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Tru-Test Limited v Callingham [2018] NZEmpC 15 (9 March 2018)

Last Updated: 16 March 2018

IN THE EMPLOYMENT COURT
WELLINGTON

[\[2018\] NZEmpC 15](#)
EMPC 76/2018

IN THE MATTER OF	an application for preservation orders
BETWEEN	TRU-TEST LIMITED Applicant
AND	NICHOLAS FRANCIS CALLINGHAM First Respondent
AND	CENTRAL COOLING AND HEATING LIMITED Second Respondent

Hearing: 9 March 2018
Appearances: M O'Brien, counsel for the applicant
Judgment: 9 March 2018

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

[1] On 8 March 2018, Tru-Test Ltd applied for preservation orders against its former employee, Nicholas Francis Callingham, and the company which he has created called Central Cooling and Heating Ltd.

[2] The basis for these applications is an assertion by Tru-Test that Mr Callingham breached his employment agreement and a confidentiality agreement in the course of establishing and operating a business which is to compete with (or may already compete with) Tru-Test.

[3] Mr Callingham was employed by Tru-Test from 1 January 2016 until he resigned with effect from 19 January 2018.

[4] Tru-Test is an agricultural technology company involved in several businesses including:

- (a) milk cooling and milk tanking storage for dairy farmers and commercial milk processors;
- (b) milk meters, designed to capture an accurate sample of milk extracted from a dairy cow during a milking season;
- (c) dairy automation solutions; and
- (d) animal weighing and electronic identification products.

[5] At the time of his resignation Mr Callingham was an Area Sales Manager. Tru-Test alleges he had access to confidential information about its business which it described as including:

- (a) the names and contact details of its clients;
- (b) its pricing information;
- (c) its product technical drawings such as tank vat designs;
- (d) its business plans and business strategies; and
- (e) farm supply data from Fonterra.

[6] Mr Callingham was employed by Dairy Technical Solutions Ltd until December 2015. Originally he was an On-Farm Technician. He was eventually promoted to Area Sales Manager – Milk Cooling and Tanks, for Taranaki in 2015. It was from this position that he transferred to Tru-Test on the same terms and conditions with effect from 1 January 2016.

[7] Mr Callingham was employed on an individual employment agreement and separately signed a confidentiality agreement. Both of those agreements preserved

Tru-Test's property in its confidential information. He was provided with a company vehicle and a laptop computer. At some stage during his employment Mr Callingham was provided with a global positioning system (GPS) and a data card (SD card) which Tru-Test says contained confidential information about the location of Fonterra supplier farms in Taranaki. Tru-Test operates globally manufacturing on-farm milk vats for Fonterra and servicing them across New Zealand. Fonterra provided GPS data to enable Tru-Test technicians and sales staff, to locate Fonterra supplier farms for service and sales work.

[8] On 17 August 2017, Mr Callingham incorporated; Central Cooling and Heating Ltd. In the preceding month, on 19 July 2017, he had met with Verne Atmore, the General Manager – Dairy Solutions for Tru-Test, and participated in a routine performance review.

[9] According to Mr Atmore, during this review Mr Callingham stated a preference to move away from sales and they discussed a potential role in technical product support. Mr Callingham did not make any comment to Mr Atmore about plans to establish his own business.

[10] In Mr Atmore's affidavit he said that on 15 September 2017 it came to his attention Central Cooling and Heating had been incorporated. He spoke to Mr Callingham to discuss this company and was advised by Mr Callingham, he says, it was set it up so his father-in-law could undertake domestic installations of heat pumps and there was no intention for the company to handle on-farm cooling work. According to Mr Atmore, Mr Callingham said he might occasionally help his father-in-law after hours. Tru-Test is not in the domestic heat pump market and the assurance given to Mr Atmore meant no further steps were taken by it.

[11] On 8 December 2017, Mr Callingham told Tru-Test he was resigning. The agreed date for his employment to end was 19 January 2018. In giving notice Mr Callingham informed his manager, Natasha King, he was going to work with his father-in-law installing domestic heat pumps.

[12] According to Tru-Test it was misled by Mr Callingham about both Central Cooling and Heating and his intentions. It came to Tru-Test's attention on 15 February 2018 that one of its customers, Kylie Rupapera, had been approached by Mr Callingham looking to provide her with a quote for work. The allegation is that Mr Callingham had visited Ms Rupapera on behalf of Tru-Test in the week before he resigned.

