Employment Court of New Zealand

Eden Group Limited v Jackson [2016] NZEmpC 60 (24 May 2016)

Last Updated: 6 July 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 60

EMPC 119/2016

IN THE MATTER OF	an application for a search order
BETWEEN	EDEN GROUP LIMITED Applicant
AND	TIMOTHY NIGEL JACKSON First Respondent
AND	PHILLIP ANDREW KITE Second Respondent
AND	CHRISTOPHER JOHN BLACKMAN Third Respondent
AND	NEW SPACE LIMITED Fourth Respondent

EMPC 120/2016

IN THE MATTER OF an application for a freezing order

AND BETWEEN EDEN GROUP LIMITED Applicant

AND TIMOTHY NIGEL JACKSON First Respondent

AND PHILLIP ANDREW KITE Second Respondent

AND CHRISTOPHER JOHN BLACKMAN Third Respondent

AND NEW SPACE LIMITED Fourth Respondent

EDEN GROUP LIMITED v TIMOTHY NIGEL JACKSON NZEmpC AUCKLAND [2016] NZEmpC 60 [23 May 2016]

Hearing:	On documents filed without notice to respondent and in Chambers on 23 May 2016
Appearances:	T Drake and M Donovan, counsel for applicant
Judgment:	23 May 2016
Reasons:	24 May 2016

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] These are the reasons for the judgment of the Court, issued urgently and without notice to the respondents, on Monday 23 May 2016.1

[2] If these reasons are not available at the time of the execution of the search order made and the service of the freezing order, the reasons must be served on the affected parties as soon as possible after execution. If these reasons are available at the time of execution, they must be served on the affected parties at that time.

[3] The applicant, Eden Group Limited (Eden Group), has a strong, seriously arguable case against the first, second and third respondents, all former employees of it. In accordance with the Court's Practice Direction,2 Eden Group has filed a proposed form of statement of problem which it will file in the Employment Relations Authority after execution of the orders that have been made. Its causes of action in those proceedings in the Authority include:

• breach of previous and enduring provisions of its individual employment agreements with Timothy Jackson, Phillip Kite, Christopher Blackman; and

• breaches of s 4 statutory obligations of good faith under the

Employment Relations Act 2000 (the Act).

1 *Eden Group Ltd v Jackson* [2016] NZEmpC 58.

2 <www.employmentcourt.justice.govt.nz/assets/Uploads/practice-direction-consolidated>.

[4] Remedies to be sought in the Authority include:

- interim injunctive relief to restrain the respondents from committing breaches;

• a permanent injunction to like effect;

• awards of special and general damages; and

• penalties for the breaches.

[5] I am satisfied that there is a strong arguable case for the applicant that these claims are, at first instance, within the exclusive employment jurisdiction of the Authority and that the evidence adduced to this Court by Eden Group supports a strong, arguable case for those remedies.

Potentially privileged evidence

[6] Some of the evidence relied on by the applicant to establish breaches of their employment agreements by the respondents whilst they were still employed by the applicant, relates to communications with the respondents' lawyer about the establishment of the New Space business. This information has been recovered forensically from digital records. It is arguably subject to a claim by the respondents for solicitor-client privilege but which the respondents have, in the circumstances, not had an opportunity to advance and which counsel for the applicant appears not to have taken into account when adducing this evidence. Despite the questionable wisdom of engaging in such correspondence using Eden Group's computer system, that may not amount to a waiver of the privilege.

[7] The safest course, in these circumstances, is to put that evidence to one side and not consider it in support of the applicant's claims, at least until the respondents have had a chance to assert privilege in those documents if they wish to do so. That said, however, there is ample evidence of activity on the part of all of the individual respondents in preparation for conducting a business in competition with the applicant while they were still employed by it. At this preliminary stage at least, the

potentially privileged evidence is not crucial to the applicant's claim for relief in the form of search and freezing orders. I have not had regard to that correspondence in reaching my conclusions.

Relevant facts

[8] The applicant is, on 'without notice' applications such as these, obliged to put relevant information before the Court, including information that may assist the respondents' defences. The following account of relevant facts is set out on this basis and is also supported by documents put before the Court which appear to speak for themselves.

