Determination Number: AA 229/02
File Number: AEA 569/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Green Drycleaners Limited (Applicant)
AND	Trina Wooding (Respondent)
REPRESENTATIVES	Ann Paterson, Counsel for the Applicant Sarah Jane Neville, Counsel for the Respondent
MEMBER OF AUTHORITY	Ken Anderson
INVESTIGATION MEETING	9 July 2002
DATE OF DETERMINATION	8 August 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Green Drycleaners Limited ("Green"), claim that Trina Wooding has breached the terms of the employment agreement that she was a party to when employed by them. The claimed breach is that Ms Wooding has used confidential pricing information in order to persuade customers of Green to transfer their custom to her new employer, Velva Drycleaning & Laundry Limited. Green wish to have the problem resolved by the Authority issuing orders restraining Ms Wooding from contacting Green clients either directly or indirectly. Green also seek further orders restraining Ms Wooding from soliciting any drycleaning business from any of their clients to Velva Drycleaning, or any other company, and restraining Ms Wooding from attempting to persuade any Green employee to terminate their employment. Finally, Green seek an order restraining Ms Wooding and Velva Drycleaning, from making use of confidential information that she has obtained during her employment with Green.

There is also a claim for damages incurred as a result of the alleged breach of the employment agreement and costs are sought.

The matter was originally to be heard as an application for an interim injunction, but given that the Authority was able to proceed quickly to hear the substantive matters, that is what duly occurred and this determination will reflect that accordingly.

Factual Background

Green Drycleaners came into existence, in its current form, in December 2000, having been purchased by the company of which Mr Carl Burling is the Manager and a Director. Ms Wooding was one of a number of staff that became employed by the new company after the business was

purchased from the previous owners. Ms Wooding was employed as a Drycleaning Assistant and her duties included dealing with customers, collecting payments, dealing with accounts, liaison with major customers and sometimes driving a van and picking up and delivering drycleaning from corporate clients.

Mr Burling says that sometime in mid 2001, he provided employment agreements for the staff at Green. However, Ms Wooding says that she did not receive an agreement until the end of March or early April 2002. However, nothing really rests on when the employment agreement was available. Ms Wooding had some queries about the content of her agreement and sought some advice from her sister whom, Ms Wooding says, is quite knowledgeable about employment agreements. Ms Wooding signed her agreement on 4 April 2002.

The employment agreement is very detailed and well constructed, apart from applying the male gender to Ms Wooding. The provisions that are relevant to the problem before the Authority, are as follows:

"14. **Restraints**

14.2 The Employee will not, without the prior written consent of the Managing Director, for a period of **one year** after the termination of his employment (for whatever reason): (Existing emphasis)

14.2.1 Directly or indirectly refer any potential or existing clients of the Company to any competitor of the Company;

14.2.2 Directly or indirectly persuade or attempt to persuade any client of the Company to discontinue using services rendered by the Company to the client; or

14.2.3 Solicit either directly or indirectly, any drycleaning business from any client of the Company which operates an account and has placed or is likely to place repeat orders with the Company; or

14.2.4 Persuade or attempt to persuade any employee of the Company to terminate his or her employment; or

14.3 The Employee will not, at any time after the cessation of his employment, represent himself as being in any way connected with the Company.

14.4 The parties acknowledge that the restraints contained in Clause 14 are reasonable for the protection of the Company's business. If a Court of competent jurisdiction declares that any part of those provisions is unenforceable or illegal, that part shall be severed or modified as directed by the Court, or negotiated by the parties, to make it enforceable.

Then at clause 27 of the agreement, there are provisions, as follows, pertaining to:

"**Confidential Information**

27.1 In this clause, "confidential information" includes:-

27.1.1 The system (including the operations manual and policy) or any information which is or may come to the Employee's knowledge during the course of employment concerning the organisation, methods, business or finances of the Company; and

27.1.2 Any trade secrets; specialised know-how or practices in any industry in which the Company may from time to time engage in business, customer lists, customer requirements, performance reports, or profitability figures or reports; and

27.1.3 Information relating to the profitability of contracts; margins on product; and other financial information in relation to the Company's business, or in relation to any customer, which are or may be of any commercial value to a competitor; and

27.1.4 Information pertaining to any other employee of the Company which is protected from disclosure under the Privacy Act 1993.

