IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 62/10
5159843

	BETWEEN	EVOLUTION E-BUSINESS LIMITED Applicant
	AND	BEN SMITH Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Dean Organ, advocate for Applicant Michael O'Brien, counsel for Respondent
Submissions Received	9 and 10 February 2010
Determination (on papers):	12 February 2010

DETERMINATION OF THE AUTHORITY ON REMOVAL APPLICATION

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[1] The respondent, Mr Ben Smith, has applied under s 178 of the Employment Relations Act 2000 to have removed in its entirety from the Authority an employment relationship problem raised by the applicant, Evolution E-Business Limited (EVO).

[2] The grounds for the removal application, with reference to s 178(2) of the Act, are that:

(a) An important question of law is likely to arise in the matter other than incidentally;

(d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[3] In EVO's amended statement of problem the employment relationship problem is expressed to be the following:

> *The respondent* [Mr Smith] *has breached terms of the employment agreement between the parties, namely:*
>
> *(1) Clause 17.1 and Schedule 2: Non-Disclosure and Confidentiality Agreement.*
>
> *(2) Clause 18.1: Other employment.*
>
> *(3) The duty of fidelity the respondent owed to his employer during the term of employment.*

[4] The resolution of the problem sought by EVO is:

(a) A compliance order requiring Mr Smith to adhere to the terms of the employment agreement between the parties, in particular Schedule 2: Non-Disclosure and Confidentiality Agreement;

(b) An inquiry by the Authority into damages arising in respect of breaches by Mr Smith and an award of such damages;

(c) Penalties against Mr Smith for each and every breach of the terms of the employment agreement, pursuant to s 134 of the Employment Relations Act 2000.

[5] The parties have been to mediation on two occasions in an attempt to resolve this employment relationship problem.

[6] EVO opposes the application for removal on the basis that there are no grounds present under s 178(2)(a) of the Act to allow that step. It is submitted for EVO that Mr Smith has not shown to the Authority that there are important questions of law likely to arise at all, or at least that are likely to arise other than incidentally.

[7] For EVO it is also submitted that Mr Smith's motives in applying for removal are suspect in view of his most recent participation in the Authority's investigation.

[8] That has been as follows. The usual telephone conference as part of the management of this investigation was held on 29 October 2009. Through counsel then instructed, Mr Smith confirmed the date for the investigation meeting as 23 February 2010. He also confirmed a timetable for providing briefs of evidence and an amended statement in reply (which he has kept to).

[9] The Authority was notified in early December 2009 that Mr Smith had withdrawn his instructions from his counsel.

[10] A few days before Christmas by email Mr Smith requested a deferment of the 23 February investigation meeting. He advised that he was based in London working on a project that would take six months to complete. He said this meant he would not be present for the meeting as scheduled in February and asked that it be postponed until June 2010.

[11] Mr Smith was advised by the Authority on 8 January 2010 that his request for an adjournment was declined. The reasons given were that EVO had not consented and also that the remedies sought by EVO included an order of compliance with the terms of his employment agreement with EVO. This was significant because compliance is a form of statutory injunction expressly intended to prevent further or on-going breaches, unlike damages and penalties which usually address past breaches. Time is more of the essence with compliance than other remedies such as the claims for damages and penalties. They may be more amenable to adjournment for a reasonable period, although not necessarily as long as six months.

[12] Mr Smith then emailed the Employment Court seeking its intervention. He provided the Court rather more detail about his circumstances than given to the Authority.

[13] The Court advised him of the statutory limitations on its role in relation to Authority investigations and also of a practical problem that its Judges were not accessible during the month of January. The Court suggested that he could apply to take part in the investigation by telephone from England, if the Authority agreed. (A copy of the Court's email of 13 January 2010 to Mr Smith is attached.)

[14] The Authority received no further application from Mr Smith until 3 February 2010 when he applied for removal. He had instructed counsel again, from the same firm as before.

[15] It is unfortunate that this removal application is now being determined on the eve of the investigation meeting, the date for which Mr Smith through his representative had agreed to three months ago without any suggestion then of a removal application being made. If it is granted Mr Smith will undoubtedly achieve his wish to have the investigation and determination of this claim deferred. No

advice has been given to the Authority as to how long it may be after 23 February before the Court is likely to be able to hear the case.

[16] EVO has awaited this investigation meeting and has complied with the directions and management planning for the case (as has Mr Smith) to the point where the meeting is now little over a week away. While there is no time specified for making an application for removal, it is clearly going to be of greater inconvenience the closer to the investigation meeting the application is made.

[17] With reference to paragraph (d) of s 178(2), the recent history outlined above is a strong factor persuading the Authority to the opinion that it should continue this investigation. It follows that the ground for removal put forward under paragraph (d) is not present.

[18] The removal application must also be considered separately on its merits under paragraph (a) of s 178(2).

[19] The questions of law said to be likely to arise in this case other than incidentally relate to a principle that has been applied in some cases that if an employer by its conduct has repudiated an employment agreement it cannot enforce a restrictive covenant against a former employee. This principle has been extracted from the House of Lords decision in *General Billposting Ltd v Atkinson* [1909] AC 118.

