

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 112
EMPC 221/2020**

IN THE MATTER OF an application for an urgent search order
without notice

BETWEEN MATAURA VALLEY MILK LIMITED
Applicant

AND GRAHAM SCOTT
Respondent

Hearing: 30 July 2020
(by telephone)

Appearances: J Smith QC and B Locke, counsel for applicant

Judgment: 30 July 2020

**JUDGMENT OF JUDGE K G SMITH
(Search Order)**

[1] Mataura Valley Milk Ltd has applied urgently, and without notice, for a search order against Graham Scott, one of its former employees.

[2] The orders sought relate to electronic storage devices thought to be in Mr Scott's possession, or under his control, understood to hold confidential information belonging to Mataura Valley and remote storage of confidential information.

[3] Given the urgency of this application only a brief review of the facts is possible. Mataura Valley was formed in 2016. It operates a dairy nutritional plant based in Gore, Southland.

[4] The company makes nutritional based milk powders at what was described by its Chief Executive, Bernard May, as a state of the art plant incorporating unique design features and technology. The plant was commissioned in August 2018 and has been producing high quality commodity and dairy food products since then.

[5] Mr May explained that the company considers it has a significant advantage over its competitors, because it owns the only plant in New Zealand designed specifically to meet stringent regulations set by the Chinese regulatory authority, the United States Food and Drug Administration and the Ministry of Primary Industry. The company is approved to export to 109 countries. One of its competitors or potential competitors is Happy Valley Nutrition Ltd.

[6] Graham Scott was employed by Mataura Valley on 22 August 2016 as its Process Design Manager and reported to Mr May. Once the company had completed its development phase Mr Scott moved into a role as Production Manager. At all times he was part of what was described as the leadership team, meaning he was a senior employee and attended all leadership meetings.

[7] In May 2019 Mataura Valley restructured its management and the position of Production Manager was disestablished. Mr Scott reached agreement with the company to be employed as Nutritional Development Manager, on a fixed-term contract, from September 2019 until 31 January 2020. His employment ended by effluxion of time on 31 January 2020. Some time subsequently he began undertaking work for Happy Valley Nutrition.

[8] At all material times the employment agreements between Mataura Valley and Mr Scott contained comprehensive provisions dealing with the ownership, copying and use of intellectual property and confidential information. He was required by the employment agreement to treat confidential information as strictly confidential and he agreed not to disclose that information to any person, firm, company or other body unless previously and expressly authorised by Mataura Valley to do so or as was required by law.

[9] Mataura Valley supplied Mr Scott with a laptop computer. It should have been returned when his employment ended but it was not. Sonia Morrison, the company's Human Resources and Office Manager, explained that when an employee's employment is terminated an exit interview is usually conducted during which the company's property is returned and its IT provider would be asked to terminate the employee's access to the computer server.

[10] For reasons which do not need to be elaborated on in this decision, it was agreed that Mr Scott did not need to participate in an exit interview. On 31 January 2020, Ms Morrison asked Mr Scott to return the company's property in his possession, including the laptop, and to do so before finishing up his employment. An arrangement was made between Mr Scott and Ms Morrison for the laptop to be returned to the company's office over the weekend following his employment ending. That delay was to allow him to complete some tasks that needed to be finished.

[11] Nothing more seems to have been said or done about the laptop until 16 March 2020. On that date Ms Morrison was advised by the company's IT provider, Focus Technology Group Ltd, that Mr Scott had requested his password be reset so that he could continue to have access to his laptop. Resetting the password would also mean providing ongoing access to the Mataura Valley's computer server. That request alerted Ms Morrison to the fact that the laptop had not been returned as agreed.

[12] Ms Morrison instructed Focus Technology to end Mr Scott's access to Mataura Valley's server. She emailed him on 17 March 2020 and asked for the laptop to be returned as soon as possible. According to Ms Morrison, Mr Scott's response was that he had reached an agreement with Mr May to continue to hold on to the laptop for three months following his employment ending, to enable him to assist with queries, and that there was an option to purchase the laptop afterwards.

[13] Mr May denied making such an arrangement with Mr Scott. That information prompted Ms Morrison to write to Mr Scott again, on 20 April 2020, to inform him the laptop had to be returned by the end of the month. While Mr Scott responded about other matters addressed by Ms Morrison in her email he did not reply about the laptop. A follow-up email was sent by Ms Morrison on 4 May 2020 again requesting

that it be returned. Eventually, on 19 May 2020, the laptop was returned by courier. On inspection the laptop had a broken screen.

[14] Mataura Valley was concerned about the state of the laptop, that it had been retained, and the delay in returning it. The company sought analysis from a computer specialist, Datalab Ltd. Its analysis involved cloning the laptop's hard drive and investigating activity on it between midnight on 20 February 2020 and midnight on 21 May 2020. Datalab provided a detailed report of its investigation indicating a substantial volume of information that was likely to belong to Mataura Valley had been accessed and/or stored.

