New Zealand Employment Relations Authority Decisions

CPC New Zealand Limited v Dunlop (Wellington) [2012] NZERA 2044; [2012] NZERA Wellington 44 (17 April 2012)

Last Updated: 17 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2012] NZERA Wellington 44
5359518

BETWEEN CPC NEW ZEALAND LIMITED

Applicant

A N D MICHAEL DUNLOP Respondent

Member of Authority: G J Wood

Representatives: D Parbhu for the Applicant

J Tannahill for the Respondent Investigation Meeting: 3 April 2012 at Wellington Submissions Received: 3 April 2012

Date of Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (CPC) claims that the respondent, Mr Dunlop, owes it $5,046 because it overpaid him 300 hours of wages and $65,321 for loss of profits as a result of alleged breaches by Mr Dunlop of his duties of confidentiality under the parties' employment agreement. At the investigation meeting CPC withdrew its claim for breaches of the clause in the employment agreement prohibiting Mr Dunlop from undertaking other employment without its prior consent. It accepted that this did not bind Mr Dunlop once he had left its employment. Mr Dunlop denies both remaining claims.

[2] In a previous determination, another Authority Member determined, after a full investigation, that Mr Dunlop had been unjustifiably dismissed and that he was owed three weeks pay in lieu of notice and holiday pay. Given that that determination

has not been challenged, I have accepted all findings in that determination as binding on the parties.

[3] As a result, but also from further information gathered during the Authority's investigation, I am able to conclude that CPC employed Mr Dunlop as a salesperson selling specialised cleaning products, commencing on or about 31 March 2008. For the first two years or so of his employment Mr Dunlop reported directly to the then General Manager, although I note that he also was supervised by the Sales Manager. The General Manager provided Mr Dunlop with a written employment agreement. The contents of the employment agreement were considered and discussed and a minor change was made, although Mr Dunlop never returned a signed copy.

[4] That employment agreement contained two relevant clauses. The first was that the ordinary hours of work were not to be less than 40 hours, at times set by the company after consultation with the employee. In Mr Dunlop's case, the ordinary hours were 8am to 5pm, Monday to Friday, as provided for in his job description.

[5] The other relevant clause relates to confidentiality. It states:

The Employee will during the term of this agreement have access to and become acquainted with confidential and proprietary information about the Company and its business.

This confidential information is a valuable, special and unique asset belonging to the Company and its subsidiaries. It includes but is not limited to, such things as: manufacturing methods, processes, techniques, products, financial information, trade secrets, customer lists, manuals, kits, drawings, specifications, equipment, files, pricing details, financial performance records, sales information, budgets, plans, operational and logistical systems, strategy and analysis, and any other information and property which is owned by the Company or which is used in or in respect of the operation of the business.

All confidential information shall remain the sole and exclusive property of the Company.

While employed by the Company, and without limitation in point of time following termination of the Employee's employment, the Employee agrees not to disclose or use confidential information without the prior authorisation of the Company.

The Employee's right to pursue work following termination of the employment that utilises their skills, knowledge and experience is recognised. The Company however reserves the right to protect its business interests.

[6] Mr Dunlop's employment ended on 1 June 2010 on the grounds of redundancy. Mr Dunlop found employment straight away with a previous employer, not in the cleaning industry. He worked there for several months, before taking up employment with a competitor to CPC, where he again worked with his previous Sales Manger.

Overpayment of wages

[7] Mr Dunlop worked in a voluntary capacity as a DJ for a community radio station for 3 hours per week every Monday afternoon. Mr Parbhu, CPC's Managing Director, claims that he was unaware of this and that Mr Dunlop was obliged to be working for it. CPC therefore seeks that portion of his salary to be paid back to the company.

[8] However, I accept the evidence of Mr Dunlop's former Sales Manager and that of Mr Dunlop, that Mr Dunlop informed the Sales Manager of this regular commitment and that the Sales Manager was given the authority to approve it by the General Manager and Mr Parbhu. The Sales Manager and Mr Dunlop agreed that the time would be made up and I note that Mr Dunlop often worked on Saturdays. On the balance of probabilities, it seems more likely than not that had the arrangement not been approved, then it would have come to the General Manager's or Mr Parbhu's attention at some point in the more than two years that Mr Dunlop worked for CPC and would have been raised with him, which it was not. Given therefore that Mr Dunlop's unpaid stints as a DJ were authorised and that the time was made up, CPC's claim is dismissed.

Confidentiality clause

[9] In *Product (NZ) Ltd v. Morgan (No.3)* [1993] NZEmpC 199; [1993] 2 ERNZ 1034, the Employment Court applied the following propositions of law concerning departing employees, as set out by the High Court in *Peninsula Real Estate Ltd v. Harris* [1991] NZHC 2630; [1992] 2 NZLR 216. These include that in the absence of a valid restraint of trade clause a former employer can not prevent a former employee simply from competing. Thus a former employer can not normally prevent a former employee from contacting or even soliciting clients or customers of the former employer. However, an employee may not use truly confidential information obtained in the course of that employment for the purposes of competing with his former employer. But what amounts to confidential

information is not susceptible of abstract definition, but will depend on the facts of each case.

[10] The confidentiality clause acknowledges, as it must, Mr Dunlop's right to pursue work following termination of employment utilising his skills, knowledge and experience. There was no restraint of trade clause applying to Mr Dunlop. He is entitled to earn a living and was entitled to pursue employment with a competitor to CPC.

[11] What Mr Dunlop was not entitled to do was to disclose or use any confidential information in his new employment that was CPC's property. I conclude that it is more likely than not that he did not disclose any such confidential information. CPC has not claimed that Mr Dunlop has used any confidential information, other than pricing formulas and customer lists. There is no evidence that Mr Dunlop had used any such information for the benefit of his new employer other than Mr Parbhu's assertion. In addition, I accept that in the hospitality industry in the Wellington region, all customers are known, because they are the kinds of operations that use commercial cleaning products. Furthermore, Mr Dunlop did not commence employment with the competitor to CPC for several months after he had been made redundant by CPC. It therefore follows that CPC had significant opportunities to bolster its position with its customer base that Mr Dunlop had previously serviced, and that any information Mr Dunlop held that was confidential, such as pricing, would be more likely than not to be out of date. I therefore dismiss CPC's claim for breach of confidentiality.

[12] In any event, CPC's claims for loss of profits were speculative and based on nothing more than an assessment of what clients had been lost in the Wellington region after Mr Dunlop had been made redundant. No evidence was provided from any of these customers that they had shifted to Mr Dunlop's new employer, or that the reason for that was misuse of confidential information by Mr Dunlop. For example, one customer lost was the temporary employer of Mr Dunlop after he

had been made redundant by CPC. He was thus not even an employee of CPC's competitor at the relevant time. Another former customer is no longer in business, and Mr Dunlop gave evidence that yet another had not left CPC through any involvement with it by him. Even then the claim contained no accounting for profits by CPC, which simply sought the $65,000 as being the 12 month's previous revenue from the customers, as opposed

to profits foregone. However, Mr Parbhu did claim, in oral submissions, that these losses may continue for another five years. This would have led CPC to lose in the order of $65,000 in profit, Mr Parbhu submitted. Such an assessment of the claim is equally as speculative as the claim in its original form.

[13] For all the above reasons, I therefore dismiss all claims by CPC New Zealand

Limited against Mr Michael Dunlop.

Costs

[14] Costs are reserved.

G J Wood

Member of the Employment Relations Authority
