

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 281
5498581

BETWEEN

PETER FURLONG
Applicant

A N D

INTERNATIONAL CARGO
EXPRESS 2013 LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Chris Patterson, Counsel for the Applicant
Peter van Keulen, Counsel for the Respondent

Investigation Meeting: 22 and 23 April 2015 and 11 June 2015 at Auckland

Date of Determination: 17 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Furlong) commenced employment with the respondent (New Ice) on 1 August 2013 in the position of General Manager based in Auckland. Mr Furlong was dismissed from that role at a meeting with New Ice on 21 May 2014 which resulted in his employment coming to an end on notice on 2 July 2014.

[2] Effective the date that Mr Furlong commenced his employment with New Ice, that entity settled the purchase of a freight forwarding and logistics business effectively in three divisions. There was a freight forwarding and logistics business in Auckland, a similar business in Christchurch and a freight forwarding and logistics business specialising in perishable product based in Auckland.

[3] The vendor of those three entities will be referred to throughout this determination when I refer to them collectively as the Old Ice companies. The elements of that collective were respectively Old Ice Christchurch (in receivership and liquidation), Old Ice Perishable (a wholly owned subsidiary of Old Ice Christchurch)

and Old Ice Auckland. Old Ice Auckland has two shareholders each owning 50% of the shares; Mr Furlong and his wife own half the shares through a family trust and the other half is owned by Old Ice Christchurch.

[4] The purchase was effected by an agreement for sale and purchase between New Ice and each of the three individual Old Ice Companies with New Ice paying \$1.545m for the Old Ice companies collectively, \$200,000 of which was deferred for 12 months under a term loan agreement due for repayment on 26 July 2014 between New Ice and Old Ice Auckland. The payment due under the term loan agreement was guaranteed by Brent Paulsen and Christine Paulsen his wife. Brent Paulsen is the sole shareholder and director of New Ice and Christine Paulsen is described as the Chief Operating Officer of New Ice.

[5] For the avoidance of doubt, the term loan just referred to was money lent to New Ice by Old Ice Auckland and notwithstanding it falling due on 26 July 2014, and being guaranteed by Mr and Ms Paulsen, the loan remains unpaid.

[6] It is also apparent that Mr and Ms Furlong sought to purchase the 50% of the shares in Old Ice Auckland that they did not own but were unsuccessful in that regard. Some time after October 2012 the Old Ice companies approached New Ice to see if New Ice was interested in purchasing the Old Ice businesses. This was because, according to the evidence of Mr Furlong, the collective Old Ice companies were struggling, his evidence being that the only company making money was Old Ice Auckland, the company that he and his wife half owned.

[7] Having approached New Ice and established that New Ice was interested in purchasing the totality of the companies, the parties subsequently reached agreement that in terms of the purchase, Mr Furlong would be employed by New Ice as the General Manager, Auckland and in return, Mr Furlong, and the other directors and shareholders of Old Ice companies entered into a three year restraint of trade.

[8] Mr Furlong's evidence, which is not disputed on this point and which in any event makes commercial sense, is that he would never have approached New Ice to purchase Old Ice if he did not have the certainty of ongoing employment in the business and his agreement to the restraint of trade was based on his conviction that he would continue to be employed by New Ice and so the restraint would never come into play.

[9] There is, however, dispute between the parties about the terms of the employment agreement between Mr Furlong and New Ice although it is common ground that just as Mr Furlong wished to continue to work in the business (albeit with new ownership) so New Ice sought to retain Mr Furlong in the business because of his local knowledge and because the head office of New Ice was based not in Auckland but in Christchurch.

[10] The parties were at odds initially about Mr Furlong's motor vehicle because although his employment agreement provided for him to have the use a fully maintained company vehicle, Mr Furlong sought to retain the vehicle that he had previously run through Old Ice Auckland and New Ice considered that particular vehicle to be more costly than other alternatives. In any event that matter was resolved.

[11] What was not resolved were issues around a bonus scheme. It is common cause that the employment agreement gives Mr Furlong access to a bonus scheme; the issue is what the quantum of that scheme is and how it operates. Mr Furlong says that the details of that arrangement were worked out by negotiation after the execution of the employment agreement while New Ice resists that claim.

[12] When Mr Furlong commenced his duties for New Ice he remained a director and a shareholder of Old Ice Auckland, the shareholding being through his family trust.

