

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 107
EMPC 25/2015**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ZESPRI INTERNATIONAL LIMITED
 Plaintiff

AND JOSEPH YU
 Defendant

Hearing: 22 June 2015 and by written memoranda filed on 6 and 7 July
 2015
 (Heard at Auckland)

Appearances: M Richards and C Loughlin, counsel for plaintiff
 P Skelton QC, counsel for defendant

Judgment: 8 July 2015

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The first issue for decision on this interlocutory judgment is whether the Zespri International Limited's (Zespri's) non-de novo challenge to a compliance order made by the Employment Relations Authority¹ should continue to be heard as a separate proceeding now that the whole of Joseph Yu's personal grievance case between the parties has been removed to this Court by the Authority for hearing at first instance.²

[2] The parties have both elected to continue with Zespri's challenge to the Authority's compliance order. I conclude that the plaintiff is entitled to a hearing and determination of that issue despite the substantive proceedings between them having now been removed to the Court. That leaves the questions whether the Authority ought to have made the order for compliance that it did and, if not,

¹ *Yu v Zespri International Ltd* [2014] NZERA 532.

² *Yu v Zespri International Ltd* [2015] NZERA 143.

whether there should be a compliance order requiring the return by Mr Yu to Zespri of a laptop and, more importantly, its contents. If there is to be an order for the return of the laptop, how this is to be effected is an equally important and hotly contested question.

[3] Background and context are always important and no less so in this case. Mr Yu was employed by Zespri and was provided by it with a laptop. Mr Yu's employment came to an end following his arrest and detention in the People's Republic of China (PRC) in relation to Zespri's commercial operations in that country. The laptop was seized from Mr Yu and is still held by the PRC's Anti-Smuggling Bureau (ASB) in Shanghai. The laptop itself, and at least some of its electronically stored contents, are the property of Zespri and I accept that it may contain other information that is the property of Mr Yu personally. I am told that the laptop was not linked to a Zespri server in New Zealand, but only to one in its PRC arm, so that Zespri does not have a duplicate of the laptop's contents.

[4] It is common ground that some information contained on the laptop is relevant to Mr Yu's claims against Zespri that he was dismissed unjustifiably. Other claims include for a breach by Zespri of its duty of good faith under s 4 of the Employment Relations Act 2000 (the Act); a breach by Zespri of its (presumably implied contractual) duty not to carry on a corrupt or dishonest business; a breach by Zespri of its duty (presumably similarly implicit) to provide a safe working environment; and a claim that Mr Yu was disadvantaged unjustifiably in his employment with Zespri under s 103(1)(b) of the Act.

[5] Mr Yu's employment agreement with Zespri provided that, on the termination of his employment, he was immediately to deliver up to it all property and information belonging to Zespri. His arrest and detention in prison and the laptop's seizure by the ASB have precluded this to date.

[6] At the early stages of the Authority's investigation of Mr Yu's claims, the Authority was asked by Zespri to make a compliance order against Mr Yu requiring him to deliver up, or to take certain steps to ensure the delivery up to it of the laptop.

By a determination issued on 23 December 2014, the Authority made the following compliance order:³

[11] [Mr Yu] is ordered to comply with his employment agreement and immediately deliver the laptop to [Zespri]. This order is subject to the following terms and conditions:

- a) Both parties will authorise an employee of the United States Consulate in Shanghai to uplift the laptop from the Shanghai Anti-Smuggling Bureau and courier the laptop (at [Mr Yu's] expense) directly to the Employment Relations Authority in Auckland for the attention of Vivienne Gee, Administration Officer where it shall be held for a period of 35 days.
- b) The laptop will be made available at the offices of the Employment Relations Authority for the period of 35 days from the date of receipt to enable each party, through their representative, to review the information with a view to reaching agreement on:
 - i. What information is [Mr Yu's] personal information;
 - ii. What information is not relevant to any issue in this proceeding;
 - iii. What information is relevant to any issue in this proceeding; and
 - iv. Of the information that is relevant, whether any of it is commercially sensitive.
- c) At close of business on the 35th day the laptop will be made available for [Zespri] to uplift and retain as its property.

