

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 18
5548067

BETWEEN	JOHN EDMINSTIN Applicant
A N D	SANFORD LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Peter Andrew and Leola Goffin, Counsel for the Applicant Kylie Dunn, Counsel for the Respondent
Investigation Meeting:	10 and 11 February 2016 at Invercargill
Date of Determination:	29 February 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Edminstin was employed by the respondent, Sanford Limited (Sanford) from February 2009 until the conclusion of the 2014 Bluff oyster season. Mr Edminstin was employed as a skipper on Sanford's oyster fishing vessel, The Toiler.

[2] During the course of Mr Edminstin's employment, an employment relationship problem arose between the parties. In order to attempt to resolve that employment relationship problem, the parties attended mediation on 24 February 2015.

[3] As a result of mediation the parties reached a settlement of the employment relationship problem and a record of settlement (the Record of Settlement) was signed pursuant to s.149 of the Employment Relations Act 2000 (the Act). The Record of Settlement has been signed by a mediator from the Mediation Services of the Ministry of Business Innovation and Employment.

[4] I prohibit from publication all details of the Record of Settlement except for clause 6 as it is the basis for the application before the Authority.

[5] Clause 6 of the Record of Settlement provides that:

6. *The applicant may collect his “marks” off the Toiler on February 27, 2015 after making appropriate arrangements with the respondent.*

[6] Mr Edminstin contends that Sanford has not complied with clause 6 of the Record of Settlement as it: (i) has not provided him with his “marks” (the Marks)¹ as he cannot access the Marks on the memory stick provided to him; (ii) it has kept a copy of the Marks; and (iii) it has used the Marks to dredge for oysters in the 2015 Bluff oyster season.

[7] Mr Edminstin applied to the Authority seeking compliance orders, compensation and penalties against Sanford and Gordon Johnson (the skipper of The Toiler for the 2015 Bluff oyster season). In a determination of 7 October 2015² the Authority dismissed the proceedings against Mr Johnson as frivolous or vexatious.

[8] In a determination of 23 October 2015³ the Authority declined to remove the remaining matter (against Sanford) to the Employment Court.

[9] By way of an amended application dated 3 December 2015 Mr Edminstin withdrew his applications for compensation and penalties and amended the compliance orders he sought. The matter remaining for the Authority to determine is only an application for compliance orders in the following terms:

- a. An order requiring Sanford to comply with the Record of Settlement and in particular clause 6 of the Record of Settlement. In the amended application it is stated that the Marks are the sole and exclusive

¹ See paragraphs [18] – [21] for an explanation of “marks”.

² [2015] NZERA Christchurch 145

³ [2015] NZERA Christchurch 158

property of Mr Edminstin and Sanford is in breach of clause 6 as it has retained and used a copy of the Marks. Further it is stated that Sanford has failed to provide the electronic data (constituting the Marks) in a form that is readable and capable of being used;

- b. An order directing Sanford to allow Mr Edminstin and his IT expert access to the Sea Plot computer and Kodon GPS, which were previously held on The Toiler (being the devices on which the electronic data constituting the Marks was stored) so that Mr Edminstin and the IT expert can verify and obtain a copy of the data constituting the Marks and then ensure deletion of that data from the two devices;
- c. Subject to paragraph (b) an order requiring Sanford to immediately delete all records and copies of the Marks from its GPS and computer systems and any other location or medium on which the Marks might be stored;
- d. An order directing Sanford to cease forthwith using or relying on the Marks in any way, in particular for locating oysters and other fishery related purposes;
- e. An order pursuant to s.137(2) of the Act requiring Mr Johnson (a proposed witness) to cease forthwith using or relying on the Marks in any way, in particular for locating oysters and other fishery related purposes;
- f. An order pursuant to s.137(2) of the Act requiring Mr Johnson to destroy all copies of the Marks in his possession, power or control.

[10] Sanford opposes the application on the basis that it has complied with the Record of Settlement and, in any event, the orders sought go beyond compliance with the Record of Settlement and instead require Sanford to do things that were not contemplated by the Record of Settlement.

[11] In the course of the investigation meeting the parties agreed a mechanism to resolve the issue of Mr Edminstin being able to access the Marks in the format

provided or some other suitable format so that he can use the Marks. As a result I am not required to determine that aspect of the compliance order sought.

