New Zealand Employment Relations Authority Decisions

Dawsons Catering Limited v Hawke (Auckland) [2016] NZERA 401; [2016] NZERA Auckland 294 (30 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 294
5637874

BETWEEN DAWSONS CATERING LIMITED Applicant

A N D MATTHEW HAWKE Respondent

Member of Authority: Rachel Larmer

Representatives: Andrew Swan, Counsel for Applicant

Garry Pollak, Counsel for Respondent

Investigation Meeting: 26 August 2016 at Auckland

Submissions Received: 26 August 2016 from Applicant

26 August 2016 from Respondent

Date of Determination: 30 August 2016

DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Dawsons Catering Limited (Dawsons) is a catering company which provides catering services for the University of Auckland (the University) and café services in the Old Government House (OGH)1

[2] Mr Matthew Hawke was 26 years old when he was employed by Dawsons. Mr Hawke was employed as the Venue Manager and Café Manager of OGH at the University. Mr Hawke's starting salary of $45,000 was increased by Dawsons in August 2015 to $55,000.

1 OGH is an on-site staff café/common room.

[3] Mr Hawke started work for Dawsons in March 2014. When Mr Hawke resigned on 27 June 2016 Dawsons immediately placed him on four weeks' garden leave and Mr Hawke's employment with Dawsons ended on 28 July 2016.

[4] Around mid-2015 the University selected three catering companies to exclusively provide catering services to it – Dawsons, Urban Gourmet Limited (Urban Gourmet) and Flame Tree Limited (Flame Tree). All University functions had to be catered by one of these three companies but individual University Event Managers could decide which of the three catering companies to use for any given function.

[5] Mr Hawke left Dawsons to take up a Key Account Manager position with Urban Gourmet which is one of Dawson's competitors. Mr Hawke's new job with Urban Gourmet was a significant promotion for him and he started this new job on

08 August 2016. The University is likely to be one of Mr Hawke's key accounts with

Urban Gourmet.

[6] Mr Hawke's individual employment agreement with Urban Gourmet contains a confidentiality clause which continues after his employment ends but it does not include any post-employment restraints.

[7] Mr Hawke told the Authority that he decided to look for other opportunities to advance his career when it became clear to him in early 2016 that there was no real prospect of him advancing his career at Dawsons in the foreseeable future.

[8] Mr Hawke's employment with Dawsons was governed by an individual employment agreement dated 11 March 2014. There is a dispute between the parties over whether or not Mr Hawke's employment agreement contained a Job/Position Description.

[9] Mr Hawke says the copy of the employment agreement he was given when he accepted employment (which he retained) attached a schedule for *"Job/Position Description"* but that this schedule was left blank. Mr Hawke says he has no memory of ever being given a written job description, nor does he have any written record to show he was ever given a job description.

[10] Mr Alexander Ross (one of the directors and shareholders of Dawsons), filed an affidavit with the Authority in support of an application by Dawsons for urgency and an interim injunction preventing Mr Hawke from working for Urban Gourmet.

This affidavit attached a copy of what Mr Ross deposed in his affidavit was Mr Hawke's employment agreement. This version of Mr Hawke's employment agreement (like the copy Mr Hawke was given) had the job description section left blank.

[11] On 24 August 2016 Mr Ross filed a second affidavit which attached a different copy of Mr Hawke's employment agreement, which had a completed schedule regarding the job description. Mr Hawke told the Authority that he had never seen that schedule before. Mr Hawke impressed me as a credible witness and I accept his evidence about that.

[12] During the investigation meeting on 26 August 2016 Mr Ross produced another (different) version of what he claimed was a second updated position description for Mr Hawke. Mr Ross admitted that there was no documentation to establish that this second (or for that matter, the first) position description had been given to Mr Hawke.

[13] Mr Hawke's evidence was that had never seen or heard of the second position description before Mr Ross produced it in the middle of the Authority's investigation meeting. I accept Mr Hawke's evidence about that.

[14] I consider it more likely than not that Mr Hawke was not provided with a copy of any job/position description prior to accepting Dawsons' offer of employment or during the course of his employment with Dawsons. I am therefore satisfied on the balance of probabilities that the schedule in Mr Hawke's employment agreement relating to his job/position description was left blank and that the written job description has only come to light as a result of these proceedings.