[7] Zespri has challenged that compliance order in this Court. It is a non-de novo challenge and encompasses only those parts of the Authority's determination of 23 December 2014 as are contained at [6]-[11]. Other elements of the case dealt with by the Authority on that date relate to non-publication orders and are not the subject of challenge.

[8] Zespri relies on its contentions of ownership of both the laptop and its information contained in it. It says that in addition to the contents, including commercially sensitive information, there are also documents that are the subject of its right to assert privilege. Essentially, Zespri does not agree to the release of the laptop or its contents into the custody of any other person as the Authority's

³ *Yu v Zespri International Ltd*, above n1, at [11].

determination required, especially as it contemplated the contents being made available to Mr Yu's lawyers after a period for their analysis.

[9] There appears to be a mutual suspicion and fear that if the laptop is returned to either of the parties, it or he will manipulate the information contained within it. I infer that a desire to eliminate that possibility was behind the Authority's requirement that the laptop be delivered to it and that it would supervise access to the laptop and its contents, at least for a limited period.

[10] Zespri says that the Authority erred in law in that (a) and (b) of [11] of its determination effectively requires Zespri to deliver up for inspection information including its legally privileged information. The company concedes that the Authority was empowered under s 138(4) of the Act to make a compliance order on terms and conditions, but argues that s 138(4) does not empower the Authority to require a party to produce for inspection its legally privileged information. Zespri says that this is the consequence of the Authority's determination and abrogates well established rules of evidence and privilege. Zespri also says that it is impossible for it to deliver to the Authority (or any other person) the laptop in its current form without having to divulge Zespri's legally privileged information.

[11] Instead, Zespri says simply that Mr Yu should be required to return the laptop to the company immediately or at least to take such steps that are necessary to do so. It accepts that Mr Yu is not physically in control of the laptop, albeit it says that he is in a position to secure its release. The company further asks for an order that Mr Yu execute a letter addressed to the officer of the ASB in charge of the investigation, authorising the release of the laptop to Zespri, being a specified thing necessary for compliance or to give effect to the compliance order.

[12] The plaintiff now argues that Mr Yu should not be entitled to assert either proprietorship of, or any privilege in, documents in the laptop, thus reinforcing its claim to an immediate return of this device. That is because, it says, its policies prohibited Mr Yu from using the laptop for his own personal purposes and his doing so breached his employment agreement with Zespri.

[13] Whether or not that is so is arguable, but it does not, in my conclusion, prohibit Mr Yu from arguing that there is such privileged material on the laptop. The plaintiff's remedy for a breach of their employment agreement may be a claim for penalty or compensation from Mr Yu. No such claim has been brought against him. Even assuming that Mr Yu may have breached the employer's policy, it is a long way from denying him an assertion of privilege in documents and this ground does not assist the plaintiff's challenge.

[14] In the meantime, the Authority has removed the proceeding before it in its entirety to the Court pursuant to s 178 of the Act.⁴

[15] In these circumstances, I inquired of counsel what the value would be in determining a challenge about the Authority's power where that issue is now moot in the Authority. The question may recur in the proceedings currently before the Court but different legislative and evidential requirements may apply to it in this forum.

[16] Both parties requested that the Court continue to hear and decide Zespri's challenge to the Authority's determination. The orders that I make will cover the evidentiary/privilege/relevance questions in this Court as they would have in the Authority. I record that no party argued that the challenge is precluded by s 179(5) of the Act. I do not consider it does so in any event.

Parameters of compliance order

[17] As counsel acknowledged at the hearing, there is really no issue about either the ownership of the laptop itself or that Zespri is entitled to its return. The key dispute between the parties concerns the relevance of documents contained on the laptop and whether Zespri is entitled to access to information over which privilege may be asserted by Mr Yu, and vice versa.

[18] The compliance order that is made will be subject to particular conditions. The objectives of those conditions are as follows:

⁴ *Yu v Zespri International Ltd*, above n 2.

- to return the laptop, and those of its contents to which Zespri is entitled, to it;
- to preserve relevant evidence contained in the electronic memory of the laptop;
- to preserve for Mr Yu such information as may be his personal information that is not relevant to the proceeding, and relevant content that may be covered by claims to privilege; and
- to enable both parties to assert claims to privilege in the information on the laptop without divulging the contents of those documents to the other before such claims are determined.

