

Attention is drawn to the  
orders prohibiting publication  
of certain information in this  
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 501  
3049812

BETWEEN RAULAND NZ LIMITED  
Applicant

A N D CONRAD DELVO  
Respondent

Member of Authority: Nicola Craig

Representatives: Paul Wicks QC and Mathew Martin, counsel for the  
applicant  
Phillip Skelton QC and Elizabeth Coats, counsel for the  
respondent

Investigation Meeting: On the papers

Submissions Received: 18 and 25 November 2020 for the applicant  
25 November 2020 for the respondent

Date of Determination: 3 December 2020

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**PRELIMINARY DETERMINATION OF THE AUTHORITY (No 2)**

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**Background**

[1] Rauland NZ Limited (Rauland or the company) claims that its former employee Conrad Delvo breached his employment agreement's confidential information, intellectual property and restraint of trade clauses.

[2] An investigation meeting to hear the substantive issues is set for 8 to 10 December 2020.

[3] Rauland applies for confidentiality and non-publication orders. Submissions were lodged by both parties.

### **The application**

[4] Rauland's parent company Rauland Australia Pty Limited (Rauland Australia) is the applicant in proceedings in the Federal Court of Australia (Australian proceedings). One of the respondents in those proceedings is Hills Limited, an Australian company with connections to Hills NZ Limited, Mr Delvo's current employer.

[5] During the course of the Australian proceedings a number of documents have been supplied through discovery which Rauland Australia considers have direct relevance to this claim by Rauland against Mr Delvo.

[6] As a result, Rauland Australia applied in the Federal Court seeking release from undertakings given in the Australian proceedings in relation to the ancillary use of those documents.

[7] On 25 September 2020 the Federal Court granted the application.<sup>1</sup>

[8] There are no difficulties with the use of some of the documents in the Authority. However, one of the documents released is a comparison table of products supplied by Rauland Australia and Hills. It is referred to as Document C and dated 16 October 2018. That document is the subject of confidentiality undertakings by parties to the Australian proceedings. Rauland agrees with the position taken by Hills in those proceedings that Document C is confidential.

[9] Both senior counsel and counsel for Rauland have provided undertakings to the Federal Court. Copies were lodged with the Authority. The undertakings require that before Document C may be introduced by counsel into the Authority proceedings, an appropriate confidentiality order/non-publication order is in place in respect of this document.

[10] Orders for non-publication and confidentiality are sought to allow admission of Document C into evidence in this proceedings. The proposed orders restrict not only the publication of Document C but the hearing in public of any evidence and

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<sup>1</sup> *Rauland Australia Pty Limited v Law (No 2)* [2020] FCA 1400.

submissions relating to that document. Rauland considers the document is relevant to this proceeding.

### **Mr Delvo's response**

[11] Mr Delvo does not oppose the application that the investigation meeting be closed during the hearing of evidence or submissions regarding Document C. Likewise he does not oppose non-publication orders regarding Document C.

[12] It is submitted for Mr Delvo that the Authority does not have a general power to declare or make "confidentiality orders", as opposed to non-publication orders under cl 10, Schedule 2 of the Act.

[13] The question of whether Document C contains trade secrets or other confidential information is said to be a matter for the investigation meeting and submissions will be made on that issue.

### **Rauland's reply**

[14] Rauland replied that the Authority does have the power to make confidentiality orders, with non-publication orders being able to be made "subject to such conditions as the Authority thinks fit".<sup>2</sup>

### **Discussion**

[15] The courts have emphasised the fundamental importance of the principle of open justice.<sup>3</sup>

[16] There is a presumption that the Authority's investigation meetings are held in public and that evidence is freely referred to during those meetings.<sup>4</sup> However, where there are specific adverse consequences or other sound reasons to do so, the general principle may be departed from.<sup>5</sup>

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<sup>2</sup> Employment Relations Act 2000, Sch 2, cl 10.

<sup>3</sup> *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511.

<sup>4</sup> *Anderson v The Employment Tribunal* [1992] ERNZ 500 regarding the Authority's predecessor, the Employment Tribunal, *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221.

<sup>5</sup> *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511, *FVB v XEY* [2020] NZEmpC 182.

[17] The Authority's jurisdiction regarding non-publication and confidentiality matters is set out in s 160(1)(e) of the Employment Relations Act 2000 (the Act) and clause 10 of Schedule 2 of the Act.

[18] The Authority has specific power to decide that an investigation meeting is not held in public.<sup>6</sup> Orders may also be made that all or any part of the evidence given shall not be published, subject to such conditions as the Authority thinks fit.<sup>7</sup> In addition the Authority has the power to regulate its own procedure.<sup>8</sup>

[19] The orders sought here relate to only one document. Therefore the application has a narrow focus. I anticipate that evidence and submissions on Document C would take up only a small part of the investigation meeting. The balance of the meeting and the evidence would remain open. There is no opposition to some form of non-publication order being made.

[20] I have read the Federal Court of Australia's Orders and Reasons for Judgment. That decision was based on agreement between the parties that Document C might ultimately be found to contain confidential information belonging to the Rauland companies. There is an overlap in the issues being considered by the Federal Court and the issues to be considered in this proceeding.

[21] I conclude that there is a sound basis for orders to be made which allow Document C to be provided in evidence to the Authority in such a way that maintains confidentiality.

[22] I make no finding at this stage regarding the relevance of Document C to this proceeding. That will need to be considered as part of the issues at the investigation meeting.

### **Orders**

[23] I make the following orders which are to remain in place unless varied or revoked by further orders of the Authority:

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<sup>6</sup> The Act, s 160(1)(e).

<sup>7</sup> The Act, Sch 2, cl 10(1).

<sup>8</sup> The Act, s 160(1)(f).

- (a) Under s 160(1)(e) of the Act, the Authority's investigation meeting in this matter is not open to any person (other than the Authority Member, Authority officers and staff, the parties' counsel and such witnesses that I consider should be present) while any witness is being questioned about Document C or parties' counsel are making submissions concerning Document C;
- (b) Under cl 10 of Schedule 2 of the Act, Document C is prohibited from being published, disclosed or communicated by any person, except for between those persons or classes of persons identified in Order (c) below;
- (c) Under cl 10 of Schedule 2 of the Act, Document C is to be maintained as strictly confidential by:
- (i) Members and Officers of the Employment Relations Authority;
  - (ii) Mr Conrad Delvo and Mr Conrad Delvo's counsel;
  - (iii) Rauland NZ Limited's counsel who have signed and provided the Federal Court of Australia an undertaking in the same form as the confidentiality undertakings signed by Paul Francis Wicks QC and Mathew Geoffrey Patrick Martin (Relevant Undertakings); and
  - (iv) Secretarial or administrative staff of Rauland NZ Limited's counsel who have signed and provided to the Federal Court of Australia an undertaking in the same form as the Relevant Undertakings.

### **Costs**

[24] Costs are reserved.

**Nicola Craig**  
**Member of the Employment Relations Authority**