IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 148
EMPC 288/2023

IN THE MATTER OF	a review of a search order
BETWEEN	CHAIN & RIGGING SUPPLIES LIMITED Applicant
AND	JUSTIN DOUGLAS WERAHOKO NIKORIMA First Respondent
AND	RAPIDO SAFETY SOLUTIONS LIMITED Second Respondent

Hearing:	4 September 2023 (Heard at Auckland and via AVL)
Appearances:	P Amaranathan, counsel for applicant No appearance for first respondent T Jarman and J Shaw, counsel for second respondent N Kearney, independent solicitor
Judgment:	4 September 2023

ORAL JUDGMENT (NO 3) OF JUDGE B A CORKILL

Introduction

[1] This matter has been called today to review a search order which I made on 22 August 2023.[1]

[1] *Chain & Rigging Supplies Ltd v Nikorima* [2023] NZEmpC 133 [*First judgment*]; and a variation to that order in *Chain & Rigging Supplies Ltd v Nikorima (No 2)* [2023] NZEmpC 134 [*Second judgment*].

[2] I have received a memorandum of the independent solicitor of 1 September 2023, memoranda of counsel for the applicant and for the second respondent of 1 September 2023 and a joint memorandum of 4 September 2023.

[3] There are appearances today on behalf of the applicant and the second respondent, along with the independent solicitor. There is no appearance on behalf of the first respondent.

Steps to date

[4] It is common ground between the parties who appeared that:

(a) the sealed order dated 23 August 2023 was served on the first and second respondents on 25 August 2023;

(b) the applicant was able to complete some, but not all, of the search on 25 August 2023;

(c) after 25 August 2023, further items were searched or provided, with the second respondent's consent; and

(d) the draft statement of problem was filed in the Employment Relations Authority on 28 August 2023.

Draft order

[5] For today's review purposes, a draft order was prepared by the applicant and considered by counsel for the second respondent. The proposed order is intended to regulate the analysis of removed documents, certain van photographs, and electronic information obtained from removed devices.

[6] A constructive process of dialogue has taken place between counsel both prior to this review hearing and at the hearing today. There are a number of issues which I need to traverse to finalise the order which I am annexing to this judgment. I will deal with these issues in the order in which they were discussed with counsel this morning.

[7] Issue one relates to the period which the information technology expert, Cameron Hansen, is to hold what is described as "an old mobile phone" and attempt to clone data from it. The device is then to be returned to the second respondent.

[8] Mr Shaw, counsel for the second respondent, suggested that the return date should be within four weeks of the date of the order being made. Ms Amaranathan, counsel for the applicant, explained there has been water damage to the device which may present some challenges, but she ultimately accepted that four weeks is a reasonable period for attempts to be made to extract information. I approve that timeframe.

[9] Issue two relates to the correct spelling of Kevin Chen's name. That is common ground and the amendment can be made accordingly.

[10] Issue three is to do with the scope of the electronic search that is to be undertaken for the period prior to 2 March 2023, being the date which is one day after Justin Nikorima's exit interview; the scope of the searches is currently described in paras (h)(ii)(b) and (d).

[11] Mr Shaw said the scope of the intended search is too broad. Ms Amaranathan submitted that for this period, both the former employee[2] and Mr Nikorima were still employed by the applicant company. It is alleged that there were conflicts of interest; there were duties of fidelity; and there is an allegation as to whether the new company, Rapido Safety Solutions Ltd (Rapido), aided and abetted the activities that occurred in this period. It is also submitted that there was misleading and deceptive conduct and that Rapido allowed this to occur. Ms Amaranathan also made the point that in September 2022, which is part of the period under discussion, Mr Nikorima and the former employee both said that they had no intention to compete with the applicant and that the applicant will argue that their statements have proved to be incorrect. Ms Amaranathan therefore says that these are all factors relevant to the pleaded claims that the company is bringing and why the searches need to be as broad as drafted in both subparas (b) and (d).

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2 I adopt the same form of anonymisation for this person as was adopted in *First judgment*, above n 1, at [7].

[12] There is also a question as to whether a conspiracy claim is being sought. Ms Amaranathan clarified that this has been pleaded as far as the first respondent is concerned. She said that if such a conspiracy were to be established involving the former employee, that could potentially bring in the former employee's communications with Allan Hindmarsh, and the former employee's communications with Mr Chen, with the new company thereby becoming part of the conspiracy.

[13] I wish to make it plain that none of this is accepted by Rapido. However, the sole question that the Court is engaged in at present relates to whether or not Mr Hansen should search on the basis of these terms.

[14] If there are consequential applications that need to be made down the track, including raising concerns that the information is irrelevant, then so be it. As I discussed with Mr Shaw, if the information extracted proves to be excessive, there may be costs issues that the Authority will need to consider in due course.

