

[2] On 4 February 2013, Mr Kerr gave six months' notice of the termination of his employment with Air NZ; as required by the terms of clause 4.2 of his employment agreement.

[3] Via a letter dated 5 February 2013, Mr Kerr was reminded by Air NZ of his obligations under his employment agreement (the agreement). Firstly, the six months' notice period is referred to and Mr Kerr is informed that the company has decided to place him on "garden leave" (with full remuneration) pursuant to clause 4.5(b) of the agreement; for the duration of the notice period:

What this means is that until 4 August 2013 you will remain an employee of the Company, but you are instructed to not attend the workplace, and not to contact employees, clients or customers of the Company. During this period, you will remain bound by your contractual obligations towards the Company, as set out in your employment agreement, as well as your common law obligations of confidentiality, good faith and fidelity.

[4] Mr Kerr is also reminded of his post-employment obligations; in particular, clause 5:

NON-COMPETITION AFTER EMPLOYMENT

In consideration of entering into this agreement, including the resultant benefits to you, you agree that for six (6) months after termination of your employment (regardless of the reason it was terminated), you will not do any of the following without the written consent of the Chief Executive:

- (a) be directly or indirectly involved in any capacity whether as an employee, contractor, principal, agent, shareholder, self employed person or otherwise, in any business or activity which was in any way in competition with the Company or its related Companies at the time your employment terminated, or enters into competition with the Company or its related Companies in the six (6) months following the date of termination. This applies anywhere in Australia or New Zealand. However, you are not prevented from holding shares listed on a recognised stock exchange as long as you do not hold more than 10% of the issued capital of any company;
- (b) attempt to entice away from the Company or its related companies any client or supplier of the Company or its related companies;
- (c) employ or attempt to entice away any employee or contractor of the Company or its related companies;
- (d) assist anyone to do any of the acts in (b) or (c).

You also acknowledge that upon termination of your employment for whatever reason, the Company may seek a further restraint which will be for consideration. Any such restraint will be by agreement with you.

[5] Mr Kerr is also informed that during the course of his employment he had access to “a substantial amount” of confidential information, business and trade connections and other information in which the company has a proprietary interest. Finally, he is reminded of legal obligations under the agreement and required to sign an undertaking and warranty accordingly.

[6] On or about 14 February 2013, Mr Kerr provided a written response. In summary, he gave an undertaking to comply with the terms of clause 5 of the agreement: (b) to (d). But Mr Kerr informed that his legal advice was that clause 5(a) is unenforceable. The reasoning being that by being placed on garden leave, he will be out of the workplace and the airline industry for six months; and if he were to be restrained for a further six months, this would have a “significant and detrimental impact” on him. In concluding his response, Mr Kerr conveyed that he was “more than cognisant” of his obligations to Air NZ. He provided a signed, but amended undertaking and informed that he was happy to discuss and allay any concerns the company may have.

[7] Air NZ wrote again to Mr Kerr on 18 February 2013. In addition to explaining to Mr Kerr the importance of the non-competition terms of his employment agreement to protect its legitimate proprietary interests; and relevant to the application for removal to the Court (and the Air NZ application), the company informed that:

For this reason the Company considers that a six month non-competition provision (in addition to your six month notice period) is the minimum required to provide adequate protection of the Company’s legitimate proprietary interest.

And further:

The Company has no wish to prevent you from furthering your career or to prevent Jetstar from engaging in legitimate competition. However, it is essential for the protection of the Company’s legitimate proprietary interests that you refrain from working for Jetstar for a period of six months following the termination of your employment to allow the highly sensitive information to which you were privy in your role to become less relevant and prominent in your mind.

[8] It eventuated that Air NZ and Mr Kerr were unable to reach a suitable accommodation of the issues and hence the company filed proceedings with the Authority on 20 May 2013. The *Statement of Problem* sets out the matters to be resolved; hence:

1. The problem which the applicant wishes the Authority to resolve is whether the respondent is or will be in breach of his contractual obligations to the applicant by:
 - (i) breaching the restraint of trade provisions of his employment agreement and/or
 - (ii) breaching the confidentiality provision of his employment agreement;
 - (iii) breaching his common law obligations of confidentiality to the applicant;
 - (iv) breaching the implied duty of fidelity which he owes to the applicant.

[9] The parties have attended (unsuccessful) mediation and on 4 June 2013, the Authority received from Mr Kerr an urgent *Application for Removal of a Matter to Employment Court*. As an outcome of a conference call with the parties on 6 June 2013, it was agreed that the Authority should determine the removal application “on the papers”.