[12] In accordance with s.174E of the Act, my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but it does not record all of the evidence and submissions received.

Background facts

[13] Sanford operates a commercial fishing, seafood farming and seafood processing business. It operates nationally and its fishing fleet covers inshore, deepwater and aquaculture vessels.

[14] Sanford has one vessel which operates out of Bluff in oyster fishing, The Toiler, and it has three quotas of the 23 Bluff oyster quotas available. The Toiler is one of 11 vessels operating in the Bluff oyster fishery area⁴.

[15] Mr Edminstin was employed by Sanford as the Skipper of The Toiler on a series of fixed term employment agreements with each employment agreement covering employment for the relevant Bluff oyster season from 2009 until 2014.

[16] Mr Edminstin's employment agreement included the following confidentiality clause:

15. CONFIDENTIALITY

*15.1 All information which may be supplied to the Skipper by the Employer or of which the Skipper may become aware from the Skipper's employment by the Employer, or from the Skipper's dealing with the Employer or which is in any way related to or connected with the business of the Employer ("**the Confidential Information**") is the property of the Employer.*

[17] In the course of his employment as the Skipper of The Toiler, Mr Edminstin was responsible for The Toiler and he had sole discretion as to when and where The Toiler would dredge for oysters. Mr Edminstin was not provided with information to assist him with dredging for oysters; Sanford did of course provide The Toiler with all of its equipment and the crew required for dredging oysters.

⁴ The legal description is the Foveaux Strait Dredge Oyster Fishery as defined in the Fisheries (Southland and Sub Antarctic Areas Commercial Fishing) Regulations 1986.

[18] In order to dredge for oysters Mr Edminstin used his knowledge of the location of oyster beds in Foveaux Strait and knowledge about wind, tide and sea conditions. Mr Edminstin describes this knowledge as crucial and valuable and in particular he describes the knowledge of location of oyster beds as being his personal and confidential information.

[19] The knowledge of location of oyster beds is recorded or remembered by a skipper as a mark. This might be by way of reference to the alignment of landmarks, recorded on a map or listed as longitude and latitude coordinates. Historically these marks were either remembered or written down on paper in a book or a collection of written records. In more recent times marks have been recorded electronically in computers on board vessels with copies stored on a memory stick or a mobile telephone or recorded and stored on the GPS navigation system used on the vessel. Marks can now be recorded with pin point accuracy.

[20] Marks are described by skippers as being the product of their lifetime of working and fishing the Bluff oyster fishery area. Marks are jealously guarded and are only passed on to others to use by gift or bequeathed in wills. There is an understanding between skippers which has developed over the years of oyster dredging which was described in evidence as a code of practice. This code is essentially a record of the custom relating to marks; that a skipper owns his marks and whilst he does not have an exclusive right to dredge for oysters in any given location nor can he claim a right to own the spot in Foveaux Strait where an oyster bed is located, his mark is one of his fishing spots and another skipper will not dredge there unless that fishing spot is also a mark they have been gifted or discovered themselves (without following or copying another skipper's dredging trail).

[21] In short skippers recognise between them a proprietary right to their marks and a right to dredge from their marks without other skippers poaching that mark unless they also have that fishing spot as one of their marks.

[22] In the course of his employment as the Skipper of The Toiler Mr Edminstin loaded his marks which he had written down on paper into the on board computer and when a GPS navigation system was installed he used that system to locate his marks and record his trail of dredging from a given mark. Mr Edminstin's evidence was that he would load a mark into The Toiler's electronic system and then he would dredge from that mark on a trail; that trail being dictated by the prevailing conditions. The

trail would be recorded in the GPS system and he might code or comment on that trail depending on the success of that particular dredging.

[23] There was conflicting evidence as to whether the location of an oyster bed would change but it appears that the skippers agree that a bed of oysters may vary in quality and quantity from season to season and even within a season depending on a number of factors such as prevailing conditions, disease and how much that bed had been dredged. Mr Edminstin's evidence was that as oyster beds did not move there was no need to find new marks during his employment, he simply dredged from his existing marks deciding which mark to use depending on conditions and the quality and/or quantity of oysters caught. That said it is clear to me that the information loaded into the on board electronic equipment was updated in the course of Mr Edminstin's employment depending on where he dredged and how much he caught. It is for this reason, amongst others, that Mr Edminstin wants the electronic data of his oyster dredging during his employment.

