

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2018] NZEmpC 153  
EMPC 417/2018**

IN THE MATTER OF      an application for a search order  
  
BETWEEN                      RAULAND NZ LIMITED  
   Applicant  
  
AND                              CONRAD DELVO  
   Respondent

Hearing:                      On the papers, filed without notice to respondent  
  
Appearances:                C Mansell and A W Johnson, counsel for applicant  
  
Judgment:                    14 December 2018  
  
Reasons:                     18 December 2018

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**REASONS FOR JUDGMENT OF JUDGE M E PERKINS**

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[1]      These are the reasons for the judgment of the Court issued urgently and without notice to the respondent on Friday 14 December 2018.<sup>1</sup>

[2]      The applicant, Rauland NZ Limited (Rauland NZ), has a strong prima facie case on an accrued cause of action against the respondent. The respondent, Conrad Delvo, is a former employee of Rauland NZ. In accordance with the Court's Practice Direction,<sup>2</sup> Rauland NZ has filed a proposed form of statement of problem which it will file in the Employment Relations Authority (the Authority) after execution of the orders that have been made. Its causes of action in those proceedings in the Authority are based on an allegation that the applicant considers that the respondent has breached his ongoing obligations as set out in his employment agreement with the applicant dated 4 August 2015, in that he has:

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<sup>1</sup>      *Rauland NZ Ltd v Delvo* [2018] NZEmpC 149.

<sup>2</sup>      Employment Court Practice Directions <[www.employmentcourt.govt.nz/legislation-and-rules](http://www.employmentcourt.govt.nz/legislation-and-rules)>.

- (a) failed to keep in confidence, confidential information he obtained whilst employed by the applicant;
- (b) retained for his own benefit, copyrighted works belonging to the applicant and/or its parent company, Rauland Australia Pty Ltd (Rauland Australia);
- (c) held or maintained works, documents and information that is the property of the applicant and/or Rauland Australia;
- (d) by retaining, copying and, using and/or sharing copyright works of the applicant and/or Rauland Australia, the respondent has breached his duty to do all such acts to secure the applicant's rights in respect to its copyrighted works; and
- (e) breached his restraint of trade, and consequently injured, impaired or reduced the applicant's business.

[3] The remedies sought in the Authority include:

- (a) A permanent injunction restraining the respondent by himself or through his agents, from publishing or sharing or using the applicant's and/or Rauland Australia's confidential information and/or copyright works and/or information that belongs to those companies;
- (b) making an inquiry into profits earned by the respondent and making orders that any unlawful profits be paid to the applicant;
- (c) imposing a penalty on the respondent for each breach of the express and/or implied terms of his employment agreement with the applicant and/or for every contravention of his obligation of good faith under the Employment Relations Act 2000 (the Act); and
- (d) costs.

[4] I am satisfied that there is a strong arguable case for the applicant that these claims are, at first instance, within the exclusive employment jurisdiction of the Authority and that the evidence adduced to this Court by the applicant supports a strong prima facie case for those remedies.

[5] On 'without notice' applications such as this, the applicant is obliged to put relevant information before the Court, including information that may assist the respondent's defences. In this case the applicant has filed in support of its application three affidavits which set out the basis for the application. The application is also supported by documents which are annexed to the affidavits put before the Court which would appear to speak for themselves. The affidavits have been sworn and filed on behalf of Steve Gomes, Managing Director of the applicant, David William Geoffrey Thompson, General Manager of the applicant and Michael Khoury of Sydney, Computer Forensic Analyst.

[6] Mr Delvo was employed by Rauland NZ as an account manager from August 2015 until 31 August 2018. His primary duties and responsibilities included:

- (a) developing and maintaining a local sales plan through building a sales pipeline looking forward one to three years;
- (b) selling Rauland NZ's products and services;
- (c) building long term relationships with Rauland NZ's customers and partners; and
- (d) building and maintaining an engaged workforce.

[7] At the time of his employment ending with Rauland NZ, his annual base salary was \$107,800 plus the use of a company car. He was also provided with a sales commission scheme over and above his base salary.

[8] During his tenure with Rauland NZ, Mr Delvo worked closely with the New Zealand customer base to secure future work. This base included private hospitals, health boards, other public hospitals and Accident Compensation Corporation.

[9] Mr Delvo had access to Rauland NZ's business information which was confidential and commercially sensitive. The information is contained on a shared server which is accessible by all staff members through their unique user profile. Mr Delvo could access this shared server through the laptop, iPad and mobile phone issued to him by Rauland NZ.

