

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 11
3017796

BETWEEN JKL
 Applicant

AND OPQ LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Greg Cain and Sophie Pidgeon, Counsel for Applicant
 Steph Dyhrberg and Alastair Clarke, Counsel for
 Respondent

Investigation Meeting: On the papers with both parties submissions being
 received on 1 February 2018 with further information
 on 2 February 2018

Determination: 2 February 2018

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 9 October 2017 I issued interim orders in respect to various matters between the parties.¹ In particular I ordered OPQ be restrained for continuing part of a disciplinary inquiry it was pursuing with regard to aspects of JKL's conduct.

[2] The basis upon which the application was granted is summarised in the original determination² as follows:

Time and again the Court has concluded a disciplinary enquiry should be placed on hold when answers that might be sought impinge upon a person's rights in the face of potential criminal action. There is, as the Court observed in *Wrackrow v Fonterra Co-op Group Limited*,³ a strong danger of injustice which is twofold:

¹ *JKL v OPQ Limited* [2017] NZERA Wellington 102

² above n 1 at [36]

³ [2004] 1 ERNZ 350 at [67]

- a. The risk of potential self-incrimination which may arise from answering questions in a disciplinary meeting where the subject matter is also subject to the SFO's inquiry; and/or
- b. The injustice that may arise should the Applicant either refuse to either attend the disciplinary meeting or answer specific questions so as to avoid the potential for self-incrimination.

[3] That approach was applied to two of what was then four concerns raised by OPQ. Essentially the reason was that one of the two matters to which the restraint applied was the subject of the original complaint to the Serious Fraud Office (SFO) and therefore highly likely to be the subject of their investigation. The second had potential to fall within the scope of the SFO's investigation and either be investigated or provide information that might influence the SFO's conclusion regarding the issue it was already considering.

[4] There was also an order prohibiting publication of the pleadings, attached documents, information contained there-in and anything which may lead to the identification of the parties.

[5] The orders were temporary and remained in effect until 26 January 2018. They were then extended for a short period while the parties made submissions about two points.⁴ The first is whether or not the original restraint should continue to have effect. The second is whether or not OPQ should also be restrained from pursuing one or more of what is a total of sixteen further allegations it raised in a letter dated 14 December 2017. It is those points this determination addresses.

[6] After some discussion about how the matter would be dealt with and whether or not a hearing or affidavits were required it was agreed it be determined on the existing papers and a joint exchange of submissions.

[7] Dealing first with the question of whether or not the present restraint should be extended. JKL argues it should. He does on the basis the SFO's investigation is *on-going and very active* and there is no indication it is close to completion. Unfortunately the party's ability to give further information is constrained by a secrecy order issued by the SFO⁵ and OPQ states it has no knowledge of the extent of

⁴ *JKL v OPQ Limited* [2018] NZERA Wellington 3

⁵ JKL's submission at [10]

the SFO enquiries.⁶ JKL also asks the prohibition on publication continues for the duration of any extension that might be granted.

[8] In essence JKL's submission is nothing has changed since the original restraint was issued and the arguments which led its issue remain applicable to its continuation.

[9] OPQ is of the view the restraint currently prohibiting it from continuing with its disciplinary action should not be extended. In support of that view OPQ, having analysed the *Wrackrow* decision,⁷ argues the passage of time has altered the situation and with it the issues of both convenience and overall justice.

[10] OPQ is arguing JKL's right to protect himself from self-incrimination must be balanced against its right to investigate the issues. Amidst other things reference is made to Judge Shaw's comments *no party is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal factors*⁸ and one must ask whether or not the danger of double jeopardy is real as opposed to theoretical.⁹

[11] Putting aside the fact there is a lack of clarity about exactly what it is the SFO is investigating I believe it fair to conclude on the information before me the significant items to which the earlier restraint applied were most likely those which were the subject of the original complaint to the SFO.

[12] To that I add the fact the SFO has very wide powers in respect to the acquisition of information and the possibility of self-incrimination does not excuse any person from complying with the SFO's requirements.¹⁰ It is that information which informs a decision about whether or not to prosecute which means there is, in my view, a high level of possible proximity to what is effectively prosecution.

[13] OPQ also argues there are other ways of addressing the issue which do not place JKL at risk of incriminating himself. For example it may be possible to proceed and reach conclusion on the basis of evidence obtained from sources other than JKL.

[14] I am not sure this is a satisfactory approach given the requirements of s 103A(3)(b) of the Employment Relations Act 2000 but I note cases cited by OPQ which suggest a time might come where it be allowed to consider continuing

⁶ OPQ's submission at [35]

⁷ above n 3 above

⁸ above n 3 at [51](d)

⁹ above n 3 at [51](h)

regardless. Having said that such a debate is one I would want to conduct in a full investigation and not one I am happy to make solely on written submissions tendered concurrently as is presently occurring.