[13] One of the early challenges for New Ice involved the reconciliation of payments made by customers to the various entities supplying those customers with services.

[14] Given the nature of the business that New Ice and Old Ice were in, at settlement date it would have been practically impossible for the vendor and purchaser to reconcile matters on that day. This is because of goods being in transit and any number of consignments could have originated prior to settlement with one or other of the entities involved in the transaction for sale and purchase, but then arrived at its destination after settlement. Old Ice and New Ice agreed on a formula for the correct disposition of monies received in those circumstances. That formula is recorded in a work in progress document. Without wishing to dwell on the detail of this agreement it is enough for me to say that the essence of the commercial

arrangement that the parties made on this matter was that the legal entity that incurred the costs of the consignment got the customer payment.

[15] But some consignments, by their nature, were straightforward. Airfreight is an example of that. Others, like imported sea freight, is more challenging, especially as costs are incurred at the beginning and the end of the process but the entity supplying services cannot render an invoice until the consignment is delivered to the New Zealand customer. By way of example only, Old Ice might have been responsible for the costs at the origin of the shipment, New Ice may have paid the arrival costs in New Zealand and because the ship has arrived after settlement of the agreement for sale and purchase of the businesses, New Ice has to raise the invoice and then the reconciliation agreement must return to Old Ice the revenue that it is entitled to as the initiator of the first part of that transaction.

[16] But there is a second limb of the agreement between the two companies concerning the reconciliation of payments. It seems that on a reasonably frequent basis, customers paid accounts to the wrong legal entity and so that too had to be reconciled. But the important point about this second kind of reconciliation is that it is not covered by the agreement between the parties incorporated within their work in progress document. This is because, certainly on the evidence of New Ice, it was not expected to be problematical, that is New Ice did not expect that there would be a continuing problem with customers paying money into the wrong bank account.

[17] New Ice's evidence is that it expected to be able to deal with these incorrect lodgements as part of the wider reconciliation process and with an exception that I will come to next, it intended to leave these matters until the reconciliation exercise contemplated by the work in progress document, was undertaken.

[18] The exception is where either one of the contracting entities (Old Ice or New Ice) thought the money should be transferred immediately because of the particular circumstances of the transaction (which happened from time to time in respect to particular payments) or where the client wanted the money it had paid returned back to them in order that it could for example pay the money into the correct account.

[19] It seems common ground that the events leading to Mr Furlong's dismissal for cause began on 14 April 2014 when a senior manager with New Ice sent an email to

Mr Furlong asking for Old Ice to pay a sum of \$14,659.69 back to New Ice because of a customer request.

[20] Mr Furlong protested and said there had not been a reconciliation provided by New Ice. New Ice persevered with its request that Mr Furlong authorise the transfer and by email dated 1 May 2014, Mr Furlong indicated he had referred the matter to his wife Jackui because he had “*stepped away*” from handling Old Ice matters.

[21] Mr Furlong sought further and better particulars but no payment was forthcoming. As a result, New Ice commenced a disciplinary process, there was a disciplinary meeting held on 14 May 2014, a preliminary decision was issued on 21 May 2014 and a further meeting was held with Mr Furlong that same day to discuss his view of penalty. The final decision was notified to Mr Furlong that day and confirmed by letter dated 23 May 2014. He was dismissed on notice. A personal grievance was subsequently raised in the usual way.

Issues

[22] It is worth my reiterating the self-evident observation that the only matter that I am empowered to investigate is the employment relationship problem raised by Mr Furlong against his employers New Ice. I have no power and therefore no right to inquire into the commercial aspects of this dispute and refer to them only where it seems to me to assist in understanding the employment relationship problem.

[23] It is apparent that there are a number of unresolved commercial issues between these parties; they must be resolved in another forum.

[24] For the purposes of the employment relationship problem, the issues I must consider are as follows:

- (a) Was Mr Furlong unjustifiably dismissed; and
- (b) If yes, are there other breaches; and
- (c) What remedies are due.

Does Mr Furlong have a viable personal grievance?

[25] I have not been persuaded that Mr Furlong has any viable personal grievance. I conclude that a fair and reasonable employer in the position of New Ice could have

concluded that Mr Furlong was guilty of serious misconduct and accordingly that the sanction of dismissal on notice was available.

[26] Of course, the law on this matter is clear that all that need be demonstrated by an employer in this situation is that the decision that it made was one of a number of decisions which it might have made in the particular circumstances of the case. It is enough that the outcome is one of the potential lawful outcomes and I am satisfied that that is the position here: *Angus v. Ports of Auckland Limited* [2011] NZ EmpC 160 applied.

[27] New Ice, through its General Manager, requested that Mr Furlong as director of Old Ice Auckland authorise repatriation of funds totalling \$14,659.69 to New Ice from Old Ice on the basis the various discrete amounts totalling that sum were monies that clients had requested repayment of.

[28] Mr Furlong's response was to attribute his failure to pay to the fact that the reconciliation between Old Ice and New Ice had yet to take place. In particular, Mr Furlong's evidence is that while he (through his wife) had provided a reconciliation from Old Ice in September 2013, there had been no response whatever from New Ice until this disciplinary matter arose and indeed it was not until 17 April 2014 (according to Mr Furlong) that Old Ice received a reconciliation statement from New Ice.

[29] By 5 May 2014, notwithstanding the attempts by New Ice to get Mr Furlong to address the issue, there had been no change in his position and accordingly New Ice determined to commence a disciplinary investigation.

[30] That disciplinary investigation was undertaken by Christine Paulsen the Chief Operating Officer of New Ice. There was much made at the investigation meeting about whether Ms Paulsen was the correct person to undertake this disciplinary investigation and the suggestion was made for Mr Furlong that in fact the decision making in regard to his disciplinary process was undertaken by Mr Paulsen; in effect it was suggested that Ms Paulsen was simply a cypher for her husband.

[31] New Ice vigorously reject that allegation and say simply that Ms Paulsen was the correct person to undertake the disciplinary investigation because she had a grip of the financials of the business and Mr Paulsen did not. Moreover, New Ice were as clear as could be that the decisions necessary during the disciplinary process were

made by Ms Paulsen and not by her husband and indeed, as Chief Operating Officer of the employer there is no reason why she could not make those decisions.

[32] However, the point is also made for Mr Furlong that Ms Paulsen is neither a director nor a shareholder of New Ice. That is as may be, but the fact is that both she and Mr Paulsen state she was involved in the day to day business of New Ice and indeed it would not be putting it too strongly to say that the couple ran the business together. Mr Paulsen gave evidence to that effect and nothing I heard dislodged that view.

[33] Technically of course, the employment agreement is between Mr Paulsen (or nominee) and Mr Furlong but I do not think any weight can be put on that technicality. It is apparent on the evidence that it was a term of the agreement between New Ice and Old Ice that Mr Furlong would be employed by New Ice as its General Manager, Auckland and I am satisfied that the employment agreement before me is the agreement under which Mr Furlong was effectively employed by New Ice as its General Manager, Auckland. That view of matters is supported to some extent by a document which Mr Furlong wants me to rely upon which he says constitutes the agreement in respect to his bonus and which very clearly identifies a corporate role in the position of General Manager where the business is described as “*combination of Ice Auckland Dry, Ice Auckland Perishables*”.

[34] It is important to Mr Furlong’s argument concerning the disciplinary process that the particular payments that constitute in aggregate the amount that Mr Furlong was asked to authorise repatriation of, form part of the overall reconciliation argument between New Ice and Old Ice.

[35] But that is not the view that New Ice takes of the matter and I agree with it. There is evidence before me of numbers of individual payments being made by each entity to the other over the period Mr Furlong was employed where the particular payment was identified as being, in effect, in a special category falling outside the totality of the reconciliation.

[36] That much is evident from the evidence of Ms Paulsen which I accept and equally it is evident from the evidence of Ms Furlong which I also accept. Both parties agree that payments were made from time to time from one entity to the other to rectify particular problems associated with the sale of Old Ice to New Ice.

[37] Analysed in this way, the question whether the overall reconciliation between the parties ought somehow to predate the resolution of this particular set of transactions, rather falls away.

[38] It would seem to me inevitable that a reconciliation of the sort contemplated initially by the work in progress agreement and even extended somewhat as a consequence of the apparent continuing confusion, would be a large and time consuming exercise.

[39] The instruction given to Mr Furlong on 14 April 2014 related to a particular group of transactions where customers sought repayments of sums they had paid to the wrong entity.

