IN THE EMPLOYMENT COURT
AUCKLAND

AC 18/09
ARC 20/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	TE RUNANGA O NGATI WHATUA Plaintiff
AND	FRANC BRENCE Defendant

Hearing: 21 April 2009 (without notice in Chambers)
(Heard at Auckland)

Appearances: Michael O'Brien and Laura Driscoll, Counsel for Plaintiff

Judgment: 21 April 2009

Reasons: 22 April 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The plaintiff, a statutory runanga under the Te Runanga o Ngati Whatua Act 1988, has applied without notice (ex parte) for a search order against its former employee Franc Brence. A search order is what used to be known as an Anton Piller order. It is now a form of statutory interlocutory order that can be made by the High Court. The Runanga's application for a search order was made to the Employment Relations Authority. It considered that although it was not empowered to make such an order, this Court is.

[2] The Authority removed the application to this Court for hearing at first instance on 16 April 2009. When the papers were referred to me very late on the afternoon of Friday 17 April, it was clear that the plaintiff sought a priority but not

such an urgent hearing that the matter could not wait until yesterday. This is the first occasion on which this Court has been asked to make a statutory search order.

[3] I am satisfied that the Court has the power to make a search order as sought in this case pursuant to reg 6 of the Employment Court Regulations 2000 and, derivatively, Part 33 of the High Court Rules 1985 as amended by s8(1) of the Judicature (High Court Rules) Amendment Act 2008. The incorporation into the High Court Rules of what was formerly an inherent power of that Court (called an Anton Piller order) resolves the jurisdictional difficulties illustrated by the judgment of this Court in *Axiom Rolle PRP Valuation Services Ltd v Kapadia* [2006] ERNZ 639.

Hearing without notice

[4] I was satisfied from the plaintiff's evidence filed, and submissions made, that to have given the defendant notice of the plaintiff's intention to seek this interlocutory order and an opportunity to be heard might have jeopardised irrevocably the plaintiff's position. That could have been by the defendant dealing with the subject matter of the application so as to make useless any order. A plaintiff seeking a hearing without notice of an application that will affect significantly a party and others has a heavy onus of persuading the Court that the defendant should not be heard. That onus was met in this case. A defendant's position is protected in a number of ways including by access to the undertakings given to the Court, the ability to apply to set aside or modify at short notice an order made without notice, and by the requirements inherent in such an order as was sought, including of independent advice and supervision.

Relevant background facts

[5] Until dismissed summarily for alleged serious misconduct, Mr Brence was employed by the Runanga from 16 July 2008 to 27 February 2009. He held a senior managerial role in Te Ha O Te Oranga Ngati Whatau (health) services ("Te Ha") and had access to and was aware of key sensitive and confidential information about the Runanga's business. Whilst still employed, on about 29 December 2008 Mr

Brence threatened to disclose information about the Runanga's business to others in apparent retaliation for strategies with which he disagreed. He had earlier proposed to what was then his new employer that it should make use of documentary information that he had retained from a previous employment. This is evidence of an arguable propensity for the respondent to threaten to misuse confidential information and to maintain and use information the property of former employers in subsequent employment.

[6] When advised of his summary dismissal on 27 February 2009 Mr Brence was asked to return the Runanga's property, as he was obliged to do contractually, and was requested specifically not to delete any information from a laptop computer and a mobile phone belonging to the Runanga that were in his possession.

[7] There is strong prima facie evidence that on 26 January, 26 February and 2 March 2009, Mr Brence (or someone on his behalf) removed some 118 files from the laptop computer onto USB memory devices. The names of those files removed indicate that their contents relate to the Runanga's Te Ha operation.

[8] There is also strong prima facie evidence that on 1 or 2 March 2009 Mr Brence deleted some 2000 files and folders from the laptop computer using what is described as *"specialist PC wiping software"* to erase permanently an unknown number of files and folders. This indicates a propensity for the defendant to destroy information that is very arguably his employer's, contrary to contractual obligations and express requests not to do so.

[9] This situation became known to the plaintiff after 2 March when Mr Brence returned the laptop computer to it. No USB memory devices were returned and the plaintiff's case is that little information remained on the laptop at the date of its return and, particularly, no emails.

[10] On 3 March the Runanga wrote to Mr Brence seeking undertakings from him as to his relevant conduct. Mr Brence's representative replied on 10 March but did not give the undertakings sought or refer in any way to the removals or deletions of files or folders referred to above and which he had been asked to explain. There is

email evidence from Mr Brence acknowledging that he returned the laptop to the Runanga devoid of electronic information. The plaintiff also says that data has been removed from Mr Brence's mobile phone provided to him for work purposes by the Runanga and which was also returned to it.

[11] Also significant at this stage is the plaintiff's evidence that Mr Brence may be intending to misuse confidential information the property of the Runanga in alternative employment or other economic activity. The Runanga is in competition with other Maori providers for health contracts with district health boards and the Ministry of Health. In particular, another organisation comprising members of a hapu of Ngati Whatua, Te Uri o Hau Tangata Developments Ltd, is in negotiations with a primary health organisation, Coast to Coast PHO, to obtain funding for Maori health initiatives. The plaintiff's case is that the information to which Mr Brence had access, and was probably on his laptop computer, is confidential commercial information dealing with such issues that, if it were to be used by a competitor, would unfairly and severely disadvantage the plaintiff. I am satisfied that there is a strong prima facie case of a commercial association between Mr Brence and Te Uri o Hau Tangata Developments Ltd. Coupled with evidence of Mr Brence's propensity to use commercial information acquired during former employment, I accept that there is a real risk of misuse of confidential information and breach of the parties' employment agreement.

