Employment Court of New Zealand

Air New Zealand Limited v Kerr [2013] NZEmpC 142 (29 July 2013)

Last Updated: 9 August 2013

–

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 142

ARC 38/13

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER of an application for disclosure and leave to file an amended statement of claim

BETWEEN AIR NEW ZEALAND LIMITED Plaintiff

AND GRANT KERR Defendant

Hearing: (by way of telephone directions conference held on 29 July

2013 at 11.00 am)

Appearances: Christie Hall, counsel for the plaintiff

Peter Chemis, counsel for the defendant

Judgment: 29 July 2013

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] Shortly after I issued my interlocutory judgment[1] in this case last Friday,

26 July 2013, a fresh application was filed by the plaintiff seeking leave to file an amended statement of claim and an order for further disclosure. A notice of opposition was filed by the defendant this morning. Because of the urgency of the matter (the case is set down for a three-day hearing commencing on 31 July 2013) I convened a telephone directions conference and heard submissions in relation to the application. The Court is obliged to counsel for their cooperation at short notice.

[2] Counsel for the defendant, Mr Chemis, consented to the application to file an amended statement of claim and so I made that order by consent. An amended

statement of claim in the form of the draft filed on 26 July 2013 is to be filed and served immediately.

[3] The application for further disclosure arises out of a statement made in paragraph 41 of the defendant's brief of evidence in which he states that "Jetstar also sent me some facts and figures in March and April which I have looked at." In March and April 2013, the defendant was serving out his notice period with the plaintiff on garden leave (on full pay) until his resignation takes effect on

5 August 2013. On that date he is proposing to commence employment with Jetstar. The plaintiff is seeking to enforce a six-month post employment restraint provision until 4 February 2014.

[4] The plaintiff submits that the documents referred to in the previous paragraph are directly relevant to the proceedings at

hand in that the defendant has considered them sufficiently relevant to refer to them in his evidence and the documents meet the requirements of relevance set out in reg 38 of the Employment Court Regulations

2000 (the Regulations).

[5] The defendant submits that he has been honest in his evidence in disclosing receipt of the information from Jetstar. He also submits:

2. ...

(c) the law allows an employee to take preparatory steps in his or her spare time whilst still employed in anticipation of competing with their employer after their employment comes to an end (*Rooney Earthmoving Ltd v McTague* [2009] ERNZ 340 (EmpC) at [121], [122] and [142]; *Fresh Prepared Ltd v de Jong* (2006) 3 NZELR

370 (HC) at [33]).

[6] Counsel for the plaintiff, Ms Hall, accepted the principle stated in [5] but submitted that the defendant was not being paid by the plaintiff to "get up to speed" with Jetstar and the plaintiff had no way of knowing whether the information supplied by Jetstar was being accessed and considered by the defendant during what would be his normal working hours or in his own time. The plaintiff submitted:

9. By allowing Jetstar to provide him with confidential commercial information relating to its business while still an employee of the plaintiff, the defendant has conducted himself in a manner which breaches the implied duty of fidelity and the express terms in respect of conflict of interest in his employment agreement with the plaintiff.

[7] Mr Chemis submitted that the application was encompassed by the third statement of principle stated by the Supreme Court of Ireland in *Framus Ltd v CRH plc*,[2] referred to in [12] of my interlocutory judgment of 26 July 2013, namely:

(3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the rules.

[8] Ms Hall did not challenge that particular statement of principle but highlighted the difference in the wording between the relevant Irish regulation and reg 38 of the Regulations.

[9] As time is at a premium, a prompt decision on this application is called for. In the course of the telephone directions conference this morning, Mr Chemis read out one of the emails the defendant was referring to in paragraph 41 of his brief of evidence, and said that the other documentation was written in a similar vein. I indicated to both counsel, that in the short time available to reflect on the submissions made, I was inclined to accept the defendant's submission that the documentation in question was not relevant to the alleged breaches pleaded. Receipt of the documentation did not, in itself, indicate a breach of the implied duty of fidelity but rather fell within the scope of activity an employee is permitted to undertake in preparation for his or her future employment. In all the circumstances, however, I suggested that the most appropriate course would be for me to inspect the documentation and give a ruling on the application at the commencement of the hearing. Counsel were agreed on that approach.

[10] Counsel for the defendant is to therefore make the documentation in question available to the Registrar before the end of the working day tomorrow.

A D Ford

Judge

Judgment signed at 3.00 pm on 29 July 2013

---

[1] [2013] NZEmpC 141.

[2] [2004] IESC 25; [2004] 2 IR 20.
