IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 128
3133440

	BETWEEN	NEW ERA IT LIMITED Applicant
	AND	ANDREW HOOD First Respondent
	AND	PHILIP GOURLEY Second Respondent
	AND	LAURA KAYE Third Respondent
	AND	STEPHEN MCGIRR Fourth Respondent
	AND	CONTRAST NZ LIMITED Fifth Respondent

Member of Authority:	David G Beck
Representatives:	Amy Keir, counsel for the Applicant Glen Jones. Counsel for the first Respondent Jenni-Maree Trotman, counsel for the second, third and fourth Respondents Claudia Harnett, counsel for the fifth Respondent.
Investigation Meeting:	On the papers
Submissions Received:	26 February 2021 from the Applicant 8, 11 and 12 March 2021 from the Respondents
Date of Determination:	1 April 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant seeks leave to consolidate two proceedings before the Authority and effectively join the first respondent to the proceedings and for the consolidated proceedings to be removed to the Employment Court. The Respondents oppose both the applications.

[2] In summary the nature of the extant proceedings are:

i) File number 3125798: New Era IT Limited ("New Era") and Andrew Hood that relates to alleged breaches of a section 149 Employment Relations Act ("the Act") settlement agreement,[1] including the confidentiality of such and alleged breaches of contract (interrelated claims involving contractual provisions specifically reserved as ongoing obligations in the settlement agreement) and an allegation that Mr Hood acted in 'concert' with the respondent parties in the following proceedings. This proceeding has not been the subject of timetabling or the exchange of witness briefs of evidence.

ii) File number 3131116: New Era IT Limited and Philip Gourley, Laura Kaye, Stephen McGirr and Contrast NZ Limited that relates to enforcement of post- employment contractual obligations and a claim that Contrast NZ Limited aided and abetted the alleged breaches and that all respondents acted in concert with Mr Hood. This latter proceeding was the subject of an unsuccessful interim injunction application that is now awaiting timetabling for a substantive hearing.

Consolidation

[3] New Era's counsel, Ms Keir, seeks consolidation of the proceedings on the basis that:

a. The Applicant is the Applicant in both proceedings;

b. The causes of action against the Respondents in both proceedings are substantially similar;

[1] Section 149 Employment Relations Act 2000

c. The factual basis for the Applicant's claims in both proceedings will likely be established by the same witnesses recounting the same factual scenarios;

d. A key allegation in both proceedings is that the Respondents worked in concert with each other to breach their obligations to the Applicant and cause damage to the Applicant's business. The Applicant seeks that the Respondents in both proceedings be held liable in solidium for the damage flowing from their actions;

e. In all the circumstances, findings made in each of the separate proceedings will affect or be binding on the outcome of the subsequent proceedings, such that the interests of justice demand that each of the Respondents in each proceedings should be entitled to address the Applicant's case; and

f. Consolidation of the proceedings is a more effective use of scarce resources.

[4] Mr Hood's counsel opposes the consolidating of proceedings by drawing distinctions between the narrower causes of actions against his client and the other respondents the former excluding breach of restraint obligations, fidelity and misuse of confidential information. Suffice to say Mr Jones contends that joining Mr hood to the proceedings would embroil him in lengthier and more complex litigation on matters not at issue and that the alleged breaches he has committed are distinct and arose out of the s 149 settlement agreement.

[5] The second, third and fourth respondents' counsel, Ms Trotman, without elaboration and indicating they did not wish to be heard, suggested grounds for consolidation had not been met.

[6] The fifth respondent Contrast NZ Limited's counsel, Ms Harnett noted her client was not joined to Mr Hood's proceedings and that these proceedings were a relatively straightforward consideration of a settlement agreement breach that do not involve Contrast NZ Limited and consolidating such proceedings would lengthen proceedings causing them additional costs.

Discretion available

[7] Whilst the Authority has no specific provision to deal with consolidation applications, s 160 (1)(f) of the Act allows that I can follow "whatever procedure the Authority considers appropriate provided such is consistent with the objectives of the Authority as an institution as set out in s 143 of the Act - this includes recognition that

"procedures for problem-solving need to be flexible" and "not inhibited by strict procedural requirements. [2] Clearly however, if I exercise discretion, I should do so using a 'framework' and I was assisted by Judge Travis's application of rule 10.2 of the High Court Rules in *George v Auckland Regional Council.* [3]

[8] Rule 10.12 of the *High Court Rules* provides:

> **10.12 When order may be made**
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> The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—
>
> (a) that some common question of law or fact arises in both or all of them; or
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> (b) that the rights to relief claimed therein are in respect of or arise out of—
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> (i) the same event; or
>
> (ii) the same transaction; or
>
> (iii) the same event and the same transaction; or
>
> (iv) the same series of events; or
>
> (v) the same series of transactions; or
>
> (vi) the same series of events and the same series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule.

[9] Judge Travis noted in *George* that:

> Authorities under that rule have observed that a broad discretion is conferred to do what is in the interests of justice and that r 10.12(c) is something of a "catch all" conferring a separate and very wide jurisdiction. Those factors can include savings in time and cost to the parties and to judicial resources, removing the risk of inconsistent decisions and convenience and expedition. However, care must be taken to avoid confusion, prejudice or oppression to one party from the size and complexity of a consolidated proceeding, especially where the evidence admissible in one proceeding will not be admissible in another. [4]

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[2] Section 143 (d) & (f) Employment Relations Act 2000
[3] *George v Auckland Regional Council* [2011] ERNZ 89 at [4] – [7]
[4] At [6] citations removed.