[15] Cameron Hansen-Beadle, from Datalab, described the following information being gleaned from this investigation:

- (a) Twenty-seven emails were sent from a user profile identified as "mvadmin" and "sam.scott". Mataura Valley is known as "mvm" and Mr Scott, despite his first name, is known as "Sam". He located databases within "sam.scott@hvn.co.nz-HVN.ost". These emails indicated the user was using the laptop to send and receive messages at the email address of Sam.Scott@hvn.co.nz, indicating the laptop was used to access the Happy Valley Nutrition exchange server (signalled by the reference to "HVN"). Mr Hansen-Beadle explain that, in most cases, this access would require a password and log-in credentials issued by the company in control of the server.
- (b) Three storage devices had been used on the laptop within the time period of the investigation:
 - (i) The first was an unnamed USB device. It was inserted into the laptop on 16 April 2020 and removed shortly afterwards.
 - (ii) The second USB device, a Toshiba USB device, was inserted into the laptop on 10 May 2020 and remained there for four hours.

- (iii) The third device was an external hard drive described as WD Elements Se 25FE USB. This device was last connected to the laptop on 11 May 2020 and removed two hours later.
- (c) The files held on the laptop involved an exchange server belonging to Mataura Valley. The files created were stored on the user account, in a folder entitled “Happy Valley Nutrition Ltd” and “MVM”. This information indicated to Mr Hansen-Beadle that it was likely to be a replication or backup of the Mataura Valley server, or it served as a locally held version of Mr Scott’s user account. It was possible that at some point the files found on the laptop had been stored on Mataura Valley’s server.
- (d) External hard drives with the names “Elements SE” and “Toshiba EXT” had been used including photos, Excel documents, work documents, PDFs and Power Points.
- (e) There was a folder named “Happy Valley 2019/2020” including work files created from March 2020, including references to information relating to consultants employed by Mataura Valley.

[16] The research enabled Mr Hansen-Beadle to say that external hard drives would have been plugged into the laptop and files on those drives interacted with during the review period of February to May 2020. A large number were files associated with Mataura Valley’s server. That showed the user of the laptop had continued to access those files while using the laptop during the period from February to May 2020.

[17] Mr May described Happy Valley Nutrition as a competitor, or potential competitor, to Mataura Valley. It is a start-up business that has been raising capital to design and develop a nutritional dairy business. His concern is that the information disclosed in the Datalink report generally indicates:

- (a) Mataura Valley's confidential information was accessed either on its server or on external hard-drives plugged into the laptop during February to May 2020.
- (b) The information accessed is confidential and involved customer information, recipes, formulae, and information about the design and build process of the Mataura Valley plant. He described this information as comprising a "how to" guide to setting up a nutritional plant. He estimated the value of the information to Mataura Valley possessed by Mr Scott would be somewhere between \$4-\$4.5 million. To add some context to that assessment he said the contract Mataura Valley had with Babbage Consulting, to assist Mataura Valley with the design work and project management, was in excess of \$10 million alone.

[18] According to Mr May the forensic analysis also produced the following confidential information owned by Mataura Valley and held by Mr Scott:

- (a) Information about a water tracking and quality programme completed by GEA Engineering.
- (b) Documents about a waste management treatment tender and waste management treatment proposed designed.
- (c) A range of policy documents relating to pre-employment checks, health and safety and critical risk documents; for example one referring to primary hygiene cleaning and another about a full pre-employment health questionnaire and hazard and risk management standard.
- (d) Documents dealing with hazard analysis critical control points.
- (e) Documents for the nutritional validation framework, that were accessed on 8 May.
- (f) An independent insurance report for an insurance provider.

- (g) A document about Mataura Valley's United States Food and Drug Administration compliance, created by Mataura Valley in December 2019.

[19] This information, it was said, is of considerable value to a potential competitor and would give it a springboard advantage in establishing a business.

[20] Mataura Valley's application was supported by a draft statement of problem to be lodged in the Employment Relations Authority, seeking a declaration that there had been a breach of the employment agreement by Mr Scott, urgent compliance orders relating to the return of its confidential information, penalties, damages and costs. As well as the supporting affidavits referred to earlier in this decision the application was accompanied by a draft search order nominating an independent supervising solicitor and computer consultant, an undertaking as to damages and a memorandum by Mr Smith QC. There is no doubt, given the turnover of Mataura Valley, that it can satisfy the undertaking it has provided.