[15] Having considered the circumstances and the submissions I conclude the present orders should be extended. The rationale for the original grant remains.

[16] That said I am also cognisant of OPQ's submission that circumstances, and with them issues of balance and convenience, can change. I also note that the present application is again for a finite period of no more than three months. It may cease earlier if the SFO either lays charges or confirms there will be none at an earlier date.¹¹ The extension shall therefore again be finite and three months is appropriate.

[17] Having concluded the present restraint should be extended the issue turns to whether or not it should be extended to apply to any of the new allegations.

[18] OPQ, in its initial response to the application for extension, conceded four of the allegations had potential to fall within the scope of the SFO's inquiry and stated *...it is prepared to consent to an order to put the four matters on hold for the same period as the current ERA order (and any applicable extension of this order).*¹² That said it also stated that the above concession would not apply if matters could not be resolved by consent and it would, in such circumstances, oppose any extension. These allegations are those numbered 5, 9 14 and 16 in the letter of 14 December 2017.

[19] There is no consent and it follows OPQ now opposes an extension to cover those allegations. That said the concession they are ones in which the SFO may well take an interest and which might inform its present investigation leads me to conclude they too should be added to the present restraint

[20] The allegations numbered 7, 8, 13 and 15 need not be considered as JKL concedes there is no potential for overlap with the SFO's investigation and it does not seek to have the restraint extended to cover them.¹³ OPQ may proceed with its inquiries in respect to those allegations.

¹⁰ Section 27 of the Serious Fraud Office Act 1990

¹¹ Letter Cain to Authority dated 20 December 2017 at [17] and JKL's submission at [13]

¹² Letter Dyhrberg/Clarke to the Employment Relations Authority dated 22 December 2017 at [10]

¹³ JKL's submission at [6]

[21] That leaves allegations 1, 2, 3, 4, 10, 11 and 12 which have subject matter which JKL contends has the potential to overlap with the SFO's investigation. Also remaining is allegation 6 which, according to JKL, has the potential to expose him to some other form of criminal liability.

[22] In determining whether or not to add those items to the present restraint I am cognizant of the party's submissions in their entirety but that said a couple of features take precedence and shall be referred to when explain my determination. They are:

- a. OPQ's submission referred in [10] above – namely that *no party is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal factors* and one must ask whether or not the danger of double jeopardy is real as opposed to theoretical; and
- b. JKL submission his key risk in respect to allegations 1, 2, 3, 4, 10, 11 and 12 lies in a possible correlation between the SFO's purpose, its comments about what constitutes financial crime and s 240 of the Crimes Act 1961.

[23] The SFO's stated purpose is the detection and investigation of serious and complex fraud.¹⁴ The SFO Act states *serious or complex fraud includes a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud.*¹⁵

[24] The SFO's guide states:

While there is no legal definition of financial crime, this behaviour usually involves an intentional act accompanied by the use of deception to obtain an unjust or illegal advantage. SFO investigations will mostly focus on a collection of offences under the Crimes Act 1961 that criminalise this dishonesty.

Typically our investigations will meet one or more of the following indicative criteria:

- a high degree of factual, financial or legal complexity beyond the resources of most other law enforcement agencies;
- multiple victims (often investors) of the suspected financial crime and a high impact on those victims;

¹⁴ Parts 1 and 2 of the Serious Fraud Office Act 1990

¹⁵ Section 2 of the Serious Fraud Office Act 1990

- a high impact on public confidence in New Zealand as a safe place to invest, or the integrity of our financial markets; or

- public interest considerations and a preventative impact of a successful prosecution.

- In the case of bribery or corruption matters, we focus on crimes involving public officials, which could undermine public confidence in the administration of law...

[25] Section 240 of the Crimes Act 1963 relates to the offence of either obtaining or causing loss by deception.

[26] Allegation 1 alleges JKL sought a kickback from an equipment supplier and when the approach was rejected threatened there would be no further orders.

[27] A perusal of a dictionary suggests this might, if correct, be considered bribery or corruption. That said there is nothing to suggest it was successful and money passed – indeed the contrary appears to have been alleged. I also note the SFO says its interest in such affairs concentrates on public officials. OPQ is a private organisation.

[28] Having considered the facts as I know them and the submissions I am not convinced this is an allegation OPQ should be restrained from pursuing.