[24] There was also evidence from Sanford that the marks loaded in to the on board electronic system included marks from the previous skipper of The Toiler.

[25] Having reached the agreement regarding the Marks as set out in clause 6 of the Record of Settlement Mr Edminstin arranged to collect the Marks from the computer and GPS system used on The Toiler. Mr Edminstin's evidence is that he arranged to collect the Marks on Friday 27 February however on the Wednesday before that he heard from another skipper that Mr Johnson was intending to get an IT expert to make copies of the Marks for Mr Edminstin and for himself. Mr Edminstin says he was *dumbfounded* by this and it was the first time he had been told the Marks would be copied.

[26] What followed was an exchange of correspondence between the parties' lawyers in which it became clear that Sanford took the view that the Marks did not belong to Mr Edminstin and it could retain a copy of them. Mr Edminstin was deeply shocked by this and he feared it could spell the end of the oyster fishing community in Bluff if a large fishing company could use a skipper's marks.

[27] On 27 February Mr Edminstin attended at The Toiler to collect the Marks. He was told he could have a copy of the Marks from the on board computer but could not

have any of the GPS records. He was told not to touch anything so, believing the Record of Settlement had been breached by this, he left and contacted his lawyer.

[28] There was then a further exchange of correspondence between the parties' lawyers. In the end Mr Edminstin was given a memory stick with a copy of the Marks from the on board computer and the GPS data. Mr Edminstin has not been able to access the data stored on the memory stick.

[29] The end result is Mr Edminstin does not have a copy of the Marks he can use and Sanford retains the original Marks in the on board computer (which was removed from The Toiler at the start of the 2015 season) and the GPS system (which was removed from the Toiler in July 2015). Sanford has made a further copy of the Marks which it has in a secure location. The evidence from Sanford is it has not used the Marks as it has a new electronic system which automatically records where The Toiler dredges, recording new marks each day.

The issues

[30] The Authority must determine the following issues:

- a. Has Sanford failed to comply with clause 6 of the Record of Settlement (or any other clause of the Record of Settlement)?
- b. If Sanford has not complied with clause 6 of the Record of Settlement is a compliance order appropriate?
- c. If a compliance order is appropriate can I order compliance in the terms sought (or some other terms)?

[31] In determining whether Sanford has complied with the Record of Settlement, the Authority must determine the meaning of clause 6.

Has Sanford complied with the Record of Settlement?

[32] The alleged failure of Sanford to comply with the Record of Settlement is the failure to comply with clause 6. In order to determine if Sanford has failed to comply I must consider what the obligation is that is imposed upon Sanford by clause 6.

[33] The meaning to be attributed to clause 6 of the Record of Settlement is to be taken from the natural and ordinary meaning of the language used⁵.

[34] On a first read clause 6 of the Record of Settlement may appear to be clear based on the natural and ordinary meaning of the words; Mr Edminstin can collect certain property from Sanford assuming he has made appropriate arrangements. The property being collected is described as *his* “marks” and the parties agree that this property is the electronic data loaded into The Toiler’s on board computer and GPS system by Mr Edminstin in the course of his employment with Sanford.

[35] What is not clear from the natural and ordinary meaning of the words is what happens to any remaining record of the electronic data constituting *his* “marks” once it has been collected by Mr Edminstin.

[36] Mr Edminstin contends quite simply that because the Marks are owned by him, which is supported by the reference to *his* “marks” and because the action is referred to as collecting this means he can take away his property leaving nothing for Sanford to retain or use.

[37] Sanford contends that actually *his* “marks” is merely a reference to marks loaded by Mr Edminstin, not a reference to ownership by Mr Edminstin. This is particularly so as ownership of the Marks was always clear between the parties as it is confidential information as expressed in clause 15 of the employment agreement and therefore the electronic data is owned by Sanford. All that clause 6 entitles Mr Edminstin to collect is a copy of the electronic data with the original data remaining with Sanford (and it follows as it is its property it can use the data as it pleases).

