

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS OF THE PARTIES AND WITNESSES**

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

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

**[2023] NZEmpC 211
EMPC 429/2023**

IN THE MATTER OF an application for without notice search
orders

BETWEEN ELG
Applicant

AND KLE
Respondent

Hearing: 22 November 2023
(Heard at Christchurch via Telephone)

Appearances: M Sumpter, M Wisker and H S E Smith, counsel for applicant
No appearance by respondent

Judgment: 23 November 2023

JUDGMENT OF JUDGE K G SMITH

[1] ELG has applied urgently, and without notice, for a search order relating to its former employee, KLE.

[2] The order sought relates to files containing significant confidential information and intellectual property belonging to ELG said to have been downloaded and removed by KLE shortly before his employment ended. A further claim is that KLE removed and has retained two computer hard drives and that the information they contain belongs to the company.

[3] Given the urgency of this application, and the sensitive nature of the information alleged to have been wrongfully downloaded and removed, only a brief overview of the facts will be provided at this stage.

[4] [REDACTED]
[REDACTED].

[5] KLE is by profession a software developer and motor control electronics expert. He was employed by ELG from 26 September 2011 until 15 November 2023. That employment was, first, as a Product Development Engineer. From November 2015 he was employed as a Senior Product Development Engineer.

[6] KLE's role at ELG gave him access to the company's products and intellectual property, including experimental software involving certain source codes powering its products and innovations.

[7] KLE's employment ended by agreement dated 14 November 2023. The terms of the agreement material to this application were that KLE's employment would end on 15 November 2023 by way of resignation. It provided for certain financial consideration and he was to:

- (a) return all ELG property on or before 15 November 2023 and that included all hardware, electronic data and company software; and
- (b) maintain strict confidentiality over all of the company's information including its intellectual property.

[8] At the heart of this litigation are allegations that KLE has, in his subsequent actions, departed from the terms of that agreement. Although not expressed quite in these terms in the application, it is also a part of the company's case that KLE's employment agreement required him to comply with all of ELG's policies regarding the retention of its intellectual property and confidentiality.

[9] This litigation has arisen because of conduct attributed to KLE just before the settlement agreement was concluded and before his departure from the company. ELG

says that on 9 November 2023 KLE's behaviour was drawn to the attention of his manager, [REDACTED], who realised that certain hardware belonging to the company that was in KLE's possession had been removed from the workplace. Inquiries were made of KLE over the following days, asking for the return of that property. It now appears that some property was returned reluctantly and only in response to specific requests.

[10] ELG says that it has now become apparent that KLE has not returned all of the hardware items he has removed. Some of that hardware is replaceable but the way in which KLE dealt with reasonable requests for its return has fuelled suspicions about his conduct, and intended conduct, over a far more serious action he took.

[11] Bearing in mind that the settlement agreement required KLE's employment to end on 15 November 2023, on 14 November he was reminded to delete all ELG intellectual property from his personal computer. On 15 November 2023 he returned to work his desktop computer, which had been issued to him for use in a home office, and a work laptop.

[12] KLE's actions over the days preceding the return of the computer and laptop prompted an inquiry by ELG's IT team. The devices he returned were subsequently referred on for specialist security investigation. On 17 November 2023, the company discovered that KLE had downloaded several hundred computer files onto what it believes to be a personal external hard drive.

[13] KLE had no reason to access the files for work-related purposes not least of which because he was at the time either negotiating the agreement that eventually led to the employment ending or had actually completed that agreement.

[14] Subsequently, an external consultant has established that sometime after 8 November 2023 two computer hard drives the property of ELG have been removed from the desktop computer KLE returned.

Jurisdiction

[15] The Employment Court has jurisdiction to make search orders pursuant to s 190(3) of the Employment Relations Act 2000 (the Act), and by applying pt 33 of the High Court Rules 2016. There must be a proceeding within the jurisdiction of the Court, or the Authority, to which an application for a search order relates.

[16] Rule 33.2 describes the purpose of a search order in the following terms:

33.2 Search order

- (1) This rule applies only if the evidence is, or may be, relevant to an issue in the proceeding or anticipated proceeding.
- (2) The court may make an order (a **search order**), in a proceeding or before a proceeding commences, with or without notice to the respondent, to—
 - (a) secure or preserve evidence; and
 - (b) require a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence.
- (3) Form G 39 must be used but may be varied as the circumstances require.
- (4) A search order must be served on the respondent.

[17] The requirements for the grant of a search order are in r 33.3, which provides:

33.3 Requirements for grant of search order

The court may make a search order under rule 33.2 only if the court is satisfied that—

- (a) an 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—
 - (i) the respondent possesses relevant evidentiary material; and
 - (ii) 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.

[18] I turn to consider each of the necessary elements required.

A strong prima facie case?

[19] While taking into account that KLE is yet to be heard, I am nevertheless satisfied that ELG has a strong prima facie case that he downloaded and retained confidential intellectual property and other property belonging to ELG breaching the employment agreement and the settlement agreement.

[20] KLE was a senior employee with specialist knowledge about the development of software programmes. In his capacity he had access to information belonging to ELG that was clearly confidential to it, and which he must have appreciated was always confidential to it.

