IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 158
EMPC 288/2023

IN THE MATTER OF	a review of a search order
AND IN THE MATTER OF	an application for consequential orders following a search order
BETWEEN	CHAIN & RIGGING SUPPLIES LIMITED Applicant
AND	JUSTIN DOUGLAS WERAHOKO NIKORIMA First Respondent
AND	RAPIDO SAFETY SOLUTIONS LIMITED Second Respondent

Hearing: On the papers

Appearances: P Amaranathan, counsel for applicant
J Douglas, counsel for first respondent
JM Roberts and B Perkins, counsel for second respondent

Judgment: 20 August 2024

JUDGMENT (NO 6) OF JUDGE B A CORKILL
(Application for consequential orders following a search order)

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[1] In a number of judgments in late 2023, the Court made search orders, and subsequently reviewed the implementation of those at review hearings.[1]

[1] *Chain & Rigging Supplies Ltd v Nikorima* [2023] NZEmpC 133; *Chain & Rigging Supplies Ltd v Nikorima (No 2)* [2023] NZEmpC 134; *Chain & Rigging Supplies Ltd v Nikorima (No 3)* [2023] NZEmpC 148; and *Chain & Rigging Supplies Ltd v Nikorima (No 4)* [2023] NZEmpC 154.

[2] On 20 October 2023, the applicant made a request for orders to deal with material that had been uplifted by a search process, against the background of the legal and IT expert analysis that had been undertaken to that point.

[3] After hearing the parties on 30 November 2023, I issued a judgment dealing with the various matters which required resolution.[2]

[4] My judgment dealt with a timetable for further searches by the applicant of electronic information which had been obtained from the search authorised by the Court. At that stage, a mediation had been scheduled for 7 December 2023. I directed the applicant to file a memorandum within two working days of the parties having attended mediation. That memorandum was to specify any further proposed steps, including a timetable. I indicated that counsel for the respondents could reply to that intended timetable and the Court would then consider the making of an order either approving the application in whole or in part, or declining it.

[5] The Court now has before it a request for the authorisation of further searches on behalf of the applicant of the electronic information which had been obtained. Because the respondents submit that undue delay has occurred, it is necessary to outline the history of events which followed the Court's judgment of 30 November 2023.

[6] On 9 February 2024, Ms Amaranathan, counsel for the applicant, filed a memorandum stating that mediation had been deferred because Mr Nikorima had been unwell for some weeks. Mediation had accordingly been rescheduled for 28 February 2024. Ms Amaranathan noted that it was not certain whether the mediation could proceed on that date. She said the applicant wished the IT expert, Cameron Hansen-Beadle, to carry out further inspection of the electronic information which had been obtained. Ms Amaranathan sought leave to file a memorandum in the following week on that topic. Leave was granted.

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2 *Chain & Rigging Supplies Ltd v Nikorima (No 5)* [2023] NZEmpC 216.

[7] On 21 February 2024, the applicant filed a memorandum which sought an inspection order to which I will refer shortly. I directed the respondents to file a reply within 14 days.

[8] On 28 February 2024, however, a mediation process commenced. On 1 March 2024, Ms Amaranathan confirmed that mediation had proceeded and that it was being "held open" until 28 March 2024 for the parties to continue their discussions. She indicated that the parties agreed that in the meantime, no further steps would be taken in either the Employment Relations Authority or the Court during this period. Accordingly, I suspended the timetable for filing a response and requested that a further memorandum be filed by 5 April 2024.

[9] On 27 March 2024, the parties jointly requested a further extension until 13 May 2024 because discussions were continuing. This was granted. A subsequent request for an extension was sought until 13 June 2024, again so the discussions could continue. I granted the request.

[10] On 13 June 2024, Ms Amaranathan sought further directions. She said that despite the lengthy mediation period, the proceedings had not been resolved. Although the applicant remained open to suitable discussions, directions were sought for a response to be given to its application of 21 February 2024.

[11] By joint memorandum of 13 June 2024, the respondents suggested that this should be deferred because negotiations were still continuing. As a reasonable period had been allowed for such a process, and timetabling the application would not preclude discussions taking place between counsel, I directed a formal response from the respondents to the outstanding application. This was filed and served on 25 June 2024. A reply was filed on behalf of the applicant on 26 June 2024.

The parties' submissions

[12] The applicant relevantly seeks an order as follows:

> All cloned electronic information may continue to be held by Mr Hansen and may be inspected by him (including in particular all accounts under the Rapido Safety Limited Office 365 subscription already preserved) and a list of files prepared which have not already been listed and appear to be evidence of the involvement of [three individuals] in the setting up or trading of the Second Respondent within any of the timeframes specified in the September inspection orders.

[13] The respondents' position is that the orders sought are unduly broad; that they would constitute an abuse of process because undue delay had occurred in advancing discovery or disclosure by inspection; and that the applicant's repeated applications for inspection orders should be brought to an end. The applicant has responded to each of these points, emphasising that the application should be granted so the Authority's investigation can be advanced.

Discussion

[14] The respondents argue that undue delay has occurred, so that the order sought should not be granted. It is apparent that delays arose originally due to Mr Nikorima being unwell. Then the parties were engaged in settlement discussions which did not resolve the matter. There was a consensus, however, that no further steps should be taken in this proceeding because those discussions were continuing. Accordingly, I place the delay issue to one side.

[15] More fundamental, however, is the jurisdictional point. The respondents submit that further IT analysis would exceed the bounds of the Court's jurisdiction to make consequential orders after a search has been executed. I have concluded that this point has merit.