[40] It was available to New Ice to treat this particular group of payments as falling outside the reconciliation arrangements. What it was doing by treating the matter in this way is no different from the process it had adopted on earlier occasions in respect of other so-called recall payment situations.

[41] A good and fair employer could instruct an employee, in those circumstances, to deal with a particular series of payments in a particular way and the evidence that I heard suggested, as I have already noted, that there were other occasions on which precisely this sort of situation, involving recall payments, was dealt with in precisely this way.

[42] I consider that the reason Mr Furlong chose not to deal with the request in the way that other similar requests had been dealt with in the past, was because of a growing anxiety about the basis of the commercial arrangement. In Mr Furlong's brief of evidence for example, he directly juxtaposes (as well he might) the intelligence that the vendor loan was not to be repaid on due date which intelligence had been provided to him on 31 March 2014, literally 14 days before he gets the instruction from New Ice's Group General Manager to make the payments in respect of the recall amounts. Mr Furlong describes himself as being "*extremely distressed*" about the intimation that the vendor loan was not to be repaid on due date.

[43] It is difficult not to see the commercial realities of the situation not clouding his judgement and causing him to neglect his obligations to his employer.

[44] Mr Furlong's evidence is that he was shocked that New Ice was demanding him to take steps in the matter because according to Mr Furlong, it was a matter for his wife and not for him.

[45] But Mr Furlong was a general manager, Auckland employed by New Ice and by virtue of his previous association with Old Ice, to use the phrase New Ice used in its disciplinary meeting, Mr Furlong had "*control of*" the funds "*which belong to this company* [that is New Ice]".

[46] Mr Furlong was accused of a failure to carry out lawful instructions, a misuse of his employer's property or funds and acting in a way that destroyed the necessary trust and confidence that must exist between employer and employee.

[47] The only significant issue in terms of the procedure that New Ice adopted that was raised by Mr Furlong was the complaint that it was Ms Paulsen rather than Mr Paulsen who was involved in the disciplinary process and I have already dealt with that.

[48] It seems to me that Ms Paulsen adopted a measured and sensible pattern in dealing with the issues. There were concerns about Mr Furlong's behaviour on the issue and having established that there was a pro forma case to answer, Ms Paulsen caused a disciplinary letter to be written which set out in clear terms what it was that Mr Furlong had to respond to, there were then two successive disciplinary meetings at which Mr Furlong was present and able to engage with the decision-maker and the evidence of the paper trail which is before me and which I have studied carefully suggests that Ms Paulsen went to some considerable lengths to consider and make judgments about Mr Furlong's responses.

[49] The fact that she did not accept the thrust of what he was saying does not mean that she did not consider what Mr Furlong had proposed by way of explanation and I am satisfied on the basis of a study of that material that it was available to her to reach the somewhat jaundiced conclusions that she did reach.

[50] The substantive decision to dismiss is based squarely on Ms Paulsen's conclusions that Mr Furlong failed to follow a lawful and reasonable instruction and could no longer be trusted to act in the interests of New Ice. Mr Furlong challenges both of those conclusions.

[51] There is no doubt in my mind that Mr Furlong was given an instruction by way of the email of 14 April 2014 and I am equally satisfied on the evidence I heard that that instruction was a lawful and a reasonable one.

[52] To demonstrate the truth of that conclusion, I need only refer to the fact that, even on Mr Furlong's evidence, he had previously authorised similar recall payments which would suggest that there was nothing unique or unusual about this particular set of payments. Moreover, it is apparent on the evidence that post-dismissal the moneys in question were in fact repatriated to New Ice anyway.

[53] Moreover, the employment agreement contains the usual provisions requiring the employee to do work as directed by the employer and there was a generic provision in the employment agreement as well requiring staff to "*appreciate the authority of management*".

[54] New Ice's position was that the payments it sought to have repatriated were the sum of invoices that were raised by New Ice and in respect of 10 of those total of 15 invoices, money was paid into the bank account of Old Ice and the customers (customers of New Ice) had requested the money be refunded.

[55] Despite the instruction and despite the disciplinary process that followed, Mr Furlong failed to make the transfers of funds back to New Ice notwithstanding the evidence that the customers had requested that and the fact that he controlled the accounts in which the money was reposing.

[56] I agree with counsel for New Ice that Mr Furlong's explanations can be distilled down to two principles. The first is that payment was withheld because the reconciliation negotiation had not yet taken place and the second was that it was not his responsibility but someone else's (either his wife's, or another senior manager in the wider group, Mr Carville).

