



Client Services:

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Surprise Search Order

A recent case heard in the Employment Court **Hynds Pipe System Limited v. Daniel Forsyth** [2017] NZEmpC 222 had some significant and swift consequences for an employee alleged to have taken confidential information belonging to his employer prior to leaving to work for a major competitor. An unusual aspect of this case is that the Employment Court heard the matter upon application of Hynds Pipe System (Hynds) without Mr Forsyth being notified or aware of the proceedings. The reason for this becomes obvious from the nature of the application, and the facts superseding it.

The application made by Hynds was for a search order, on an urgent basis. Hynds sought:

“an order to search for, inspect, and make forensic copies of a number of devices which are believed to be in the respondent's possession. The devices may contain confidential information belonging to the applicant, which Mr Forsyth has wrongfully copied or transferred in breach of his employment obligations.”

Mr Forsyth was Hynds' Business Development Manager, responsible for sales, development of business relationships and securing contracts for major projects. He left Hynds in January 2017, in order to join a major competitor of Hynds. Subsequent to his leaving, it was discovered that he had copied multiple files from his work laptop, deleted a significant number of work-related documents, as well as forwarding numerous documents to a private gmail account.

The company commissioned forensic reports in relation to the alleged actions of Mr Forsyth. In its consideration of these, the Court said:

“[4] Forensic reports commissioned by the company (including one from KordaMentha, which undertook a full forensic analysis on Mr Forsyth's work laptop following his departure) are before the Court and lend weight to the applicant's concerns about a breach of the confidentiality obligations contained in Mr Forsyth's employment agreement. The company is also concerned about a major project that it lost to a competitor, the company Mr Forsyth now works for, and the circumstances leading up to this turn of events. This also underpins the company's concerns about a breach of loyalty.”

The Court then went on to find that in the circumstances, advance notice to Mr Forsyth of the proceedings was not appropriate:

“I am satisfied that there is a significant risk that any orders that might be made on notice could be nullified by the destruction or concealment of relevant evidence and that it is appropriate to proceed without notice. This is informed by the evidence relating to past actions, and the veracity of assurances previously given by Mr Forsyth about the work-related information he held. I am also satisfied that adequate grounds for urgency have been made out, having regard to the matters raised in the affidavit evidence and by Mr Skelton QC, counsel for the applicant. No proceeding has yet been filed in the Employment Relations Authority, for the same reasons which support the applicant's without notice application.”

The Court's ability to issue search orders is provided for within the Employment Relations Act, which gives the Court the same powers as the High Court in this regard. What is needed is proceedings within the Court's jurisdiction either filed or pending. In this case, due to urgency and the desired lack of notice, the proceedings were pending rather than filed.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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The requirements for a grant of a search order are:

“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.”*

The Court commented that the “cumulative requirements about which the Court must be satisfied reflect the intrusive nature of search orders”.

The Court went on to say:

“[10] As I have said, the evidence before the Court is that the respondent has copied or transferred the applicant’s confidential information onto identified external storage devices and to a Gmail account. There is also evidence that the respondent has already deleted some of the applicant’s information, prior to his employment coming to an end, and that he was less than upfront in his communications with the applicant in respect of documentation he held and how it was being dealt with. There is also some evidence linking Mr Forsyth to the loss of a major contract to the applicant’s competitor shortly before his departure. I am satisfied that the applicant has a strong prima facie case based on breach of confidentiality, and other breaches of Mr Forsyth’s obligations as an employee, as reflected in the draft statement of problem that has been placed before the Court. This aspect of the application is bolstered by the contents of the KordaMetha report.

[11] The report, and other material before the Court, strongly indicates that the respondent possesses evidentiary material relevant to the claims set out in the draft statement of problem. There is a real possibility, informed by the respondent’s past behaviour, that he will destroy such material or cause it to be unavailable for use in evidence in the anticipated proceeding. There is also evidence of serious actual and potential damage to the applicant by reason of the respondent’s actions, including the loss of a major contract and the deletion of some of the company’s work related files which it has been unable to recover, and the likely negative fall-out if third parties obtain access to its confidential information.”

The Court then proceeded to issue the search order.

It is clear from this case that an employee who is suspected of breaching confidentiality and taking company information can face significant consequences that may well come out of the blue. Evidence obtained from a search order may result in litigation seeking penalties and damages. In circumstances where the employer has lost a client due to the employee’s unlawful actions, the damages could be significant.



TO ENSURE EXISTING EMPLOYMENT AGREEMENTS ARE COMPLIANT!

The amendments to the Employment Relations Act, introduced by the Employment Standards legislation may require changes to a number of provisions in existing individual employment agreements, including:

- Hours of Work
- Overtime
- Salaried Payments
- Conflict of Interest; and
- Deductions from Remuneration provisions.

For existing employees **1 April 2017, was the deadline** for ensuring that your individual employment agreements comply with the new legislation. The team at MGZ are available to undertake a review of your employment agreements to ensure compliance.