[12] Mr Brence has raised a personal grievance against the Runanga alleging that he was dismissed unjustifiably. He has accused one of the Runanga's directors, Allan Pivac, of maintaining a personal vendetta against him. The plaintiff has also advised the Court, as it is required to, that a further defence or justification of his actions by Mr Brence may be that he had allowed his wife to use the laptop computer and the information removed or deleted concerned her or her work and not Runanga. There is also the possibility raised by the evidence that pornographic or other objectionable material was downloaded onto and viewed on the laptop computer in February 2009 so that Mr Brence may have deleted such material in an attempt to avoid his employer's discovery of it. In fairness to Mr Brence, there is no suggestion that this pornography is unlawful material. Even if, however, these are genuine

reasons for having copied some and erased much more material, they do not explain logically what Mr Brence appears to have done.

[13] The plaintiff anticipates that Mr Brence may argue that if his dismissal is found to have been unjustified, the repudiation of their employment contract by the Runanga would render any post-employment obligations unenforceable. Even if Mr Brence's dismissal was unjustified, and he is remedied properly for this as the Employment Relations Act 2000 allows, it is not a strong argument for, or justification of, self-help remedies that are very arguably breaches of the parties' employment contract.

The search orders

[14] The orders are attached to this judgment so I will not summarise them. Suffice to say they are both extensive and intrusive.

[15] There are a number of safeguards proposed as conditions of the order. These, too, are set out in the order and Notice to Respondent that I also annex, so will not summarise.

[16] In the particular circumstances of the case I am satisfied that it is unnecessary to require either the applicant or the independent solicitor to do more than draw to Mr Brence's attention his entitlement to take legal advice about these orders. While in some cases an unrepresented, unqualified, and/or inexperienced recipient of such orders may require more information to exercise effectively that option, Mr Brence is already represented by an employment law advocate in the matter of his personal grievance. Evidence presented to me shows that the advocate has been active and assiduous in representing Mr Brence and I have little doubt that the respondent will have access to legal advice about his position when the orders are brought to his attention.

Compliance with the High Court Rules 1985

[17] I am satisfied that the plaintiff has met the requirements of Part 33 of the High Court Rules that, via reg 6 of the Regulations, are applicable to this application which the Court is empowered to grant.

[18] The Runanga has a strong prima facie case on an accrued cause of action being breach of employment agreement. The potential or actual loss or damage to the Runanga will be serious if a search order is not made. There is sufficient evidence that Mr Brence possesses relevant evidentiary material and there is a real possibility that he might destroy such material or cause it to be unavailable for use in evidence in the proceeding before the Court or the Authority. The foregoing are the cumulative requirements under Part 33.

[19] I am satisfied that the number of persons permitted to execute the search order is as small as is reasonably practicable in the circumstances and that none is within the prohibited class of persons set out in r33.4. I am satisfied that Mr Brence has, or has had recently and knows the whereabouts of, evidence that is or may be relevant to the plaintiff's proceeding for breach of employment agreement: r33.2(1). This is a proper case in which to make a search order without notice to Mr Brence to secure or preserve that evidence and to permit persons to enter premises for the purpose of securing and preserving such evidence: r33.2(2).

[20] It is a condition of the orders made that the Runanga has undertaken to the Court to pay the reasonable costs and disbursements of the independent solicitor appointed under r33.7. It is a further condition of the orders that the plaintiff has given an undertaking as to damages. I am satisfied that the plaintiff has sufficient assets within New Zealand to discharge the obligation created by the undertaking as to damages and so waive the statutory requirement for security under r33.5(3).

[21] Pursuant to r33.7 I appoint Daisy Williams, barrister at law, to be the sole independent solicitor to supervise the execution of the order and to do whatever is required in relation to the order the Court considers appropriate. Pursuant to r33.7(4)

I require Ms Williams to report in writing to the Court on the search no later than one working day before the return date when this proceeding will be reviewed, being Monday 11 May 2009 at 10 am in the Employment Court at Auckland.

[22] I confirm, pursuant to r33.8, that there will be a hearing in open Court at 10 am on Monday 11 May 2009 at which the applicant, the respondent and the independent solicitor will be entitled to appear to address the making of any further orders under r33.8(2) that may be appropriate.

[23] Leave is granted to any party including the respondent to apply on reasonable notice but earlier than 11 May 2009 in relation to the orders made and their execution.

[24] I reserve questions of costs on the application for next consideration on 11 May 2009. The orders of the Court as sealed will be attached to this judgment.

[25] This judgment is not to be published beyond its delivery to the parties and the independent solicitor until after the orders have been executed and the plaintiff's solicitor has so advised the Registrar.

GL Colgan
Chief Judge

Judgment signed at 12.15 pm on Wednesday 22 April 2009