[19] The trick is how to achieve these objectives expeditiously, cost-effectively, and justly. Unlike the approach adopted by the Authority and that proposed by Mr Yu, I consider that the process should be adopted incrementally. This will give the parties the opportunity to make their own agreed adjustments and the Court to supervise, if necessary, how a complex balancing exercise is achieved. Inter-party trust, as was foreshadowed in evidence at the hearing, can be allowed to establish itself. I have already concluded that the simplistic and blunt approach advanced by Zespri is now inappropriate, given that proceedings are now before the Court and there are issues of relevance, confidentiality and privilege in the contents of the laptop.

Discussion

[20] Without the complications outlined and to be referred to, Zespri would ordinarily be entitled to a (discretionary) compliance order enforcing its contractual entitlement to the return of the laptop and the implicit inclusion of its information therein. However, a simple order of this nature that the company seeks would not meet the interests of justice in the current circumstances.

[21] Those complicating factors include that:

- the laptop is in the possession and under the control of a law enforcement agency of a sovereign foreign state;
- in addition to containing information which is the property of the plaintiff, it is probable that the laptop also contains information that is the property of the defendant, some of which may, in addition, be the defendant's privileged information; and
- there are proceedings concerning Mr Yu's employment and his dismissal, previously before the Authority and currently before the Court, in which some of the information contained in the laptop is very likely to be subject to claims to privilege by both parties.

[22] Where there may arise in litigation a disputed question about whether information is privileged, one of the options open to a court (or to the Authority under its legislation) is to inspect the relevant documents itself and to determine whether they are privileged. If all the documents are not privileged, then they will be available for disclosure to, and inspection by, the other party; and the Authority Member who determined the question would not be precluded from hearing the substantive proceeding. However, if one or more of the documents are privileged, they would be returned to the party that has claimed privilege. The Authority Member who inspected them may recuse himself or herself from hearing the substantive proceeding if there is a risk of that Member's decision being affected by the knowledge that he or she has obtained from the inspection.

[23] That was probably intended by, but was not the effect of, the Authority's determination. It provided a means by which the laptop could be returned to New Zealand and required it to be delivered to the Authority itself, where it would be held without being released to either of the parties for a period of 35 days. The Authority's compliance order also provided a means for the parties, by counsel, to review the information contained on the laptop with a view to seeking agreement as to whether such information was Mr Yu's personal information; determining what was information relevant to the proceeding; and whether any of the relevant information was commercially sensitive.

[24] I consider, however, with respect, that the terms of the compliance order made by the Authority, rather than the fact of making a compliance order, contain the error into which it fell.

[25] First, the terms of its order permitted the whole of the contents of the laptop to be 'reviewed' (that is, as I understand it, inspected) by the representatives of both parties. In these circumstances, Zespri is understandably and rightly concerned that its privileged information may thereby have been disclosed to Mr Yu. The opposite may also have occurred. That is, Mr Yu's privileged information could have been disclosed to Zespri through its representative.

[26] Second, the Authority was not correct that the concerns of the parties were about sensitive commercial information. Commercial sensitivity alone is not a ground for resisting inspection and disclosure of documents. If the laptop contains Zespri's commercial information that is sensitive, it is likely that Mr Yu will already be aware of that information as a result of it being on his laptop. Some, but perhaps not all, of such information may have lost some of its sensitivity after three or more years of concealment. But Zespri operated on five-year plans in the PRC and some may still be operative.

[27] The concern with currently commercially sensitive information is properly with its misuse or wider dissemination than may be necessary for the conduct of the proceeding. There are well established and often used means of ensuring that commercially sensitive information is not disclosed beyond those persons properly interested in the proceeding.

[28] In this case, the concerns of both parties are about information that may be the subject of privilege that they are entitled to assert. The Authority's conditions attaching to the compliance order did not deal with the question of how disputed questions of privilege might be addressed justly and privilege protected. Indeed, the Authority's mechanism appears to have allowed for the disclosure of privileged information. There was no *modus operandi*, for example, for an Authority Member to review and determine whether particular documents were privileged and to make or withhold orders disclosing those documents to the other party.