[10] On 30 June 2018 Mr Delvo resigned from his employment with Rauland NZ which was to become effective from 31 August 2018. His resignation was accepted. On the last day of his employment, which was 27 August 2018, Mr Delvo returned the laptop, iPad and mobile phone to Mr Thompson. During a conversation with Mr Thompson, Mr Delvo assured him that he had returned all Rauland NZ's property. Later in the day at a farewell function, Mr Delvo informed Mr Thompson that he did not have another job and was not sure whether he was to stay in the industry if he did obtain other employment. This was clearly incorrect as on 6 September 2018, public notification was given that Mr Delvo had commenced employment as the Enterprise Business Development Manager with Hills NZ Ltd, a subsidiary of Hills Health Solutions Pty Ltd in Australia (together now referred to as Hills). Hills is a direct competitor with Rauland NZ and Rauland Australia. During mid-September 2018 Mr Delvo was observed by Rauland NZ employees at the premises of one of its hospital customers and had contacted another. These were customers which Mr Delvo had contact with during his employment with Rauland NZ.

[11] Mr Delvo's employment agreement contained several post-employment restraints and obligations. There were elaborate clauses in his employment agreement dealing with confidential information, intellectual property and restraint of trade. The restraint of trade clause, which is particularly pertinent, subsisted for a period of six months and reads as follows:

30. **Restraint of Trade**

30.1 You agree to not at any time during the period set out in Schedule 1.

- (a) Undertake or carry on or be employed or directly or indirectly concerned or interested either as employer, employee, consultant, associate, agent, director, shareholder or in any other capacity in any business in the Nurse Call or Patient Entertainment Market at any place within the distance of 30km of any premises of the Company;

- (b) Attempt personally or by letters, advertisements or otherwise to obtain customers or suppliers of the Company for yourself or for any other person, firm, company or employer engaged in any business in the Nurse Call or Patient Entertainment Market;
  - (c) For yourself or for any other person, firm, company or employer solicit, interfere with or endeavour to entice away from the Company any person, firm or company who at any time during this Agreement is a customer or supplier of the Company; or
  - (d) Either on your own account or for any other person, firm, company or employer solicit, interfere with or endeavour to entice away from the Company any person who at any time during the continuance of this Agreement was an employee or contractor to the Company.
- 30.2 In addition to the restraints set out above, you must not, at any time after the termination of this Agreement
- (a) Advertise, publicise or permit the advertising or publicising of the fact of your employment by the Company in a manner likely to cause damage to the Company; and/or
  - (b) Do any act or thing whatsoever which may injure, impair or reduce or be likely to injure, impair or reduce the Company's business, goodwill or reputation or the Company's standing in the eyes of the public.
- 30.3 You agree and acknowledge that the remedy at law for breach of any of your obligations under this clause would be inadequate and you agree that temporary and permanent relief by way of injunction against you may be granted in any proceedings which the Company or any persons on its behalf may bring to enforce any of the provisions of this clause without the necessity of proof of actual damage suffered by the Company.
- 30.4 You agree that your salary is adequate consideration for the restraints on your post-employment activities.
- 30.5 You acknowledge the reasonableness of these restraints and agree that if, despite this acknowledgement, you ever successfully challenge the validity of any of these restraints by due process at law, you will agree to a reasonable restraint to be determined by the Court.
- 30.6 You acknowledge that each of these restraints is a separate restraint and that if any provision is invalid and not enforceable in accordance with its terms, the other provisions which are self-sustaining and incapable of separate enforcement are and continue to be valid and enforceable in accordance with their terms.

[12] Prior to Mr Delvo leaving the employment of Rauland NZ, two other employees of Rauland Australia had resigned and commenced working for Hills. As

a result of the unexpected loss of a significant tender, which it was discovered had been awarded to Hills, Rauland Australia became concerned about the two former employees who may have misappropriated Rauland Australia's confidential information. Forensic searching was carried out in respect of those two employees, and on 15 October 2018 and 1 November 2018 Rauland Australia obtained Anton Pillar orders (search orders) against the two employees. As a result of this, Mr Gomes considered it prudent to have forensic examinations carried out on the contents of the laptop issued by Rauland NZ to Mr Delvo. This was to determine whether there was any evidence to confirm whether Mr Delvo had been in contact with specific former employees of Rauland NZ or Rauland Australia prior to commencing employment with Hills and whether he had retained Rauland NZ's confidential information or maintained such information subsequent to his resignation. This forensic examination was carried out by Ferrier Hodgson and the results are contained in the affidavit of Mr Khoury.