[38] In order to resolve this ambiguity I can consider extrinsic evidence that will aid the interpretation of clause 6. In *Firm PI 1 Limited v Zurich Australian Insurance Limited*⁶ the Supreme Court summarised the approach to contractual interpretation as:⁷

...It is sufficient to say that the proper approach is an objective one, the aim being to ascertain “the meaning which the document would

⁵ *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149 applying *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444

⁶ [2014] NZSC 147, [2015] 1 NZLR 432

⁷ Op. cit at [30]

convey to a reasonable person having all of the background and knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[39] The background that I consider relevant and which I will therefore consider in order to come to a conclusion on the interpretation of clause 6 of the Record of Settlement includes the circumstances giving rise to the Record of Settlement and its purpose, the employment relationship and in particular any terms of the employment agreement which are relevant, the custom and practice relating to marks and the Bluff oyster fishing industry, the wider fishing practice which Sanford applies to deepwater fishing, and how the Marks were used and recorded during Mr Edminstin's employment.

[40] The Record of Settlement was entered into in order to resolve the employment relationship problem between the parties. The employment relationship had already come to an end and the Record of Settlement makes no mention of this. So before entering this agreement the post termination relationship between the parties was governed by the terms of the employment agreement that survived termination and any common law duties. The Record of Settlement does not appear to have been entered into to discharge and replace any of those ongoing obligations. It creates new obligations pertaining to the settlement of the employment relationship problem; it does not address any ongoing obligations such as confidentiality nor is it expressed as being the entire agreement between the parties⁸.

[41] Mr Edminstin's employment agreement contained specific provisions relating to confidential information. Clause 15, which I have quoted above provides for three types of confidential information: (i) all information supplied by Sanford to Mr Edminstin; (ii) all information which Mr Edminstin becomes aware of from his employment or from his dealings with Sanford; and (iii) all information which is related or connected to the business of Sanford.

[42] In my view any information created by Mr Edminstin in the course of his employment must become confidential information under clause 15 of his

⁸ On this basis the Record of Settlement is not to be treated on the same terms as the settlement agreement in *JP Morgan Chase Bank v Lewis* [2015] NZCA 255.

employment agreement as it is captured either by points (ii) or (iii) in paragraph [41] above⁹.

[43] It is clear from the evidence that Mr Edminstin was aware of clause 15 when he entered into the employment agreement and he had the opportunity to consider its effect. When questioned about this he appeared to be saying that he didn't think this clause would apply as it was particularly wide suggesting that the act of taking his lunch with him on board The Toiler would cause that to become confidential information. I take this to mean he thought clause 15 could not apply to his property which he brought on to The Toiler and in light of the custom and practice relating to marks he considered that clause 15 would not operate to cause something he viewed as being his property to become his employer's. In short Mr Edminstin believed the Marks would not become confidential information because he has some sempiternal right to that information arising out of custom and practice.

[44] The custom and practice Mr Edminstin relies on was presented simply and clearly by many of the skippers who dredge for oysters in the Bluff oyster fishery. I had no reason to doubt any of the witnesses who gave evidence and I found the evidence to be compelling and interesting. Each of the skippers who gave evidence referenced an "agreed code of practice". This document records the following:

1. *Our Skippers' Marks are our personal individual and confidential property as they have been for generations whether kept in our heads, or recorded on pieces of paper, in notebooks, on maps or charts on personal computers or CDs or memory sticks or on-board computers or other devices.*
2. *It is our tradition and custom that our Marks can be passed to other skippers and friends by gift, sharing or being inherited or passed in Wills.*
3. *We can identify and recognise other Skipper's Marks by reference to our own Marks.*
4. *As agreed with the Bluff Oyster Management Company in 2004 and as a compromise we provide a grid reference and Log Book data of the areas fished at the agreed 2004 rate of \$20.00 a day.*
5. *All skippers in the Bluff Oyster Fishery are aware of these customs and traditions and agreements.*

⁹ The Marks are also likely to constitute intellectual property owned by Sanford pursuant to s21 of the Copyright Act 1994.

[45] This code of practice evidences two things; first, what the skippers accept is the practice associated with marks having developed over many years of custom, and second, this practice is one that is accepted between skippers but has no binding effect on any person or entity. It is nothing more than a record of how skippers believe *it is and has always been*¹⁰.

