

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 144/08
5121645

BETWEEN TEMPERZONE LIMITED
Applicant

AND OWEN RAYMOND JOY
Respondent

Member of Authority: Alastair Dumbleton

Representatives: David Neutze, Counsel for Applicant (heard ex parte)

Telephone conference 16 April 2008

Determination: 16 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Temperzone Limited has applied to the Authority to have resolved by investigation and determination claims against a former employee Mr Owen Joy. The claims are that he acted in breach of a contractual and statutory duty of good faith by receiving secret commission payments from suppliers of Temperzone and that he distributed confidential documents and other information to those suppliers in breach of his duty of fidelity and confidentiality.

[2] To resolve that problem Temperzone seeks an award of damages for the loss or harm suffered by the company as a result of Mr Joy's alleged receipt of unauthorised commission payments in a substantial amount and also damages for the consequences suffered as a result of the disclosure of confidential information by Mr Joy. A penalty for breach of the employment agreement is also sought by Temperzone against Mr Joy.

[3] As an interim step in the investigation Temperzone has applied *ex parte* to the Authority for orders as may be obtained from the High Court and known there as a Mareva injunction to restrain Mr Joy from dealing in or disposing of certain assets he has in New Zealand. Preservation of the assets in this way will provide some security in the event Temperzone's claim for damages and a penalty is successful, enabling the company to collect from Mr Joy the amount awarded in judgment against him.

[4] I am satisfied from the evidence given by way of sworn affidavit to the Authority by officers and senior employees of Temperzone that Mr Joy worked for the company for a long period under an employment agreement. The problems now referred to the Authority arise directly from Mr Joy's performance of that relationship and his compliance with the terms and conditions of his employment agreement.

[5] The problems are therefore to be resolved by the Authority which under the Employment Relations Act 2000 has the exclusive and first instance jurisdiction to investigate and determine such claims.

[6] As it has done previously since inception in 2000, the Authority may grant orders having the effect of Mareva injunctions against persons who are or were party to an employment relationship.

[7] The jurisdiction of the Authority in this regard arises under s 162 of the Act, and in part also under s 157(3) and s 160(1)(f). Further, there is provision under s 221(d) permitting the Authority, in order to enable it to more effectually dispose of any matter before it according to the substantial merits and equities of the case, to give such directions as are necessary or expedient in the circumstances.

[8] If there was ever any doubt about the Authority's jurisdiction to make orders on an *ex parte* basis, an amendment to the Act in 2004 confirmed "*the powers of the Authority to make ex parte orders.*" Under s 173(2C) such orders can be made on the basis of relevant material received from one party before the respondent has been provided with that material for comment.

[9] As was stated by the High Court in *BNZ v. Hawkins* (1989) 1 PRNZ 415, an applicant for a Mareva injunction must show that it has a good arguable case on its substantive claim (in this case for damages and penalty) and that there are assets to which the injunction can be applied. As well, an applicant must show there is a real risk that the respondent will dissipate or dispose of those assets so as to render itself

“*judgment proof.*” Mere assertion of belief that a party might dissipate its assets unsupported by solid grounds justifying that belief, will not be sufficient. There must be facts from which the Authority or a court can properly infer a danger of default if assets are removed from jurisdiction.

[10] I am satisfied that the necessary grounds are present in this case for the orders to be made against Mr Joy on the terms sought.

[11] There is affidavit evidence that over several years Mr Joy in the course of dealing with overseas suppliers of Temperzone arranged for commissions to be secretly paid to him to for securing contracts with his employer. There is evidence that Mr Joy has been making arrangements to set himself up in Thailand, causing Temperzone to fear that he will dispose of his assets in New Zealand and take the proceeds overseas or send moneys held in a bank account directly to accounts he has in overseas countries.

[12] I note that the Police have taken an interest in Mr Joy following complaint by Temperzone and have executed a search warrant on his property and seized items from him. His passport has also been seized, an indication that he is regarded as a flight risk by the Police.

[13] The specific assets to which the injunction is to applied have been identified precisely in the orders and these are all located within New Zealand. They are a bank account, a superannuation fund and real property he is a part owner of.

[14] An undertaking as to damages has been supplied by Temperzone which I am satisfied is a company that is well able financially to meet its obligation in this regard, should it be required to by the Authority. Counsel, Mr Neutze, has confirmed to the Authority that he knows of no adverse aspects to the applicant’s claim that should be disclosed to the Authority.

[15] I am also satisfied that the orders themselves have been drafted no more widely than is necessary to achieve the purpose of the injunction. They will apply until further order of the Authority which may be sought on notice by Temperzone or by Mr Joy at any time.

[16] Further directions will be considered by the Authority in due course with regard to mediation and the conduct of an investigation into the damages and penalty claim.

[17] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority