IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 177
5422623

	BETWEEN	MARK WOODS Applicant
	A N D	UNITED CLEANING SERVICES LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Stephen Langton, Counsel for Applicant Bridget Trollope, Counsel for Respondent
Submissions Received:	On 14 April from the Respondent, on 16 April from the Applicant.
Investigation Meeting:	On the papers
Date of Determination:	09 May 2014

DETERMINATION OF THE AUTHORITY

A. United Cleaning Services Limited (United Cleaning) is to comply with the Authority's direction of 3 March (March direction) within 14 days of the date of this determination.

B. United Cleaning's repeated and continual refusal to comply with the Authority's directions including the March direction is conduct which has obstructed and delayed the Authority's investigation and it is liable to a penalty under s134A of the Employment Relations Act 2000 (the Act).

C. United Cleaning is ordered to pay a penalty of $8000 pursuant to s135(2)(b) of the Act. Under s136(2) of the Act, $4000 of the total penalty ($8000) is to be paid into the Authority for payment into a Crown Bank Account and the remaining $4000 is to be paid

directly to Mr Woods. These payments are to be paid by United Cleaning within 14 days of the date of this determination.

Employment relationship problem

[1] The issue for determination is whether the respondent, United Cleaning Services Limited (United Cleaning) in repeatedly and continually failing to comply with the Authority's direction to provide a named client list exclusively to the Authority, has obstructed or delayed the Authority's investigation in breach of s134A of the Employment Relations Act 2000.

[2] Section 134A states:

> *Penalty for obstructing or delaying Authority investigation*
> *Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).*

[3] Under s134A(2), the Authority may award a penalty of its own motion. United Cleaning claims it is not liable to a penalty because it had *sufficient cause* to not comply with the Authority's direction.

[4] By statement of problem filed on 13 June 2013, the applicant, Mr Mark Woods, claims he was unjustifiably dismissed on 14 September 2012 by United Cleaning. Mr Woods further claims United Cleaning was in breach of its statutory duty of good faith pursuant to ss.4(1)(a) and 4(1A)(c) of the Employment Relations Act 2000 (the Act).

[5] Mr Woods alleges that in the months leading up to his dismissal several meetings were held with Mr Bob King, one of United Cleaning's directors about United Cleaning's financial difficulties. Mr Woods claims he requested details to support claims made by United Cleaning of poor financial performance but these were not forthcoming. Mr Woods claims his subsequent dismissal was as a result of these questions concerning United Cleaning's financial performance.

[6] United Cleaning denies these allegations concerning its financial performance and claims Mr Woods was justifiably dismissed because he had brought clients into disrepute and it no longer had trust and confidence in him. One of the issues between

the parties is whether United Cleaning's financial circumstances was relevant to Mr Woods' dismissal.

[7] On 20 November 2013, the Authority convened a telephone conference. Both Mr Langton, Counsel for Mr Woods and Ms Trollope, Counsel for United Cleaning attended. Agreement was reached during the conference about the way in which the matter was to proceed up to an investigation meeting which was scheduled for 3 to 5 March 2014. Agreement included that:

> *The respondent's witness statements and bundle of documents (to include accounts referred to in para.2.25(c) and (d) of the statement in reply and a list of clients with corresponding revenue for the three year period immediately prior to the applicant's dismissal) are to be lodged with the Authority and served on the other party by 4pm Wednesday 29 January 2014.*

[8] On 22 November, Ms Trollope filed a memorandum requesting that the direction made that the respondent file and serve *"a list of clients with corresponding revenue for the three year immediately prior to Mr Woods' dismissal"* be dispensed with.

[9] In support of her request, Ms Trollope claimed that this information was not relevant to the issue for determination by the Authority as to whether or not Mr Woods' dismissal was justified. Mr Langton opposed Ms Trollope's request in a memorandum dated 26 November 2013. Mr Langton submitted that the documents were relevant because there is a live question (including the question of justification) for determination by the Authority over the financial performance of United Cleaning, including whether the financial performance reported to him was correct.

[10] I issued a Member's Minute on 28 November 2013 which included the following direction:

> *I have carefully considered memoranda filed by both counsel and I propose to deal with Ms Trollope's first application by revoking the current direction that the respondent provide a list of clients with corresponding revenue for the three year period immediately prior to the applicant's dismissal. The direction will be replaced by a direction that such a client list is to be provided exclusively to me to consider. Such a list will be confidential to me. I will consider the issue of relevance of the client list and convene a further telephone conference to deal with this aspect of the proceeding.*

[11] United Cleaning did not comply with this direction.