[29] In that sense, the Authority erred and its determination of 23 December 2014, relating to the laptop and its contents, must be and is set aside.

[30] However, that is not the end of the matter because Mr Yu has now proposed a methodology which he says will address properly disputed questions of privilege of documents that may be contained on the laptop.

[31] Mr Yu's proposal is set out as Schedule A to his statement of defence filed on 1 April 2015. It should speak for itself as follows:

1. The defendant is ordered to deliver up the laptop to the plaintiff subject to the following terms and conditions:
 - (a) Plaintiff and defendant are to jointly instruct an IT expert (**IT Expert**) to:
 - (i) retrieve the laptop from the Shanghai Anti-Smuggling Bureau (**ASB**) and bring the laptop back to New Zealand.
 - (ii) make a forensic image (clone) of the laptop's hard drive (**Clone**); and
 - (iii) undertake a search of the information on the hard drive (**Search**) and prepare a report to the parties in accordance with the agreed process set out below.
 - (b) Plaintiff and defendant are to provide all necessary assistance to the IT Expert to undertake her/his instruction including (without limitation) providing written consent to the ASB releasing the laptop to the IT Expert.
 - (c) Following the retrieval of the laptop and its return to New Zealand, the IT Expert is to make the Clone and a working copy (or copies, if required) (**Working Copy**) of the laptop for the purpose of undertaking the Search.
 - (d) The Search will be carried out by the IT Expert for the purpose of protecting any documents that either plaintiff or defendant claim to be legally privileged, or personal information of the defendant that is not relevant to any issue in the proceeding, from unauthorised viewing by the other party.
 - (e) Counsel for plaintiff and defendant are to exchange and provide to the IT Expert, within 7 days of the IT Expert retrieving the laptop, the key words that are to be used by the IT Expert to locate any privileged information or any of the defendant's personal but not relevant information. The

IT Expert will then undertake a key word search (**Key Word Search**) using those key words.

- (f) The IT Expert is to prepare a report that he will provide to counsel for the parties (**Report**) that:
 - (i) Lists all email correspondence on the laptop (details to include date of email, sender and all recipients of the email (including blind carbon copied recipients), and the subject line of the email);
 - (ii) Describes all other files on the computer by file name;
 - (iii) Flags those emails or documents that have been identified by the Key Word Search as potentially being subject to a privilege claim by a party or as being personal information of defendant that is not relevant to any issue in the proceeding.
- (g) The Report and an electronic copy of all documents referred to in the Report (excluding any documents that the IT Expert has flagged as subject to a claim by a defendant of legal privilege or as being defendant's personal information) is to be provided to counsel for plaintiff. A copy of the Report and the documents flagged as being subject to a claim by defendant of legal privilege or as being defendant's personal information will be provided to counsel for defendant.
- (h) Plaintiff will have 14 days from receipt of the Report to review the documents and to serve an objection notice (**Zespri Objection Notice**) on the IT Expert and on counsel for defendant identifying the documents or categories of documents described in the report to which objection to disclosure is taken (**Zespri Challenged Documents**). Plaintiff must specify in the Zespri Objection Notice the grounds for its objection.
- (i) During the same 14-day period, counsel for defendant will review those documents flagged as being subject to a claim by defendant of legal privilege or as being the defendant's personal information, and will serve an objection notice (**Yu Objection Notice**) on the IT Expert and on counsel for plaintiff identifying documents or categories of documents to which objection to disclosure is taken (**Yu Challenged Documents**). Counsel for defendant will specify in the Yu Objection Notice the grounds for its objection.
- (j) The IT Expert is to amend the Report to flag those listed documents that are Zespri Challenged Documents or Yu Challenged Documents (**Amended Report**).
- (k) The Amended Report, along with an electronic copy of all documents referred to in the Amended Report (excluding

the Zespri Challenged Documents), is to be provided to counsel for the defendant within 14 days of the IT Expert receiving the Zespri Objection Notice. Similarly, those documents previously flagged as being subject to a claim by the defendant of legal privilege or as being the defendant's personal information which are not Yu Challenged Documents will be provided to counsel for the plaintiff.