[9] Eden Group is engaged broadly in the building or construction industry. It operates three informal separate divisions, one of which, known as Sector One, is relevant to this case. Sector One deals with fit-outs and maintenance work for commercial and industrial premises but also engages in some residential and related work. Until December 2015, Sector One had 10 employees. The first respondent, Timothy Jackson, was its General Manager until his resignation from that role took effect on 18 December 2015. Mr Jackson was also a director of, and shareholder in, Eden Group but resigned his directorship with effect from 16 December 2015 and subsequently sold his shares in the company.

[10] Phillip Kite was, until 4 February 2016 when his resignation took effect,

Sector One's Contracts Manager.

[11] Christopher Blackman was previously a Contracts Manager for Sector One. Upon Mr Jackson's resignation, Mr Blackman was promoted to be Sector One's General Manager but ceased in that role upon his resignation which took effect from

26 February 2016.

[12] In the case of Mr Blackman, the evidence indicates that he may have had at least the following relevant terms and conditions in his employment agreement:

4 Obligations of the Relationship

...

4.2 Obligations of the Employee

The Employee shall:

...

(iii) Conduct their duties in the best interests of the Employer and the employment relationship;

(iv) Deal with the Employer in good faith in all aspects of the employment relationship;

...

11 Other Employment Obligations

11.1 Conduct

...

11.1.4 The Employee will act with loyalty and good faith towards the Employer, in the best interests of the Employer, and will comply with the lawful directions of the Employer. ...

...

11.2 Confidential Information

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any

person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the

Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's

business, pricing, costing, payments, suppliers, customers or contractors.

...

11.4 Conflicts of Interest

The Employee agrees that there are no contracts, restrictions or other matters including any private contract work, business activity, secondary or

voluntary employment which would interfere with their ability to discharge their obligations under this agreement. If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any

potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. Where the

Employer forms the view that such a conflict does or could exist, it may direct the Employee to take action(s) to resolve that conflict, and the

Employee shall comply with that instruction. When acting in their capacity

as Employee, the Employee shall not, either directly or indirectly, receive or accept for their own benefit or the benefit of any person or entity other than the Employer any gratuity, emolument, or payment of any kind from any person having or intending to have any business with the Employer.

...

11.7 Non Competition

The Employee must not (whether on your own account or for any other

person), at any time during your employment, or for a period of four weeks after termination of employment be engaged or interested in (whether as principal, employee, agent, consultant, contractor or otherwise) in any trade or business which competes or is likely to compete with the trade or business of Eden Group Ltd within the Greater Auckland area, or utilises directly or indirectly Eden Group's confidential information.

...

[13] In the cases of Messrs Jackson and Kite, in respect of whom there are apparently no written terms and conditions of employment, the applicant will need to rely on partially-written employment practices, recognised implied terms and conditions and any applicable statutory terms and conditions of their employment. Those implied obligations of the employees include ones of fidelity, trust and confidence, a prohibition on misuse of confidential information and, arguably, acting otherwise than in good faith towards the applicant under s 4 of the Act. I consider that there are, even in these circumstances, sufficient of these to establish arguable cases of breach by those two respondents and consequent loss by Eden Group. There may also be other causes of action justiciable in the employment law jurisdiction which will be able to be incorporated by modification of the applicant's statement of problem in the Authority or any other subsequent pleadings in any other jurisdiction.

[14] New Space is a new company established by Mr Kite during 2015 but, which the evidence shows, was to be, and is now, participated in by Messrs Jackson and Kite as leading figures, if not yet as shareholders and directors. The sole shareholding in New Space is in the name of Mr Kite personally, but the applicant says it will establish that Mr Kite is a constructive trustee for Messrs Jackson and Blackman, as evidenced by a shareholders' agreement between these three men.

[15] There is a substantial volume of documentary evidence establishing that between April 2015 and early 2016, Messrs Jackson, Kite and Blackman together prepared to establish New Space in the market as a direct competitor to Eden Group's Sector One. While some preparations to compete may not be unlawful when undertaken by an individual employee, there is substantial evidence of coordinated and deceptive establishment of a vehicle to do so that was in place, and in some instances arguably operating, while the individual respondents were still in employment with Eden Group. Those preparatory activities included, in no particular order: establishing a domain name; establishing email addresses including for the named respondents; securing premises; securing mobile telephone arrangements for the new business; obtaining and trialling an accounting software program; making arrangements with the Commissioner of Inland Revenue for the new company; engaging chartered accountants for New Space and to undertake work on the three respondents' personal trusts; arranging banking facilities for the new

company; arranging land line and other electronic communications systems; arranging business insurances; arranging logo/design work; purchasing motor vehicles; and similar preparatory moves to the launch of a business. Mr Kite incorporated New Space on 28 April 2015.

[16] Apart from co-ordinated preparation to compete, there is also evidence of the respondents' very arguably 'crossing the line' into clearly unlawful conduct by existing employees. That evidence includes (from 30 October 2015 to 27 January

2016) taking away physical files and records, the property of Eden Group, and the copying of Eden Group's electronic data records and attempting subsequently to delete those.

[17] Evidence of unlawful activity by the first, second and third respondents during their employment includes also preparing quotations for Sector One's customers, including its then largest customer, from mid-April 2015; and, in December 2015, whilst all three individual respondents were still employed by Eden Group, preparing and submitting a quotation for work to be performed for a Sector One customer but for performance in February or March 2016. This may bear the strong inference that this work was to be performed by New Space rather than by Sector One.

[18] There is other evidence of arguably deceptive conduct by Mr Jackson towards Eden Group and Sector One during the period of his notice of resignation. This includes the suggestion that Mr Jackson attempted unilaterally to vary the share-sale agreement into which he entered with the other shareholders in Eden Group, whereby they purchased his shares in that company for $220,000.

[19] There is forensic analytical evidence that, commencing in late October/early November 2015, Sector One's customer and other confidential data was copied by one or more of the individual respondents from a shared laptop computer which was the property of Sector One, and that attempts were subsequently made to delete or damage that copied information. The suggestion or inference is that these activities were undertaken particularly by Mr Blackman although in conjunction with the other two individual respondents. Also missing from Eden Group's records are hard and

electronic copies of Mr Blackman's individual employment agreement, although the evidence at the moment before the Court is that this agreement replicated effectively that of one of Sector One's carpenters, David Abel, whose employment agreement has been put before the Court. I have already set out parts of this that may be relevant to Mr Blackman's situation.

[20] There is no evidence, apart from the assertion that the employment agreements of Messrs Jackson and Kite were partly written/partly oral, of the terms and conditions of their agreements. In particular, there is no suggestion or evidence that Messrs Jackson and Kite were subject to constraints upon competitive activity with the applicant after their employment terminated. At the hearing Mr Drake advised me that in fact neither Messrs Jackson nor Kite had a comprehensive written employment agreement with Eden Group despite holding managerial positions within that division and, in the case of Mr Jackson at least, being a founder of the company and, as well as an employee, a director of it. If that is so, it may be a failing on Eden Group's part that may subsequently make its range of causes of action narrower than might otherwise have been the case.

[21] In the case of Mr Blackman, the evidence suggests that he may have been subject to a post-employment restraint in economic

activity of only four weeks, which period has now well passed.

[22] Further, there is evidence that between 5 and 7 January 2016, when few people were at Sector One's office premises, persons (inferentially Messrs Jackson, Kite and Blackman) copied, or arranged to have copied, a very substantial number of electronic files (including Sector One's customers' terms of trade, quotations, staff lists and schedules of rates and charges) from both the shared laptop and, at least indirectly, Eden Group's mainframe computer system.

[23] Records of transactions with Vodafone New Zealand in respect of new telephone systems for New Space indicate that by mid-November 2015, other staff of Sector One (carpenters and labourers) may have been told of the proposed competitive business being established by the first three respondents, or had even agreed to join New Space. The names of other staff were the same five of Sector

One's establishment of seven staff who have subsequently left and now appear, for the most part at least, to be working for New Space. This is evidence of an arguable persuasion of colleagues to leave Eden Group to join New Space, which may have been prohibited implicitly.

[24] The applicant has established evidence of loss of its usual work from longstanding customers since late 2015 and that New Space is now undertaking the work that Sector One would previously have expected to have performed. Eden Group says that the respondents are now performing ongoing work for several longstanding customers of Sector One who have cancelled a number of arrangements with Eden Group. There is also evidence that at least one subcontractor to Sector One (a painting and decorating company) has indicated its confusion that the first respondent, Mr Jackson, is working with a subsidiary company of Eden Group (New Space) and that there is other evidence that Sector One contracts have been diverted away from that company or cancelled.

[25] There is a strong, arguable case that the nature of the work now being performed by the respondents is in direct competition with Sector One and Eden Group.

[26] The applicant estimates that, unless restrained from doing so, it will, over the

2016 calendar year, lose up to 90 per cent of its previous work to New Space and, thereby, its revenue and gross profit. Eden Group's Company Director, Christopher Collins, deposes to the prospective fact that Sector One will thereby operate at a loss instead of at an expected healthy profit.

Legal principles

[27] It may be arguable for the respondents that the law does not prohibit at least many of such preparatory arrangements being made whilst someone is in the employment of a potential competitor. Counsel, Mr Drake, relies on the judgment of this Court in *Rooney Earthmoving Ltd v McTague* in support of a submission that whilst preparatory steps to establish an employee in subsequent competition with his or her employer may be taken by an individual employee, where such steps are taken

in concert with others surreptitiously, such protections will be lost.3 The applicant will also rely on s 4 of the Act and common law obligations of disclosure to Eden Group of such arrangements by others which were breaches by the other individual respondents.

[28] Issues of preparatory planning to compete were addressed as long ago as in *Schilling v Kidd Garrett Ltd*.4 Such activities in the *Schilling* case included: incorporating a company; seeking funding; informing a significant client of the employee's resignation (before advising the employer of that); and arranging a meeting with that client to discuss a possible transfer of the business. In that case the employee concerned resigned, travelled overseas on leave, and obtained an important

agency, until then held by his former employer. Cooke J in the Court of Appeal concluded that even during the period in which Mr Schilling was regarded as having been on leave, his contract of service and the relationship with his employer continued. Cooke J concluded:5

... It seems to me, however, that in February, instead of negotiating for himself, Schilling was bound to take reasonable steps to enable Kidd Garrett to retain the agency. In a sense, of course, it is unrealistic to expect of him anything of the sort; but that is only because he had got himself into a position where his duty and his interest conflicted. To carry out his duty he would at least, I think, have had to allow Kidd Garrett the first opportunity of notifying Husqvarna (and the New Zealand dealers) of his resignation and the first opportunity of approaching Husqvarna. ...

[29] In *Rooney*, Judge Travis concluded that the *Schilling* judgment and the subsequent Court of Appeal judgment in *Morris v Interchem Agencies Ltd*6 are authority for the proposition that "canvassing suppliers can undermine an employer's reputation and goodwill and cause rumours to circulate, as can approaches to staff without advising the employer."7 Judge Travis relied on the following statement of Tipping J in *Morris*:

It is one thing to plan to leave your employer and set up a competing business if you proceed with discretion. It is quite another, in my view, to do so in such a way that your plans become widely known but without telling your employer, and in a way that is potentially damaging to your employer.

3 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 (EmpC).

4 *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA) per Cooke J.

5 At 270-271.

6 *Morris v Interchem Agencies Ltd* [2003] NZCA 140; [2003] 1 ERNZ 93 (CA).

7 *Rooney*, above n 5, at [123].

