

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 62/08
5106327

IN THE MATTER of an application to defer an
investigation meeting

BETWEEN MATTHEW BREWSTER
Applicant

AND PRIDEX INDUSTRIES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: David Goldwater, Counsel for Applicant
Clayton Williams, Counsel for Respondent

Submissions lodged: 8 May 2008 by the Respondent
9 May 2008 by the Applicant

Determination: 9 May 2008

PRELIMINARY DETERMINATION OF THE AUTHORITY

The application

[1] Mr Brewster is an applicant, in conjunction with three others, in proceedings before the Authority. The substantive matter is set down for investigation on Tuesday 13, and Wednesday, 14 May 2008.

[2] The respondent has lodged an application to defer the Authority's investigation in respect of Mr Brewster until the New Zealand Police and Serious Fraud Office conclude their respective investigations into the alleged unlawful possession of a computer key said to belong to the respondent company, and the alleged unauthorised access by Mr Brewster to the respondent's computer system.

[3] The application is made:

... on the basis that if Mr Brewster is charged, prosecuted and convicted of the theft; and if he maintains that he is an employee (and if this is found to be the case) the respondent will say he never had the intention of returning the key, and this would effectively mean the conduct amounted to theft as an employee/servant.

The respondent submits that Mr Brewster would have great difficulty bringing a personal grievance against PINZL in this situation. Additionally, the respondent potentially has further (and quite substantial) evidence of contributory conduct which is a large basis of the current defence (if Mr Brewster is found to be an employee).

The same applies to the unauthorised access to the computer system; if Mr Brewster is charged, prosecuted and convicted of this matter, although outside the period of employment claimed by Mr Brewster (denied by the respondent), the respondent submits there is an ongoing duty of fidelity which extends beyond termination of the employment.

Again Mr Brewster would have difficulty bringing a personal grievance against PINZL with such a conviction, and the respondent will say that this is further (and again substantial) of the intent of Mr Brewster/Fox with respect to the association with PINZL.

Discussion and analysis

[4] At this point, the Authority understands that while the Police and Serious Fraud Office are carrying out their respective investigations, no charges have been laid against Mr Brewster. Such a situation provides no certainty as to when Mr Brewster's personal grievance and recovery might be heard if the Authority was to await developments on these two fronts.

[5] Further, to delay the investigation of this applicant's claim while proceeding with those of the other three will occasion additional costs for the respondent and absorb the Authority's resources unnecessarily.

[6] A directions conference was held on 22 February 2008 and the scheduling of evidence lodgement and exchange set out for the investigation meeting on 13 and 14 May 2008. That was the appropriate time for the respondent to raise any issues in respect of Mr Brewster's claim. To lodge an application such as the one in hand so close to the investigation of the substantive matters, where the ground of the application has been known to the respondent since it lodged its complaints with the Police and Serious Fraud Office, is approaching the vexatious.

The determination

[7] The application is declined.

[8] The full matter will proceed as scheduled.

[9] The Authority will issue its determination in due course and in the event Mr Brewster is found to have been an employee of the respondent and is found to be due any remedies, the Authority will address these in a supplementary determination after hearing specific submissions from counsel for each party.

Paul Montgomery
Member of the Employment Relations Authority