[21] The forensic analysis that has been undertaken so far has not shown any business-related reason to justify KLE having access to this information, especially at the point in time when his employment was in the process of coming to an end by agreement.

[22] ELG's application is assisted by KLE's behaviour in the incremental way in which he returned to ELG the hardware he had. He responded only after requests were made for specific items and even then only reluctantly and incompletely complied with the requests.

[23] A reasonable inference is that KLE is taking steps to improperly retain and use ELG's property.

Would there be potential or actual serious loss or damage?

[24] I accept Mr Sumpter's submission that there is a significant potential for loss or damage to ELG if the property obtained by KLE is not preserved and returned. Given the sensitive nature of that information I do not intend to say anything more about it, beyond commenting that ELG operates in an environment where protecting that intellectual property is especially important. I accept if the property is not

preserved the loss or damage likely to be sustained would be broader than merely financial.

[25] The company has illustrated that there is a risk of reputational damage as well as financial damage. Given that a lot of the company's products, and the intellectual property which underpins them, is in [REDACTED] there may be other ramifications as well.

[26] The way in which KLE handled ELG's property supports the conclusion that there is a risk of serious loss or damage to the company. So does the now raised concern by ELG that in the negotiations which lead to the settlement agreement, and the agreed cessation of employment, there was a previously unexplained request to alter the termination date by a few days, which was not connected with any stated personal reason or obvious commercial one. While ELG agreed to the proposed date, it now draws an adverse inference from the fact that KLE delayed returning some property until the final day of his employment. It considers, with reasonable cause, that the extra time may have facilitated downloading files.

[27] The combination of downloading significant quantities of intellectual property, the incremental way some other property was returned, the missing hard drives and the delayed departure date are sufficient to indicate that there is a risk of potential or actual serious loss in the absence of an order.

The need for proportionality and caution

[28] Mr Sumpter accepted that a search order should not be made lightly. There has to be an assessment of proportionality between the perceived risk to ELG and KLE's rights and interests.

[29] The reality is that so much information is now said to have been downloaded and retained without any reason to explain that course of conduct that there is no reasonable alternative. An order is a proportionate response.

Possible defences

[30] As an application made without notice there is an onus on ELG to attempt to identify defences that might be available. Candidly, Mr Sumpter submitted that there were none that could be identified save for the possibility that KLE may attempt to argue that he was not the person who downloaded the files and/or removed the hard drives.

[31] While that submission was appropriate, the link between the downloading and the missing hard drives points to KLE and suggests that such a defence, if raised, would not be determinative.

Outcome

[32] Taking all of these matters into account I am satisfied that an order is appropriate. Section 190(3) of the Act and pt 33 of the High Court Rules have been satisfied.

[33] At the hearing last evening I raised with Mr Sumpter the nature and extent of the draft orders and the need for some amendments. Some of the orders that were contemplated went further than was necessary to protect ELG's position. Some raised the possibility of interfering with KLE's rights in ways that were arguably not permitted by pt 33. In particular, Mr Sumpter's attention was drawn to the certain aspects of the draft order that cannot, at this stage, be granted:

- (a) 6.1(b) seeking the completion of a non-disclosure deed by certain categories of potential advisor to KLE, which I am not persuaded is within the ambit of pt 33.
- (b) 6.1(e) about proposed restrictions on when and how KLE may seek to obtain advice by being in the presence of the supervising solicitor when doing so, for the same reasons as in (a).
- (c) C.2 (and following) requiring KLE to swear an affidavit setting out certain information about his knowledge of the removal of the ELG

property specifying in some detail what must be addressed by him; as I discussed with Mr Sumpter my concern is that pt 33 may not be intended to go this far and in any event purporting to compel KLE to swear an affidavit may compromise other rights he has in the event that his alleged actions give rise to other legal proceedings.

- (d) C.6 relating to redaction of documents to be served as part of this application and without specifying what would be redacted.
- (e) That part of the draft orders seeking not only to preserve the property that is the subject of this application but, if it belongs to ELG, to delete it. That proposed order goes further than the High Court Rules contemplate.

[34] I understood Mr Sumpter to accept that changes were required and that a revised draft order would be filed.

[35] As modified, the search order is granted.

[36] A copy of this judgment, the sealed order, the draft statement of problem in the Employment Relations Authority that was filed as part of the application, all of the affidavits in support of the application, the application itself and counsel's supporting memorandum are to be served on KLE when the order is executed. Further, the statement of problem is to be finalised and filed in the Authority forthwith.

[37] This judgment is not to be published other than to the parties, their legal representatives, the supervising lawyer and the forensic computer consultants or analysts engaged by the applicant before **5 pm on 4 December 2023**. Further, the Court file is not to be searched without leave of a Judge.

[38] The application is to be adjourned until **9.30 am on 4 December 2023** at the Employment Court in Auckland for the purposes of considering the supervising lawyer's first report. On that date the applicant, respondent, and the supervising

lawyer may all be heard. In the meantime, leave is reserved to apply on reasonable notice to revoke, amend or vary the order.

[39] Costs are reserved.

K G Smith
Judge

Judgment signed at 12.35 pm on 23 November 2023