[13] The Ferrier Hodgson preliminary report revealed there was evidence that on 24 July 2018, Mr Delvo had removed copies of Rauland NZ's confidential information by way of removable USB storage devices. Folders containing Rauland NZ's confidential information were created on the removable USB devices at the time that they were connected to Mr Delvo's laptop (and therefore the shared server). The forensic analysis stated that there was a high probability that Mr Delvo may have obtained further confidential information. The forensic analysis stated that while there was some correspondence between Mr Delvo and the Rauland Australia former employees who had commenced employment with Hills, there was no evidence to suggest that this correspondence was suspicious in any way or related to his resignation and subsequent employment with Hills.

[14] Having reviewed the preliminary report, Mr Gomes made enquiries with the New Zealand office regarding whether the removable USB devices mentioned in the report could be located in the office. None were located. Mr Gomes also indicates in his affidavit that there appeared to be no legitimate business reason for Mr Delvo to be accessing files at that point in time which was in the evening on the day in question. Mr Delvo had not discussed accessing the information with any of the staff members of Rauland NZ or Rauland Australia.

[15] Mr Gomes in his affidavit indicates that the confidential information which Mr Delvo may have taken could be used by a competitor such as Hills to its commercial advantage. The information could be used to undermine Rauland's business strategy, leverage Rauland's contacts and undercut it on price. Information regarding employee remuneration could also be used to solicit more existing employees of Rauland. In addition, Mr Gomes refers to the experience of the unexpected loss of a tender for future business to Hills following alleged breaches committed by the two Australian employees.

[16] Mr Gomes acknowledges that to date none of Rauland NZ's existing customers have indicated that they wish to change providers. Nevertheless, all the information which has been gathered because of the forensic analysis has obviously caused grave concerns about Mr Delvo's activities in the period leading to termination of his employment with Rauland NZ and his activities after joining Hills. In seeking orders on an urgent basis and without notice to Mr Delvo, the applicant properly points to the risk that if Mr Delvo has indeed acted in the way suspected then there is otherwise a grave risk that he will endeavour to destroy the evidence which might be discovered in his possession by way of the search order sought.

[17] As indicated in the interim judgment issued on 14 December 2018, the matter is to be considered pursuant to s 190(3) of the Act and Part 33 of the High Court Rules. Section 190(3) of the Employment Relations Act 2000 gives this Court jurisdiction to make search orders, and the basis for a search order being made is prescribed in rr 33.2 and 33.3 of the High Court Rules 2016.

[18] Having regard to the information which is contained in the affidavits and the information which has been procured by the forensic examination undertaken, I am satisfied that the applicant, Rauland NZ, has a strong prima facie case on an accrued cause of action. I am also satisfied that it has been established that the potential or actual loss or damage to the applicant will be serious if the search order is not made. I am also satisfied that there is sufficient evidence on an inferential basis in relation to the respondent, Conrad Delvo, that he possesses relevant evidentiary material and that there is a real possibility that he might destroy such material or cause it to be

unavailable for use in evidence in the proceedings anticipated to be filed with the Authority if they have not already been so filed.

[19] For these reasons and in view of the urgency of the situation, the search order was accordingly made on 14 December 2018. The Court has been informed that it was executed at 7 am on 17 December 2018. At a hearing at 11 am on Wednesday 19 December 2018, the Court will consider a report on the search from the Independent Solicitor appointed in this matter. That will be to decide what further steps need to be taken in respect of any evidence gathered and how it is to be secured pending hearings in this matter, but at the same time, protecting the interests of other parties involved and in particular Mr Delvo's present employer Hills in irrelevant but nevertheless privileged, commercially sensitive information.

[20] At the hearing the applicant, the respondent and the Independent Solicitor are entitled to be heard. Any other relevant matters will also be considered at the hearing.

[21] As indicated in the earlier judgment, costs are now reserved, but at the hearing on 19 December 2018, the matter of costs will be reviewed.

[22] As with the earlier judgment, this judgment is not to be published other than to the parties, their representatives, the Independent Solicitor and the Forensic Analysts.

M E Perkins  
Judge

Judgment signed at 12 noon on 18 December 2018