The removal application

[10] The power of the Authority to remove a matter to the Court emanates from s.178 of the Employment Relations Act 2000 (“the Act”) whereby under subsection (2), the Authority may order the removal of the matter or any part of it, to the Court, if:

- (a) an important question of law is likely to arise in the matter other than incidentally; or
- (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or
- (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[11] Mr Kerr’s application for removal substantially relies on the ground available under s.178(2)(a); citing that one or more important questions of law are likely to arise other than incidentally, namely:

- (a) whether a period of garden leave (involving the employee's complete removal from the relevant industry and his or her workplace) is in essence a restraint of trade; and
- (b) how and to what extent a period of garden leave should be taken into account when assessing the reasonableness of a post-employment restraint of trade.

[12] Mr Kerr also relies, but to a lesser extent, on s.178(d) of the Act in that the Authority should be of the opinion that in all the circumstances, the Court should determine the matter(s).

The submissions for the applicant in support of the removal

Section 178(2)(a)

[13] The submissions for Mr Kerr say that the broad issue that arises is whether garden leave should be treated in the same or a similar manner as a restraint of trade. The related enquiry is whether a garden leave period is, in fact, a restraint of trade and how and to what extent it can be taken into account when determining the reasonableness of a post-employment restraint.

[14] It is submitted that these issues do not arise incidentally and they are central to the case. Attention is drawn to the fact that by the time that Mr Kerr is due to commence his employment with Jetstar (5 August 2013), he will already, in effect, have been restrained for six months via the observance of the notice/garden leave terms of his employment agreement.

[15] Reference is made to the absence of New Zealand legal authority pertaining to the above issues. Mention is made of some Australian decisions (*Peters (WA) Ltd v Petersville Ltd* [2001] HCA 45 and *Prebon (Australia) Pty Ltd* [2008] NSWSC 852) and the examination in those judgments of restraint of trade principles applying when determining whether a garden leave provision is reasonable.

[16] It is submitted that both Australian and English Courts have held that periods of garden leave are relevant in determining the reasonableness and validity of a post-employment restraint (see *Prebon (supra)* and *Credit Suisse Asset Management Ltd v Armstrong* [1996] ICR 882 (CA)).

[17] In a New Zealand setting, the submissions for Mr Kerr refer to *Lloydd v Diagnostic Medlab Services Ltd*². This case involved the granting of special leave by the Employment Court to remove proceedings from the Employment Relations Authority to the Court. The principal ground relied upon for the removal was that an important question of law was likely to arise other than incidentally. Relevant to the current matter, it was argued for the plaintiff, Dr Lloyd, that an important question of law arising was whether or not there was a fetter on an employer's right to rely on the express garden leave clause and its relevance to the law of restraint of trade. Apparently, the parties subsequently settled matters and hence we do not have the benefit of the wisdom of the Court in regard to a closer examination of such issues. But in any event, on the limited information that can be gleaned from *Lloydd* judgment, it is difficult to entirely relate the issues relating to the garden leave situation that existed for Dr Lloyd to the circumstances pertaining to Mr Kerr.

[18] Nonetheless, it was accepted by the Court in *Lloydd* that New Zealand Courts had not yet had to "grapple" with the question of law as to whether garden leave provisions are enforceable only to the extent that they protect legitimate interests. The Court held that Dr Lloyd was entitled to rely on the overseas cases as persuasive support for the questions of law that he sought to have the Court determine. At face value, this appears to be a much narrower issue than what Mr Kerr has brought to the Authority. That is, whether the enforced garden leave can be seen as an additional restraint that can be added to the post-employment restraint, thereby making the overall restraint period unreasonable. I shall return to the matter of relevant overseas judgments about such matters in due course.

Section 178(2)(d)

[19] In the affidavit filed with the removal application, Mr Kerr expresses his view that since late February 2013, Air NZ has been delaying the progress of matters as it was in the company's interests to do so; or at the least it has been tardy. In essence, Mr Kerr says that if the substantive application made by Air NZ is heard by the Authority and even given a prompt determination, if this is appealed by either party, by the time a final outcome is decided by the Court, he could be delayed in commencing his employment with Jetstar. Not unreasonably, Mr Kerr suggests that he could, in effect, be restrained not by a (arguably) lawful restraint but rather by delay

² [2009] 1 ERNZ 42

associated with the litigation process itself. While one can understand Mr Kerr's reservations, perhaps he is a little too pessimistic about the effectiveness of the Authority and/or the Court when it is accepted that urgent proceedings are necessary. It also has to be noted that pursuant to s.161 of the Act, Mr Kerr could have initiated proceedings in the Authority seeking a determination of the lawfulness of the relevant terms of the employment agreement. In fairness to Mr Kerr, he acknowledges this but he anticipated that Air NZ would have commenced proceedings earlier than it did. Nonetheless, Mr Kerr must have been aware that Air NZ would, most probably, initiate proceedings to protect its position and he could have pre-empted this by seeking a declaration from the Authority in regard to the reasonableness of the relevant terms of his employment agreement.