- (l) The parties may seek directions from the ERA on the status of all or any of the Zespri Challenge Documents or the Yu Challenged Documents and whether those documents must be disclosed.
- (m) Subject to a direction by the ERA pursuant to paragraph (l) above, the IT Expert is to permanently delete from the laptop the Yu Challenged Documents and he is then to return the laptop to the plaintiff.
- (n) The IT Expert is to retain in his possession the Clone and any Working Copy of the information on the computer until such time as the proceedings and any challenge or appeal has been finally determined either by agreement or order [of] the ERA or a competent Court, following which the IT Expert is to delete all such information.
- (o) Leave is reserved for the IT Expert and/or the parties to seek further directions from the ERA if required to give effect to these orders.

[32] Although there has been recent and intense discussion between counsel about agreeing a method of managing the laptop's content, Zespri has now retreated to its position of simply seeking the return of the laptop and contents of it in the first instance. It is, with respect, unrealistic in the current circumstances simply to direct, as the plaintiff asks, that Mr Yu be compelled to return the laptop to Zespri immediately. Mr Yu does not have the laptop in his possession or under his control. He can be required to take such steps as may lead to the release of the laptop but I have grave reservations that the Court (or the Authority) is entitled, in law, to make an order purporting to bind a sovereign foreign state, as was the effect of Zespri's claim in the Authority.

Decision

[33] The following are the conditions upon which the Court orders the defendant to comply with his contractual obligation to return the laptop to Zespri:

1. Within 45 days of the date of this judgment, Joseph Yu is to do whatever may be required by the Anti-Smuggling Bureau of the People's Republic of China in Shanghai to enable that Bureau to release from its custody, and to send to the Registrar of the Employment Court of New Zealand at Auckland, the laptop, the property of the plaintiff, which was seized and is subsequently being held by that Bureau.
2. Within the same period allowed for above, the plaintiff is likewise to do whatever is necessary, whether in conjunction with Mr Yu or otherwise, to consent to the laptop's release directly to the Registrar of the Employment Court of New Zealand at Auckland.
3. Once the parties have taken the foregoing steps and have confirmed to the Registrar of the New Zealand Employment Court at Auckland that the laptop is available for collection, the Registrar is to arrange for a reputable international courier company to collect it from the ASB and send it directly to the Registrar. The cost of sending the laptop to the Registrar of the Employment Court of New Zealand at Auckland, by secure courier arrangements, is to be met in the first instance by the plaintiff.
4. Within the next 14 days after the date of this judgment, the parties are to attempt to agree upon the identity of an independent IT expert who will make a forensic image of (clone), analyse, and summarise the documentary and other contents of the laptop, and report to the Registrar of the Employment Court of New Zealand at Auckland. In default of such agreement, Mr Michael Spence of deCipher Ltd is to be so appointed. As a condition of the appointment of the independent IT expert, he/she must provide a written undertaking to the Court that he/she holds the laptop and any clone of its contents, for and at the direction of the Court; and that such independent IT expert will not take instructions from the parties in relation to the laptop but will refer any such matters to the Court and will only be

directed by the Court in relation thereto. Responsibility for payment of the fees and disbursements of the independent IT expert is to be met in the first instance by the plaintiff, although as approved by the Registrar as to the reasonableness of those fees and disbursements. Those costs (and the costs of returning the laptop to the Court in New Zealand) will become disbursements in the substantive proceedings.

5. The independent IT expert is to clone the laptop's hard drive for the purpose of undertaking a search and analysis of the information on the hard drive and for the preparation of a report to the Registrar of the Employment Court of New Zealand at Auckland in accordance with the following process.
6. Counsel for the parties are to provide all necessary assistance to the independent IT expert to undertake her/his task, including about the manner in which groups of documents or individual documents on the laptop are to be searched for (by key word searches) and subsequently identified in the independent IT expert's report to the Registrar of the Employment Court of New Zealand at Auckland. In default of the agreement by counsel for the parties as to these instructions to the independent IT expert, the Court will give such directions on application of either party. Leave is reserved to the parties to apply for further directions from the Court on key word search terms if these cannot be agreed between counsel.
7. If a relevant document or documents on the laptop are not in the English language, the parties are to confer about the appointment of an independent translator to assist the independent IT expert and/or the Court in the fulfilment of the conditions of this compliance order. If the identity of a translator cannot be agreed upon between the parties, leave is reserved for either of them to apply to the Court to make such an appointment. As in the case of other disbursements incurred in the execution of these conditions, the reasonable costs of a translator are to be met by the plaintiff (Zespri) in the first instance

but will be disbursements in the litigation and subject to any final costs order of the Court.