[57] As I have already noted, those explanations were considered by Ms Paulsen and she concluded that they did not excuse the conduct. As to the first, again as I have already noted, Ms Paulsen did not accept that this particular set of payments ought to await the wider reconciliation and as to the second, Mr Furlong controlled the accounts in which the money was lying, Mr Furlong was a senior manager with New Ice and was therefore obligated to protect and enhance New Ice's business interests.

[58] I am directed to *Bosher v. Wellington Combined Taxis Ltd* [2013] NZERA Wellington 139 which it is said is supportive of Mr Furlong's position. I do not agree. Mr Bosher was found to have been unjustifiably dismissed by the Authority but the reason for the dismissal in Mr Bosher's case was because of a failure by a company he controlled to make payments of moneys it owed to Mr Bosher's employer and Mr Bosher's employer decided it had lost trust and confidence in him because of the failure of his company to make the continuing loan repayments.

[59] But the gravamen of the Authority's decision is that Mr Bosher himself maintained his bona fides vis-à-vis the employer and it was wrong of the employer to confuse, in effect, Mr Bosher with his company.

[60] Moreover in *Bosher*, the issue there was moneys owed by one limited liability company to another with the employee having an employment relationship with one company and a governing directorship role with the other. In the instant case, there is little doubt that the money in question belonged to New Ice; it was New Ice's money because it was money owed to New Ice in respect to invoices raised by New Ice. In effect Mr Furlong's failure to respond to New Ice's instruction meant he was standing between New Ice and its property.

[61] Counsel for Mr Furlong also directs me to *Hally Labels Ltd v. Powell* [2011] NZEmpC 63 and *Sky Network Television v. Duncan* [1998] 3 ERNZ 917 which it is said are authority for the proposition that where a dispute exists an innocent party to an employment agreement can only cancel for breach after a dispute resolution process. Again, I am not persuaded that these decisions assist Mr Furlong. If there was an issue about the lawfulness of the instruction, I would have expected Mr Furlong to raise it at the time. He did not. Indeed, as I have already noted above, there is ample evidence that Mr Furlong authorised earlier payments in exactly similar circumstances back to New Ice and in the particular circumstances of these payments, they were repatriated to New Ice on 30 June 2014, after the dismissal. Indeed, there was no suggestion at the time of the pertinent events that there was any issue between the parties concerning the lawfulness of the request.

[62] I am satisfied then that these decisions do not assist Mr Furlong either.

[63] Given my conclusion that Mr Furlong was issued with a lawful and reasonable instruction which he chose to disobey, I am satisfied that, based on the relevant

provisions in the employment agreement on which the employer relies and its appropriate investigation into the matters complained of, it was available to a fair and reasonable employer in the position New Ice was in to conclude that Mr Furlong was guilty of serious misconduct and therefore potentially subject to the ultimate employment sanction of dismissal.

[64] For the avoidance of doubt, I reach precisely the same conclusion in respect of the trust and confidence allegation. Mr Furlong had made entirely similar payments in similar circumstances previously but effectively chose to make some sort of stand on this occasion by refusing the request to transfer the money back.

[65] In those circumstances, I again conclude that a fair and reasonable employer in New Ice's position could conclude that its trust and confidence in Mr Furlong as an employee of New Ice was fatally compromised because it was available to New Ice to conclude, as I fancy it did, that Mr Furlong was more interested in protecting the interests of Old Ice than he was in furthering the interests of New Ice.

[66] That is so, it seems to me, notwithstanding the involvement of the two legal entities. Mr Furlong pleads that the request made of him was effectively an improper request falling, it is said, outside the aegis of his employment with New Ice. But it seems to me that submission flies in the face of the evidence. The evidence was that the money in dispute was money owed to New Ice as a consequence of New Ice having rendered invoices in respect to it, and I am satisfied a good and fair employer could require a senior employee to arrange the repatriation of those funds.

[67] Mr Furlong argued that there were associated issues in respect of other sums of money and in effect it seemed he was looking to establish a set-off but I did not understand him or Ms Furlong to say that they disputed that the money belonged to New Ice. On that basis it seems to me inevitable that one must conclude that New Ice is entitled to give Mr Furlong instruction in respect of its property and is entitled to lose trust and confidence in him if he demurs. I have already indicated I do not consider the case of *Bosher* assists Mr Furlong for similar reasons.

[68] I am also not assisted by Mr Furlong's contention that because there was a commercial dispute between New Ice and Old Ice (accepted) that necessarily prevented New Ice and Mr Furlong from having an employment dispute and the only basis it seems to me on which *Hally Labels* and *Duncan* can assist Mr Furlong is on

the basis that there has been some evidence of a flag being raised in protest. Here, at the time the events happened, which is the only time that the Authority can make a judgment on, there was no explicit suggestion of a dispute between the parties.

[69] Certainly there were unresolved commercial issues which remain unresolved to a great extent, but no one suggested at the time that the employment issue identified by New Ice ought to be deferred or dealt with in a different fashion as seems to me to be the implication from the Court of Appeal decision in *Duncan*.

[70] It is all very well for parties to undertake *ex post facto* rationalisation but the issue for the Authority must always be what happened at the time of the events complained of. Much was made in the investigation meeting about the fact that this particular aspect was not pleaded in the statement of problem and was effectively sprung on New Ice during the investigation meeting process.

[71] I allowed some extra time for New Ice to respond to that new suggestion by Mr Furlong but repeat my view that whether it was raised in the statement of problem or at the investigation meeting matters not at all; the real issue is whether it was in the parties' minds at the time of the events complained of and on the evidence I heard there is no suggestion that that analysis had occurred to anyone at the time.

[72] Because it was dwelt on to a great extent in the investigation meeting, I need to comment briefly on the assertions advanced for Mr Furlong concerning the various commercial disputes between these parties. There remain significant disputes between Old Ice and New Ice but as I said at the beginning of this determination, I am not persuaded that it is within my remit to consider any of them except to the extent that they impact on the employment relationship problem identified by Mr Furlong. I have already made my view on that clear.

[73] I agree with counsel for Mr Furlong that Mr and Ms Paulsen struggled to answer questions in cross-examination and it is a fact that a section of the cross-examination which counsel for Mr Furlong wished to undertake with Ms Paulsen was effectively put to Ms Paulsen by me rather than by counsel because Ms Paulsen was seemingly unable to respond to counsel appropriately. She did, however, respond to me and I was satisfied that I understood the answers to the questions I put to her on behalf of counsel.

[74] It is also true that Mr Paulsen was less than fulsome in his answers to questions relating to the commercial dispute between Old Ice and New Ice. Indeed, some questions put to Mr Paulsen he simply refused to answer.

[75] That said, I have not been persuaded that either Mr Paulsen or Ms Paulsen failed to respond appropriately and fulsomely to questions that were relevant to my employment investigation. It is undoubtedly true that they were guarded in their responses to questions that touched on the commercial disputes they had with Old Ice but that is understandable. Those disputes are ongoing and there is litigation in prospect in other courts in that regard.

[76] Ms Paulsen in particular would not be the first important witness in one of my hearings who was troubled by accurate cross-examination from able counsel, even although I have not been persuaded that the parts of that cross-examination where Ms Paulsen was troubled have assisted me in investigating this employment relationship problem.

Are there other breaches found?

[77] There are two matters that fall for consideration here. The first is whether Mr Furlong is due a bonus payment or not and the second is whether the restraint of trade provision in his employment agreement is enforceable.

[78] Dealing with the bonus question first, I am not persuaded that Mr Furlong is entitled to any bonus. There are two hurdles for Mr Furlong in this matter. The first is to satisfy me that there is a meeting of minds in respect of what the bonus quantum actually was and the second is the question of whether he met the terms of the bonus and therefore was entitled to the benefit of the clause, or not.

[79] I am satisfied that the only thing that was agreed between the parties in respect of the bonus was the provision in the employment agreement which is clause 12.1(c). It is in the following terms:

The employee will be entitled to participate in a bonus scheme to a maximum of \$40,000 as per the Bonus Scheme Score Card (scorecard) with a focus on growth and profitability.

[80] There is also a document in the common bundle before the Authority which I could best describe as a sketch or draft of an addendum to the employment agreement but in relation to the bonus issue, it seems to me no more than a draft which is still

subject to negotiation and agreement. Amongst other things, looking at the document I have just referred to in a practical way, there is no prospect of calculating a bonus entitlement because key performance indicators have not been identified so there is nothing to measure performance against.