27.2 The Employee shall during the continuance of employment and after his termination (for whatever reason):-

27.2.1 Not disclose any confidential information to any person other than an employee of the Company or other person authorised to receive it;

27.2.2 Use his best endeavours to prevent the disclosure or publication of any confidential information by an employee of the Company;

27.2.3 Not use any confidential information to his own benefit, as distinct from the benefit of the Company;

27.2.4 Not use or attempt to use any confidential information in any manner which may injure or cause loss whether directly or indirectly to the Company;

27.2.5 Not turn his personal knowledge or influence over any clients, suppliers or contractors of the Company to his own benefit, as distinct to the Company; and

27.2.6 Not remove or copy any information, including client/customer information, from the Company's premises without the written consent of the Managing Director, except in the normal course of the Employee's duties;

27.2.7 Not directly or indirectly make record of, any information regarding the Company's business, or any matters associated with the Company except as reasonably necessary in the normal course of the Employee's duties.

27.3 The provisions of this clause shall cease to apply to information which enters that public domain other than directly or indirectly through the default of the Employee.

It seems that concerns arose on the part of Mr Burling, regarding the loyalty of Ms Wooding, some time late October or early November 2001. This was shortly after the departure of the then Manager at Green, Mr Leon Lyford. Mr Lyford took up the position of Manager with a competitor of Green, Velva Drycleaning & Laundry Limited ("Velva"). Soon after Mr Lyford left Green, Mr Burling noticed, by chance, that one of the larger customers of Green, a business named Austins, had not placed any orders for several weeks. Mr Burling said that Austins would normally place business with Green worth on average, about $1,000.00 each month.
Mr Burling says that he raised the loss of Austins' business with Ms Wooding and asked why she had not informed him. He said that her response was that she had known for several weeks that Austins had moved their business to Velva Drycleaning. Mr Burling was of the view that the loss of Austin's business coincided with Mr Lyford's relocation to Velva Drycleaning.

On the other hand, Ms Wooding says that she did not know that Austins had moved their business to Velva until she was informed by Mr Burling. I understand that Austins subsequently returned their business to Green.

However, as a result of the loss of Austins business, Mr Burling was particularly anxious to ensure the new employment agreement was signed by Ms Wooding so that he would have the reassurance of the restraint and confidentiality provisions as set out above.

As it transpired, the concerns of Mr Burling may have had some validity, as on 8 April 2002, another employee, Mr Fakatoa, employed as a presser, gave notice that he was leaving and duly departed on 14 April 2002, without working out the required notice period provided by his employment agreement. He also went to work for Velva. Then on 14 May 2002, Ms Wooding gave notice that she would be leaving on 4 June 2002. She did not say at the time where she was going, but Mr Burling subsequently discovered that she also went to work at Velva. Upon making that discovery, Mr Burling instructed his lawyers to write to Ms Wooding and remind her of her obligations under clauses 14 and 27 of the employment agreement.

At about the same time, 11 June 2002, Mr Burling discovered that as of 23 March 2002, a large customer of Green, a Company named Vector, had ceased to use Green for their business, resulting in a potential loss of approximately $7,200.00 per annum. Upon this discovery, Mr Burling instructed his lawyers to commence the proceedings that are now for the determination of the Authority.

It is the view of Mr Burling, that since Mr Lyford went to work at Velva, there has been a deliberate policy on the part of Velva to obtain staff and business from Green and unless the restraint provisions of Ms Wooding's employment agreement are enforced, she will continue to pass on confidential information about the customer base of Green, which will duly be exploited by Velva.