[15] In light of these factors, I allow the current language used in subparas (b) and (d) to stand.

[16] Issue four relates to the period 2 March 2023 to 2 June 2023, as described in paras (h)(iv) and (v), and a search in what is described as a "non-compete period" for any steps taken by the first or second respondents to compete with the applicant's business.

[17] Mr Shaw argued that the second respondent was not subject to a restraint, and that it was entitled to compete with the applicant company in that period. Ms Amaranathan has taken me to cl 15.2 of Mr Nikorima's individual employment agreement (IEA) which provides:

> 15.2 You agree that, after your employment ends, and in the area specified in Schedule 1, you will not directly or indirectly:
>
> (a) For a period of 6 months directly or indirectly deal with any of our clients, suppliers and customers with whom you dealt or had knowledge of during the period of 12 months immediately preceding your employment ending

(b) For a period of 6 months, attempt to encourage or persuade any of our employees, contractors or consultants to end their contract or agreement with us; or

(c) For a period of 3 months be involved, as an employee or otherwise, in any business that competes with us.

15.3 These restraints apply in the area specified in Schedule 1.

15.4 You agree that the restraints are fair and reasonable for the proper preservation of the goodwill of our business, and the value of the remuneration and benefits referred to in this agreement are fair and reasonable consideration for you giving the restraints.

15.5 If this clause or any part of it is held invalid for any reason by any Authority or Court with jurisdiction to consider such clauses, the clause shall apply as modified by the Court or Authority or, if it is not modified, the remainder of this clause and agreement will continue in force and effect. Alternatively, the parties to this agreement may negotiate a valid and enforceable provision in [replacement] of the invalid provision.

[18] Ms Amaranathan submitted it is very clear Mr Nikorima is a director and shareholder and was such from the company's incorporation. She says that the breadth of the language of cl 15.2(c) is such that if competing, it is arguable that Mr Nikorima has breached his restraint of trade provision. Similarly, if Rapido is involved in the competing via Mr Nikorima, there may also be a breach.

[19] Mr Shaw explained that there are in fact three directors of the second respondent company and that Mr Nikorima is, via another company interest, a minority shareholder. Therefore, he says there are other parties involved. His point is that there may be legitimate steps taken by Rapido that would not fall foul of the undeniably broad scope of cl 15.2. I note what Mr Shaw says but at this stage, and given the subsequent potential protections that can be considered, I conclude it is appropriate for the non-compete search to be undertaken.

[20] Issue five arises from para (h)(vi), which concerns the period 2 March 2023 to 20 September 2023. It relates to Mr Nikorima's contractual non-solicitation period, as described in cl 15.2(b) of the IEA. The issue is whether Mr Hansen's search should be restricted to any attempts by the first respondent only, to solicit or undertake actual solicitation of the former employee or any other employee to work for Rapido. The discussion I had with counsel narrowed to the point where the question is whether the attempts should simply be restricted to those of Mr Nikorima, or whether it should

also encompass attempts by the second respondent, Rapido. Given the broad scope of the above IEA clause, I consider that the subparagraph should refer to any attempts by the first respondent and/or the second respondent.

[21] Issue six covers the same period but arises from the non-dealing period which is referred to in cl 15.2(a) of the IEA. The debate concerns the question of whether the search should relate to communications or other dealings between Mr Nikorima only, and customers; or whether it should extend to dealings between Rapido or the former employee, and customers. The second respondent says that it and the former employee are not subject to a non-dealing period. Again, I conclude that having regard to the breadth of the language used in the clause, the ability to obtain protective orders if necessary, and finally the ability for the Authority to deal with issues that have proved to be excessive on a costs basis in due course, it is appropriate for the search to be undertaken as drafted.

[22] Issue seven concerns communications or other dealings between Mr Nikorima or the former employee or Rapido, and the applicant's suppliers referred to in a particular supplier list. The question is whether this search should include Rapido and the former employee. I am told by Ms Amaranathan that reliance is placed, for the purposes of this search, on cl 15.2(a) which deals with dealing directly or indirectly for a period of six months with suppliers and customers with whom Mr Nikorima dealt, or had knowledge of, during the 12 months immediately preceding his employment ending.

[23] Again, the language is broad and could arguably extend, through the use of the words "directly or indirectly", to activities undertaken both by the second respondent and/or the former employee. I allow that provision to stand.

[24] Issue eight relates to a search for a period which is not time-bound: para (h)(ix). It concerns a search by Mr Hansen for a removal of, or plans for the removal of, the applicant's product. Mr Shaw went on then to suggest a qualifier which is indeed used in the next clause, being the words "for example, marked with the Applicant's logo, traceable to the Applicant via product codes, unique numbers or other description to be provided by Ms Edwards to Mr Hansen and to the Respondents."

