

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 197
EMPC 368/2022**

IN THE MATTER OF an application for search orders

BETWEEN HYNDS PIPE SYSTEMS LIMITED
 Applicant

AND JUNMING (JASON) CHENG
 First Respondent

AND ZEB LIMITED (T/A SPANIT)
 Second Respondent

Hearing: 25 October 2022
 (Heard at Auckland)

Appearances: J Rooney and M B Austin, counsel for applicant

Judgment: 1 November 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] Hynds Pipe Systems Limited (Hynds) has applied urgently, and without notice, for search orders against the first respondent (Mr Cheng), who is a former employee of Hynds, and the second respondent, Zeb Limited (t/a SPANIT) (SPANIT), which is the current employer of Mr Cheng.

[2] The orders sought relate to electronic devices and user files in the possession of Mr Cheng and SPANIT, as well as documents they may hold that belong to Hynds (and the wider Hynds group of companies). This material is more specifically identified in the draft search orders filed with the application.

Mr Cheng left Hynds to work for SPANIT

[3] At this stage, the Court only has Hynds's view of the facts. A summary follows.

[4] Mr Cheng was employed with Hynds as a quality assurance technician from 27 November 2018 until 17 December 2021. When he gave notice of resignation to Hynds, he advised it that he was taking up employment with SPANIT. At that stage Hynds did not consider SPANIT to be a competitor. For that reason, it did not place Mr Cheng on garden leave or limit his access to Hynds's systems, steps it says it would usually take when an employee is leaving to join a competitor.

[5] However, in February 2022, Hynds became aware that SPANIT was planning to produce a number of products that were the same as or similar to those produced by Hynds. In July 2022, it became aware that SPANIT may have used Hynds's technical drawing standards for the purposes of attempting to become an approved supplier to Auckland Council.

[6] At that time, it made the possible connection between SPANIT's new work stream and Mr Cheng. It therefore conducted an assessment of Mr Cheng's use of its information systems prior to the termination of his employment, including reviewing his email, download and printing history.

[7] Hynds says that it found that Mr Cheng had sent 24 emails to an external email address between 22 September 2021 and 17 December 2021. It subsequently identified the external email address as being Mr Cheng's personal email address.

[8] Most of those emails attached Hynds's documents, some of which Hynds says included its proprietary, confidential and/or highly sensitive information regarding its processes and systems, financial costings, product lists, and product drawings and specifications. The 24 emails sent in less than three months contrasts with 11 emails sent in the almost three years of previous employment. Further, the 11 previous emails were of a different nature, being innocuous emails covering such things as Mr Cheng's recruitment and on-boarding, or were sent when Mr Cheng was working from home during COVID-19 lockdowns.

[9] Over the same period, it appears that Mr Cheng printed a significant number of confidential and highly sensitive documents, the majority of which contained technical drawings of Hynds's products. Hynds says that the documents printed included ones that did not seem to be relevant to Mr Cheng's work activity, including screenshots of information from a restricted access system.

[10] Hynds says that it has since done comparison reports that identified that a number of the technical drawings printed by Mr Cheng depict products that are the same as or very similar to a number of the products that SPANIT has started producing; in particular:

- (a) manhole componentry (including lids, risers and bases) of varying dimensions; and
- (b) catchpits of varying dimensions.

[11] Hynds says that there are similarities regarding the dimensions of the relevant products. It says too that a technical guide produced for the "SPANIT Manhole System" also contains a number of similarities to Hynds's own technical guide for its manhole system.

[12] The review of Mr Cheng's work email account apparently show attempts by Mr Cheng to delete emails from his "sent" folder.

[13] Hynds says that it has been unable to confirm whether Mr Cheng downloaded any documents or files to external storage devices prior to the termination of his employment. Accordingly, it is unable to determine the extent to which he has further confidential information and intellectual property in his possession.