[81] Moreover, I have not been directed to any email traffic between Mr Paulsen and Mr Furlong which would evidence a concluded agreement. The only emails that I have found which refer to the bonus issue all talk about it being effectively a work in progress. Moreover, in his evidence to the Authority, even Mr Furlong appeared to concede that all the elements for the bonus were not in place.

[82] The law on this matter is clear and is relied upon by New Ice. In *Ogilvy & Mather (New Zealand) Ltd v. Turner* [1995] 1 ERNZ 11, the Court determined that the standard required is that the bonus was due and owing to the employee and that, but for the dismissal, the employee would have received the bonus.

[83] Applying the test in *Ogilvy & Mather*, it is clear that no bonus payment is due Mr Furlong.

[84] That leaves the question of the applicability or otherwise of the restraint of trade in Mr Furlong's employment agreement. The law on this matter is well settled. Counsel for New Ice refers me to an elegant summary of the law by Judge Ford in *Air New Zealand Ltd v. Kerr* [2013] NZEmpC 153:

The approach to restraint covenants is for the Court to determine what the clause means when properly construed and then to consider whether the employer or former employer has established a legitimate proprietary interest requiring protection. Legitimate proprietary interests have been held to include protection of customer connections, confidential information and the integrity or stability of the workforce. In the present case the proprietary interest claimed is the protection of confidential information. If such an interest is established, then the issue arises as to whether the restraint provision is shown to be no wider than is reasonably necessary. That in turn requires consideration of the reasonableness of the period of the restraint, its scope and its geographical limits.

[85] The issues then are:

- (a) What does the clause mean;
- (b) Is there a legitimate proprietary interest; and

(c) Is the restraint no wider than is reasonably necessary?

[86] The restraint covenant in the relevant employment agreement is in the following terms:

30. *Non-solicitation*

30.1 *In the event this agreement is terminated for any reason, the employee agrees not to, for a period of 12 months after termination:*

- (a) *Entice clients or Agencies away from the employer or solicit the employer's clients or agencies for business or interfere with the relationship between the employer and any of the employer's clients or agencies for services provided by the employer, where such clients or agencies were receiving goods or services from the employer at any time during the period of employment prior to the date of termination;*
- (b) *Solicit or endeavour to entice away, offer employment or partnership to or enter into any partnership with or employ any person who is at such date of termination or who was at any time prior to such date of termination employed by the employer.*

[87] Mr Furlong seeks a declaration that the restraint of trade clause just recited is void and unenforceable. As a matter of fact, its force and effect expired by effluxion of time some two months ago.

[88] It is apparent from a review of this restraint clause that it is of the less onerous kind designed only to prevent the employee from enticing away customers of the employer or interfering with business relationships between customers and the employer and in addition, it prevents the employee from soliciting or enticing away from the employer any other employees of that employer.

[89] Critically, the clause does not prevent Mr Furlong from working in the industry but only gives a year's protection to the employer from solicitation of clients or staff.

[90] Mr Furlong was the Auckland General Manager for New Ice and a senior member of the management team. It is evident from the evidence I heard that he was instrumental in introducing new business to New Ice and/or retaining existing business during his tenure and that much of that activity was as a consequence of his undoubted personal and business skills.

[91] The evidence for New Ice is that the 12 month term for the restraint was, in its judgement, necessary to protect its proprietary interests given Mr Furlong's seniority, his importance in recruiting and retaining customers after what was effectively a merger and that any lesser restraint would effectively leave it exposed.

[92] I am satisfied that New Ice has a legitimate proprietary interest in protecting its business from solicitation of either clients or staff by Mr Furlong given his importance to the business and his seniority in it.

[93] I am also satisfied that the restraint is no wider than is necessary. In particular, it is only a non-solicitation restraint and does not prevent Mr Furlong from working in the industry that he is clearly expert at. Moreover, case law suggests that the length of the restraint is not unreasonable in all the circumstances.

[94] Accordingly, I conclude that there is no basis for a finding that the restraint of trade provision is either void or unenforceable.

Determination

[95] I have not been persuaded that Mr Furlong has any viable personal grievance or any other claim in this jurisdiction against International Cargo Express 2013 Limited. His claim accordingly fails in its entirety.

Costs

[96] Costs are reserved.

James Crichton
Member of the Employment Relations Authority