Discussion

[10] Whilst it is accepted that it is conceptually arguable that all of the contextual events may be linked, I have yet to see any compelling evidence of such beyond inferential. [5] The first conceptual problem New Era has is this is not an application to have two proceedings consolidated involving the same parties. I thus have to carefully examine the interests of each party opposing the order for consolidation.

[11] From Mr Hood's perspective I am persuaded that he is facing distinct claims largely unrelated to the breaches claimed against the second to fifth respondents. Mr Hood's claim also involves discussion of a confidential settlement agreement that would be difficult to preserve should I consolidate the proceedings or effectively join him to proceedings. I am persuaded by the contention of Mr Jones that investigating the breach alleged would not entail a lengthy investigation. For these reasons I will not order any consolidation of Mr Hood's matters as such can be easily and distinctly dealt with in separate proceedings.

[12] Likewise, but with more surety, I do not consider consolidation involving Contrast New Zealand is feasible as they were not a party to the employment relationship or settlement agreement concerning Mr Hood. I do acknowledge that there may be a claim for a potential penalty action in substantive proceedings if evidence confirms aiding and abetting of contractual breaches occurred but effectively joining Mr Hood bears not relationship to this claim as the claim as pleaded was that Contrast New Zealand allegedly aided or abetted breaches of the second, third and fourth Respondents' contractual obligations.

Finding

[13] Overall I can see no cost savings to the parties by effectively joining Mr Hood and consolidation of proceedings and I decline the applicant's request for an order to consolidate proceedings.

Removal to Employment Court?

[14] Section 178 of the Act allows consideration of removal of a matter to the Employment Court in the following circumstances: if an important question of law is

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[5] See paras discussion at [47] – [52] of my interim decision *New Era IT Limited v Philip Gourley, Laura Kaye, Stephen McGirr and Contrast NZ Limited* [2021] NZERA 66

likely to arise in the matter other than incidentally; the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately; the court already has proceedings before it which are between the same parties and which involve similar or related issues; or if the Authority is of the opinion that in all the circumstances the court should determine the matter.

[15] The arguments for removal are summarised as follows, but because I have not ordered consolidation of proceedings I do not traverse the grounds advanced by Ms Keir pertaining to Mr Hood and my deliberation is only as to whether File number 3131116 should be removed to the Court.

Important question of law

[16] The overall objects of the Act set out in Part 1, include the need to reduce judicial intervention [6] but Part 10 of the Act describing institutions, includes that the Authority should recognise at times that "difficult issues of law will need to be determined by higher courts" [7]

[17] As Ms Keir advanced what she considered were novel or important arguments relating to Mr Hood's alleged actions and joint liability issues and I have not consolidated proceedings, this leaves matters that are routinely dealt with by the Authority and I reject the contention that such matters are unusually complex. What is left are substantive proceedings against the second to fourth respondents that they breached restraint obligations and post-contractual duties and of a nature that the Authority usually deals with.

[18] Ms Keir has impliedly advanced a more compelling argument that discovery issues may require the more robust statutory powers that the Court possess but unfortunately I have no way of assessing the extent of this 'problem' as no dispute exists around specific matters that have been brought to my attention and thus I have not had the ability to deal with such in setting this matter down. I am also mindful that the three remaining parties have experienced counsel representing them. I also have no assessment of actual damages claims made and am not specifically apprised of the nature of expert evidence Ms Keir claims is required.

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[6] Section 3 (a) (vi) Employment Relations Act 2000
[7] Section 143 (g) Employment Relations Act 2000

[19] I conclude no important question of law arises but I may be minded to revisit removal should the parties not be able to reach agreement on specific disclosure matters.

Public interest

[20] The applicant, although alluding to public interest, did not advance any reasons for the Authority to take this factor into account. I see no great need for urgency in removing this to the court and these matters being resolved and no disruption to services to the education sector being at risk in the interim or general public interest issue at stake. I am also not persuaded by the suggestion of speculative ongoing losses that the applicant claims that they will incur beyond normal market competition as a reason for urgency.

In all the circumstances should the court determine the matter?

[21] The final consideration outlined in s 178(2)(d) of the Act allows the Authority to 'stand back' and consider the proceedings holistically. In this context I note that the Authority offered an early substantive hearing that was declined by the applicant with counsel indicating their case was not yet fully prepared. This means I am unable to fully appreciate the scope of the complexity claimed or get a handle on disclosure issues and what is in dispute. Referring this matter to the court will not necessarily expedite matters nor contain costs.

[22] Overall I can find no compelling features of the applicant's case that would warrant removal to the court and I will now set this matter down for an early timetabling telephone conference with a view to setting down substantive hearings as soon as practicable for both matters.

Outcome

[23] **The application for consolidation of proceedings for file numbers 3125798 and 3131116 and an order to remove to the Employment Court is declined.**

Costs

[24] Costs are reserved.

David G Beck
Member of the Employment Relations Authority