Hynds makes an application without notice for search orders

[14] Hynds has applied without notice for search orders against Mr Cheng and SPANIT. The draft orders against Mr Cheng would allow authorised people to search Mr Cheng's home and work site for electronic devices listed in the draft search order, and documents belonging to Hynds. The draft search order against SPANIT would

allow the authorised persons to search for electronic devices, user files and documents belonging to Hynds. Both draft sets of orders provide for a one hour stand down period during which the respondents may voluntarily surrender the material being sought.

[15] The draft search orders also would require Mr Cheng and SPANIT to:

- (a) provide information as to the whereabouts of certain property or its source;
- (b) disclose all devices and provide the information necessary to access data on the devices; and
- (c) open and unlock any doors, cupboards, drawers, safes, containers, cases or other physical means of storage within the premises building or motor vehicles covered by the order.

[16] The draft orders propose appointing independent solicitors (Mr Langton of LangtonHudsonButcher and Ms Swarbrick of SBM Legal) who would supervise the carrying out of the orders and report to the Court.

[17] There are clauses covering listing material removed from the premises, and for the secure retention of the material.

[18] Hynds has provided a draft statement of problem that it intends to file with the Employment Relations Authority (the Authority).¹ It also has provided undertakings from Mr Rooney, solicitor for Hynds, and from Mr Moss, chief executive officer on behalf of Hynds and a draft notice to the respondents, which would be provided before the search orders are executed.

¹ “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 8.

[19] The grounds on which Hynds applies for search orders are as follows:

- (a) It has a strong prima facie case on several causes of action against:
 - (i) Mr Cheng, including claims for breaches of the employment agreement including misusing Hynds's confidential information and intellectual property, and breaches of his express and implied duties of fidelity, loyalty and confidentiality to Hynds; and
 - (ii) SPANIT, including claims for misusing Hynds's confidential information and intellectual property, breaching the confidence of Hynds, and aiding and abetting breaches of Mr Cheng's employment agreement with Hynds.
- (b) The potential or actual loss or damage to Hynds if the orders are not made against Mr Cheng and SPANIT will be serious.
- (c) There is good reason to believe that Mr Cheng and SPANIT are in possession of material which is the property of Hynds and which is evidentiary material relevant to the anticipated proceedings in the Authority.
- (d) There is good reason to believe that Mr Cheng and SPANIT are misusing Hynds's material.
- (e) There is a real possibility that, unless the search orders are granted, Mr Cheng and SPANIT will destroy Hynds's material or cause it to be unavailable to be used in evidence in the anticipated proceedings in the Authority.
- (f) Damages would not be an adequate remedy for Hynds but would be an adequate remedy for Mr Cheng and SPANIT.

- (g) Hynds has filed undertakings as to damages, costs and the manner of execution of the search orders.
- (h) Hynds's solicitors have filed undertakings as to the manner of execution of the search orders.

[20] The application also refers to the memorandum and affidavits filed in support of the application and the draft statement of problem.

[21] Hynds has identified arguable defences on the part of Mr Cheng and SPANIT (but which Hynds considers are untenable).

The Employment Court may make search orders

[22] The Employment Court's jurisdiction to make search orders arises from s 190(3) of the Employment Relations Act 2000. It does so by applying pt 33 of the High Court Rules 2016. As the application is without notice, Hynds also must file a memorandum that complies with r 7.23(3) of the High Court Rules, which it has done.

[23] The purpose of a search order is to secure or preserve evidence that is or may be relevant to an issue in a proceeding or anticipated proceeding, and to require a respondent to permit persons to enter premises for that purpose.²

[24] The Court may make a search order only if it is satisfied that:³

- (a) the applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that the respondent possesses relevant evidential material; and

² High Court Rules 2016, r 33.2.

³ Rule 33.3.

- (d) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the Court.

Case against Mr Cheng appears strong

[25] While Mr Cheng has not yet been heard, on the basis of the evidence before the Court, I am satisfied that Hynds has a strong prima facie case against him. The material appears to demonstrate that he forwarded information to his personal email address, which he was not entitled to do, and that he printed information that went beyond his needs as an employee.

[26] There seems to be no legitimate explanation for his actions.

[27] The evidence also shows that his new employer, SPANIT, appears to have used that information to the detriment of Hynds. The inference is that SPANIT received the information from Mr Cheng.

Case against SPANIT also appears strong

[28] It is less common for search orders to be made by the Employment Court against a new employer.

[29] The extent of the jurisdiction of the employment institutions in respect of the causes of action against SPANIT is likely to be an issue in this proceeding.⁴ This would need to be dealt with by the Authority, or the Court on removal.⁵ In any event, however, one of the proposed causes of action is that SPANIT has aided and abetted Mr Cheng's breaches of his employment agreement, which is a claim that would clearly sit in this jurisdiction.⁶

[30] Again, based on the untested evidence before the Court, Hynds has a strong prima facie case, including on that cause of action, against SPANIT.

⁴ *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [103]–[104].

⁵ At [108].

⁶ Employment Relations Act 2000, s 134.

Is there serious loss or damage or potential for serious loss or damage?

[31] Hynds says that although it has not been quantified, the potential or actual loss or damage to it will be serious if search orders are not granted.

[32] While it can ascertain from its own records documentation that has apparently been sent from a Hynds email account to Mr Cheng's personal email address, search orders are necessary to protect evidence of material that might have been stored on external devices. It also would protect evidence of any forwarding of information from Mr Cheng to SPANIT. Search orders against SPANIT would protect evidence of Hynds's confidential information and intellectual property being used by SPANIT.

[33] The evidence provided in support of this application supports that Mr Cheng has surreptitiously retained information for his own personal use. It also supports that SPANIT knowingly used Hynds's confidential and/or proprietary information received from Mr Cheng to SPANIT's advantage. I am satisfied that this evidence provides an inferential basis for concluding that there is a risk that information may be deleted or concealed if search orders are not executed.

[34] I am conscious that search orders are serious, and there must be some proportionality between the perceived threat to Hynds and the consequences to Mr Cheng and SPANIT of such orders being executed. However, I am satisfied that search orders are the only reasonable option for securing information which is evidentiary material relevant to the anticipated proceedings against Mr Cheng and SPANIT. Part 33 of the High Court Rules has been satisfied.

[35] The search orders as drafted by the solicitors for Hynds are granted.

[36] In the application, Hynds seeks an order that the service copies of the affidavits are redacted at this stage on the basis that they contain commercially sensitive confidential information and intellectual property. It refers to annexures to the affidavits filed by Mr Moss (Annexures C and E) and by Mr Foo (Annexures B and D), who is Hynds's IT manager. Hynds proposes that unredacted copies of those exhibits be provided to counsel for the respondents on receipt of their undertaking to receive it on counsel-to-counsel basis.

[37] At this stage, I make an order that service copies are redacted as suggested. It may be that the proposal that unredacted copies are only provided to counsel is accepted by Mr Cheng and SPANIT but, if not, that is a matter they can bring before the Court in due course.

[38] A copy of this judgment, the draft statement of problem, all of the affidavits but with the redactions proposed by Hynds, the application for an order, and the supporting memorandum, undertakings and notice are to be served on Mr Cheng and on SPANIT along with the search orders, before they are executed.

[39] The statement of problem is to then be finalised and filed with the Authority as soon as possible.

[40] This judgment is not to be published other than to the parties, their representatives, the supervising lawyer and computer consultants, until further direction from the Court. I make an order that the court file is not to be searched without leave of a Judge. If anyone seeks access to it, the parties are to be given notice of that application so that they can be heard from before it is dealt with.

[41] Hynds's current intention is to execute the search orders on 4 November 2022. On that basis, at 9.30 am on 22 November 2022, the Court at Auckland will consider the reports from the supervising lawyers. On that date, the applicant, the respondents and the supervising lawyers will be heard. In the meantime, leave is reserved for any party to apply to the Court on 24 hours' notice to vary or discharge the orders made in this judgment.

[42] Costs are reserved.

J C Holden
Judge

Judgment signed at 11 am on 1 November 2022