[13] As a result of receiving information about the approach to Ms Rupapera Tru-Test has reviewed his email account with that company and has ascertained, so far as it can, that:

- (a) he had been planning to create Central Cooling and Heating from about 2 August 2017;
- (b) some information about Tru-Test's pricing, customer lists, and quotations had been forwarded by Mr Callingham from his Tru-Test account to his Central Cooling and Heating email account;
- (c) he had forwarded to his email account at his company supplier pricing information supplied to him by Tru-Test; and
- (d) contrary to what had been said to Mr Atmore, he had planned from the outset to be involved in on-farm refrigeration business.

[14] Amongst the material which Mr Atmore said had been found on examining Mr Callingham's Tru-Test email system were the following:

- (a) a credit application form for his company addressed to Daikin Air Conditioning New Zealand Ltd;
- (b) on 28 November 2017, he forwarded an email to his company's email account pricing information for Cooling Equipment, a supplier to Tru-Test which, it is said, would enable him to be able to plan and price for his new business with a view to undercutting Tru-Test's quotations;
- (c) an email from Mr Atmore to Tru-Test's sales representatives, circulated on 6 December 2017, containing commercially sensitive pricing information about milk cooling and tank solutions product lines;
- (d) on 13 January 2018, Mr Callingham is said to have forwarded to his company's email account Tru-Test's recommendation and a quotation to a customer;
- (e) Tru-Test's Taranaki quote spreadsheet titled "Nick Quote Sheet Master" containing customer information, quotations and the value of quotations had been sent to Central Cooling and Heating;
- (f) Fonterra's GPS information on Taranaki farm locations, which had been provided to Tru-Test under a confidentiality arrangement with Fonterra. This information is said to allow customers to be readily identified and located. Mr Atmore said that GPS information normally kept in Mr Callingham's company vehicle could not be located on 16 February 2018 but a

package containing the relevant SD card was left anonymously at his company's reception on 19 February 2018;
(g) design technical drawings for several of Tru-Test's milk vats;
(h) milk vat temperature and technical bi-col information and prices; and
(i) Tru-Test's Taranaki customer quote spreadsheet with historical customer details including names and contact information.

[15] It is asserted by Tru-Test that this information is not only confidential and commercially sensitive but the way in which Mr Callingham has dealt with it breaches his employment agreement and confidentiality agreement. Tru-Test's concern is that it has been actively misled by Mr Callingham about his intentions and seeks a preservation order to secure relevant documents pending an investigation and proceedings for an injunction and damages.

[16] The preservation order which is sought relies on r 7.55 of the High Court Rules which applies pursuant to reg 6 of the [Employment Court Regulations 2000](#). Counsel, Mr O'Brien, in his memorandum relied on *Matsuoka v LSG Sky Chefs New Zealand Ltd*¹ and *Axiom Rolle PRP Valuations Services Ltd v Kapadia*² in support of the proposition that an order can be made in these circumstances.

[17] Underscoring the application is a concern that Mr Callingham has obtained and is misusing, confidential information and information belonging to Tru-Test. Mr Atmore has deposed to a concern that the way in which Mr Callingham has conducted himself causes him to fear for the security of the material which it is said has been taken and which, if necessary, will form part of the evidence which may be used at trial.³

[18] A preservation order is discretionary.⁴ In this case an evaluation is necessary to determine whether orders are appropriate. I am conscious that this is an application which has been made without notice to either of the respondents and it is being considered in the absence of evidence from them or any submissions on their behalf. Nevertheless, on an interim basis at least, I am satisfied Tru-Test has demonstrated a breach of the employment agreement and potential misuse of its confidential property. It is also justified in being concerned about the security of property it seeks to preserve. It is necessary to grant the orders which have been sought, at least on an interim basis, to ensure the preservation of that property.

Outcome

[19] The application for urgency is granted.

[20] The application for preservation orders is granted in the form of the draft order filed with the application but subject to the following:

1 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [\[2017\] NZEmpC 14](#).

2 *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [\[2006\] NZEmpC 73](#); [\[2006\] ERNZ 639 \(EmpC\)](#).

3 See *Axiom*, above n 2, where the preservation of evidence was also in issue.

4 See for example *Lewis v Poultry Processors (Holdings) Ltd* [\[1988\] NZHC 243](#); [\(1988\) 3 PRNZ 167 \(HC\)](#).

(a) the order in [20] will lapse, if not renewed, at 4.00 pm on Monday 19 March 2018;

(b) the full application and all supporting affidavits are to be served forthwith on the respondents together with a copy of this judgment;

(c) these orders, will be reviewed at a telephone directions conference to be conducted on Monday 19 March 2018 at 11.00 am; and

(d) if the respondents oppose the orders they must file a notice of opposition and any affidavits, or otherwise take steps, no later than

4.00 pm Thursday 15 March 2018.

[21] Costs are reserved.

K G Smith Judge

This judgment is signed at 8.45 pm on Friday 9 March 2018.