



Employment Court of New Zealand

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Hynds Pipe System Limited v Forsyth [2017] NZEmpC 22 (4 March 2017)

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Last Updated: 19 May 2017

NOTE: Interim non-publication order made at [16], and subsequently extended, lapsed at 4pm on 1 May 2017.

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 22](#)

EMPC 44/2017

IN THE MATTER OF an application for a search order

BETWEEN HYNDS PIPE SYSTEM LIMITED
 APPLICANT

AND DANIEL FORSYTH RESPONDENT

Hearing: On papers filed on 3 March 2017; by telephone (3 March
 2017)
 and further material filed

Appearances: P Skelton QC, counsel for plaintiff

Judgment: 4 March 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Hynds Pipe Systems Ltd (the applicant) has applied for a search order. The application is sought on an urgent basis, without notice to the respondent, Mr Daniel Forsyth. The applicant seeks an order to search for, inspect, and make forensic copies of a number of devices which are believed to be in the respondent's possession. The devices may contain confidential information belonging to the applicant, which Mr Forsyth has wrongfully copied or transferred in breach of his employment obligations.

[2] The applicant has filed a draft statement of problem setting out a number of alleged breaches. The documentation thought to be in Mr Forsyth's possession is relevant to the anticipated proceedings against him. The applicant is concerned that unless without notice orders are made Mr Forsyth will destroy this evidence or

otherwise make it unavailable for use in the Employment Relations Authority.

[3] Mr Forsyth was employed by the applicant as Business Development Manager. The role involved sales and the development of business relationships and securing contracts for major projects. He left the company in January 2017, going to work for a large competitor. The evidence (as yet untested) is that despite the applicant seeking and receiving assurances from Mr Forsyth about the information he held and what he had done with it, it became apparent that he had copied multiple files from his work laptop, deleted a significant number of work related documents and sent numerous documents to a privately set up Gmail account.

[4] Forensic reports commissioned by the company (including one from KordaMentha, which undertook a full forensic analysis on Mr Forsyth's work laptop following his departure) are before the Court and lend weight to the applicant's concerns about a breach of the confidentiality obligations contained in Mr Forsyth's employment agreement. The company is also concerned about a major project that it lost to a competitor, the company Mr Forsyth now works for, and the circumstances leading up to this turn of events. This also underpins the company's concerns about a breach of loyalty.

[5] I am satisfied that there is a significant risk that any orders that might be made on notice could be nullified by the destruction or concealment of relevant evidence and that it is appropriate to proceed without notice. This is informed by the evidence relating to past actions, and the veracity of assurances previously given by Mr Forsyth about the work-related information he held. I am also satisfied that adequate grounds for urgency have been made out, having regard to the matters raised in the affidavit evidence and by Mr Skelton QC, counsel for the applicant. No proceeding has yet been filed in the Employment Relations Authority, for the same reasons which support the applicant's without notice application.

[6] The Employment Court may make search orders pursuant to [s 190\(3\)](#) of the [Employment Relations Act 2000](#) (the Act) and to Part 33 of the High Court Rules. There must be a proceeding within the jurisdiction of the Court to which the application for a search order relates or, if substantive proceedings have not yet been issued because of urgency or for some other reason, to which the order can relate. This precondition has been met.

[7] Rule 33.2 provides:

The court may make an order (a search order), in a proceeding or before a proceeding commences, with or without notice to the respondent, to—

- (a) secure or preserve evidence; and
- (b) require a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence.

[8] The requirements of the grant of a search order are set out in r 33.3 which provides:

The court may make a search order under rule 33.2 only if the court is satisfied that—

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that—
 - (i) the respondent possesses relevant evidentiary material; and
 - (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

[9] The cumulative requirements about which the Court must be satisfied reflect the intrusive nature of search orders.

[10] As I have said, the evidence before the Court is that the respondent has copied or transferred the applicant's confidential information onto identified external storage devices and to a Gmail account. There is also evidence that the respondent has already deleted some of the applicant's information, prior to his employment coming to an end, and that he was less than upfront in his communications with the applicant in respect of documentation he held and how it was being dealt with. There is also some evidence linking Mr Forsyth to the loss of a major contract to the applicant's competitor shortly before his departure. I am satisfied that the applicant has a strong prima facie case based on breach of confidentiality, and other breaches of Mr Forsyth's obligations as an

employee, as reflected in the draft statement of problem that has been placed before the Court. This aspect of the application is bolstered by the contents of the KordaMetha report.

[11] The report, and other material before the Court, strongly indicates that the respondent possesses evidentiary material relevant to the claims set out in the draft

statement of problem. There is a real possibility, informed by the respondent's past behaviour, that he will destroy such material or cause it to be unavailable for use in evidence in the anticipated proceeding. There is also evidence of serious actual and potential damage to the applicant by reason of the respondent's actions, including the loss of a major contract and the deletion of some of the company's work related files which it has been unable to recover, and the likely negative fall-out if third parties obtain access to its confidential information.

[12] During the course of the telephone hearing last evening I raised some concerns about the scope of the draft order, and the list of project work contained within it. Mr Skelton subsequently advised that he agreed that various items ought to be deleted. The draft order has been amended accordingly.

[13] I am otherwise satisfied that the draft orders, which include undertakings supported by an affidavit, are appropriate. I have considered whether the applicant's concerns can adequately be addressed by some lesser procedure but have concluded that the threats identified by Mr Skelton, and as they emerge from the affidavit evidence, are appropriately met by making the orders sought.

[14] I reserve leave for either party to apply on short notice for any further order or directions. Otherwise the matter will be back before the Court at 10 am on Thursday 9 March 2017 for consideration of the first report of the supervising lawyer and of the IT expert, and to deal with any applications. The applicant and respondent and the supervising lawyer are entitled to be heard on that date.

[15] A copy of the draft statement of problem, this judgment and other documents filed in this matter, are to be served on the respondent when the orders are executed. The statement of problem is then to be filed with the Employment Relations Authority.

[16] This judgment is not to be published other than to the parties, their representatives, the supervising lawyer, and the IT expert at least until 4pm on 9

March 2017.

[17] Costs are reserved.

Christina Inglis

Judge

Judgment signed at 10.15am on 4 March 2017