

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 91
EMPC 210/2018**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN BRIDGETTE JOHNSTONE
 Plaintiff

AND KINETIC EMPLOYMENT LIMITED
 Defendant

Hearing: 21 May 2019
 (Heard at Auckland)

Appearances: P White, counsel for plaintiff
 P Skelton QC and M Lister, counsel for defendant

Judgment: 2 August 2019

JUDGMENT OF JUDGE J C HOLDEN

[1] In proceedings between Ms Johnstone and her former employer, Kinetic Employment Ltd (Kinetic), the Employment Relations Authority (the Authority) issued summonses to Ms Johnstone and Ms Henderson personally, and in their capacity as directors of Recruitment Studio Ltd. Those summonses required the recipients to attend at the Authority and bring and produce computer systems in their possession or control. The summonses also required the recipients to provide all passwords and other things necessary for the Authority and a forensics computer expert to examine the computer systems, including certain email and LinkedIn accounts.

[2] The Authority subsequently determined that it had not acted outside its jurisdiction by issuing the witness summonses.¹ Ms Johnstone challenges that determination and this judgment resolves her challenge.

[3] Ms Johnstone accepts that the Authority is entitled to issue witness summonses but says the summonses contemplated a forensic examination of the recipients' computer systems. She says the Authority has no jurisdiction to order a forensic examination. Her principal argument is that such an order for forensic examination is a "search order as provided in the High Court Rules 2016", and therefore prohibited by s 160(4) of the Employment Relations Act 2000 (the Act).

[4] Ms Johnstone also claims that, if the Authority had jurisdiction to order forensic examination of the computer systems, it acted unreasonably in making such orders.

[5] Ms Johnstone seeks:

- (a) a declaration that the Authority had no jurisdiction to order forensic examination of Ms Johnstone's or Ms Henderson's computer systems;
or
- (b) a declaration that the Authority acted unreasonably in ordering forensic examination of Ms Johnstone's and Ms Henderson's computer systems;
and
- (c) an order quashing the Authority's determination that Ms Johnstone's and Ms Henderson's computer systems are to undergo forensic examination; and
- (d) costs.

¹ *Johnstone v Kinetic Employment Ltd* [2018] NZERA Auckland 218.

- [6] There are potentially four principal issues for the Court:
- (a) whether the Authority had jurisdiction to issue the witness summonses in the form that it did; in particular, whether the orders for forensic examination are precluded by s 160(4) of the Act;
 - (b) if s 160(4) does not preclude such orders, whether the Court has jurisdiction to determine the challenge, bearing in mind that a challenge cannot be made to a determination about the procedure that the Authority has followed, is following, or is intending to follow, including a determination about whether the Authority may follow or adopt a particular procedure;²
 - (c) whether the Court can consider Ms Johnstone's arguments regarding reasonableness; and if so, whether this issue is moot; and
 - (d) if the Court can consider those arguments, whether the Authority's orders should be quashed for unreasonableness.

The parties have claims in the Authority

[7] Ms Johnstone has filed a personal grievance claim in the Authority for unjustifiable disadvantage arising from Kinetic's actions after she tendered her resignation. Kinetic has counterclaimed alleging, among other things, Ms Johnstone misused its confidential information and breached an enforceable restraint of trade.

[8] In that context, Kinetic sought and obtained the witness summonses.

[9] The summonses were similar but not identical in their terms. The summons for Ms Johnstone provided:

- 1 You are required to attend before the Employment Relations Authority at Level 10, 280 Queen Street, Auckland on 24 July 2018, 10:00am and from then until you are no longer required to attend, to give

² Employment Relations Act 2000, s 179(5).

evidence in relation to a matter before the Employment Relations Authority.

- 2 You are ordered to bring with you and produce at the same time and place:
 - a. all computer system(s) as defined in section 248 of the Crimes Act 1961 (attached), in your possession or control;
 - b. all passwords or other information, tools or devices necessary to access and copy for the Authority and a forensics computer expert to review and restore as required the computer system(s), including but not limited to the following email and LinkedIn addresses:³
 - i. [...]@hotmail.com;
 - ii. [...]@recruitmentstudio.co.nz;
 - iii. linkedin.com/[...].
 - c. all documents (including electronic and hard copy documents) containing any confidential information belonging to Kinetic Employment Limited in your control or possession.
- 3 This summons is issued by the Employment Relations Authority at Auckland on the application of Kinetic Employment Limited, the respondent/applicant, under the seal of the Employment Relations Authority at Auckland on 9 July 2018.