[29] Allegation 2 is relates to two overseas trips JKL took at OPQ's expense. It is alleged that while away he took an opportunity to advance his own interests while also using his association with OPQ and its principles as leverage in those endeavours. It is alleged these activities constitute an undisclosed conflict of interest contrary to the provision of JKL's employment agreement.

[30] Again I am not convinced this is an allegation OPQ should be prevented from pursuing. It appears, from the information before me and as stated by OPQ to have more relevance to a potential breach of the employment agreement with few direct financial implications, at least of a fraudulent nature. This is especially so when I consider JKL owns and operates his own businesses and OPQ is not only aware of that but potentially endorses it by using those companies to provide it with some services. This would appear to have little or no potential to be of interest to the SFO especially if the allegation is pursued as couched.

[31] Allegation 3 is JKL used OPQ's premises and resources to refurbish a capital item he owned. Allegation 4 is the same capital item was then sold to a new owner and shipped overseas at OPQ's expense. This is said to have been done by ordering a 40 foot container when a 20 foot one would have sufficed for a legitimate OPQ shipment and using OPQ staff to pack the item while recording their work as *admin*. I shall deal with these items together.

[32] That the work was being performed on OPQ premises would be hard to hide – this was a large item. That said the possible hiding of the use of OPQ's resources on the project and the possibility the use of obvious resources such as OPQ's staff was allegedly hidden by incorrect financial reporting is both potentially deceptive and could result in direct financial gain to JKL. It is, I conclude behaviour which has the potential to be of interest to the SFO in that it might, if the concern is valid, further illustrate the use of deception to obtain an unjust or illegal advantage.

[33] The investigation of these allegations should, I conclude, be added to the restraint.

[34] Allegation 10 is JKL stole an item belonging to one of OPQ's owners and then packed it in the container referred to in allegation 4. It is said this was discovered when allegation 4 was being investigated but it is unclear whether or not the item actually left the country.

[35] This item raises an issue in that I am not sure the item left New Zealand or that there was any financial gain from the attempt to export it. Having considered this allegation I conclude on the information before me, it is more akin to an allegation of theft rather than the complex and serious fraud which is the domain of the SFO. I also note the item belonged not to OPQ but an owner. I am not convinced I should restrain OPQ from investigating this allegation.

[36] Allegation 11 relates to the alleged misappropriation of various items from OPQ's stock and selling them to an overseas buyer for USD \$6,185. Allegation 12 is similar to allegation 11 and involves 2 specific items.

[37] These allegations both allege JKL is disposing of OPQ's property and then retaining the proceeds. They would, if justified, illustrate intentional behaviour potentially covered by some form of deception for the purpose of improper and direct financial gain. These are activities and outcomes that appear to fall within the SFO's

domain and could well be of interest to it given the initial trigger for its inquiry. Having said that other aspects of what the SFO says it is interested in, namely multiple victims and an impression of factual, financial or legal complexity, appear to be missing.

[38] In weighing these allegations I conclude there is a distinct possibility the potential for financial gain would make these of interest to the SFO and that the original restraint should be extended to include these accusations.

[39] Allegation 6 is JKL twice used OPQ's equipment in a manner which breached various statutory regulations and in a way which had the potential to affect OPQ's ability to operate.

[40] I am not convinced it is appropriate to add allegation 6 to the restraint. The information before me does not suggest the alleged breaches are financial in nature or that they might be of interest to the SFO given its mandate. Nor is there any evidence of a current interest from the regulatory body whose requirements are said to have been breached. While a risk of double jeopardy may exist it is little more than a possibility. There are no proceedings no foot let alone proximate ones.

[41] Finally comment need be made about the fact further information arrived at 4.00 pm today. It relates to JKL's partner and the effect a raising of the suppression order might have on her.¹⁶ While the late proffering of this information caused some initial disquiet the fact I have decided to continue the original restraint means a continuation of the suppression goes hand in hand. Suppression does not, of course, preclude the pursuit of the disciplinary issues OPQ is now free to pursue.

Orders and Conclusions

[42] It is therefore ordered that the restraints and prohibitions recorded in paragraphs 48 (a), (b) and (d) of *JKL v OPQ Limited* [2017] NZERA Wellington 102 remain in effect until 2 May 2018.

[43] To that is added an order OPQ be similarly restrained from pursuing the allegations numbered 3,4, 5, 9, 11,12, 14 and 16 in the letter of 14 December 2017. That order also expires on 2 May 2018 (or earlier if the SFO either proffers charges or confirms there will be none).

[44] OPQ is free to continue with its disciplinary enquiry in respect to the allegations numbered 1, 2, 6, 7, 8, 10, 13 and 15 in the letter of 14 December 2017.

[45] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

¹⁶ Also refer n 1 at [47]