifies the following information as confidential or not, a*

¹ [1986] 1 All ER 617

² [1992] 2 NZLR 216

³ Ibid at pg 5

departing employee may not take with him customer or client lists for the purpose of using them in a competing role ...

6. Neither may a departing employee deliberately memorise such information for that purpose ..

[13] From the evidence available to the Authority, I am satisfied that Ms Ryken used commercially sensitive information which she obtained in the course of her employment with Smartpay, during the course of her new employment with Nationwide, which thereby gained a commercial advantage over Smartpay.

[14] I find that this was in breach of clause 6 of the Settlement with which Ms Ryken has failed to comply..

[15] **In order to effect compliance with clause 6 of the Settlement, I therefore order that Ms Ryken comply with clause 6 of the Settlement including by:**

- a. Not using information she acquired through her employment about Smartpay's customers' contract expiry dates, and**
- b. Not using her knowledge about Smartpay's business processes and techniques.**

[16] For the information of Ms Ryken failure to comply with an order such as this one made by the Authority under s 137 of the Act may provide a basis for an application to be made by Smartpay to the Employment Court for enforcement of the order. Under s140 of the Act, where the Court is satisfied that any person has failed to comply with a compliance order made under s137, the Court may order remedies, including a fine not exceeding \$40,000.00 and/or the seizure of property and for the proceeds of sale to be distributed to the person enforcing the Authority's order.

Eleanor Robinson
Member of the Employment Relations Authority