



New Zealand Employment Relations Authority Decisions

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Otoy New Zealand Limited v Kozlov (Auckland) [2016] NZERA 641; [2016] NZERA Auckland 246 (21 July 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 246
5635557

BETWEEN OTOY NEW ZEALAND LIMITED

Applicant

AND ANDREY KOZLOV Respondent

Member of Authority: Andrew Dallas

Representatives: Stephen Corlett and Philippa Couldwell, Counsel for the
Applicant

Investigation Meeting: On the papers lodged without notice to the Respondent

Determination: 21 July 2016

DETERMINATION OF THE AUTHORITY

A. This matter is removed under [s 178](#) of the [Employment Relations Act 2000](#) for the Employment Court to hear and determine without first being investigated by the Authority.

Employment Relationship Problem

[1] By statement of problem supported by an affidavit lodged with the Authority on 20 July 2016, OTOY New Zealand Limited (OTOY) sought, among other things, a without notice interim injunction against Andrey Kozlov, a former employer and leave to serve him outside New Zealand. OTOY says Mr Kozlov is currently resident in Voronezhskaya Oblast, Russian Federation.

[2] Upon review of OTOY's application, I granted urgency in my capacity as
Duty Member.

[3] OTOY is a software developer based in Ponsonby, Auckland. OTOY's
software is licensed in New Zealand and internationally.

[4] OTOY and Mr Kozlov were bound by and to a series of fixed term employment agreements which contained terms dealing with confidentiality and intellectual property rights. OTOY alleges that Mr Kozlov has breached his post-employment obligations under these terms.

[5] Mr Kozlov was involved in the development of software suite known as "Octane" for OTOY and, prior to that, for a company which OTOY acquired (including its intellectual property) and for whom Mr Kozlov was employed.

[6] Mr Kozlov resigned his employment with OTOY on and from 10 April 2015.

[7] In or about April 2016, OTOY says it became aware of software called

“FStormRender” which it alleges is almost identical to Octane.

[8] In or about July 2016, OTOY says it became aware that Mr Kozlov was the person responsible for the development of FStormRender. FStormRender is registered to a company called “Pinksoft”, which OTOY says Mr Kozlov registered in the Czech Republic.

[9] OTOY alleges Mr Kozlov has used its confidential proprietary source code and information from Octane to create FStormRender.

Removal to the Court

[10] For reasons that follow, I reached the view that this matter should be removed to the Employment Court (Court) for hearing and determination. I have done so under [s 178\(2\)\(a\)](#) of the Act as important questions of law are likely to arise in the matter other than incidentally. I also believe it is appropriate to remove the matter to the Court under [s 178\(2\)\(d\)](#) of the Act. This provision allows the Authority to order removal of a matter on its own motion where it is of the opinion that in all the circumstances the Court should determine the matter.

[11] Prior to reaching the view that the matter should be removed to the Court, I discussed it with Counsel for OTOY. Counsel was in agreement with my proposed course. If the Court was of the view that such a removal was not proper in this particular case, it could return the matter to the Authority for investigation.

[12] The following aspects or circumstances of this matter were relevant to my opinion that the Court should hear and determine the matter.

Important questions of law

[13] Having reviewed OTOY’s application and supporting affidavit, I am satisfied this matter involves important questions of law likely to arise other than incidentally. These questions include:

- (i) Does the jurisdiction exist to issue a without notice interim injunction against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement;
- (ii) Does the jurisdiction exist to issue a permanent injunction against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement;
- (iii) If so:
 - a. what is the proper approach to service of a without notice interim injunction and/or permanent injunction against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement;
 - b. what is the proper approach to enforcement of an interim and/or permanent injunction against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement;
- (iv) Does the jurisdiction exist to award penalties under the Act against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement;
- (v) If so, what is the proper approach to the enforcement of penalties under the Act against a non-New Zealand domiciled person and specifically a person domiciled in the Russian Federation for breach of an employment agreement?

[14] Questions of law arising in a matter need not be controversial, novel or particularly difficult in order to be important within the context of [s 178\(2\)\(a\)](#) of the Act. Although, the questions of law identified in the particular circumstances of this matter may contain elements of all three.

Other matters

[15] I have taken into account that removing the matter would deprive Mr Kozlov of a further level of challenge. However, I put more weight on the important questions of law outlined above.

[16] I have also taken into account, given the circumstances of the matter, there is a likelihood of a challenge to the Authority’s determination.

Andrew Dallas