[20] In summary, it is submitted that Air NZ should not be able gain an advantage because of legal delays. Therefore, if the substantive matter is heard and determined by the Employment Court, Mr Kerr will have an outcome prior to 5 August 2013.

The submissions for Air NZ in opposition to the removal

An important question of law

[21] Air NZ says that an "important" question of law has not been raised. It is submitted that the central issue in this matter is whether the six-month non-competition provision is necessary to protect the legitimate proprietary interests of the company: is reasonable and hence, enforceable. Air NZ says that the relevance and weight to be accorded to the garden leave period is only one of a number of factors relevant to the Authority's determination of the central issue and it is not decisive or strongly influential. Rather, the period of garden leave is best categorised as a factual matter "auxiliary" to the main issue between the parties. In summary, it is urged that when determining the reasonableness of the restraint, the Authority can take into consideration the duration of the restraint and also the practical effect of the garden leave period: and whether all of this is reasonably necessary for Air NZ to protect its legitimate proprietary interests. It is submitted that the Authority would (or should) essentially adopt this approach and therefore the matters involved are not of sufficient importance to warrant removal to the Court.

Garden leave provisions

[22] It is submitted for Air NZ that the submission for Mr Kerr that the circumstances existing in *Lloyd* are similar to those pertaining to Mr Kerr, is not correct. I accept that this may be so to some extent given that the question of law in *Lloyd* involved the degree to which garden leave provisions are enforceable, to the extent that they protect legitimate proprietary interests. And while it is correct that Mr Kerr does not take issue with having to observe a period of garden leave on its own, the matter that he seeks to have determined is whether the period of garden leave, combined with the post-termination restraint, creates a situation whereby there is a total period of restraint which is unreasonable. Therefore, while I accept that the enforceability of a garden leave provision on its own is hardly novel, the overall findings in *Lloyd* give at least some degree of support to Mr Kerr's general position.

No grounds for removal under s.178(2)(d)

[23] Air NZ says that there are no grounds for removal under s.178(2)(d) of the Act. In particular the company denies that there has been any undue delay on its part in bringing or pursuing proceedings before the Authority. The evidential basis for this submission is set out in the sworn affidavit of Mr Kevin Thompson, General Manager People – Operations and Flight Operations and Safety. Mr Thompson attests to the process that was followed by Air NZ when it became aware that Mr Kerr was not prepared to give the written undertakings that the company required from him. The Authority accepts that the time frame for matters to develop, to the extent that proceedings in the Authority became necessary, was not particularly unusual for such matters. And of course, the point had already been made that Mr Kerr could have made an application to the Authority for a declaratory determination.

[24] Air NZ submits that the Authority should be cautious about removing matters to the Court where removal is opposed by one of the parties. The substance of this argument is that should this matter be removed to the Court, Air NZ will not obtain a determination from the Authority and hence will be deprived of the right of appeal (challenge) to the Court if it does not accept the decision of the Authority. But then, rather oddly, the further submissions for Air NZ rebut the argument for Mr Kerr that an appeal against the determination of the Authority by either party is likely. Given the urgency attached to this matter it would not be productive to engage in an analysis of the weight of the arguments for either party. It is probably enough to say that such

matters have been concisely explained by Chief Judge Colgan in *NZ Amalgamated Engineering, Printing and Manufacturing Inc v Carter Holt Harvey Ltd.*³

[25] Air NZ does not accept the proposition advanced for Mr Kerr that any appeal will result in a restraint by default. It is submitted that given the urgency that has already been afforded to the parties, if the Authority were to determine matters at first instance, and in the event of an appeal by either party, it would be possible for the Court to allow an application to progressed with urgency, with a judgment available prior to 5 August 2013; when Mr Kerr is due to commence his employment with Jetstar. While not in position to make any assessments about a possible timetabling of matters in the Court in the event of an appeal, I would repeat my earlier observation that both the Authority and the Court are able to afford urgency to appropriate matters with decisions usually being produced promptly.

[26] Finally, Air NZ says that it is concerned Mr Kerr's removal application is motivated by a desire to choose the judicial forum where he considers that he will receive the most favourable hearing. An extract from a letter from Buddle Findlay to Minter Ellison of 5 June 2013 is referred to, whereby counsel for Mr Kerr expresses the view that the Employment Court will "undoubtedly take a more rigorous approach" and it will be better equipped to examine in detail the confidential information that Air NZ wishes to protect. This is not the time for the Authority to comment on the merits or otherwise of such a view, except to say that it may be true that in some instances, legally complex matters are better suited to the minute scrutiny that the Court appears to be better resourced and designated for (as a court of record) as compared with the statutory role of the Authority under s.157 of the Employment Relations Act.

