

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

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

**[2021] NZEmpC 96  
EMPC 213/2021**

IN THE MATTER OF      an application for search orders

BETWEEN                EXTENDAY NEW ZEALAND LIMITED  
                                 Applicant

AND                        LANCE MICHAEL MICKLESON  
                                 First Respondent

AND                        STANLEY WILLIAM EVANS  
                                 Second Respondent

Hearing:                On the papers

Appearances:        C M Murphy and T R Sanders, counsel for applicant

Judgment:            30 June 2021

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**JUDGMENT OF JUDGE J C HOLDEN  
(Application for a search order)**

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[1]      The respondents, Messrs Mickleson and Evans, are employed by Extenday New Zealand Ltd (ENZL) in sales roles. ENZL is in the business of manufacturing and supplying fabrics and textiles for the horticulture industry.

[2]      ENZL says the respondents are the only New Zealand-based sales representatives. Their employment agreements contain terms requiring confidentiality, protecting ENZL's intellectual property, and restricting conflicts of interest.

[3]      Mr Toye, ENZL's director and sole shareholder, attests that on 1 December 2020 he received an anonymous email containing a tip-off that, after customers

decided not to purchase ENZL's products, ENZL sales representatives offered them a cheap alternative manufactured by an American company which seemed to be looking for a foothold in the New Zealand market (the American company). A series of emails were exchanged between ENZL and the source over the next few months which gradually implicated the respondents and the American company.

[4] When Mr Toye investigated, he found that the respondents' work emails also appeared to show they were offering alternative products to ENZL customers.

[5] In March 2021, ENZL hired a private investigator to undertake further investigation. The evidence is that, posing as a fictitious grower, the private investigator made inquiries through the American company's website. He was put in touch with a person who appeared to be Mr Mickleson. The private investigator also arranged for two of ENZL's customers to record meetings with Mr Mickleson in May 2021, during which he offered alternative products at a cheaper price. The recording apparently shows that Mr Mickleson claimed to have sold products to two other previous ENZL customers for 20 per cent less than the ENZL equivalent. The respondents' phone records further reinforced suspicions that they were selling the American company's products to ENZL clients. The private investigator's report concluded that both men had been offering to sell products to ENZL customers on behalf of the American company.

[6] ENZL estimates the financial impact of the lost deals with the two previous ENZL customers to be between \$403,462.32 and \$487,856.85. It also believes an indirect loss of revenue has occurred as a result of the respondents sharing customer information and pricing information with the American company.

### **ENZL makes an application without notice for a search order**

[7] ENZL has applied without notice for search orders with terms:

- (a) allowing authorised people to search the respondents' homes for all written, printed and electronic information pertaining to ENZL's

- business, the business of the American company, any other horticulture business, and the financial affairs of the respondents;
- (b) allowing them to search for any products or sample products relating to the horticulture industry;
  - (c) restraining the respondents from altering, concealing or destroying any information in their control pending a substantive decision;
  - (d) appointing independent solicitors (Mr Drake and Mr Campbell of Wynn Williams) pursuant to r 33.7 of the High Court Rules 2016;
  - (e) requiring the respondents to disclose the whereabouts of any further relevant information or product and allowing the authorised persons to then search those premises, to the extent that they are under the control of the respondents;
  - (f) giving leave to the respondents to apply to the Court to vary the orders on 24 hours' notice to the applicants; and
  - (g) reserving costs on the application.

[8] ENZL has provided a draft statement of problem that it intends to file in the Employment Relations Authority (the Authority) seeking declarations, compliance orders, injunctions, damages, interest and penalties.

### **ENZL gives grounds for the search order**

[9] ENZL makes its application on the following grounds:

- (a) it has a strong prima facie case that the respondents have breached their duties to ENZL; and
- (b) ENZL will suffer serious loss or damage and it may not be able to establish that loss because that information is not in ENZL's control and because the information held by the respondents is susceptible to copying, transfer, access through multiple devices, and/or storage in several locations;

- (c) there is sufficient evidence that the respondents have material in their possession belonging to ENZL;
- (d) there is a real possibility the evidence may be destroyed or made unavailable for use in anticipated proceedings;
- (e) ENZL has given an undertaking in accordance with r 33.5, including undertaking to pay damages sustained by the respondents as ordered by the Court, to pay the reasonable costs and disbursements of the independent solicitors and the independent IT consultant, to inform the respondents of their right to obtain legal advice before complying with the search order and that any information or product seized will be held in the safe custody of ENZL's solicitors until they are returned to the respondents or the Court makes an order as to how they are to be dealt with;
- (f) the overall justice of the case favours ENZL; and
- (g) service of notice of an application would cause undue delay or have a detrimental effect.

### **Employment Court may make search orders**

[10] The Court is empowered by s 190(3) of the Employment Relations Act 2000 to make search orders and does so pursuant to the requirements set out in r 33.3 of the High Court Rules.

### **Grounds are made out**

[11] The evidence presented by ENZL establishes a strong prima facie case that the respondents are in breach of their obligations to it. The evidence also establishes that ENZL faces serious potential or actual loss or damage if search orders are not made.

[12] There is evidence that the respondents may possess relevant evidentiary material and the evidence of the conduct of the respondents to date demonstrates that

there is a real possibility that they may seek to destroy such material or cause it to be unavailable for use in evidence in the anticipated Authority proceedings.<sup>1</sup>

[13] Ms Murphy, counsel for ENZL, has certified that the grounds on which the application relies are made out and that all reasonable enquiries have been made or taken to ensure that the application contains all relevant information, including any opposition or defence that might be relied on by any other party, or any facts that would support the position of any other party.<sup>2</sup>

[14] In Ms Murphy's memorandum in support of the application, she identifies defences she reasonably considers could be raised by the respondents.<sup>3</sup> Based on the untested evidence currently before the Court, none of the identified defences would appear strong.

### **Search orders made**

[15] The draft search orders filed by the applicant follow the form set out in the High Court Rules.<sup>4</sup>

[16] Accordingly, search orders are made substantively in the terms specified in the draft orders and in the application.

[17] At 9.30am on 16 July 2021, the Court at Auckland will consider the reports on the searches from the independent solicitors, Mr Drake and Mr Campbell. ENZL, Mr Mickleson, Mr Evans and the independent solicitors are all entitled to be heard on that date. The other matters specified in the orders will also be considered at that hearing.

[18] The proposed substantive proceedings in this matter are to be filed with the Authority on the first available date following execution of the orders.

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<sup>1</sup> *Dunlop Holdings Ltd v Staravia Ltd* [1982] Com LR 3 (CA).

<sup>2</sup> High Court Rules 2016, r 7.23 and form G 32.

<sup>3</sup> Rule 33.5(4)(a).

<sup>4</sup> Form G 39.

[19] A copy of this judgment is to be served on the respondents at the same time as service upon them of the search orders and other related documents when the search orders are executed. ENZL must also provide a copy of this judgment to the independent solicitors.

[20] This judgment is not to be published other than to the parties, their representatives, the independent solicitors, the personal security specialist and the independent IT experts from PricewaterhouseCoopers employed in this matter until further order of the Court.

[21] Costs are reserved.

J C Holden  
Judge

Judgment signed at 3 pm on 30 June 2021