[15] I find that Mr Hawke effectively had a day-to-day operational role rather than a management role with Dawsons. Although Mr Hawke had a small number of employees to look after he was not responsible for their terms of employment. Mr Hawke simply organised (managed) staff to ensure that the University's catering orders were processed and fulfilled.

[16] Mr Hawke's job involved processing catering orders for the café, arranging function rooms (setting up and delivering food) and organising functions (preparing proposals (quotes) to meet the requirements of various functions). Mr Hawke was not involved in preparing business plans, business development or marketing strategies.

[17] Mr Hawke would work with the University's Event Manager to get a menu that suited their budget and function requirements. Mr Hawke was mainly involved with catering small items such as pastries, sandwiches and sweet slices or treats for morning and afternoon teas or lunches. The prices for these small items were listed on a menu that Dawsons had provided to the University, and which was available to all University staff via its intranet.

[18] On occasion Mr Hawke would work with a University Event Manager or Event Assistant for a bespoke event. Mr Hawke did not have access to pricing for items purchased for bespoke events.

[19] This bespoke pricing was set by management so Mr Hawke would pass on the University's function requirements to his manager who would price the cost of the bespoke event. Mr Hawke was never told how these bespoke prices were arrived at so he did not know what the profit margins were or how the bespoke pricing was set.

[20] Mr Hawke was also responsible for ensuring that the ordered food, beverages and crockery/glassware was delivered to the appropriate place at the appropriate time. He told the Authority that a lot of his job just involved picks ups and drop offs of items required for functions.

[21] Dawsons claims that Mr Hawke's role expanded in August 2015 after it was awarded one of the University's three catering contracts. Mr Hawke denies that. He says he became busier because there were more functions but he disputes that his role changed.

[22] Clause 31 of Mr Hawke's employment agreement deals with confidential information. It is a comprehensive confidential information clause which is stated to continue after Mr Hawke's employment with Dawsons had ended.

[23] Clause 31 states:

31.1 The Employee undertakes not to disclose to any person, or make use of, any information or material regarding personal details of any other Employee that has been obtained during the course of their employment with the Employer.

31.2 The Employee shall not remove or copy any confidential, or commercially sensitive and commercially valuable information, including client/customer information, from the Employer's premises without the consent of the Employer.

31.3 The restrictions contained in the preceding two clauses under this heading do not apply to:

i. The use or disclosure of such information in the

normal course of the Employee's duties; and

ii. Information which has already become public knowledge other than as a result of a breach of this clause by the Employee.

31.4 The restrictions contained in the first two clauses under this heading apply both during the term of this agreement and after the expiry of the agreement.

31.5 Employees shall not at any time or for any reason whether during the term of this agreement or after its termination, use or disclose to any person any confidential information relating to information or trade secrets of the Employer except so far as may be reasonably necessary to enable the Employee to fulfil the obligations under this agreement.

31.6 Employees shall not disclose any confidential information to any other employee who is not authorised to receive it.

31.7 Employees shall not use any confidential information relating to the Employer's business, or information gained through their employment, to their own benefit, as distinct from the benefit of the Employer.

31.8 Employees shall not use or attempt to use any confidential information in any manner, which may injure or cause loss whether directly or indirectly to the Employer.

31.9 During the course of employment or after termination of employment with the Employer, the Employee shall not directly or indirectly make a record of, or divulge, or communicate to any other person, any information regarding the Employer's business or any matters associated with the Employer. When requested, the Employee hereby agrees to sign a Statutory Declaration stating they are collecting commercially sensitive and valuable information only to perform the tasks required by the Employer and that the commercially sensitive and valuable information will not be passed to others during and after the term of employment. The Employee also irrevocably agrees to sign a Statutory Declaration stating they have returned all copies, in any and every form, of all commercially sensitive and valuable information on the termination of employment with the Employer.

[24] Clause 44 of Mr Hawke's employment agreement is a restraint of trade clause.

It states:

44.1 Employees shall not at any time during the time of this agreement or for a period of 12 months after the termination of employment where the Employee establish, purchase, or

obtain an interest in, be employed by, either directly or indirectly any business in conflict or relation in any way to the employer within a radius of twenty (20 kilometres without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld.

