**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

[2017] NZERA Wellington 124
5638854

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| | BETWEEN | INDUSTRIAL EQUIPMENT DISTRIBUTORS LIFTING CENTRE LIMITED<br>Applicant |
| | A N D | RODNEY SCOULLER<br>First Respondent |
| | | DARRYN PAUL SCRIVENER<br>Second Respondent |

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| Member of Authority: | Michele Ryan |
| Representatives: | Ian Matheson, Counsel for the Applicants<br>Susan Hughes QC, Counsel for the Respondents |
| Investigation Meeting: | Via telephone conference on 19 October 2012 |
| Determination: | 1 December 2017 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Industrial Equipment Distributors Lifting Centre Limited (IED) is in the business of supplying, distributing and maintaining specialist lifting equipment for use in a variety of industries.

[2] IED claims the respondents, former employees Rodney Scouller and Darryn Scrivener, accessed and used its confidential information in breach of their respective contractual obligations. IED also alleges Mr Scouller and Mr Scrivener have each breached duties of fidelity and good faith owed to it during employment. It seeks significant remedies associated with the claims.

[3] This determination addresses whether IED's claims should be removed and heard by the Employment Court at first instance.

**Background**

[4] Mr Scouller, was employed by IED as a Manager for approximately 18.5 years until 2015. In 2014 he was given a written employment agreement. Although the agreement was not signed by either party, IED says Mr Scouller had, either expressly or by implication, agreed to the terms of employment contained in the document. Mr Scrivener was employed by IED in early 2011. He too was given a written employment agreement in 2014, which was signed. Each employment agreement contained the following confidentiality provision:

> Unless otherwise directed by IED… you will not misuse or disclose any confidential information which comes to your knowledge, either directly or indirectly, by virtue with your employment with IED…

[5] Mr Scrivener's employment agreement further stated "This clause applies both during and after your employment".

[6] Mr Scouller and Mr Scrivener left IED in July and September 2015 respectively. On 21 September 2015 they incorporated a company called Specialised Lifting Services (SLS). Each respondent is a director and shareholder of that entity. SLS began trading in November 2015.

[7] Between October and December 2015 IED's web-based management tool (the *System*), said to contain detailed client information and records, was accessed remotely. IED had the matter investigated by technology experts. In May 2016 it obtained pre-trial orders for disclosure.[1] That information established that the two IP addresses used to access the System were connected to Messrs Scouller and Scrivener.

[8] The Authority received IED's statement of problem in August 2016 and the respondents' statement in reply in September 2017. IED estimates its losses (current and future) as $1,806,000.[2] The respondents accept that SLS competes with IED and that a number of IED's former clients have transferred their business

[1] *Industrial Equipment Distributors Lifting Centre v Spark New Zealand Ltd & Vodaphone New Zealand Ltd* [2016] NZEmpC 45; *Industrial Equipment Distributors Lifting Centre v Spark New Zealand Ltd & Vodaphone New Zealand Ltd (No 2)* [2016] NZEmpC 52

[2] Estimated lost profit over 10 years beginning in 2016

to SLS. They say there is no property in any of IED's clients and by inference, no link between their access of the System, and IED's customers moving their business to SLS.

[9] In January 2017 the parties agreed to a forensic examination of the respondents' computer hard-drives. Progression towards an investigation meeting with the Authority was deferred to allow this to occur. The examination appears to have been unsuccessful where IED says all data had been deleted before the examination was conducted. Between March and August the owner/supplier of the System conducted further forensic inquiries for IED.

[10] On 5 October 2017 the Authority held a case management call (CMC) with the parties to discuss how the matter should be progressed.

**Order for removal**

[11] Prior to the CMC counsel were invited to consider whether the nature of the matter was such that it should be removed to the Court. During the CMC counsel indicated IED supported removal of the matter. Counsel for the respondents did not oppose removal.

[12] Pursuant to s.178 the Authority may on its own motion order the removal of a matter to the court to have it hear and determine the matter without the Authority investigating it. Alternatively, a party may make an application to have a matter removed. In both instances the matter may only be removed if the circumstances of the case meet at least one of the four possible grounds for removal set out at s.178(2).

[13] I consider s.178(2)(d) is applicable to this matter where I am of the opinion that in all the circumstances the Court should determine the matter. My reasons are as follows:

- Firstly, the case as presented will provide challenging and complex evidential issues regarding causation, proximity and/or remoteness to losses, and liability. I note there appears to be some remaining disclosure issues between the parties regarding the information at issue, particularly regarding "use" by the respondents, which can be better addressed by the Court. Should an assessment as to damages be

required the Court has much stronger prescriptive powers to order discovery of documents to assist that inquiry than the Authority has to determine it. Further, the Court is aware of the factual matrix leading to the applicant's claim having already issued pre-proceeding discovery orders.[3]

- Next, it is clear from the information furnished (including the quantum of IED's claim) that the matter is important to the parties. I consider it almost inevitable that any determination by the Authority will be challenged by one party or the other. It is likely that significant forensic evidence from the overseas based owner of the System will be required. A hearing by the Court at first instance is likely a more efficient use of judicial, and the parties', resources.

- The matter has become protracted. It is now two years since IED became aware that its System had been accessed. Notwithstanding the parties will lose a right of appeal I consider the Court is more likely to be able to expeditiously conclude this matter than the Authority. Counsel for IED advised that the Court has availability in the first quarter of 2018 which the Authority is unable to offer.

[14] Each of the separate factors referred to above would not ordinarily warrant removal of the matter. Considered together however I am satisfied that in the particular circumstances of this case it is appropriate to exercise the discretion available to the Authority and have the matter removed.

**Determination**

[15] The order for removal in this instance is pursuant to s.178(2)(d). I order the entire matter be removed to the Employment Court for hearing and determination.

Michele Ryan
Member of the Employment Relations Authority

[3] Ibid at n.1