[20] There is little dispute in this case about what Mr Smith did that is alleged to have amounted to a breach of provisions of his employment agreement. He does not deny providing an affidavit to the plaintiff in proceedings brought in the High Court against EVO, his employer at that time, but he seeks to have that conduct excused. The plaintiff in the proceedings was Transactor Technologies Ltd (TTL), a company for which Mr Smith now works.

[21] It is though a major factual issue whether, as Mr Smith alleges, there was conduct on behalf or by EVO that was unlawful and repudiatory, and that provided an excuse for his contended breach. EVO denies that it acted unlawfully and correctly points out that this largely factual issue has yet to be decided by any court or tribunal. EVO consented on 22 December 2008 to an order for interim injunction being made by the High Court against it and two other defendants requiring EVO not to access,

use, disclose, provide access to, adapt or copy the software belonging to the plaintiff in that case and its programmes to any person or for any purpose.

[22] The proceedings were eventually settled between TTL and EVO and there has been no decision from a substantive trial holding that EVO did anything wrong.

[23] Until it is established as a matter of fact what EVO did or did not do, it is premature to raise questions of law as being likely to arise in relation to its conduct other than incidentally in this case.

[24] The removal application also refers to an "*inequity rule*" as being applicable to provide a complete defence to Mr Smith against the compliance order application and other remedies sought. In this regard the submissions in support of removal refer to s 157(3) of the Employment Relations Act 2000, which provides for the Authority's jurisdiction to be an equitable one.

[25] I find this submission too is dependant heavily on the findings of fact that are yet to be made by the Authority from its investigation as to the conduct of EVO.

[26] It is well established that compliance is a discretionary remedy and there will no doubt be many situations where on the facts established the Authority may exercise that discretion against granting an order, even where it appears there has been a breach of a term of an employment agreement. The inequity rule is another matter to be considered as part of the exercise by the Authority of its discretion under its equitable jurisdiction.

[27] The submissions on behalf of Mr Smith seeking removal also refer to contended complex issues of causation in relation to the claim for damages and assessment of those. The test under s 178(2)(a) is not complexity of legal issues but importance of those.

[28] EVO accepts that an investigation and determination of the claim for damages may be deferred until the issue of Mr Smith's alleged breach has been decided. As also pointed out, Mr Smith has had the opportunity but not yet taken it, to seek further particulars about the damages claim.

[29] I find that the contended questions of law are too remote at this stage to be considered as likely to arise and satisfy the test for removal under s 178(2)(a).

[30] The final matter under (a) again assumes that a finding will be made that EVO breached the employment agreement it had with Mr Smith, and did so to a serious degree. The legal question posed is whether *"his acceptance of that repudiation means that the employment agreement has been cancelled."*

[31] It is submitted that Mr Smith accepted the alleged repudiation by resigning and that this amounted to cancellation of the agreement.

[32] This argument is advanced in the face of the evidence that exists already, in the form of Mr Smith's contentious affidavit sworn and presented to the High Court in 22 January 2009, in which at para.3 he stated:

> *Although I am currently employed by EVO, on 5 January 2009 I gave EVO notice of my intention to resign, with effect from 13 February 2009.*

[33] There is no evidence that Mr Smith cancelled or purported to cancel the employment agreement under s 7 of the Contractual Remedies Act 1979. The evidence is that he gave notice of resignation, and for a period of over one month. He has not claimed to have been constructively dismissed, or even that his resignation was a constructive cancellation.

[34] Further in his amended statement in reply, apparently prepared by Mr Smith himself and provided to the Authority only three weeks ago (and a year after he had sworn his affidavit), Mr Smith states:

> *Over the Christmas and New Year period, I went on holiday and, while away, I decided to tender my resignation from the applicant on 5 January 2009. My resignation took effect from 13 February 2009.*

[35] He relates that he was directed by EVO his employer to go on *"garden leave"* with immediate effect and serve out the balance of his notice period up to 13 February 2009. He claims that he was not employed by anyone else while he served out this garden leave "*under the employment of* [EVO]."

[36] This conduct in giving more than the contractual period of notice and in submitting to garden leave while presumably still receiving pay from EVO, appears to be inconsistent with the actions of a party who has cancelled an employment agreement.

[37] It is another question of fact whether or not, under s 7 of the Contractual Remedies Act 1979, by words or conduct Mr Smith evinced to EVO an intention to cancel. His own evidence of his conduct strongly suggests otherwise.

[38] Mr Smith, according to his own evidence, resigned his employment, an action taken under an employment agreement according to its terms and conditions, whereas cancellation is an action taken over an employment agreement by invoking statutory rights such as s 7 of the Contractual Remedies Act.

[39] Accordingly, on the state of the evidence that exists so far I consider that this last contended question of law cannot be said to be one that is likely to arise at all.

[40] I find that the grounds put forward under paragraph (a) of s 178(2) do not support the application for removal.

Determination

[41] For the above reasons, Mr Smith's application for removal is declined.

[42] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority