

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 382
5384572**

BETWEEN CARMEN VICELICH
 Applicants

AND PROPERTYIQ NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Carolyn Ranson, Counsel for Applicant
 Scott Wilson, Counsel for Respondent

Submissions received: 23 October 2012 from Applicant
 24 October 2012 from Respondent

Determination: 25 October 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The issue the Applicant, Ms Carmen Vicelich, wishes to resolve is a claim for breach of her individual employment agreement (the Employment Agreement) by the Respondent, PropertyIQ NZ Limited (PropertyIQ) involving recovery of monies, being expenses and commission payments.

[2] PropertyIQ, which denies that it owes Ms Vicelich any monies in relation to unpaid commission or expenses, claims that in the event that any monies are determined to be outstanding in relation to the expenses and commission payments claim, it has a counterclaim and set off against any such payments, which arise as a result of the breach by Ms Vicelich of the express and implied terms of the Employment Agreement.

[3] The express terms which are alleged to give rise to the counterclaim are in relation to misuse of confidential information and breach of the 'Restraint of Trade' clause in Ms Vicelich's Employment Agreement which states:

For a period of three months following the expiry of the period of notice of termination of your employment including where payment in lieu is made for any reason, you will not attempt to solicit or endeavour to entice away from PropertyIQ NZ any of PropertyIQ NZ's clients, suppliers, customers and staff with whom you have dealt and of whose trade circumstances you are aware, to terminate or restrict their trade relations with PropertyIQ NZ.

Issues

[4] The Authority may, pursuant to s 178 of the Employment Relations Act 2000 (the Act), order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Act have been met. The grounds as set in s 178(2)(a) (b) and (d) of the Act are

- a. an important question of law is likely to arise in the matter other than incidentally;*
- b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court;*
- d. the Authority is of the opinion that in all the circumstances the court should determine the matter.*

Removal Application and submissions

[5] The Authority is minded to remove the matter to the Employment Court pursuant to s 178 of the Act on the basis that the parties are also involved in concurrent proceedings in the High Court in which PropertyIQ alleges that Ms Vicelich has unlawfully acquired its confidential information.

[6] The allegations made by PropertyIQ against Ms Vicelich in the High Court arise from the same set of circumstances as have lead to the counterclaim in the Authority.

[7] In an interim judgment in *PropertyIQ NZ Limited v Carmen Vicelich and Data Insight Limited*¹ Duffy J observed² that the Employment Relations Act 2000 (the Act) provides no remedies against a former employee about to use for his or her own benefit confidential information obtained during the course of his or her employment, and further that the statutory obligations imposed by the Act do not survive the lawful termination of the Employment Relationship.

¹ CIV-2012-404-003693

² At para [16]

[8] The effect of this High Court judgment appears to be that where there are parallel causes of action arising out of the same employment-based situation, the High Court should exercise jurisdiction over all proceedings between the parties, which would include those which fall within the Authority's "exclusive" Jurisdiction conferred by s 161 of the Act.

[9] The Authority invited submissions from the Applicant and the Respondent on the question of removal.

Applicant's submissions

[10] The Applicant supports an order for removal to the Employment Court of the matter under s 178 on the basis that the Authority has previously seen fit to do so where, as in this case, it is a matter of concurrent jurisdiction in which the issues are complex and interconnected, citing in support *New Zealand Guardian Trust Co Limited v Rimon*³ and *Dark v Williams & Kettle Ltd*⁴

[11] Ms Ranson for the Applicant contends that similarly in this case there are concurrent proceedings in another Court of competent jurisdiction dealing with the same claim as in the Respondent's counterclaim, which is inextricably linked to the subject of the claim by Ms Vicelich.

[12] The Applicant therefore submits that the whole of the proceedings be removed to the Employment Court on the basis that :

- The interim High Court jurisdiction judgment has raised issues in respect of jurisdiction in proceedings where the claim and the counterclaim are interrelated and it would be practical to have both issues dealt with by one Court;
- There is a risk of having proceedings in the one matter spread over three jurisdictions, being the Employment relations Authority, the Employment Court, and the High Court;
- It is appropriate to have a Court of equal standing to hear the employment aspects of the case whereby there are concurrent proceedings in the High Court rather than hear the employment issues in a lower Court;

³ ERA Auckland AA288A/4, 27 October 2004

⁴ ERA Auckland AA299A/03, 8 October 2003

- The question of whether there is jurisdiction to hear a claim for effectively a second time in a concurrent jurisdiction is an important question of law; and
- It is in the public interest to provide clarification, with as much certainty as possible, of the jurisdictional issues between employment matters and civil matters, where those matters co-exist and are interrelated.

Respondent's Submissions

[13] The Respondent opposes an order for removal on the basis that the matters before the Authority are straight forward. Ms Vicelich's claims relate to unpaid business expenses due under the Employment Agreement, and arrears of wages claims pursuant to s131 of the Act. These are matters in relation to which the Authority has exclusive jurisdiction.

[14] The Respondent submits that its counterclaim is for penalties for Ms Vicelich's breaches of the Employment Agreement and the statutory duty of good faith which again fall within the Authority's exclusive jurisdiction pursuant to s 133, and s 161(1)(a), (b) and (m).

[15] Mr Wilson for the Respondent further submits that the jurisdiction of the Authority to deal with and make determinations of the nature made by the High Court is not an issue for the Authority given the nature and extent of the claims. In summary, the jurisdictional question would not serve to assist in determining any matters in the Authority.

[16] Mr Wilson contends that:

- The opinion of the [High] Court is not relevant to the Authority's investigation and will not assist in the determination of the issues before the Authority, citing in support *Nelson v Poritua Community Law Research Center Inc*⁵;
- As the jurisdictional question does not raise any "real doubt" about how the Authority should handle the case, it is not relevant to the Authority continuing its investigation;
- If the Authority were to refer a question of law to the Court that is not relevant to the Authority (other than in an ancillary manner) "continuing its investigation", the Authority would be acting outside the prescribed manner set out in s 177 of the Act.

⁵ [1993] 2 ERNZ 1109

- Referring this case may also be at odds with the objectives of the Authority pursuant to s 143(fa) of the Act
- The objectives inherent in ss 101(ab) and s 143(b) and (c) are (among other things) that employment relationship problems should be resolved “quickly and successfully” and “promptly”, citing *Abernethy v Dynea New Zealand Ltd*⁶
- If the question of law is referred to the Employment Court the parties will (unnecessarily) incur additional and potentially significant costs of dealing with the matter going to Court.
- The jurisdictional issue does not arise in this case, and accordingly referring the matter to the Employment Court will not assist in determining the matters at hand.

Determination

[17] I am satisfied that an important question of law is likely to arise other than incidentally in this matter, being whether there is exclusive jurisdiction for the Authority to hear the matters before it which have also arisen in a concurrent High Court case and arise out of the same subject matter.

[18] I further find that it is important for parties and the public to have certainty of jurisdiction in matters involving civil and employment issues where those matters co-exist and are inter-related.

[19] Finally, I am satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2) (a), (b) and (d) of the Act. In all the circumstances the Employment Court should determine these matters. I order that the whole employment relationship problems between the Applicants and the Respondents be removed to the Employment Court.

Eleanor Robinson
Member of the Employment Relations Authority

⁶ [2007] ERNZ 271