[25] Ms Amaranathan said that although the same qualifier had been added, as appears in the next clause, this particular clause deals with a different issue. It is dealing with not only removal of, but also plans for the removal of, the applicant's product. She highlighted a possible scenario where a plan to source product is advanced, which arguably infringes the IEA provision, even although at the time of such planning, the product had not yet been marked or identified.

[26] My earlier comments regarding potential irrelevance and potential costs scenarios apply here. I allow that clause to stand without the filter added by Mr Shaw.

[27] Issue nine relates to whether the qualifier I have just been discussing should be added for the purposes of para (h)(xi). This concerns a search by Mr Hansen for material relating to possession by Rapido or by Mr Nikorima of product which appears to belong to the applicant.

[28] After discussion with counsel, there is agreement that the qualifier can be added to that particular subclause. It is approved accordingly.

[29] Issue 10 relates to a clause concerning information about the sale by Rapido of product and/or equipment where there is no corresponding evidence of purchase by Rapido of that item of product or equipment.

[30] Mr Shaw raised concerns as to the breadth of the search. After discussion with the Court as to the possibility of information being protected were it to be placed before the Authority, Mr Shaw accepted there were the mechanisms to which recourse could be had subsequently. On that basis the objection was withdrawn.

[31] Issue 11 concerns the possession or use by Rapido or by Mr Nikorima of information belonging to the applicant. Mr Shaw initially submitted that this should be restricted to confidential information only.

[32] Ms Amaranathan referred to cl 18.11 of the IEA which provided:

> 18.11 You must return anything belonging to us when your employment ends (or if you start a period of garden leave and we require it), including our information (hard copy and electronic) and equipment.

[33] Ms Amaranathan noted the return of property clause was not restricted to confidential information only. She also pointed out there is already evidence suggesting Mr Nikorima had utilised a non-confidential template used by the applicant, and that this was, in effect, a springboard for the new entity.

[34] I accept Ms Amaranathan's submissions on this point and the provision may stand.

[35] The final issue I discussed with counsel, issue 12, concerns the use, in brackets, of a reference to the name of the former employee in subparas (xi), (xiv) and (xv). After discussion with the Court, it was agreed that a formula for making it clear that analysis of information or searches concerning the former employee are to do with activities undertaken by him in his capacity as an employee of Rapido. So, it is agreed that after the word "Rapido" in each of those clauses, may be added "(which for the avoidance of doubt includes [the former employee])".

[36] That concludes the discussion of disputed matters.

Other matters

[37] There are several other items that were either alluded to by counsel or which I raised.

[38] The first is that in my view it is important for the Court to make it clear that all these processes are being undertaken under the supervision of the Court. To that end, I order that all removed items, photographs taken and cloned electronic information are to be held by counsel for the applicant and/or the applicant's IT expert, Mr Hansen, until further order of the Court.

[39] A consequence of the order I have just made is that there will need to be an amendment to subpara (c) of the draft order to make it clear that the inspection of photographs is to take place at the offices of RiceCraig – those words are to follow the word "inspected" in that subclause.

[40] The next matter is that there will be a further review of these steps at 2 pm on 12 October 2023. Any applications that any party wishes to advance are to be advanced prior to that review. Accordingly, any relevant application is to be filed and served by 4 pm on 5 October 2023 and any notice of opposition is to be filed and served by 4 pm on 10 October 2023.

[41] If this timeline is too tight and, in particular, Mr Hansen has been unable to complete his work, I will vary the above timetable.

[42] I have discussed with counsel the possible discharge of the non-publication orders I made in respect of my earlier judgments, and make below in respect of this judgment. Such orders are interim. My preliminary view is that there is no proper reason for maintaining them, but in order to give counsel on both sides an opportunity to consider that issue, they are to file memoranda by 4 pm on 11 September 2023. I will then consider the issue further.

[43] There is an interim non-publication order in respect of this judgment, until further order of the Court.

[44] I reserve leave to any party to apply to the Court to revoke, vary or extend the orders I have made today.

[45] I reserve costs.

B A Corkill
Judge

Judgment in its original form delivered orally at 11.27 am on 4 September 2023, with editorial amendments made prior to the judgment being issued.

ORDER AS AUTHORISED

Hard copy documents[3]

(a) The removed documents and copied documents are to remain in the possession of the Applicant's solicitor and can be inspected by her and a list made of the following:

(i) Any documents which appear to belong to the Applicant;

(ii) Any documents which appear to be evidence of the following:

(A) The Respondents dealing with the Applicant's customers or suppliers.

(B) The Respondents dealing with the Applicant's product.

(C) The Second Respondent trading within the non competition period.

(b) Any of the removed documents or copied documents which are not in the list are to be returned to their owner and copies of them are to be destroyed.

Van photos[4]

(c) The 25 August van photos and the 28 August van photos may be inspected at the offices of Rice Craig by Jaqueline Edwards and Lance Davis of Chain & Rigging Supplies Limited and an inventory made of product which appears to belong to the Applicant.

(d) A copy of the inventory will be provided to the Respondents.

Electronic information[5]

(e) The Information Technology expert, Mr Hansen, may continue to hold the "old" mobile phone and attempt to clone it as soon as possible and in the event

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3 As referred to in counsel's memorandum of 4 September 2023.
4 As referred to in counsel's memorandum of 4 September 2023.
5 As referred to in counsel's memorandum of 4 September 2023.

he determines it is not able to be cloned, he will return it to the Second Respondent within 4 weeks of the order being made.

(f) All cloned electronic information may be held by Mr Hansen, inspected by him and a list of files prepared which appear to be evidence of any of the matters set out in (h) below.

(g) The above files are to be shared with the other parties on a Counsel to Counsel basis so they can be checked for privileged and/or irrelevant material.

(h) The matters referred to in (f) above are as follows:

For the period prior to 2 March 2023, being the day after Mr Nikorima's exit interview:

(i) Removal, extraction or copying by Mr Nikorima or by the former employee[6] of the Applicant's information, including by extraction or forwarding of information via hardware or via cloud upload or by email from Mr Nikorima's Chain & Rigging email address to his personal email address.

(ii) Communications by email, text, or direct messaging (including WeChat or Whatsapp) as follows:

a. Between Mr Nikorima and Allan Hindmarsh or Mr Nikorima and Kevin Chen.

b. Between the former employee and Allan Hindmarsh or the former employee and Kevin Chen.

c. Between the former employee and Mr Nikorima containing the words "Rapido" or "Allan" or "Kevin" or "investor".

d. Containing the word "Rapido".

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6 The former employee's name will be recorded in the sealed copy of this order.

For the period after 1 March 2023 and prior to 15 April 2023, being the day after the former employee's last day of employment:

(iii) Communications by email, text, or direct messaging (including WeChat or Whatsapp) as follows:

a. Between the former employee and Mr Nikorima.

b. Between the former employee and Allan Hindmarsh or Kevin Chen.

For the period from 2 March 2023 to 2 June 2023 being (approximately) Mr Nikorima's non compete period:

(iv) Purchasing goods, selling goods or services, attempting to sell goods or services, attempting to purchase goods, marketing, promoting or advertising the Second Respondent's business.

(v) Any steps taken by the First Respondent or Second Respondent to compete with the Applicant's business.

For the period from 2 March 2023 to 20 September 2023 being (approximately) Mr Nikorima's contractual non solicitation period:

(vi) Any attempts by the First Respondent and/or the Second Respondent to solicit, or actual solicitation of the former employee or any other employee of the Applicant, to work for Rapido.

For the period from 2 March 2023 to 20 September being (approximately) Mr Nikorima's contractual non dealing period:

(vii) Any communications or other dealings between Mr Nikorima or the former employee or Rapido and the customers listed at Annexure B of Ms Edwards' Affidavit.

(viii) Any communications or other dealings between Mr Nikorima or the former employee or Rapido and the Applicant's suppliers referred to in

a supplier list to be provided by Ms Edwards to Mr Hansen and (on a Counsel to Counsel basis) to Norris Ward McKinnon.

For a period which is not time bound:

(ix) Removal of, or plans for the removal of, the Applicant's product.

(x) Sale of product which appears to be the Applicant's product (for example, marked with the Applicant's logo, traceable to the Applicant via product codes, unique numbers or other description to be provided by Ms Edwards to Mr Hansen and to the Respondents).

(xi) Possession by Rapido (which for the avoidance of doubt includes the former employee) or by Mr Nikorima of product which appears to belong to the Applicant (for example, marked with the Applicant's logo, traceable to the Applicant via product codes, unique numbers or other description to be provided by Ms Edwards to Mr Hansen and to the Respondents).

(xii) Sale by Rapido of product and/or equipment where there is no corresponding evidence of purchase by Rapido of that item of product/equipment.

(xiii) Any evidence of the purchase of the products on-sold to Tilyards Plumbing which were referred to in paragraphs 23 to 40 of Ms Edwards' affidavit and Annexures N, S and T.

(xiv) Possession or use by Rapido (which for the avoidance of doubt includes the former employee) or by Mr Nikorima (or by the former employee on behalf of Rapido) of information belonging to the Applicant.

(xv) Use by Rapido (which for the avoidance of doubt includes the former employee) or by Mr Nikorima of confidential information belonging to the Applicant, such as knowledge of the Applicant's customer requirements, pricing structures and discounts.