IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 549
3040911

	BETWEEN	GARRA INTERNATIONAL LIMITED Applicant
	AND	LOAY KANJO First Respondent
	AND	NEW ZEALAND GREEN FARM LIMITED Second Respondent

Member of Authority:	Helen Doyle
Representatives:	James Pullar and Amy Kennerley, counsel for the Applicant David Beck, counsel for the Respondent
Case Management Conference with counsel:	11 September 2019
Further information from counsel:	16 September 2019 from the Applicant 19 September 2019 from the Respondent
Date of Determination:	25 September 2019

DETERMINATION OF THE AUTHORITY

Removal to Employment Court

[1] The Authority may on its own motion under s178(1) of the Employment Relations Act 2000 order the removal of a matter, or any part of it, to the Employment Court to hear and determine without the Authority investigating it.

[2] The Authority is of the view it is appropriate that this matter be removed in its entirety.

[3] This determination sets out the reasons why.

The nature of the claim

[4] This is a matter where it is alleged that the first respondent breached obligations to the applicant. These include contractual duties arising under the employment agreement of a restraint of trade provision, a non-solicitation provision and a confidentiality provision. Further it is alleged there are breaches of alleged statutory duties of good faith and common law duties of fidelity and fiduciary duties. It is alleged that the second respondent has aided and abetted the breach of an employment agreement.

[5] The Authority's view that the matter should be removed is because of disclosure issues for which the prescriptive process in the Employment Court would be particularly advantageous. Without such a process there could be a risk of incomplete or problematic disclosure.

What has occurred with disclosure?

[6] In a memorandum of counsel lodged in December 2018 the applicant wanted a number of documents to be disclosed before attendance at mediation.

[7] Mr Beck on behalf of the first and second respondents signalled a willingness to attend mediation and opposed disclosure.

[8] The Authority, in a minute dated 21 January 2019, considered the nature of the claims and the information that had been requested by the applicant. It set out the objection to disclosure. It directed that the parties attend mediation prior to any formal orders for provision of information for reasons that it set out in the minute. There was a process set out if mediation was unsuccessful. Mr Beck was within 14 days to direct a response to each of

the requested items of information and to confirm whether there were any other material bank accounts. He was asked to set out whether there were any issues of privilege. If so, and the information was relevant, then a process was set out that a copy should be provided to the Authority for a decision about the issue of privilege. Mr Pullar and Ms Kennerley were to have an opportunity for a response before the Authority determined the issue. The Authority also set out a proposed method for dealing with any issue of commercial sensitivity.

[9] Mediation and subsequent negotiations were unsuccessful.

[10] Mr Beck provided a further memorandum dated 5 August 2019 in which he set out that the first respondent was not prepared to supply the information requested due to commercial sensitivity and the applicant failing to make a prima facie case for damages or providing evidence of any contact between the respondent and the applicant's current clients. There was reference to privilege. The response to disclosure was not on the basis directed in the Authority minute.

[11] Mr Pullar and Ms Kennerley responded in a further memorandum dated 15 August 2019 and noted that there was a failure to comply with the minute of the Authority. There was no agreement with the matters advanced by Mr Beck. Amongst other matters in a fairly lengthy document it was noted that the proceedings were not comparable to smaller scale matters in the Authority because of the nature of breaches alleged and the scope of damages. It was recorded that a prescriptive approach to disclosure may be appropriate. Ultimately it was proposed that the Authority undertake an assessment of all documents and any failure to properly address the processes being a cost issue.

Conference with counsel

[12] During a conference with counsel on 11 September 2019 the Authority indicated that it may consider removing this matter to the Employment Court. Counsel was given some time to discuss this with their clients.

[13] Counsel did not, following that, disagree with the appropriateness of removal. Mr Beck did want the Authority to consider making a preliminary finding on the scope of the restraint and whether a customer and supplier came within the scope of the potential breach.

[14] Mr Pullar and Ms Kennerley in their response did not agree that would be of assistance because the restrictive covenants only form one aspect of the claim, other claims are likely to require the same nature of disclosure as the restrictive covenants and issues about the covenants are better suited for disposition in light of all the relevant evidence rather than in isolation.

[15] I am not persuaded that it would be advantageous to either party for the Authority to delay removal and determine on a preliminary basis the scope of restraint in isolation of the other claims. That has the potential to increase costs without corresponding benefit.

[16] I find that the Authority should remove this matter to the Employment Court.

Order

[17] The Authority orders on its own motion the removal of this matter under file number 3040911 in its entirety for hearing and determination by the Employment Court. The Employment Court should be provided with the statement of problem and statement in reply and any documents attached thereto together with all memoranda lodged with respect to disclosure in the Authority.

Costs

[18] I reserve the issue of costs. Mr Pullar and Ms Kennerley asked that costs in the Authority be reserved in light of what they say was the failure to comply with the direction of the Authority about disclosure and the cost of the attempts to obtain disclosure to date. It is likely that costs are dealt with ultimately by the Employment Court.

Helen Doyle
Member of the Employment Relations Authority