IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND **[2013] NZERA Auckland 184**
5391142

	BETWEEN	MATAMATA INDUSTRIAL MACHINERY LIMITED Applicant
	A N D	JON FITZGERALD KENNEDY McALLISTER Respondent

Member of Authority:	James Crichton
Representatives:	Maria Dew, Counsel for Applicant Respondent in person
Investigation Meeting:	On the papers
Date of Determination:	10 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant company (MIMICO) is engaged in the business of selling, hiring and servicing heavy machinery for the mining and associated industries as well as importing and distributing a range of spare parts for such heavy machinery.

[2] The respondent (Mr McAllister) was until recently a sales representative for MIMCO.

[3] There was a written employment agreement containing common terms prohibiting competition with the employer, requiring confidentiality and the protection of the employer's intellectual property. Similarly, MIMCO relies upon implied terms of loyalty and fidelity and the statutory obligation of good faith as between the parties.

[4] MIMCO alleges that during its employment of Mr McAllister, he established his own business in competition with MIMCO. A disciplinary investigation with Mr McAllister was eventually undertaken by MIMCO in the course of which Mr McAllister resigned his employment. MIMCO allege that Mr McAllister failed to return its property and further allege that after the termination of the employment, MIMCO discovered that Mr McAllister had diverted significant business from MIMCO to his own company and that in that and other respects, he breached his obligations, both express and implied, to MIMCO.

[5] Significant losses have been incurred, according to MIMCO.

[6] Mr McAllister accepts that he explored setting up his own business and indicates that he discussed those matters with MIMCO. However, Mr McAllister denies breaching either express or implied terms of his employment agreement, denies causing loss to MIMCO and points out that his employment agreement does not have a restraint of trade provision.

[7] At the request of the applicant, the Authority directed the parties to mediation, but that did not successfully resolve the employment relationship problem.

[8] Then by joint memorandum dated 27 March 2013, an application was made to remove the whole matter to the Employment Court and that costs in relation to this application be reserved for determination at the conclusion of the Court proceeding.

The application for removal

[9] The application proceeds essentially on the footing that it is considered that important questions of law are likely to arise in the matter, other than incidentally.

[10] Those important questions of law include, *inter alia*, the scope of the express contractual duties that Mr McAllister had, including, for instance, his obligation not to engage in competition with MIMCO, Mr McAllister's implied duties of loyalty and fidelity, the extent of the statutory duty of good faith in the present factual matrix, whether what Mr McAllister did during the employment was no more than preparation for subsequent business opportunities of his own or constituted breaches, and finally what the appropriate legal principles are concerning causation, remoteness and quantification of damages in the present case.

[11] The Authority is told that MIMCO obtained a search order and an interim injunction against Mr McAllister from the Employment Court at Auckland in August 2012 (Judge Travis). The search order has been executed and the interim injunction remains in place.

[12] Counsel submit that there are significant disputes between the parties both in respect to liability and to quantum and that issues concerning causation of loss are factually and legal complex.

[13] The level of damages that are likely to be claimed by MIMCO are significant and that is confirmed to the Authority by expert evidence filed by affidavit, in support.

The law

[14] Section 178 of the Employment Relations Act 2000 (the Act) gives the Authority power to order the removal of a matter to the Court, or a part of it, without the necessity for the Authority to first conduct an investigation into the same matter. Such an order may be made subject to such conditions as the Authority thinks fit.

[15] There are four broad grounds on which an application may be granted, only two of which are relevant in the present proceeding. The relevant subparagraphs are set out below:

> *Section 178(2)*
> *The Authority may order the removal of the matter, or any part of it, to the Court if –*
>
> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
>
> *...*
>
> *(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[16] Dealing first with whether an important question of law is involved, the Authority is referred to the well known passage in the Employment Court decision in *Hanlon v. International Education Foundation (New Zealand) Inc* [1995] 1 ERNZ 1 when at p.7 the Court opined:

> *A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision on it or a material part of it.*

[17] It is submitted that while there are significant factual disputes between the parties, it is nonetheless the position that *questions of law that arise are likely to be of critical importance*.

[18] Furthermore, the present case involves challenging aspects relating to causation of loss following breach and His Honour the Chief Judge remarked in *Rooney Earthmoving Ltd v. McTague* [2007] ERNZ 356:

> *The law of causation of loss following breach of contract is among the most difficult elements of remedies for contact breach.*

[19] Turning now to consider the second leg, whether in all the circumstances the Authority should remove the matter to the Court for determination, there are a number of factors weighing in the balance.

[20] The first of those is the fact that the Court is already seized of the proceeding to the extent that a search order and an interim injunction have already been granted by the Court and the interim injunction remains in place.

[21] Second, the quantum of the potential remedies to be considered in the present case make it almost inevitable that if the matter were investigated and determined by the Authority, there would be a challenge to the Employment Court. It follows that if there is an inevitability about that process, it is in the best interests of the parties to have the matter determined at first instance by the Court.

[22] Further, the Authority is reminded of the more formal regime for the disclosure of documents in the Court with the point being made by counsel that such a regime creates a genuine benefit to the parties in complex litigation which is not available to them in the Authority.

[23] Moreover, the very fact that this application is made jointly by the parties must be a factor which the Authority ought properly to weigh in concluding whether or not removal to the Court is appropriate or not.

[24] The Authority has been persuaded that orders should be made to remove this matter to the Court because important questions of law are likely to arise, other than incidentally, and because, on balance, the Authority is persuaded that the Court should

determine the matter. As to the first limb, the Authority considers there are important questions of law which will arise at the core of any decision to be made. These will include *" the proper basis for the assessment of damages ",* issues around causation and remoteness of loss as well as whether, as a matter of law, Mr McAllister breached express and implied terms of his employment agreement.

[25] Concerning the second limb, the Authority is influenced by the joint nature of this application, by the fact that the Court is already seised with an application in relation to this matter, and by the access the parties will have to the more formal discovery process available in the Court.

Conclusion

[26] The Authority is satisfied that the proper course of action is to order the removal of the whole of the employment relationship problem between these parties, Matamata Industrial Machinery Imports Limited and Jon Fitzgerald Kennedy McAllister to the Employment Court for the Court to hear and determine without the Authority investigating the matter.

[27] Costs in relation to this application are to be reserved and determined at the conclusion of the proceeding.

James Crichton
Member of the Employment Relations Authority