[10] Kinetic then proposed a process for the forensic examination, using a named independent forensics computer expert.

[11] Ms Johnstone challenged that proposal, saying that the Authority did not have jurisdiction to order forensic examination of the witnesses' computer systems. Ms Johnstone relied on s 160(4) of the Act.

[12] On 17 July 2018 the Authority issued the determination now being challenged. In determining that it had not acted outside its jurisdiction by issuing the witness summonses, the Authority said that the summonses were pertinent to assessing the liability aspect of Kinetic's counterclaim, and that the forensic examination may also assist in determining that liability.⁴ The Authority scheduled a conference call to discuss procedures for undertaking the forensic examination.

³ Full addresses omitted for the purposes of this judgment.

⁴ *Johnstone v Kinetic Employment Ltd*, above n 1, at [12]-[14].

Order for forensic examination is not a search order

[13] Section 160(4) of the Act, upon which Ms Johnstone’s principal argument relies, provides that:

- (4) The Authority may not make a ... search order as provided for in the High Court Rules 2016.

[14] High Court Rule 33.2 describes a search order as:

- (2) ... an order ... in a proceeding or before a proceeding commences, with or without notice to the respondent, to—
 - (a) secure or preserve evidence; and
 - (b) require a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence.

[15] The prescribed terms and form of a search order also confirm that the recipient is required to permit certain named persons to enter the recipient’s premises for the purpose of securing or preserving certain evidentiary material.⁵

[16] Before the High Court can make a search order it must be satisfied that the recipient has relevant evidentiary material, and there is a real possibility that such material might be destroyed or become unavailable for use in court.⁶

[17] Search orders in Part 33 of the High Court Rules are a codification of what were previously known as “Anton Piller” orders, being orders that required a respondent to give permission to an applicant and the applicant’s solicitors to enter the respondent’s premises so as to inspect papers.⁷ Such orders are regarded as an extreme remedy, reserved for the most urgent and serious of cases. An order can be executed either with or without notice and has two decisive features:

- (a) the respondent is required to grant permission to enter its premises to secure and preserve evidence;⁸

⁵ High Court Rules 2016, r 33.6(1); Sch 1, G 39.

⁶ Rule 33.3(c).

⁷ *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55, [1976] 1 All ER 779 (CA Civ).

⁸ *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA), at 477 per Somers J; *Axiom Rolle PRP Valuation Services Ltd v Kapadia* [2006] ERNZ 639 at [15]-[16].

- (b) the order is to be executed by the people named in the order, usually including the applicant's solicitors, but must not include the applicant itself.⁹

[18] The most significant feature, and the reason why search orders are regarded as extreme, is that they are executed directly at the premises (and often home) of the respondent. That is seen as potentially causing trauma and a sense of outrage to the respondent as a result of what may be seen as an invasion of the sanctity of the respondent's home.¹⁰

[19] Significantly here the Authority has not authorised the entry into, or search of the recipients' homes or premises. Also, the examination of the computer systems is being carried out under the supervision of the Authority itself, not by the applicant's solicitors. The examination was not sought or granted on an urgent, without notice basis.

[20] Further, the forensic examination is not to "secure or preserve" evidence. Its purpose is to allow the Authority Member to review and consider the material held on the computer systems.

[21] The orders for forensic examination are not search orders as provided for in the High Court Rules 2016. Section 160(4) of the Act is not applicable.

The Authority's process for obtaining the information is a matter of procedure

[22] Ms Johnstone then submits that, even if the orders for forensic examination are not search orders, the Authority is not able to make them.

[23] She accepts that the Authority may issue the summonses and may require the people being summonsed to produce before the Authority any books, papers,

⁹ High Court Rules 2016, r 33.4; A refinement from Anton Piller orders, which permitted the applicant itself to execute the order.

¹⁰ *Colombia Picture Industries Inc v Robinson* [1987] 1 CH 38 at 73 (in relation to Anton Piller orders); *Axiom Rolle*, above n 8, at [16], citing P Biscoe "Mareva and Anton Piller Orders: Freezing and Search Orders" (LexisNexis, Sydney, 2005).

documents, records, or things in that person's possession or under that person's control in any way relating to the matter.¹¹ However, she says that s 160 does not provide the Authority with a power to order a search of the witnesses' computer systems.