44.2 Should this clause be held to be invalid for any reason, the remainder of the agreement shall continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replacement of the invalid provision.

[25] On 09 August 2016 Dawsons filed an interim injunction application to prevent Mr Hawke from working for Urban Gourmet until 27 July 2017. The matter was accorded urgency and an early substantive investigation meeting was held in lieu of determining the interim application.

[26] In its Statement of Problem Dawsons sought:

(a) A declaration that the restraint of trade clause in Mr Hawke's

employment agreement is valid and enforceable;

(b) A final injunction preventing Mr Hawke from working for Urban

Gourmet before 27 July 2017;

(c) An inquiry into damages, a penalty and costs.

[27] Halfway through the Authority's investigation meeting on 26 August, Mr Swan advised the Authority that Dawsons conceded that the restraint was unreasonable. However notwithstanding that concession, Dawsons continued to pursue its claims against Mr Hawke and maintained that a permanent injunction should be issued against him.

[28] Although it was not pleaded in its Statement of Problem (so Mr Hawke did not have notice of a claim to modify the restraint) in closing submissions Mr Swan submitted that the Authority should modify the restraint to prevent Mr Hawke from working for Urban Gourmet on any matter to do with the University until after

28 October 2016. That would be four months after Mr Hawke gave notice and three months after his employment with Dawsons had ended.

[29] Mr Hawke says he is aware of the ongoing confidentiality obligations in his Dawsons' employment agreement. Mr Hawke told the Authority he understands his obligations under the confidentiality clause, he has not breached this clause, he does not intend to breach this clause, he has not been asked by Urban Gourmet to breach this clause, and he intends to continue to meet the post-employment confidentiality obligations he entered into with Dawsons. Mr Hawke says this is sufficient to protect Dawsons' interests.

[30] Mr Hawke says the restraint clause is anticompetitive. It seeks to prevent him from earning a living in his chosen field within all of Auckland which is where he lives and where his whole life is based. Mr Hawke submits the restraint clause in his Dawsons' employment agreement should be held to be invalid and unenforceable.

The issues

[31] The following issues are to be determined:

(a) Does Dawsons have a legitimate proprietary interest it may protect?

(b) If so, is the restraint not more than is reasonably necessary to protect

Dawsons' legitimate proprietary interest?

(c) If so, is the restraint enforceable?

(d) If so, has Mr Hawke breached the restraint?

(e) If so, has any such breach by Mr Hawke resulted in damage to

Dawsons?

(f) If so, should damages be awarded against Mr Hawke?

(g) If Mr Hawke has breached the restraint clause in his Dawsons'

agreement should a penalty be imposed on him for doing so? (h) What, if any, costs should be awarded?

Does Dawsons have a legitimate proprietary interest it may protect?

[32] The starting point for restrictive covenants are that they are against public policy and therefore prima facie unenforceable. However, the law recognises that

restrictive covenants may be enforceable if the employer has a legitimate proprietary interest to protect and the restraint is no wider than is reasonably necessary to do that.

[33] A restraint which merely attempts to limit or reduce competition is unenforceable. Nor may restraints be used to prevent an employee from competing with a former employer or merely to prevent a former employee from using their skills, experience, general knowledge and knowhow after the employment has ended.

[34] Dawsons bears the onus of establishing on the balance of probabilities that when it entered into the restraint with Mr Wilson in March 20142 it had a legitimate proprietary interest which required protection in relation to Mr Hawke's employment.

[35] In his two affidavits Mr Ross states a number of times that "*all*" of Dawsons' information is confidential so "*everything*"

that Mr Hawke knows about Dawsons falls within the restraint and should be protected. Mr Ross also reiterated that same position a number of times while giving his evidence during the Authority's investigation meeting.

[36] Mr Ross insisted that "*everything*" that Mr Hawke had access to in the course of his employment was a "*trade secret,*" "*intellectual property,*" or "*confidential information*". Mr Ross' position is that "*absolutely everything*" to do with Mr Hawke's employment falls within the protection of the restraint clause.

[37] The law does not permit an employer to put a blanket restriction on all of its information in this way. A restrictive covenant may be held to be reasonable in order to prevent an employer's confidential information being passed on, however unwittingly, by a former employee providing it is limited to an appropriately short period.