Analysis and conclusions

[27] In regard to the argument advanced for Mr Kerr that there are grounds under s.178(2)(d) for the Authority to form an opinion that the Court should determine the matter in all the circumstances, I conclude that it has not been proven to the extent that the discretion available to the Authority should be exercised on this criterion. While the views expressed by Mr Kerr in regard to possible delays being brought

³ [2002] 1 ERNZ 74 at p.83, para 38.

about by the litigation process are understandable, given the absence of any real evidence that unreasonable delay would occur if the Authority were to determine matters at first instance, it is not accepted that on its own, this is a valid reason for removal to the Court. Nor is it accepted that a challenge to a determination of the Authority would be a definite possibility, albeit it is accepted that the matters at issue are of substantial importance to the parties. But that does not mean that if a party obtains an unacceptable determination from the Authority, that they will get a more favourable conclusion from the Court. All litigation is fraught with risk and expense and even with the process of de novo hearings, where parties get an opportunity to run their cases in a different manner in the Court than they did in the Authority, having obtained the benefit of an analysis by an Authority member, it is by no means certain that the extra expense involved will deliver a different result. Therefore, a party thinking about challenging a determination will usually closely assess the litigation risk *vis a vis* their resources before initiating proceedings in the Court. And of course there is always the possibility that having obtained a determination from the Authority, one or both parties may reconsider their position(s) and enter into further discussions/negotiations: perhaps involving further mediation.

[28] However, in regard to the grounds under s.178(2)(a), I conclude that Mr Kerr is on sounder ground. Whether a question of law may be found to be an important question of law, the Authority is referred to in *Hanlon v International Educational Foundation (NZ) Inc*⁴ where Chief Judge Goddard stated that:

I conclude without difficulty that questions of law are likely to arise in this case otherwise than incidentally, and I turn my attention to the real issue which is whether the questions of law are important questions of law. It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law to be an important one for the purposes of s 94 [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally.

Then further:

Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect

⁴ [1995] 1 ERNZ 1

of it or strongly influential in bringing about a decision of it or a material part of it.

[29] It seems to me that the above words:

“A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.”

[30] Applied to this case, the parties have not been able to refer to, nor is the Authority aware of, legal precedent in New Zealand that goes to the issue that Mr Kerr brings to the Authority. That is: Can the enforced garden leave be seen as an additional restraint that can be added to the post-employment restraint, and thereby make the overall restraint period unreasonable? I find that this is an important question of law and that the determination of the question will not only have consequences for the parties to this matter but also, most probably, for others given the now relatively common use of garden leave and post-termination restraints in employment agreements. Particularly in circumstances where an employee, such as Mr Kerr, holds a senior management position and has access to critical information that goes to the legitimate proprietary interests of the employer.

[31] The submissions for Mr Kerr have drawn the attention of the Authority to a judgment of the Supreme Court of New South Wales: *Tullett Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 852 (21 August 2008). While the issues in that case are rather different in their context to those pertaining to Mr Kerr, there is a comprehensive legal analysis of contractual terms that act as a restraint on employees, some of which is not of particular assistance in regard to the context of this case. However, of some relevance (in my view) is the reference by Brereton J. to a number of English cases (*Provident Financial Group PLC & Whitegates Estate Agency v Hayward* [1989] ICR 160, *William Hill Organisation Ltd v Tucker* [1998] ICR 291 and *Wesoky v Village Cinemas International Pty Ltd* [2001 FCA 32) whereby the reasonableness of garden leave provisions is examined. And then (at paragraph 66) his Honour held that:

Here, I have no difficulty in concluding that the restraints were reasonable so far as they operated during any period of “gardening leave” which Mr Purcell was required to take during the three month notice period – particularly as the period of any such “gardening leave” was to be credited against the post-employment restraint. Moreover, the considerations which informed my conclusion that a

post-employment restraint of three months would be reasonable, similarly support the conclusion that a restraint during a period of “gardening leave” for up to three months would be reasonable.

[32] The Authority is also aware of another English case: *Credit Suisse First Boston (Europe) Ltd v Padiachy* [1998] IRLR 504, where Longmore J. stated that it may be legitimate to ask whether an anti-competition covenant is justified in a case where the employee is also subject to a garden leave provision, but this would appear to depend on the overall reasonableness of the period of garden leave involved.

[33] In regard to the question of law that Mr Kerr wishes to have determined, and observing the comments of Travis J. in *Lloydd* (supra) that a party is entitled to rely on overseas cases as persuasive support for questions of law before the Employment Court, I conclude that the combination of the factors involved in this case is of sufficient importance to warrant a removal of the matter to the Employment Court.

Determination

[34] For the reasons set out above I find that pursuant to s.178(2)(a) of the Employment Relations Act 2000, matters relevant to file no: 5418714 - Air New Zealand Limited v Grant Kerr, should be removed to the Employment Court on the basis that an important question of law is likely to arise other than incidentally. It is so ordered.

Costs: Costs are reserved.

K J Anderson
Member of the Employment Relations Authority