8. The independent IT expert's report about the contents of the laptop will, when it is made to the Registrar, be referred to a Judge who will then confer with counsel for the parties about the contents of that report and what further steps are to be taken.
9. The independent IT expert's report to the Registrar should list all email correspondence (including attachments to such correspondence and the metadata, namely file name, date created (if any), author (if any) and file size) on the laptop, including details of date, sender, recipients (including blind copy recipients) and subject line of the email. Further, the independent IT expert's report should describe all other files on the laptop by file name and include the relevant metadata (namely, file name, date created (if any), author (if any) and file size). Finally, the independent IT expert's report to the Registrar should flag those emails or documents that have been identified by the key word search (and previously identified by counsel for the parties) as potentially being subject to a claim of privilege by a party or as being personal information of the defendant that is not relevant to any issue in the proceeding.
10. Both parties are to be provided with a copy of the independent IT expert's report. The defendant (Mr Yu) will then have the period of 30 days to identify from that list the documents on the laptop that he considers should not be provided to the plaintiff, either because they are subject to a claim to privilege or because they are both personal and not relevant to his proceedings in EMPC 132/15. The plaintiff may have 14 days from the date of its receipt of Mr Yu's claims to assess these and to advise Mr Yu's solicitors whether it wishes to dispute Mr Yu's claims. If such dispute is notified, then the Court will provide directions about how to deal with that dispute upon application by either or both of the parties. All such information

subject to such a claim by Mr Yu will be copied onto an external hard drive by the independent IT expert and then deleted from the laptop. The laptop, and any clone thereof, will remain in the sole possession and under the control of the Registrar of the Court until such claims have been disposed of and the Court has made further directions about the return of the laptop to the plaintiff.

11. Pending further order of the Court, the original of the laptop and its contents will remain in the custody of the Registrar of the Employment Court of New Zealand at Auckland and it may not be inspected by any person without leave of a Judge. The electronic clone made by the independent IT expert and any relevant external hard drive, will remain in his or her custody pending further directions of the Court, and no person may make any further copy or copies of them or have access to them without leave of a Judge.
12. There will be a further interlocutory hearing (probably by telephone conference call) between a Judge and counsel for the parties once the independent IT expert's report has been received by the Registrar and forwarded to the Judge. Further directions as to how and when the report and its contents may be released to the parties, including how any disputed questions of relevance or privilege may be dealt with, will be determined at that further hearing.
13. Costs are reserved on the hearing of this application at this stage.

[34] The following direction is made on file EMPC 132/2015 (the parties' substantive proceedings that have now been removed to the Court in their entirety), which is very closely associated with this. It is necessary for the plaintiff in that proceeding (Mr Yu) to file and serve a statement of claim in compliance with reg 11 of the Employment Court Regulations 2000. That should be done within 30 days of the date of this judgment, taking account of Mr Yu's current predicament in the PRC. The defendant in that proceeding (Zespri) is then to file and serve a statement of

defence to that statement of claim. That is to be done within 30 days of the date of receipt by it of the plaintiff's statement of claim.

[35] Because the terms of the orders made in this judgment differed from the proposals of the parties at the hearing and had not been able to be discussed with them, a draft of this judgment was sent to the parties on 30 June 2015 seeking any further submissions on it within the following seven days. An order was made prohibiting publication of the draft judgment, although this judgment now delivered is not restricted as to its publication. Submissions were received in this period allowed, so that this judgment that is now issued takes account of those submissions (relating to the details of the conditions attaching to the compliance order) that have been accepted by the Court.

G L Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 8 July 2015