IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 619
3068897

	BETWEEN	RAULAND NZ LIMITED Applicant
	A N D	CONRAD DELVO Respondent

Member of Authority:	Nicola Craig
Representatives:	Clare Mansell, counsel for the Applicant Elizabeth Coats and Holly Struckman, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	30 August and 20 September 2019 for the Applicant 13 September 2019 for the Respondent
Date of Determination:	30 October 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. This matter is removed in its entirety for the Court to hear and determine in the first instance.

B. Costs are reserved.

Employment Relationship Problem

[1] Rauland NZ Limited (Rauland or the company) employed Conrad Delvo as an account manager from 2015. Rauland provides communications systems in the healthcare sector.

[2] Mr Delvo gave notice of resignation from his employment at Rauland, with his last working day being 31 August 2018. He began work with Hills NZ Limited, a subsidiary of Hills Health Solutions Limited in Australia (together referred to as Hills), which Rauland describes as its main competitor.

[3] Rauland's parent company, Rauland Australia Pty Limited (Rauland Australia) obtained Anton Pillar orders against two former employees who had been engaged by Hills. The company decided to undertake further investigations regarding Mr Delvo's actions prior to his departure.

[4] Rauland applied to the Employment Court and obtained a without notice search order, seeking to secure a number of documents and any information relating to Rauland or Rauland Australia.[1]

[5] Shortly thereafter Rauland filed its claim in the Authority alleging breaches of the employment agreement regarding confidential information, copyrighted works and restraint of trade.

[6] The Authority proceeding was not progressed for some time in order to allow forensic analysis of devices taken under the search order. Once the Court directed that the Authority proceeding should be served on Mr Delvo, a statement in reply was filed. Mr Delvo says that he has complied with his contractual obligations to Rauland including keeping confidential information in confidence. He claims the restraint of trade is unenforceable.

[7] Documents concerning Rauland or Rauland Australia were released by the forensic investigator to the parties in July 2019.

[8] Rauland now applies for the whole matter to be removed to the Employment Court. The application relies on s 178(2)(a), (c) and (d) of the Employment Relations Act 2000 (the Act). Mr Delvo opposes removal.

[9] The parties agreed that the removal application could be dealt with on the papers. Submissions were received from both parties.

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[1] *Rauland NZ Limited v Delvo* [2018] NZEmpC 153

[10] I have not recorded everything received from the parties but have stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.[2]

Rauland's claim in the Authority

[11] Rauland claims that Mr Delvo breached his contractual obligations by:

(a) failing to keep information confidential;

(b) retaining copyrighted works for his own benefit;

(c) holding or maintaining works, documents and information;

(d) retaining, copying, using and/or sharing copyright works; and

(e) breaching his restraint of trade.

[12] Orders sought at the time the proceeding was filed in December 2018 were:

(a) a penalty for breaches of the employment agreement;

(b) an injunction restraining Mr Delvo from publishing, sharing or using confidential information, copyright works or other information; and

(c) an inquiry into profits earned by Mr Delvo and orders that any unlawful profits be paid to Rauland.

Important question of law – s 178(2)(a)

[13] Rauland submits that there is an important question of law in relation to its claim for an account of profits in respect of the unlawful gains said to be received by Mr Delvo as a result of breaches of the employment agreement. The important question is described as causation of loss, although it may be better described as causation of gains in light of the account of profits remedy sought. Mr Delvo does not accept that an important question of law has been identified.

[14] Guidance on the predecessor to s 178(2)(a) of the Act was provided by Chief Judge Goddard in *Hanlon v International Educational Foundation (NZ) Inc***:**

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question is resolved. That is not an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the

[2] Section 174E of the Act.

> question are of major significance to employment law in general. Most questions of law that could be described as important will be far less momentous. … Importance, at any rate of a question of law, cannot exist in isolation. … The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it. [3]

[15] Questions of law need not be complex, tricky or novel to be important.[4] To meet the test under s 178(2)(a) the issue must arise other than incidentally, so that the outcome will turn on the answer.[5]

[16] Rauland relies particularly on two decisions regarding causation. The law of causation of loss following breach of contract was described by Chief Judge Colgan as "among the most complex, and difficult elements of remedies for contract breach", in *Rooney Earthmoving Ltd v McTague*[6].

[17] That was a factor in the Authority's decision to remove in *Matamata Industrial Machinery Limited v McAllister*.[7] However, in that case the application for removal was jointly made.

[18] Mr Delvo claims that no loss flows from his actions, Rauland has not identified any such losses and therefore the matter is not sufficiently complex to justify removal.

[19] At present there is no damages claim. However, the company says that due to the life cycle of tender processes, Rauland does not know the full extent of any losses suffered due to Mr Delvo's actions for some time. Furthermore, it may not become aware of losses without the benefit of formal discovery. In that way the grounds for removal are interlinked. Counsel submits that it is premature to claim at this point that causation of loss will not be an issue for determination.

[20] In conclusion, there is currently no damages claim and although I cannot rule out the prospect of an important question of law arising on whether Mr Delvo's actions

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[3] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.
[4] *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].
[5] *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].
[6] *Rooney Earthmoving Ltd v McTague* [2007] ERNZ 356 at [43].
[7] *Matamata Industrial Machinery Limited v McAllister* [2013] NZERA Auckland 184.

were causative of an improper gain for account of profits purposes, at this stage that is not sufficiently specific and is too premature to found removal.