[30] This Court's judgment in *Rooney* also reiterates that dishonesty or fraud is a necessary ingredient of a breach of fidelity; and that although dishonesty may well be a breach of the duty, it does not follow that there can be no breach without dishonesty. So, the Judge in *Rooney* recorded that it was common ground that the defendants in that case, while they were employed, could not, without the knowledge and consent of their employer, act in such a manner as to compete with their

employer or assist any other person to so compete.8

The search order application

[31] A search order in the terms applied for may both confirm these evidence- based concerns of breaches by the individual respondents of their terms and conditions of employment with Eden Group and also reveal further similar breaches currently unknown to the applicant because of the covert nature of their commission. Such evidence as may be revealed on a search may strengthen its case for damages and injunctive relief against what it contends are dishonest and, in one case fraudulent, former senior employees. The allegations of fraud relate to the activities of one of the individual respondents who attempted to obtain (and may have obtained) mobile telephones for family members of one of the other respondents but which were intended to be, and were, fraudulently charged to Eden Group.

[32] This foregoing evidence, very much summarised, establishes the following.

[33] There was activity on the parts of the first three respondents that, while still employed by Eden Group, went further than permitted in preparing to engage in business competition with the applicant. That evidence arguably supports the applicant's contention that the three individual ex-employees breached their implied obligations to their employer whilst employed and, in one case, arguably Mr Blackman's express obligations.

[34] In addition to those arguable cases of breach of express and implied employment obligations, I am satisfied that the execution of a search order may reveal other causes of action that warrant relief against the respondents including

8 At [125].

interim and permanent injunctive relief and damages. These causes of action include misuse of confidential information; breach of obligations of terms and conditions; and misleading and deceptive conduct by the individual respondents.

[35] In these circumstances I was satisfied that the requirements of Part 33 of the High Court Rules had been made out by the applicant and that it was in the interests of justice that a search order should be issued.

Freezing order application

[36] The applicant's grounds for a freezing order appeared, at least initially, to be less strong than those for a search order. There is, for example, no suggestion that the respondents or any of them are either not New Zealand citizens or New Zealand residents nor is there any evidence (as distinct from genuine concern by Eden Group) that any of them may abscond and/or alienate assets that might otherwise be available to the applicant as a judgment creditor. In the case of the fourth respondent, New Space, it is a New Zealand registered and domiciled company.

[37] Mr Drake, however, emphasised the nature and extent of the covert and collective preparation of the first three respondents over a lengthy period, which included evidence of deliberately misleading the applicant including, in one instance, arguably fraudulently. Counsel emphasised this individual and collective dishonesty and submitted that there is no reason to believe that this conduct may not continue once the respondents are aware of these proceedings in an attempt to judgment-proof themselves.

[38] My initial reluctance to grant a freezing order turned, in part, on needing to ensure that, in combination with the search order and any injunctive relief that the applicant might obtain, it would not mean effectively and summarily, the end of New Space's business including, as it does, a number of employees who are not parties to these proceedings.

[39] Mr Drake emphasised, however, that the intention of the freezing order was not to prevent the respondents from conducting that business, at least until the rights

and liabilities of the parties can be determined on a more informed basis but, rather, to prevent alienation of their and its assets during that period. Counsel emphasised that each of the three respondents appears to have a personal trust or trusts. The applicant's case is that New Space has a substantial amount of business already (principally, it claims, from its customers) and even if it has had to borrow to establish that business, is probably in a healthy state financially.

[40] With the amendments made to the draft freezing order, I was satisfied that the assets of the respondents could be protected from alienation or diminution by the making of a short-term freezing order without the employment of innocent parties being drastically affected or the ability of the new company to trade in the meantime. The potential risk of diminution or dispersal of assets by the respondents in the same manner as they have very arguably conducted themselves in relation to their employer over the last 12 months meant that I was satisfied that the tests under Part

32 of the High Court Rules were satisfied, at least on an interim basis.

[41] In all of these circumstances, I considered that the interests of justice warranted search and freezing orders and these were made and sealed for execution.

[42] I confirm that costs have been reserved on this application.

[43] In respect of both the short judgment issued on 23 May 2016 and this one setting out the reasons for that, there is to be no wider distribution of these than to the parties and their lawyers until the orders have been executed and at least until the review date of 10 June 2016 has passed.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on Tuesday 24 May 2016