Jurisdiction

[21] The Employment Court has jurisdiction to make search orders pursuant to s 190(3) of the Employment Relations Act 2000 (the Act), and by applying pt 33 of the High Court Rules 2016.¹ There must be a proceeding within the jurisdiction of the Court, or the Authority, to which an application for a search order relates.

[22] Rule 33.2 describes the purpose of a search order in the following terms:

33.2 Search order

- (1) This rule applies only if the evidence is, or may be, relevant to an issue in the proceeding or anticipated proceeding.
- (2) The court may make an order (a **search 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.

¹ As required under Employment Court Regulations 2000, reg 6(2)(ii).

- (3) Form G 39 must be used but may be varied as the circumstances require.
- (4) A search order must be served on the respondent.

[23] The requirements for the grant of a search order are in r 33.3 that provides:

33.3 Requirements for grant of search order

The court may make a search order under rule 33.2 only if the court is satisfied that—

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that—
 - (i) the respondent possesses relevant evidentiary material; and
 - (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

[24] I turn now to consider each of the necessary elements required.

Strong prima facie case?

[25] At this interlocutory stage, and given that the application is without notice so Mr Scott has not yet been heard, I am satisfied that the applicant has a strong prima facie case.

[26] Mr Scott was a trusted senior employee of Mataura Valley. In that capacity, he had access to information that was clearly both confidential to it and valuable to a potential competitor. The Datalab forensic analysis shows that after his employment ended and he no longer had any entitlement to access that information, or legitimate reason to do so, he nevertheless retained it and accessed it. A reasonable inference to draw is that he did so to benefit himself, Happy Valley Nutrition or both.

[27] I am satisfied that the company has established a strong prima facie case.

There would be potential or actual serious loss or damage?

[28] I accept Mr Smith's submission that there would be the potential for loss or damage to Mataura Valley and that would be serious if the search order was not made. The order is necessary to:

- (a) secure or preserve the evidence that may be necessary in order to perfect its causes of action against Mr Scott; and
- (b) to understand the nature and extent of the alleged breaches.

[29] There is sufficient evidence that Mr Scott possesses or controls the relevant confidential information either in devices or remotely. While the laptop has been returned, the full nature of the information he has retained, or had access to, is still to be ascertained. That includes the use that has been made of it. Mr May explained that Mataura Valley is in the process of seeking capital to further expand its business and he knows, from material published by Happy Valley Nutrition, that that company is also competing in the marketplace for funds for development. In that situation, there is not only a risk that Mataura Valley's information will be used to provide a springboard advantage, but that there will also be an incentive for Mr Scott to attempt to cover his tracks.

[30] I am satisfied that there is a real risk that the information may not survive in the absence of an order. The surreptitious way in which it appears Mr Scott has continued to access the information supports this conclusion as does the fact that the laptop was returned damaged. While there is no evidence that Mr Scott actually caused the damage, there is at least a possibility that he did so in an attempt to prevent discovery.

The need for proportionality and caution

[31] A search order should not be made lightly. There has to be some proportionality between the perceived threat to Mataura Valley's rights and the remedies that may be granted, and the severe consequences to Mr Scott of such an order being executed. I am satisfied that there is no reasonable alternative that might

serve the purpose of securing the information to enable Mataura Valley to consider or pursue causes of action open to it.

Outcome

[32] Taking all of these matters into account an order is appropriate. Section 190(3) of the Act and pt 33 of the High Court Rules have been satisfied. The conduct of Mr Scott, as outlined in the material provided in the application, is of such a nature that a search order is appropriate to address the risks faced by Mataura Valley.

[33] I raised with Mr Smith this morning the nature and extent of the draft orders and whether they needed to be amended. That was because one of the orders contemplated, unintentionally, not only to copy information found in remote storage devices, but to delete that information. I consider authorising deletion of information exceeds s 190 and r 33.3 and that part of the draft order is to be deleted.

[34] The search order as modified is granted. A copy of this judgment, the draft statement of problem before the Authority, all of the affidavits, the application for an order and supporting memorandum are to be served on Mr Scott when the order is executed.

[35] The statement of problem is to be finalised and filed with the Employment Relations Authority forthwith.

[36] This judgment is not to be published other than to the parties, their representatives, the supervising lawyer and the computer consultant before **4 August 2020**. I further order that the Court file is not to be searched without leave of a Judge.

[37] The proceeding is adjourned until **9.30 am on 10 August 2020** at **Christchurch District Court (Courtroom 1, 20 Lichfield Street, Christchurch)** for the purposes of considering the supervising lawyer's first report.² On that date the applicant, respondent, and the supervising lawyer will be heard. In the meantime, leave is reserved to apply at short notice to revoke, amend or vary the order.

² The date is different to the one discussed this morning, occasioned by the availability of a Courtroom.

[38] Costs are reserved.

K G Smith
Judge

Judgment signed at 3 pm on 30 July 2020