[16] As Judge Holden explained in *TPT Forests Ltd v Penfold (No 2)*,[3] when a search order comes to be reviewed, the Court may make orders it considers just and, in doing so, must consider, amongst other criteria, what is to happen to any goods removed from the premises or to any copies that have been made.[4]

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3 *TPT Forests Ltd v Penfold (No 2)* [2022] NZEmpC 42, [2022] ERNZ 147; and citing High Court Rules 2016, r 33.8.

4 *TPT Forests*, above n 3, at [12].

[17] As observed, after a search order has been executed, the parties will often agree on consequential orders, which can expedite the proceedings. An example was provided where computer devices are involved and there is agreement as to appropriate word searches.[5]

[18] Judge Holden accepted a submission that in a case where there is outright opposition to an order sought, the relevant question is whether the proposed consequential orders are necessary to secure or preserve evidence in circumstances where it might otherwise be destroyed or made unavailable for the purpose of the proceeding.[6]

[19] One example given was where a computer device has been taken but not cloned. Consequential orders may be needed to allow for the device to be cloned before its return or, alternatively, that the device be searched for the applicant's business records so that they can be removed and preserved prior to the return of the device.

[20] It was observed that search orders are a serious intrusion on respondents and should go no further than the minimum necessary to preserve documents or other articles that may otherwise be destroyed or concealed.[7] Judge Holden concluded that caution is relevant when considering consequential orders.

[21] I respectfully agree with this summary.

[22] The application which is now before the Court involves, in effect, three elements. The first is that the IT expert should continue to hold all cloned electronic information; the second is that it may be inspected by him; and the third is that a list of files, which have not already been listed and appear to be evidence of involvement of certain individuals, should be prepared.

[23] Looking at the application through the lens of the necessity to secure or preserve evidence, I agree that the first element of the application is necessary so as to

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5 At [13].
6 At [15].
7 At [18]. Referring to *Columbia Pictures Industries Inc v Robinson* [1987] Ch 38.

meet those objectives; but the second and third are not. Thus the IT expert should continue to hold the cloned electronic information under the supervision of the Court, so that it may be preserved.

[24] The Court is advised that the applicant's substantive proceedings are now before the Authority. Ms Douglas and Mr Roberts, counsel for the first and second respondents respectively, submitted that the applicant has "failed" to advance its substantive claim. It may be more correct to say that there has been an understandable focus on settlement, and now on advancing the matter by obtaining what is in effect discovery of relevant materials.

[25] Counsel also submitted that the Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case without regard to technicalities.[8] Counsel said it does not have any formal discovery or disclosure process for this reason.

[26] I agree that there are no formal processes as such for discovery of documents in the Authority, but the power under s 160(1)(a) of the Employment Relations Act 2000, to call for evidence and information, is nonetheless relevant and is properly used by the Authority from time to time as an aspect of its investigative role.[9]

[27] The power to call for evidence has also been used by the Authority to ensure that evidence is preserved pending the substantive investigation meeting;[10] in that instance, evidence held in the computer systems of a respondent was required to be cloned and held in the safekeeping of the Authority.

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8 Employment Relations Act 2000, s 157(1).

9 For example, *Jackel (NZ) Ltd v Ireland* [2004] EMHNZ 131 (ERA) (Member Scott); and *Rau v Waikato Raupatu Trustee Co Ltd* [2004] EMHNZ 214 (Member Urlich). See also *Faitala v The Pacific Island Business Development Trust* [2024] NZERA 34 (Member Blick) where the point was made recently.

10 *Multiserve Education Trust Ltd v Ross* ERA Auckland AA271/06, 23 August 2006 (Member Oldfield).

[28] As to the obtaining of documents by the Authority, in *Andrew v Commissioner of Police*, the Court expressed the view:[11]

> … the ERA can, in appropriate cases, direct parties to make documents available to it for the purposes of its investigation of an employment relations problem … That is not, however, the same thing as general pre-trial disclosure and inspection of documents that is, in other Courts, the subject of detailed statutory schemes and protections that do not exist for the ERA.

[29] I agree with these observations. I am satisfied that the Authority has the ability to request information from the IT expert and may, under the general powers it has under s 160, request that the cloned material may be inspected so as to assist the Authority in its investigative role.

[30] The Authority is now better placed to consider the relevance of the information now requested, in light of the cases raised by the various parties. However, if the Authority were to make an order requesting further information from the IT expert, it would be appropriate for the Court to accommodate that.

[31] In short, while I am not prepared to sanction the second and third elements of the order as currently sought, a degree of flexibility is appropriate so as to provide for the possibility of these steps being taken. If the Authority determines that further information held by the IT expert may be relevant and should be provided, it is appropriate that it be obtained without the need for further Court orders.

Result

[32] I order that the IT expert continue to hold all cloned information which has been obtained until further order of the Court. I also make a conditional order that, if the Authority so requests, the cloned information is to be inspected and a list of further relevant files prepared by the IT expert and filed in the Authority. The Authority may then consider any distribution issues, as well as any other conditions that are considered appropriate.

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[11] *Andrew v Commissioner of Police* [2003] 2 ERNZ 514 (EmpC) at [9]. See also *MAS Zengrange (NZ) Ltd v HDT Ltd* [2013] NZEmpC 210, [2013] ERNZ 716 at [43]–[47].

[33] I direct counsel to file updated memoranda on or before 1 November 2024. I expect to hear from the parties at that stage as to whether there are any other outstanding issues, and whether costs in relation to this proceeding should, at that stage, be dealt with.

[34] I reserve costs.

B A Corkill
Judge

Judgment signed at 11.30 am on 21 August 2024