IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 169
EMPC 394/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	RAULAND NZ LIMITED Plaintiff
AND	CONRAD DELVO Defendant

Hearing: On the papers

Appearances: C Mansell, counsel for plaintiff
E Coats, counsel for defendant

Judgment: 21 November 2019

JUDGMENT OF JUDGE M E PERKINS

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[1] These proceedings have been removed to the Court pursuant to s 178 of the Employment Relations Act 2000 (the Act). For reasons set out in this judgment, the Court considers that the matter was not properly so removed, and the Employment Relations Authority (the Authority) is now ordered to investigate the matter.

[2] The proceedings were removed pursuant to a preliminary determination of the Authority dated 30 October 2019.[1]

[3] The substantive proceedings were filed with the Authority in order to found an application to the Court by the plaintiff for a without notice search order against the defendant pursuant to s 190(3) of the Act. This was necessary as, by virtue of s 173(4)

[1] *Rauland NZ Ltd v Delvo* [2019] NZERA 619.

of the Act, the jurisdiction of the Authority to make ex parte search orders is specifically excluded.

[4] In order to enable a party to apply to the Court for a search order, the application must be founded on substantive originating proceedings, which, in this case, could only be filed with the Authority.

[5] The defendant, Conrad Delvo, was formerly employed by the plaintiff, Rauland NZ Ltd (Rauland). Mr Delvo resigned from his position with Rauland and in September 2018 commenced employment with Rauland's main competitor, Hills Health Solutions, which appears to be a trading branch of Hills Ltd. The proceedings filed with the Authority allege breaches of Mr Delvo's employment agreement with Rauland involving confidential information, copyrighted works and restraint of trade.

[6] The search order, having been made and executed, has been the subject of one hearing to deal with administrative matters arising. The Court's involvement in the matter is now virtually complete. There may be some further minor attendances to deal with the technicalities of forensic searches. The purpose of the application to the Court of course was simply to uncover and protect evidence for the purposes of the proceedings filed in the Authority. Any issues arising as to disclosure and admissibility of relevant documents uncovered become matters for the Authority to deal with as part of its investigation.

[7] The determination of the Authority in deciding to remove the proceedings to the Court revolved around two issues. The first was that Rauland had submitted that there was an important question of law in relation to its claim for an account of profits. The important question was described as being related to causation. Mr Delvo did not accept that an important question of law had been identified. The second issue was that Rauland relied upon s 178(2)(c) of the Act that the search order proceeding meant that the Court already had before it proceedings which were between the same parties and which involved the same or similar or related issues. The Authority relied upon these two issues as meaning that the balance favoured removal to the Court.

[8] It is my view that the Authority's reliance upon these issues in order to remove the proceedings to the Court in the face of objection from Mr Delvo was erroneous having regard to the particular circumstances existing in this case. First, while the issue of causation may in some cases be a complicated issue, it is primarily resolved upon a factual basis. If issues of law arise, and that is a matter of conjecture in this case, they would not arise other than incidentally during the course of the investigation. Whether or not such an issue will indeed arise in the proceedings is purely speculative at this stage and not a proper basis for removal. Secondly, a finding by the Authority that the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues is a misunderstanding of the nature of the search order jurisdiction vested in the Court.

[9] As indicated earlier, the application for a search order must be founded upon substantive proceedings. In this case, the proceedings with the Authority were not filed until after the search order had been executed for obvious reasons. They were directed, however, to be filed immediately after the execution of the search. There are not two sets of proceedings in this matter; there is only one. Because of jurisdictional limits, it is the Court which has to consider the application for a search order and use it to uncover and protect evidence, but that is for the purposes of the proceedings which are with the Authority. There may be cases where the application for a search order does develop into more substantive proceedings between the same parties being before the Court, in which case a different conclusion on removal might be reached, but this case is not one of those. The purpose of the Authority considering removal when the Court already has proceedings before it involving the same parties and the same or similar issues is to ensure that there is not duplication of evidence and expenditure of unnecessary costs in having proceedings conducted in both the Court and the Authority at the same time. That is not the situation which arises in this case. As indicated, the Court is soon to conclude its involvement in issues relating to the search order, and it will then be for the Authority to use its investigative powers to deal with relevant documents.

[10] Prior to considering the Authority's determination in this matter, I gave the parties the opportunity of making submissions. The inquiry into the removal was

initiated by the Court, and it was appropriate to ensure the parties had notice of the concerns at the removal and give them the opportunity of providing submissions.

[11] Ms Mansell, counsel for Rauland, made the submission that, even if the Authority did not properly remove the proceedings to the Court, the delays as a result of the inevitable challenges to any determination of the Authority on the substantive issues, would make it just in the circumstances for the proceedings to remain with the Court. This is a submission which is often made when applications for removal are being considered. It is not a submission which is properly based. While that was the result in *Vice-Chancellor of Lincoln University v Stewart (No 2)*, the Court there made clear that the circumstances of that case were unusual and that it:[2]

> ... should not be taken as an indication of the conclusion which might be reached in other cases… the discretion is more likely than not to be exercised in favour of a direction that the Authority investigate the matter.

[12] Again, the issue of whether or not there will be an appeal is purely speculative. It imples that the parties regard the Authority as simply going through the motions when that is not the case. The submission denigrates the Authority, its Members and the valuable investigative process which is vested in the Authority. Cases such as this may involve complicated issues, but the causes which have been raised against Mr Delvo would have been well within the contemplation of the legislature when the jurisdiction of the Authority was set. While the Authority does not follow formal procedures in dealing with documentary evidence as the Court does, it nevertheless has wide powers to call for and consider such evidence as part of its investigative process. This matter is well within the capabilities of the Authority to deal with by its inquisitorial, investigative process and it is appropriate for the case to proceed there.

[13] The starting point, when an application for removal is being considered, is that, absent the criteria set out in s 178 of the Act which might justify the exercise of the discretion to remove, a party must have the right to have an investigation with all of the benefits that entails. In this case, Mr Delvo has been unjustifiably deprived of that entitlement against his wishes. The determination states that the matter is relatively finely balanced. It goes on to state that it would be more cost effective and efficient

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2 *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 (EmpC) at [43]-[45].

for one body to consider the issues rather than a moving of matters back and forth between the Authority and the Court. That, again, is a misunderstanding of the nature of the application to the Court for search orders, which will not continue beyond any further technical issues relating to forensic analysis. It is the Authority and not the Court that will be dealing with the substantive issues in what is one set of proceedings. If the Authority was correct on this point, it would mean that, in virtually every case where a search order was applied for, the substantive proceedings, which are required to be filed in the Authority, would be removed.

[14] It is for these reasons that I have decided that the circumstances existing in this case mean that the matter was not properly removed and that the Authority should now continue with its investigation. In view of the fact that this matter was raised on the Court's own initiative, costs will lie where they fall. Costs in respect of the search order application will be dealt with in due course and may need to await the outcome on the merits at the conclusion of the Authority's investigation.

M E Perkins
Judge

Judgment signed at 4.45 pm on 21 November 2019