

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 463
3118618 & 3120893

BETWEEN	NZ TECHNOLOGY GROUP HAWKES BAY LIMITED Applicant
AND	HAIG DAVID CHARLES FLASHOFF First Respondent
AND	DONALD PETER PRICE Second Respondent
AND	RAYMOND REGINALD TAYLOR Third Respondent
AND	SEAN GLASSPOOL Fourth Respondent
AND	ENGAGE TECHNOLOGY LIMITED Fifth Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Mark Hammond and Karina McLuskie, counsel for the Applicant
Hamish Kynaston and Nicola Cuervo, counsel for the First, Second, Third and Fifth Respondent
DeAnne Brabant counsel for the Fourth Respondent

Investigation Meeting: On the papers and by telephone conference

Submissions [and further Information] Received: 30 October 2020 from the Applicant
29 October 2020 from the First, Second, Third, Fourth and Fifth Respondents
2 November 2020 from the First, Second, Third and Fifth Respondents

Date of Determination: 11 November 2020

DETERMINATION OF THE AUTHORITY

A. These matters are removed to the Employment Court to hear and determine

Employment Relationship Problem

[1] NZ Technology Group Hawkes Bay Limited (NZTG) provides ICT services to small and medium sized businesses in the Hawkes Bay. It was created by a related entity which had perceived a need in Hawkes Bay communities for ICT services; it then identified local companies in the area that provided those services and sought to acquire the assets and businesses and then employ relevant personnel.

[2] NZTG then employed the first to fourth respondents and entered into individual employment agreements (IEA) with each of them.

[3] On 7 September 2020 each of the first to fourth respondents wrote to NZTG resigning with immediate effect.

[4] NZTG also received a letter on the same day sent on behalf of the first to third respondents, and a Mr Peter Dunkerley, seeking to terminate the agreements for sale and purchase under which the relevant business had been acquired by NZTG. Prior to these events, the first to third respondents and Mr Dunkerley had incorporated Engaged Technology Limited (ETL), the fifth respondent in these proceedings. In its statement of problem, NZTG alleges that the first to fourth respondents and 18 other employers, vacated its premises taking assets including confidential information, passwords, security data, vehicles, laptops, phones and other equipment.

[5] It is asserted that ETL then emailed all of NZTG's clients directing them to pay it for services provided by NZTG and stating that ETL would be servicing the customers in future. It was further alleged that the first to fourth respondents were in breach of their employment agreements with NZTG by:

- (a) Using its confidential information in a manner which was damaging to it;

- (b) Carrying out work for ETL in breach of restraint provisions;
- (c) Contacting clients of NZTG in breach of non-solicitation convenance, and in breach of restrictions not to use NZTG's confidential information; and
- (d) Taking NZTG's assets and equipment with them upon resignation.

[6] The statement of problem filed on 10 September 2020 (File No. 3118618) asks for the Employment Relations Authority to make a range of declarations and orders including damages and penalties. The first to fifth respondents filed a statement in reply on 18 September 2020 and a further amended statement of problem was filed by the applicant on 16 October 2020. No reply to the amended statement of problem has yet been filed.

[7] An application for an interim injunction which was strongly opposed, was also filed and on 29 September 2020 the Authority granted the NZTG's application for an interim injunction¹.

[8] On 5 October 2020 NZTG filed a further statement of problem dated 5 October 2020 which asks the Employment Relations Authority to order the respondents to comply with the interim injunction.(file 3120893)

The current situation

[9] On 16 October 2020 the Employment Court (Judge Corkill) granted NZTG a freezing order on terms.

[10] A challenge to the Authority's interim injunction has also been filed with the Court (EmpC 319/2020).

[11] File numbers 3118618 and 3120893 are currently with the Authority awaiting a substantive hearing.

[12] On 29 October 2020 an application was received from the first, second, third and fifth respondents to remove all matters to the Court, namely file numbers 3118618 and 3120893. A case management conference call was held on the same day in which counsel for all parties attended and submissions made in respect of removal to court. This was followed by a memorandum of counsel on behalf of the applicant on 30 October 2020 agreeing that file

¹ *NZ Technology Group Hawkes Bay Limited v Flashoff and Others* [2020] NZERA 388.

number 3118618 should be removed to the Court but asking the Authority to timetable matters for a hearing on its compliant application (file number 3120893). A further memorandum of counsel for the respondents dated 2 November 2020 was filed in response.

Discussion

[13] All parties have agreed that the Authority should make its determination on the papers and submissions made during the 29 October 2020 case management conference call.

[14] The grounds for removal include the observation that the matters in issue are numerous and factually legally complex. Further grounds include the following:

- (a) The issues are the same as the issues before the court and the challenge to the interim injunction.
- (b) The issues arise out of a complex commercial dispute involving commercial and contract law issues. There are issues regarding ownership of relevant property, and it is also clear there will be significant and complex evidence regarding any potential loss. These include dealing with a claim for general damages of between \$3.8 and \$5 million dollars together with unspecified special damages, penalties, and compliance orders.
- (c) Counsel for the applicant resists removal of file number 3120893. This file relates to the applicant's request that all respondents comply with the interim injunction already issued by the Authority on 29 September 2020. Whilst all counsel wish file number 3118618 removed to the Court, the applicant prefers that a timetable be set for a hearing on the application for compliance. No persuasive grounds as to why that matter should not be removed to the Court have been provided. Whilst submissions in support of that position were made by the applicant's counsel during the case management conference call on 29 October 2020, it does seem illogical for the Authority to retain the application for compliance when the substantive matter has been removed.

[15] I am told that there are important questions of law likely to arise other than incidentally including:

- (a) Consideration of whether the original sale and purchase agreements are a nullity.

- (b) Who owns property that the applicant says has been taken unlawfully by the respondents.
- (c) Whether the respondents' employment agreements have been repudiated by the applicant's conduct.
- (d) Whether restraints of trade are enforceable in light of the above.

Conclusion

[16] For the following reasons, I order removal to the Court of the matters lodged under file numbers 3118618 and 3120893. It is appropriate and in the overall interests of justice. I note:

- (a) The Court already has aspects of these matters before it relating not only to the freezing order already granted by the Court, but also in respect of the challenge to the interim injunction issued by the Authority.
- (b) I accept that important questions of law are likely to arise in this matter other than incidentally. It is likely there will be a tension between the commercial agreements entered into between the parties, and the employment relationships which then followed and are reflected in the IEAs entered into between the individuals involved. It would seem undesirable for the Authority to be dealing with some aspects of the parties' claims and the Court others. As the Court already has proceedings before it involving the same parties and involving related issues, it is appropriate to remove the matter.
- (c) I am accordingly satisfied that it is appropriate for the Authority to exercise its discretion to remove these matters in accordance with s 178(2)(a), (c) and (d) of the Act.
- (d) Further, in respect of the compliance application, file number 3120893, I note that the application for compliance asked the Authority to order compliance in respect of the interim injunction already issued. If the respondents had not complied with the interim injunction, then it begs the question as to why it is likely there would be compliance, at least to the degree that satisfies the applicant, of any subsequent compliance order issued by the Authority. The Court has far wider powers in respect of compliance and is better placed to deal

with the application especially as it is already seized of the matter due to the challenge.

Costs

[17] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority