

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 184/09
5164990**

BETWEEN SPICERS PORTFOLIO
 MANAGEMENT LIMITED
 Applicant

AND TONIA LISETTE ROBERTSON
 Respondent

Member of Authority: Leon Robinson

Representatives: Anthony Drake, Counsel for Applicant
 Candice Murphy, Counsel for Respondent

Investigation Meeting: 12 June 2009

Determination: 12 June 2009

DETERMINATION OF THE AUTHORITY (ORALLY)

[1] The applicant company Spicers Portfolio Management Limited has lodged a statement of problem and an application for urgency and interim directions on return of information and property. That statement of problem is dated 9 June 2009.

[2] The applicant alleges that the respondent has breached her employment agreement and employment obligations owed to the applicant by breaching her duties of fidelity, loyalty, confidentiality and good faith. The applicant company seeks urgent interim directions from the Authority regarding the return of its information.

[3] The applicant company carries on business in financial planning including providing services in cash management, borrowing, mortgages, tax planning and advice, investment strategies, retirement planning, asset management and estate planning.

[4] The respondent commenced employment with the applicant company on or about the 18th of September 2006 in the position of Partnership Manager Corporate Clients although that is apparently controversial now. On the 1st of April 2007 the respondent's title changed to Manager Corporate Solutions. The respondent's employment has apparently now ended though that too is controversial and there is some doubt as to when the employment ended.

[5] Today I have held an investigation meeting primarily for the purposes of interviewing the respondent Ms Robertson in relation to the directions which are sought on an urgent basis by the applicant company. I have agreed that the directions sought are urgent and accordingly this proceeding has been granted urgency.

[6] Attending before the Authority today is the applicant company's Ms Heather Hay, Mr Murray Harris, and the respondent Ms Robertson. Ms Robertson has given sworn evidence to the Authority today and has also lodged an affidavit in opposition to the application for interim directions, that affidavit being sworn on the 12th of June 2009.

[7] The applicant company claims three substantive causes of action. Firstly that the respondent has breached a duty of confidentiality owed to it. Secondly, a breach of the duty of fidelity and thirdly, a breach of the duty of good faith. It seeks directions as set out paragraph 3 of the statement of problem.

[8] Ms Robertson has given evidence today and which she concedes that she has previously sent to her own email address known as a "Gmail" account, some 39 emails from the employer's email system. Those emails consist undoubtedly of the employer's property and attached various documents in electronic form. I need not make any findings as to the lawfulness of Ms Robertson's actions in doing so but it is clear that she is presently in possession of those documents and more correctly, her solicitors now have copies of the email correspondence and the attachments.

[9] Because the applicant company seeks substantive relief I agree that is necessary to make direction to safeguard the information which is now held by the solicitors. I now deal with the directions that are sought in the statement of problem.

[10] Firstly, I note Ms Robertson's sworn evidence that she does not hold any of Spicer's confidential information.

[11] The first direction sought requires Ms Robertson to surrender to the applicant company's solicitors any documents whether electronic or physical within the respondent's power, possession or control which are documents belonging to the applicant which are derived from documents belonging to the applicant and which contain information including confidential information belonging to the applicant or which have any relevance to the work carried out by the respondent while she was employed by the applicant including but not limited to the documents earlier referred to.

[12] I accept Ms Robertson's sworn evidence today and also as she deposes in her affidavit that she is no longer in possession of the information alleged by the applicant company which she sent to her private email address. I have no reason to doubt Ms Robertson's evidence.

[13] I am concerned however, that Ms Robertson's legal advisors are in possession of copies of the information which is now in dispute. I do not appreciate that the lawyers have any right to retain copies of the documentation if I accept that Ms Robertson herself does not accept that she is entitled to retain the information herself. Therefore I agree that the information which is held by the solicitors is not properly held by those solicitors. It is the property of the applicant company and ought to be returned. Insofar as the respondent Ms Robertson has the power over that documentation I expect that Ms Robertson will now instruct her lawyers to release the documentation to the applicant company.

[14] At this stage I do not expect to make a formal direction to the lawyers to do the same and expect they will on my indication in this determination surrender the documentation held to the applicant company's lawyers.

[15] As to 3.1(c) in the statement of problem I accept Ms Robertson's counsel's concern that it may not be possible for Ms Robertson to recall confidential information that is no longer within her power, possession or control. Such information may well proceed beyond the immediate documents which are now in question and therefore I consider it would be too onerous a task on her to comply with the order that is sought at 3.1(c)(i) of the statement of problem. In light of a preservation order that I made in a Minute on 10 June 2009 I do not consider that it is necessary to make the direction sought at 3.1(d) of the statement of problem.

[16] There is a laptop computer which Ms Robertson has given evidence of today on which she accesses the information the subject of this application. There are also USB memory sticks which are in possession of the lawyers. I would expect the USB memory sticks to be released to the applicant company's solicitors. In respect of the computer laptop which is Ms Robertson's property, I am formally calling on Ms Robertson to produce that laptop to the Authority. I understand that Ms Robertson would prefer that Ms Spence is not the person who conducts an inspection on the laptop computer, and in accordance with Ms Robertson's wishes Ms Robertson shall nominate a computer forensic expert who will carry out an inspection of the laptop computer which she provides to the Authority. That independent computer forensic expert shall conduct an inspection of the laptop computer, firstly to verify that the laptop computer does not hold any of the applicant company's property. That computer forensic expert shall also provide an undertaking that he or she shall deal only with the computer laptop as directed by the Authority.

[17] The expert shall also delete any property of the applicant company as may be found on the USB devices following which they shall be returned to Ms Robertson.

[18] In respect of the respondent's Gmail account, I direct that that account shall also be inspected by the forensic expert and the search confined to email correspondence originating from the applicant company.

[19] It is noted from the statement of problem that the applicant company alleges that the respondent has engaged in business activities outside of her employment with the applicant and without the applicant company's knowledge. The statement of problem makes allegations in respect of activities allegedly by Ms Robertson.

[20] It is important to note that Ms Robertson has indicated to the Authority today both in her sworn evidence but also in her affidavit that she is happy for an independent forensic computer expert to attend and confirm that all Spicer's confidential information is deleted from her personal computer and personal USB devices. Her agreement and consent in that regard is material to the Authority in relation to the directions which have now been made.

[21] The statement in reply is to be lodged by 25 June 2009.

[22] Ms Robertson has seven days from the date of this determination to nominate a computer forensic expert to attend to the inspection I have directed. The documentation held by Ms Robertson's lawyers should be returned within the seven days to the applicant company's solicitors and the USB devices and Ms Robertson's personal laptop computer should also be provided to the Authority within seven days.

[23] I expect that once the statement in reply has been lodged and the various matters which I have made directions in respect of here are attended to, that I shall address the question of further mediation.

Leon Robinson
Member of Employment Relations Authority