The Court already has proceedings – s 178(2)(c)

[21] Rauland relies on s 178(2)(c) of the Act as the search order proceedings are already with the Court.

[22] The search order has been executed and relevant documents identified as a result of the search have been delivered to the parties. The parties disagree on whether there is much more likely to be required of the Court, unless the removal application is granted.

[23] Rauland asserts that it will seek further disclosure. There are several aspects to this; some related to what was obtained by the search order and some to other things. I will mention the first matter here and the remainder under the following heading.

[24] The search found several documents on Mr Delvo's Hills work laptop which Rauland identifies as belonging to it. The names of these documents include references to client list, handover list and New Zealand strategy.

[25] Rauland wishes to seek orders compelling the forensic investigator to identify further information regarding those documents. This includes when they were accessed, how long they were open/edited, whether they were copied and whether other documents on the laptop were accessed or altered whilst documents identified as belonging to Rauland were open. This seems likely to require further analysis of the clones of the devices. This is a matter best dealt with by the Court as it authorised the seizure of the devices.

[26] Submissions on behalf of Mr Delvo anticipate that any further orders from the Court as to disclosure would require an entirely new search order application to the Court. A question is raised as to whether there is any basis for such an application, as the previous search order has now been completed. Rauland does not accept that a new application would necessarily be required.

[27] Another matter Rauland identifies as likely needing the involvement of the Court is a destruction regime in respect of the documents currently held by Mr Delvo.

[28] Submissions for Mr Delvo note that the destruction issues has not been raised with counsel and are likely to be easily capable of resolution between the parties without recourse to the Court.

[29] In terms of overlaps in the Authority and Court's proceedings, affidavits already filed in the Court no doubt contain some of the evidence necessary to determine the claims currently before the Authority but further evidence regarding the documents found by the forensic examination and any losses or gains would be needed.

[30] Rauland relies on *Matamata Industrial* and *Eden Group Limited v Jackson*.[8] I note that in *Matamata Industrial* an interim injunction had been issued by the Court, as well as a search order.

[31] What is currently before the Court clearly involves the same parties and concerns issues the same or related to what is before the Authority and so s 178(2)(c) is satisfied. There is the prospect of some further decisions by the Court being required.

The Court should determine in all the circumstances – s 178(2)(d)

[32] Rauland submits that the Court is better suited to deal with this matter in the first instance in light of the number and nature of documents and the Court's more formal discovery process.

[33] The removal application refers to 689 documents being released by the forensic investigator following analysis of the electronic devices obtained during the search. Rauland identifies that these documents appear to be documents that are its confidential information and/or intellectual property.

[34] Although the quantity of documents may be large in comparison to some cases, I would not characterise it as extraordinary as submitted for the company. The Authority on occasions has to deal with situations, including those where electronic devices have been forensically analysed, involving large quantities of documents.

[35] The company notes that the search orders concerned devices located at Mr Delvo's home and that it is conceivable that there are additional repositories of relevant documents that were not accessed during the search order process. It is submitted that

[8] *Eden Group Limited v Jackson* [2016] NZERA Auckland 175.

a robust discovery process would 'draw out' any additional relevant information that may be Mr Delvo's possession or control.

[36] The Authority does not operate a discovery process in the same way the Court does. The Authority may order disclosure of documents from the parties and require witnesses to attend with documents if necessary. That may deal with the issue of any further documents held by Mr Delvo.

[37] More compelling in terms of removal is non-party discovery. As set out above, some documents Rauland claims to be its confidential information were found on the laptop issued by Mr Delvo's current employer Hills. Rauland has indicated that it intends to seek non-party disclosure orders against Hills to determine the extent (if any) that Rauland's documents are in its possession or control. These orders are available in the Court and the Court's processes are better suited to the identification and provision of documents in such circumstances.

[38] The Court's disclosure regime would assist the parties in terms of the identification of documents and any matters relating to their disclosure and/or destruction. Any issues regarding discovery could be addressed in the Court in the first instance, rather than being subject to potential challenge from any determination made by the Authority.

Conclusion on removal

[39] There are proceedings before the Court between the same parties regarding the same or related issues. There are also reasons why the Court should determine the matter. I am satisfied that the grounds in s 178(2)(c) and (d) of the Act are satisfied.

[40] The Authority retains a discretion even though one of the statutory tests is satisfied.[9] I have considered in the balance factors including:

(a) the presumption that the Authority will consider employment relationship problems first;

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9 *Auckland District Health Board v X (No. 2)* [2005] 1 ERNZ 551.

(b) the existence of disputed facts including whether Mr Delvo complied with his contractual obligations to keep information confidential, which may be best determined by the Authority;

(c) the likelihood of the Authority being able to provide for a speedier resolution; and

(d) the loss of an appeal right if the matter is first heard in the Court.

[41] Although relatively finely balanced, I conclude that this proceeding is best removed in order for the Court to be able to deal with the further disclosure issues relating to the clones of the devices and non-party discovery, as well as the substantive issues. It would be more cost effective and efficient for one body to consider the issues, rather than a moving of matters back and forth between the Authority and the Court.

[42] The entirety of the matter before the Authority is removed to the Court to hear and determine the substantive issues between the parties, without the issues first being investigated by the Authority.

Costs

[43] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority