Determination Number: WA 71/07
File Number: 5080185

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Lawrence Fenerty (applicant)
AND	Max Tarr Industrial Limited (respondent)
REPRESENTATIVES	Graham Rossiter for Lawrence Fenerty Geoff O'Sullivan for Max Tarr Industrial Limited
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS	Received by 30 April 2007
DATE OF DETERMINATION	7 May 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed on 2 March 2007 Mr Fenerty asks the Authority to declare a restrictive covenant claimed by his former employer, the Company, to be not part of his employment agreement or, in the alternative, that the relevant clause is void and unenforceable.

2. The Company says Mr Fenerty is bound by the relevant restraint of trade clause.

3. Mediation on 30 March did not settle the parties' employment relationship problem.

4. In an earlier conference call the parties agreed, in the event of the matter not settling in mediation, to an investigation in Palmerston North on 19 April. As it happened, and by way of a letter dated 10 April, counsel for the respondent, Mr Geoff O'Sullivan, advised that Mr Tarr, its principal witness, had been hospitalised. It therefore proved necessary to abandon the 19 April investigation.

5. In a subsequent telephone conference call, the parties' representatives agreed that the Authority would proceed to investigate and determine the matter on the papers, i.e. after considering witness statements and submissions from the parties. A filing timetable was also agreed.

Background

6. The Company provides industrial electrical automation and process control services. Mr Tarr is its managing director.

7. Following an interview by Mr Tarr and Jonathan Hogg, the respondent's manager, Mr Fenerty was employed by the Company in the area of industrial electrical installation and maintenance from September 2005 until 12 February 2007.

8. Mr Fenerty says he was given a copy of an employment agreement and offered a position. He took the agreement home overnight before signing it and returning the document to the Company. He says he received his copy of the employment agreement after starting with the Company. Mr Tarr says the original employment agreement issued to him contains two miss-fed pages and, as a result, an incomplete clause 22. He accepts the Company has a signed copy of an agreement containing a legible clause 22.

9. Clause 22 of the parties' agreement reads in full as follows:

> *Employees may not take employment with any of the employers significant or regular clients within 12 months of leaving the employer. Significant or regular clients are those with whom the employer undertakes either at least one job per month, or an average of 12 jobs per annum, or 12 days work per annum, or have sales exceeding $10,000.*

10. Mr Fenerty cannot recall discussing the now disputed provision, clause 22. He does not say the clause was not in the agreement, only that he does not remember seeing it.

11. Mr Fenerty accepts that in the course of his employment with the respondent he carried out *"a reasonably significant amount of work"* (par 5 of his first witness statement) for what is now his new employer.

12. After accepting the offer of employment with his new employer, Mr Fenerty wrote a letter of resignation to the Company. The latter promptly advised the applicant of its view that, because of the provisions in his employment agreement, he could not go and work for a client. Mr Fenerty says that he checked his copy of their employment agreement and discovered that the relevant page was unreadable (refer to the copy attached to his counsel's, Mr Graham Rossiter's, letter of 12 March). He sought and obtained from Mr Hogg a clear copy of that page.

13. The Company subsequently amended its position and advised Mr Fenerty he could work for the client provided he did not carry out any of the work for it that he had previously undertaken on the respondent's behalf. The applicant says he told Messrs Tarr and Hogg he would not do any installation or maintenance electrical work for his new employer until the issues relating to his employment agreement were resolved.

The Company's Position

14. Amongst other things, the respondent says Mr Fenerty was employed as a specialist in technical industrial work.

15. It says Mr Fenerty was advised of his right to seek independent legal advice before signing the generic industrial tradesmen employment agreement offered to him. The applicant was aware of the provision and was provided with opportunities to seek clarification. It is difficult to believe Mr Fenerty would have signed the agreement with the defective page as filed by the applicant. The original, computer generated, copy has no blurred or truncated pages: the document produced by the applicant is obviously a photocopy miss feed.

16. Mr Fenerty was highly skilled, intelligent and confident and would have been well aware of his obligations to the Company which he accepted without comment or change to the employment agreement offered to him.

17. It says clause 22 is designed to prevent employees leaving and taking with them significant and regular clients of the Company. Mr Fenerty's new employer fits this category: in other words the restraint is limited and particular.

18. While initially advised by Mr Fenerty the work he would be doing for his new employer was not the sort he had carried out for the applicant, the Company was subsequently informed Mr Fenerty would be doing exactly the work for his new employer that he had carried out for the applicant. He would thereby clearly be in breach of the restraint clause in their employment agreement.

19. The restraint of trade clause is designed to protect the Company's significant or regular clientele for 12 months which under the circumstances is not unreasonable: *Fuel Espresso Limited* v *Hsieh* [2007] NZCA 58.

20. Mr Fenerty was responsible for developing and maintaining the Company's relationship with what is now his new employer: he now seeks to replace the respondent's relationship with his own. The applicant began servicing his new employer on behalf of the Company in September and December 2005. In 2006 he undertook most of the 31 jobs the Company did for that client, especially the larger and more technical projects. The value of sales to that client from April 2006 to March 2007 totalled $116,483.36 + GST. The applicant was predominantly assigned that client.

21. Clause 22 is neither too long a term or overly broad and the Company must be able to enforce it as it ensures the respondent some measure of protection and allows it to commit to staff training and improvement without fear this will lead to the eventual loss of its significant and regular clients.