[38] *Faccendia Chicken Ltd v. Fowler & Ors*3 defined "*confidential*" information as falling into three categories:

(a) Information which is easily accessible from public sources, which is not confidential and which the employee may use at any time;

2 Reasonableness is to be determined at the time the restraint was entered into, see *Gallagher Group v Welly* [1999] 1 ERNA 490 (CA).

3 [1985] 1 All ER 724.

(b) Information which the employee has been told is confidential, or which is so obviously confidential because of its nature or character, but which is also information which remains in the employee's head and is part of their own skill and knowledge which they use in the course of their employment.

This information cannot be disclosed by an employee while employed, but they may use all of their own skills and knowledge for their own benefit after the employment relationship has ended. This sort of information may be able to be protected by an express restraint which is stated to continue after the termination of an employee's employment;

(c) Trade secrets which are so confidential they cannot be used by the employee to benefit anyone but the employer.

[39] The Employment Court in *Trans Pacific Industries (NZ) Ltd v. Harris and Smart Environmental Ltd*4 held that information that is clearly intended to remain confidential, but which is not necessarily as strictly confidential as trade secrets may still be protected. I do not consider there is any such information here that is not already protected by the confidentiality clause.

[40] Mr Ross accepted that none of the information Mr Hawke was privy to in his employment with Dawsons was marked as being "*confidential*". Mr Ross also accepted that Mr Hawke was never expressly told that certain information was considered "*confidential*" or would fall within the confidential information clause in his employment agreement.

[41] In the absence of express confidentiality, the question for the Authority is whether Mr Hawke had access to information that was so obviously by its nature or character confidential. I am not satisfied there was.

[42] Mr Ross failed to identify any information that could reasonably be considered to be a trade secret or intellectual property. There was no evidence, other than Mr Ross' broad but unsupported assertion, that Mr Hawke ever had access to any such

information.

4 [2013] NZEmpC 97 at [38].

[43] I would have expected Mr Ross to have been able to have identified specific information which was either a trade secret or intellectual property if that was in fact the case, so I consider it significant that he could not do so.

[44] Mr Ross identified the following items as confidential information – pricing, menus, University contacts and relationships with Events Mangers and University staff. I am not satisfied that any of these items in this particular case, based on the evidence presented to the Authority, amounts to confidential information which may reasonably be protected by a restraint clause.

[45] I do not accept Mr Ross' evidence that Mr Hawke had developed sufficient influence over Dawsons' customers to entitle it to protect such relationships by way of a restraint. The only evidence of this was Mr Ross' assertion.

[46] First, Dawsons contractual relationship was with the University. Mr Hawke had no knowledge of the contract between Dawsons and the University – other than knowing one existed. Mr Hawke was not privy to the contractual terms, he was not involved in negotiating the contract, and he had no ability at all to influence any of the decision makers at the University who were responsible for deciding which companies would be approved to provide catering services for University functions.

[47] I find that Mr Hawke's relationships with the Event Managers or Event Assistants or the University staff were not relationships of any real influence that would be capable of being protected by a restraint.

[48] They were purely transactional relationships. Mr Hawke would talk to different people who were organising University functions to ascertain their function requirements, he would then quote for the desired services and if Dawsons received the order then Mr Hawke would ensure the items that had been ordered were delivered.

[49] Decisions about non-standard pricing (for items that were not priced as per the published menu) were made by managers who were at a higher level than Mr Hawke. Mr Hawke was not aware of what margins were applied to what items. Nor did he know what items (other than offering free glassware) could be discounted or by what level in order to secure a function order.

[50] The evidence was that the Event Managers and Event Assistants would change. Mr Ross was unable to name any University employee over whom Mr Hawke was likely to have influence or to explain how and why Mr Hawke would have had any such alleged influence. I consider that omission significant.

[51] I accept Mr Hawke's evidence that when employed by Dawsons he only knew two Event Managers by name and one of them is no longer employed by the University. The evidence before the Authority is that names of the University Event Managers could be found by searching the University's website and/or by making inquiries with the University, so I do not consider this information can be confidential to Dawsons.