[46] In contrast Sanford's evidence is that its experience in the wider fishing industry is that this type of information is not owned by its employed skippers but rather is information belonging to it as the employer. This was simply put as, we are in the business of hunting fish and this type of information is an important record of where fish are caught. Co-ordinates of fishing spots in deepwater fishing are recorded and kept by Sanford. A departing skipper is generally entitled to a copy of marks created by him/her during the course of his/her employment (although not always depending on circumstances) but these records are Sanford's and they are used by the new skipper. Sanford takes the same view on oyster marks.

[47] I now turn to apply this background knowledge and the facts relating to how the Marks were created and used by Mr Edminstin¹¹ in my analysis of the meaning of clause 6 of the Record of Settlement.

[48] The first question is what is the reference to "marks" in clause 6 of the Record of Settlement? Marks are the locations or fishing spots. These physical spots are not owned by skippers, boat owners, employers or other participants in the Bluff oyster fishery. There can be no doubt that the collection of property referred to in clause 6 is not the collection of actual places but rather records of those places which have been identified. So "marks" must be the collection of some record of a mark.

[49] The second question is what are "his marks"? Any marks referenced by "his" or "a skippers" or "my" are either records of marks that a person claims to own or records of marks that a person uses. Skippers claim these records are owned by them and passed on (evidenced by custom and practice). This is because they believe they have some sort of exclusive ownership of the coordinates or an exclusive right to dredge at the fishing spot (by custom and practice). However their marks are simply the marks they use; the fact others recognise this and do not use them unless any of

¹⁰ Evidence from Lynn Atwell, skipper.

¹¹ See paragraph [23].

those marks happen to be in their list of marks that they use does not create ownership or exclusive rights to a mark.

[50] In this case “his marks” is a reference to the marks used by Mr Edminstin when he was employed by Sanford. They are electronic records of the physical fishing spots; these records being created by Mr Edminstin when he entered his written records into the on board computer and GPS. Mr Edminstin does not own the physical mark, he does not have an exclusive right to dredge from that mark nor does he own the electronic copy of the mark. It is notable that “his marks” includes additional information added by Mr Edminstin in the course of dredging. This is confidential information and is owned by Sanford. “His” cannot be a reference to ownership of anything by Mr Edminstin but rather is a reference to records created by Mr Edminstin.

[51] The third question then is what is meant by “collect his marks”? Is it possible notwithstanding that the marks are owned by Sanford that “collect” confers some right to take away the original record and/or all copies of the Marks? In my view collect does not mean take away the original records of the Marks because the only way this could occur would be to take away the GPS equipment and computer that was on board The Toiler. Mr Edminstin’s evidence was that he would take away an electronic version of the data comprising the Marks on a memory stick and/or disc; he took both of these with him when he went to collect the Marks on 27 February. Mr Edminstin would only ever collect a copy of the Marks.

[52] When I consider the relevant background and how the Marks were created and stored I am left with two conclusions: (i) the Marks (as created and stored during Mr Edminstin’s employment) constitute confidential information and are owned by Sanford; and (ii) in any event because of the nature of the creation and storage of the Marks (i.e. electronic) Mr Edminstin can only ever have collected a copy of that data.

[53] This means that the obligation under clause 6 of the Record of Settlement is for Sanford to allow Mr Edminstin to take away a copy of the Marks and it can retain any record of the Marks that it has.

[54] If this is the obligation imposed upon Sanford then in order to interpret or apply clause 6 as Mr Edminstin contends and impose additional obligations on Sanford to delete any remaining records of the Marks and not use the Marks I would

have to imply that into clause 6 and/or find that these additional obligations were agreed but not recorded and as a matter of fact and law this is not something I can do.

Determination

[55] Subject to the parties resolving the issue of Mr Edminstin being able to access and use the copy of the Marks he has been provided with, Sanford has complied with clause 6 of the Record of Settlement and a compliance order is not required.

[56] I decline the application for a compliance order.

Costs

[57] Costs are reserved. The parties should seek to agree between them how the legal costs incurred by taking part in these proceedings should be dealt with. In the absence of such agreement, any party seeking a contribution to its legal costs may lodge and serve a memorandum within 28 days of the date of this determination. Any party opposing such application may then lodge and serve a memorandum in reply within a further 14 days.

Peter van Keulen
Member of the Employment Relations Authority