[12] A further telephone conference was held on 12 February 2014 to deal with this and also United Cleaning's failure to file witness statements in accordance with the Authority's timetable order. As a result of this failure by United Cleaning, the Investigation Meeting scheduled for 3,4 and 5 March had to be adjourned. In an email to counsel for both parties following the telephone conference, I recorded the following:

> *… in accordance with the Authority's Minute of 28 November, Ms Trollope is to provide the Authority the full client list and Mr Langton with an unnamed one immediately. …*

[13] The direction was not complied with and on 19 February 2014, Ms Trollope filed a memorandum in which she stated:

> *8. Counsel for the respondent is arranging to uplift the commercially sensitive information from the respondent, being the named client revenue list (the **Named Client List**), directed to be filed to the Authority Member exclusively.*
>
> *9. The respondent, prior to providing the Named Client List to counsel, seeks confirmation that upon the Authority's receipt and consideration of the Named Client List, the Authority will invite further submissions from each party."*

[14] Ms Trollope's memorandum further requested sufficient opportunity to challenge to the Employment Court any direction made by the Authority that the client list be disclosed to Mr Woods.

[15] Upon receipt of Ms Trollope's memorandum an email dated 3 March 2014 was sent by the Authority to the parties stating:

> *With regard to the provision of the named client list to the Authority exclusively, this will not be disclosed to the applicant or to any third party unless directed by the Authority. Upon receipt of the named client list, no direction/determination for release will be made by the Authority without first hearing from the parties. In the event a direction is made as to disclosure of the named list, it will not take effect for two working days to give either party time to make any applications regarding the Authority's direction/determination as to disclosure.*
>
> ***(the March direction)***

[16] United Cleaning did not comply with the March direction. A further telephone conference was held on 1 April 2014 to deal with this issue.

[17] Ms Trollope filed a memorandum in the Authority prior to the telephone conference in which she stated:

> *6. With respect, the direction or undertaking provided by the Authority Member is unclear as to the course of action for the named client list to be held and/or disclosed by the Authority, and in what, if any, circumstance the named client list might be provided unilaterally by the Authority, to the applicant.*
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> *7. The respondent seeks assurance that the named client list will not be disclosed prior to a final determination of the issue (including a challenge of any direction for service on the applicant) and an outline of the clear procedure that would be adopted in the event that the Authority member makes a direction for service of the client list on the applicant.*

[18] Ms Trollope states further in para.16(d) of her memorandum:

> *16. (d) For the avoidance of doubt, the named client list shall not be disclosed pending a final determination of the issue of disclosure of the named client list, including a challenge (if any) of the Authority Member's determination.*

[19] At the telephone conference on 1 April, I informed both Counsel that I considered United Cleaning's continued failure to comply with the March direction may be conduct that *"obstructed*" or "*delayed"* the Authority's investigation and could result in liability for penalties under s.134A of the Act.

[20] United Cleaning was again directed to file the named client list by 4pm, Friday 4 April 2014. On 7 April Ms Trollope sent an email to the Authority stating that as she had not received the named client revenue list from United Cleaning, the direction was not able to be complied with. To date the March direction has not been complied with.

[21] On 7 April 2014, an email was sent to counsel for both parties as follows:

> *The Authority is now considering whether these actions (failure to comply with the Authority's directions) constitute an "obstruction" or "delay" of the Authority's investigation under section 134A(1) of the Employment Relations Act 2000 and if so whether penalties should be awarded under section 134A(2).*

[22] United Cleaning was given until 14 April to file and serve submissions on the issue and Mr Woods was given until 28 April to respond.

[23] In a memorandum dated 14 April 2014, Ms Trollope submitted that United Cleaning was not opposed to the Authority member being provided with the named client list. However, Ms Trollope submitted that in her view the Authority's directions were incomplete and United Cleaning was unclear as to the level of risk if the named client list (which it considered was commercially sensitive) was served on the applicant.

[24] Ms Trollope makes a number of submissions concerning the relevance of the named client list to the issue for determination in support of the stance taken by United Cleaning in failing to comply with the direction. Ms Trollope argues that the Authority is "*not required to view the client list to adjudge its relevance*."

[25] Ms Trollope submits that the Authority is not able to conclude that United Cleaning has caused an *"obstruction or delay to the Authority's investigation, without sufficient cause"*. The argument by Ms Trollope is that United Cleaning is seeking to protect its commercial interests from a former employee and this was *sufficient cause* for refusing to comply with the direction to produce to the Authority the named client revenue list.

[26] Mr Langton, in an email to the Authority states that United Cleaning's failure and repeated refusals to comply with the Authority's directions has resulted in unnecessary costs for Mr Woods.

[27] I do not accept Ms Trollope's submissions that United Cleaning has sufficient cause for refusing to comply with the March direction. Section 160 of the Act confers wide powers on the Authority "*to call for evidence and information from the parties or from any other person…."* in investigating any matter before it.

[28] My direction contained in a Minute of 28 November directing production of the named client list exclusively to me was made for the purpose of obtaining *evidence and information* from the parties for the Authority's investigation in to the claims of unjustified dismissal and breach of good faith by United Cleaning. The language and meaning of the direction could not have been more explicit in my view and was for the purposes of enabling me to consider documentation which may be relevant to my investigation.