[52] I am therefore not satisfied that the names of any Event Managers who engaged Dawsons to cater functions while Mr Hawke was employed by Dawsons may be protected by a post termination restraint on the basis such information is already in the public domain.

[53] I do not accept Mr Ross' evidence that Dawsons' menus are capable of giving rise to a legitimate proprietary interest which can reasonably be protected by a post termination restraint.

[54] Mr Ross accepted that Dawsons had provided the University with a list of all menu items available to be ordered with the price of each item noted on the menu beside each item. The other two University approved catering companies had apparently done likewise.

[55] The evidence was that these menus were available not only on the University intranet but also to at least one (and likely more) non-University employee. I accept Mr Hawke's evidence that the items offered by the different catering companies were generally known as they were mostly standard sandwiches, pastries and sweet treats. It was also open to one of the approved catering companies to ask an Event Manger what menu items had been offered at any particular event.

[56] Mr Ross confirmed to the Authority that he had access to the menus of the other two University approved catering companies who provided services to the University and that he used that information when formulating Dawsons' menu offerings. I am therefore not satisfied menus were confidential because they could clearly be obtained other than through Mr Hawke's employment with Dawsons.

[57] Even if the menu was confidential then it would be covered by clause 31 of the agreement, so I do not consider it reasonably necessary for Dawsons to include a restraint clause to protect a menu, which is also an item which is subject to change at Dawsons' discretion.

[58] Mr Ross' assertion that Mr Hawke had *"knowledge of Dawsons' internal workings"* that needed to be protected by a restraint clause is not supported by actual evidence. Mr Ross was unable to explain what these allegedly confidential *"internal workings"* were or why they needed to be protected. Nor did Mr Hawke know what Mr Ross was referring to.

[59] I find that Mr Hawke did a relatively simple job and was paid less than the average male annual wage for the work he performed.

[60] Mr Hawke met with University staff to discuss their function requirements, he put together an event proposal, which involved him advising University staff of the price of the items they wanted if they ordered off the menu which had listed prices.

[61] If it was a bespoke event Mr Hawke would pass the events requirements to a more senior manager to price the bespoke items that had been requested by University staff. Mr Hawke then ensured that the ordered items were delivered to the event as per the order.

[62] The evidence established that Dawsons used standard restraint clauses in its agreements for all staff. There was no discussion by Dawsons with Mr Hawke about his role or the need for a restraint when he was offered employment. He was just given an agreement that contained a restraint and was asked to sign it if he accepted the offer of employment.

[63] Mr Hawke says he signed without legal advice, while Dawsons had specifically obtained legal advice regarding the restraint before incorporating it into its standard template. I consider there was unequal bargaining power in this case.

[64] The Authority heard evidence from two former Dawson employees (one was Mr Hawke's former manager and the other

is a Dawsons shareholder who also used to be the third most senior person at Dawsons).

[65] Both of these former employees were more senior than Mr Hawke and they were both paid considerably more than he was. Both former employees had restraints that were very similar to Mr Hawke's and both former employees are currently employed by Dawsons' competitors. I note that Dawsons did not enforce the restraint clauses for either of these more senior former employees.

[66] I find that Dawsons has been unable to discharge its onus of establishing on the balance of probabilities that it had a legitimate proprietary interest that was reasonably capable of being protected by a post-termination restraint in respect of Mr Hawke's employment.

[67] I find that the clause 44 restraint in Mr Hawke's employment is invalid, unreasonable and unenforceable. Accordingly none of Dawsons' claims succeed.

[68] Even if I had held there to be a legitimate proprietary interest that was capable of being protected by a reasonable post termination restraint, I note that Dawsons conceded the restraint clause in this case as unreasonable. So on that basis it would not have been held to be valid or enforceable.

What if any costs should be awarded?

[69] Mr Hawke as the successful party is entitled to a contribution towards his actual costs. The parties have 7 days within which to agree costs. If agreement is not reached then Mr Hawke has 14 days from the date of this determination to file a costs application, with Dawsons having 21 days from the date of this determination to file its costs response.

[70] As indicated at the investigation meeting, this may be an appropriate matter for the Authority to consider increasing the notional daily tariff due to the manner in which Dawsons has conducted its case. The parties are invited to specifically address that in any costs submissions they file.

Rachel Larmer

Member of the Employment Relations Authority