[24] The Authority is an investigative body. Its role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.¹² It may, in investigating any matter, call for evidence and information from the parties or from any other person and may follow whatever procedure it considers appropriate.¹³

[25] Here, the Authority has determined that some of the information in the computer systems may be relevant to the employment relationship problems before it. The Authority Member therefore wants to look at that information. That is the aim of the summonses and of the orders for forensic examination. The Authority is entitled to require the witnesses to produce the computer systems for the Member to look at the information they contain.

[26] Beyond that, the Authority wishes to put in place a process by which it can extract and review the information on the computer systems. The issue then is whether this proposed process is able to be challenged in the Court, or is a challenge precluded by s 179(5) of the Act?

[27] In considering the scope of s 179(5), the following principles apply:

- (a) The general principle is that Authority proceedings should not be interrupted by challenges at a pre-determination stage.¹⁴
- (b) The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down, and avoid delays. Access to justice considerations are dealt with in the right of challenge or review

¹¹ Employment Relations Act 2000, sch 2, cl 5.

¹² Employment Relations Act 2000, s 157(1).

¹³ Employment Relations Act 2000, s 160(1).

¹⁴ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

once the Authority has made a final determination on the matter before it.¹⁵

(c) The Court must have regard to the effect of the determination in light of the policy objectives. It can consider determinations that have an irreversible and substantive effect. But it is not enough that an order has an impact on the parties. Any decision will have some impact on the parties.¹⁶

(d) The Court can consider questions of jurisdiction. These are distinguishable from procedural questions in that they concern *whether* the Authority has the power to do something, and not *how* it goes about it.¹⁷

[28] While Ms Johnstone has expressed concerns regarding privacy, that is not a basis for excluding potential evidence; nor is it a concern that is unique to material held on computer systems. The effect on her is not irreversible and substantive.

[29] Ms Johnstone seems to be concerned that the Authority is to be assisted by a nominated computer forensics expert, but that is not inconsistent with the Authority's powers of investigation. The computer forensics expert would act in a similar way to a translator, enabling the Authority Member to 'read' what is on the computer systems in circumstances where the Member presumably lacks the technical ability to do that herself.

[30] Having found the Authority is entitled to see information on the computer systems, how the Authority Member proposes that she obtains it is a matter of procedure. Accordingly, pursuant to s 179(5) of the Act, Ms Johnstone is unable to bring a challenge to the orders establishing that procedure.

¹⁵ At [23].

¹⁶ *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182 at [18].

¹⁷ *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 at [55]; *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221.

Ms Johnstone claims Authority acted unreasonably

[31] Ms Johnstone then argues that the orders for forensic examination should be quashed because the manner in which the Authority went about making those orders was unreasonable. In her second amended statement of claim, Ms Johnstone repeats her concerns over what she says is the invasiveness of the orders, says there was an insufficient evidentiary basis for the orders and that neither she nor Ms Henderson had any real opportunity to respond prior to the orders for forensic examination being issued.

[32] As Mr Skelton QC, counsel for Kinetic, submits, Ms Johnstone's claims of unreasonableness are tantamount to an application for review under s 194 of the Act.

[33] Section 184(1A) of the Act would prevent Ms Johnstone from seeking a judicial review at this stage.¹⁸ The Authority has not issued a final determination on all matters relating to the subject of the review application between the parties to the matter; the substantive claims have not been determined. This makes an application for judicial review premature. Further, the Court has not determined the outcome of this challenge.

[34] In any event, these proceedings are a challenge, not an application for judicial review. The issue of unreasonableness was not before the Authority or determined by it and therefore cannot form part of Ms Johnstone's de novo challenge.

[35] That resolves this issue for present purposes. However, that does not mean that the issue is moot. Given the conclusion that the orders for forensic examination are matters of procedure and therefore not able to be the subject of a challenge, the issues of reasonableness have not been determined by the Court.

[36] The challenge is dismissed. The Authority should now proceed with its investigation.

¹⁸ *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [26].

Costs are due to Kinetic

[37] Kinetic seeks costs and is entitled to them. A provisional costs classification of Category 2B was given to this matter. The parties are to endeavour to resolve costs between them. If that cannot be achieved, Kinetic may make an application for costs within 20 working days of the date of this judgment. Ms Johnstone is to file and serve her response within 15 working days of being served with Kinetic's application for costs and Kinetic must file and serve any reply within a further five working days.

J C Holden
Judge

Judgment signed at 2 pm on 2 August 2019