22. The Company is entitled to protect itself by agreement against losses caused by employees soliciting valuable work away from it when they leave. Under these circumstances the 12 months restraint is not onerous or unreasonable, particularly as it does not stop Mr Fenerty working for a competitor, but only precludes him for that period for working for a significant client of the Company.

23. The Company says that running a business of 32 staff and hundreds of clients is very demanding. If it is unable to enforce Mr Fenerty's agreement then other staff will assume they too do not have to adhere to their contracts in whatever way may suit them at any time. It is fundamental to any business that agreements are honoured by the parties to those agreements.

Mr Fenerty's Position

24. Amongst other arguments, the applicant says there are two basic issues to this problem:

a. Was clause 22 validly incorporated into the employment agreement and therefore is it binding on Mr Fenerty? And,

b. If binding on the applicant, what is the legal efficacy of Clause 22?

25. The starting point is that restraints of trade clauses are void as being contrary to public policy. The burden is therefore on an employer to justify and sustain the *"inherent vice"* of a restrictive covenant: *Radio Horowhenua Limited* v *Bradley* [1993] 2 ERNZ 1085, p. 1096.

26. In considering whether a restraint is reasonable in all the circumstances regard must be given to the history of the employment, the nature of the employer's interest to be protected, the likely effect on it of the former employee taking up a position with a competitor, the likely effect on the employee of the covenant being enforced and any relevant considerations of public interest: *Radio Horowhenua* (above), p. 1094.

27. A restraint must be sustainable with particular reference to the specific proprietary interest asserted by the employer: *Force Four NZ Limited* v *Curling* [1995] 2 ERNZ 282. The onus is therefore on the Company to establish a valid proprietary interest: the fact that he was an electrician who dealt with customers of the respondent is not in itself sufficient.

28. If the employer establishes a valid proprietary interest, the next and crucial issue is that of reasonableness of the restraint. Generally speaking reasonableness is determined having regard to the cumulative effects of duration, geography and the restricted activities. For example, there are numerous instances of clauses of 12 months duration being struck down: *Cain* v *Turner and Growers Limited* [1998] 3 ERNZ 314, etc. The specified restraint of 12 months is manifestly excessive: if the restraint is otherwise justified, it is suggested a maximum reasonable restraint would be one of 3 months.

29. The restraint is also unreasonable because of its unlimited geographical scope. And because it prevents the applicant from working for a client of the respondent in any capacity.

30. The applicant says he left the Company's employment for various reasons and that he is now earning approximately $8,000 less than what he earned in his last year with the respondent.

Discussion and Findings

31. I find that no issue arises in respect of the defective page as the applicant accepts reading and signing off a clear employment agreement with the Company, which incorporated clause 22.

32. Mr Fenerty properly concedes that his new employer was a significant client as defined by clause 22 of his previous employment agreement.

33. I am satisfied there is no evidence of Mr Fenerty using his position with the Company to undermine its relationship with the applicant's new employer, or that he enjoyed personal knowledge and influence over his new employer and thereby undermined the Company's good will in and with that client.

34. While Mr Fenerty often acted as the Company's representative in respect of that client, I am not satisfied from the evidence he did so exclusively or as a specialist (refer to his generic employment agreement, etc). I also note that Mr Fenerty's relationship with the client, now his employer, was for a relatively limited period of time, effectively a little over a year.

35. I therefore do not accept that the Company enjoyed, through the applicant, a proprietary interest in the client.

36. Unlike the restraints sought and granted in *Fuel Espresso Limited* (above) (effectively 70 metres and for a little over one month), this is an instance of an employer attempting to impose a geographically unlimited restraint of trade for 12 months.

37. Significantly, in *Fuel Espresso Limited* (above), after having regard no doubt to time and distance restraints sought and the fact that – as in this application – it was dealing with an initial and only agreement of the parties, the Court of Appeal did not find an extra *"premium"* (par 18) was required for a restraint of trade clause. It quoted with approval the reference in Treitel (9ed) *Contract* at 66, that a person who makes a commercial promise expects to have to perform it and, correspondingly, one who receives such a promise expects it to be kept. Expressed with even greater efficiency:

> *Agreements are made to be kept*.
>
> (*Fuel Espresso Limited* (above), par 21)

38. Having regard to this recent decision and the facts of the case, in particular the nature of Mr Fenerty's previous position with the Company, I am satisfied an agreement was made to be kept but only to the extent of the reasonableness of that agreement. While clearly unreasonable because of its unlimited scope, geography can be ignored for the purposes of this determination because the location is unchanged in Mr Fenerty's situation.

39. The purported duration of twelve months cannot be ignored: it is clearly excessive. That is because the applicant was employed not as a specialist, nor exclusively, and by way of a generic employment agreement. And, while his new employer appears to have been one of the respondent's significant clients, that relationship has to be balanced by public policy, including Mr Fenerty's right to work and his new employer's right to use whoever it chooses to services its requirements: *Radio Horowhenua*, above.

40. As proposed by the applicant, and bearing in mind the practical effect of the *Fuel Espresso Limited* decision (above), I am satisfied that the restraint of trade agreement between the parties should be amended to a duration of three months.

Determination

41. For the reasons set out above I am satisfied that Lawrence Fenerty is not to undertake any duties for his current employer that he performed for Max Tarr Industrial Limited for three months from the date he commenced his present employment.

42. Costs are reserved.

Denis Asher
Member of Employment Relations Authority