[29] Following a request by Ms Trollope, the direction was clarified (March direction) to accommodate concerns regarding any possible disclosure of United

Cleaning's commercial interests. The March direction provides a clear process to be followed in the event the Authority directs disclosure of the named client list.

[30] The March direction states that the named client list would be provided to the Authority exclusively and would not be disclosed to the applicant or to any third party unless directed by the Authority.

[31] Importantly, the March direction states in relation to the disclosure of the named client list, no such direction would be made without "***first hearing from the parties"***.

[32] Even after hearing the parties, the direction states that even if a direction as to disclosure of the named list is made, such a direction would not take effect ***"for two working days to give either party time to make any applications regarding the Authority's directions/determination as to disclosure"***. This allows for a challenge by either party to the Employment Court along with a stay pending determination of the challenge.

[33] It is my view that there is a clear process laid out in the March direction to accommodate United Cleaning's concerns about disclosure of its commercial information. The Authority has directed production of the named client list on four occasions and it has still not been complied with. It is my view that United Cleaning *"without sufficient cause"* has obstructed and delayed the Authority's investigation. The Investigation Meeting is scheduled to proceed on 18,19 and 20 June but in light of United Cleaning's ongoing refusal to comply with the March direction there is a possibility it may require adjournment.

[34] *Brannigan v Davidson*[1] is a Privy Council case concerned with whether witnesses at the "Winebox inquiry" were obliged to answer questions. The relevant statutory provision made it an offence not to answer questions if the privilege against self-incrimination did not apply and the refusal to answer was without sufficient cause.

[35] The following statement from their Lordships at pp.147 and 148, is relevant to the Authority, its inquisitorial functions and the meaning of "*sufficient cause*":

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1 [1997] 1 NZLR 140 (PC)

> *Parliament entrusted the conduct of this inquiry to the commission. It is for the Commissioner to decide which witnesses to summon, and whose evidence is necessary. In these proceedings the Court is not exercising an appellate jurisdiction. It is exercising its supervisory, reviewing jurisdiction. The distinction is not a piece of empty formalism. As the inquiry proceeds and information is gradually gathered from different sources, the Commissioner is in a far better position than the Court to assess how important the witness's evidence may be, and to weigh that against the proffered excuse.*
> *Nor is it for the Commissioner to justify in advance the questions or topics he proposes to pursue with the appellants. Such a course would be calculated to stultify the inquiry, and would go beyond the protection those compelled to give evidence are reasonably entitled to expect in an inquisitorial investigation of this nature.*
>
> *This important question need not be answered in the present case, and Their Lordships consider it better to leave the answer to be supplied on another occasion. The reason why the question need not be answered is that in the present case the statutory "sufficient cause" and "just excuse" exceptions provide ample scope for all the circumstances to be taken into account. Inherent in these two expressions, which are synonymous in this context, is the concept of weighing all the consequences of the refusal to give evidence: the adverse consequences to the inquiry if the questions are not answered, and the adverse consequences to the witness if he is compelled to answer.*

[36] As an inquisitorial body, the Authority is entitled to and has the statutory power to decide the information it requires to conduct its investigation. In assessing whether United Cleaning has "sufficient cause" to refuse and to continue to refuse to comply with the March direction, various consequences must be weighed up. Potential harm to United Cleaning if required to comply, potential harm to Mr Woods if the Authority is unable to assess the information directed to be produced when investigating his claim and of course the wider consequences to the Authority of having its statutory powers to make directions and have them complied with in order to conduct an investigation, flouted.

[37] I find that United Cleaning in refusing to comply with the March direction has obstructed and delayed the Authority's investigation without sufficient cause. Weighing up the various factors, the March direction is clear and protects any concerns United Cleaning may have as to disclosure of its information. I am satisfied there is a potential for harm with regard to Mr Woods' right to resolve his grievance without obstruction by United Cleaning.

[38] I must now consider penalty. United Cleaning's conduct should be met with a penalty,

> *"… particularly to send a message that attempts made to subvert statutory and contractual dispute resolution processes must not go unchecked by the Authority, as parties to employment relationships must have confidence that the Authority, without delay or obstruction, will be able to carry out a full and fair investigation into any employment relationship problem whenever required. A penalty payable to the Crown for breach of s 134A of the Act is appropriate."*[2]

[39] I make the following orders. United Cleaning is to comply with the Authority's March direction within 14 days of the date of this determination.

[40] United Cleaning's repeated and continual refusal to comply with the Authority's directions including the March direction is conduct which has obstructed and delayed the Authority's investigation and it is liable to a penalty under s134A of the Employment Relations Act 2000 (the Act).

[41] United Cleaning is ordered to pay a penalty of $8000 pursuant to s135(2)(b) of the Act. Under s136(2) of the Act, $4000 of the total penalty ($8000) is to be paid into the Authority for payment into a Crown Bank Account and the remaining $4000 is to be paid directly to Mr Woods. These payments are to be paid by United Cleaning within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

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[2] *Manoharan v The Chief Executive of Waiariki Institute of Technology)* [2011] NZERA Auckland 427 para 55