It is also claimed by Green that Ms Wooding has acted in breach of Schedule 1 of the employment agreement in that she failed to immediately inform Mr Burling when Vector stopped using the services of Green. Among the tasks and duties of Ms Wooding, as set out in Schedule 1 of the employment agreement, is the following:

> "**Competition - Protection of Business**
> If a corporate customer stops using our services management should be **informed immediately**. (Existing emphasis.)

It was submitted for Green, that the purpose of early notification of the loss of business, is to enable Mr Burling to visit the customer in question and address any problems and attempt to regain that business.
Mr Burling says that if Ms Wooding had informed him of the loss of the Vector custom, as she was required to do under the above provision, he would have acted promptly to persuade Vector to ensure that they returned their business to Green. It is claimed that the loss incurred, because Ms Wooding failed to inform him of the loss of the Vector business, is between $4,800.00 and $5,400.00. To be more specific, Green submit that the loss of net profit, because of the loss of the Vector work, for one year amounts to $5,100 per annum, but discounting that sum by 20% to take into account the loss of opportunity, means the sum they are seeking as damages from Ms Wooding, is $4,080.00.

The Matters for Determination

1. The first matter that falls for determination is whether Ms Wooding breached the conditions of Schedule 1 of her employment agreement in regard to her obligation to inform her employer that a corporate customer, namely Vector, had stopped using the services provided by Green, and if so, are the damages sought by Green proven?

2. Then there are other matters related to the restraint of trade provisions of the employment agreement. Firstly: Are the provisions of clause 14 of the agreement reasonable for the protection of Green’s business, and if so, did Ms Wooding breach the restraint of trade provisions. And then, if she did breach those provisions, are damages proven?

3. Finally, there are the confidentiality provisions at clause 27 of the agreement. Did Ms Wooding act in breach of those provisions and if so, are damages proven?

1. **The Provisions of the Schedule 1.**

There is no doubt that under the specific provision of Schedule 1, there was an obligation upon Ms Wooding to notify Mr Burling, should a corporate customer, such as Vector, stop using the services provided by Green. However, the obligation to give such notification presumably relies upon Ms Wooding being aware of the loss of such custom. Ms Wooding says that she was not aware that Vector had ceased providing their business to Green and simply thought that they were just having a quiet period.

I have to say that I have some difficulty with that explanation and if it is correct, then it displays an extraordinary naivety on the part of Ms Wooding as to the requirements of a corporate entity such as Vector, particularly given the quantity of drycleaning that had been forthcoming from that business on a daily basis and her involvement with that. There is the possibility that Ms Wooding was just careless and that may well be the case, given the circumstances concerning the loss of Austins' business. Nonetheless, looking at the overall circumstances, I conclude that Ms Wooding should have been aware that Vector had stopped using the services of Green. She also had an obligation to inform Mr Burling of the loss of that business and she failed to meet that obligation. Therefore, her conduct was in breach of the applicable provision of her employment agreement.

The question then is: As a result of the breach of the employment agreement, are the losses claimed by Green directly attributable to the conduct of Ms Wooding ?

Before moving to consider that question, I have to say that the claim advanced by Green is indeed nebulous and while I have no reason to doubt the credibility of Mr Burling on this issue, there is no tangible evidence of the income received from Vector that goes to verify the damages claim that has been advanced.

However, given the overall law applying to this matter, the lack of tangible evidence as to the loss incurred, is just one factor in the matrix. In ***Medic Corporation Limited v Barrett (No 2)*** *[1992] 3 ERNZ 977,* at p.983, the Chief Judge of the Employment Court held as follows:

> "The law places limits on the consequences that may be laid at the door of a defendant. They must be consequences of which it can convincingly be said that they are the result of the defendant's conduct, in the sense that they would probably not have ensued but for the defendant's conduct. And they should be such consequences as would be apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct. They must be consequences that are sufficiently proximate. They must not be too remote"

And then further, at p.984:

> "It is for the plaintiff [Green] to prove, not for the defendant [Ms Wooding] to disprove, that loss has been sustained that it is not too remote to be taken into account and the extent of that loss, but only on the balance of probabilities and not beyond reasonable doubt."

There are a number of factors that lead me to the conclusion that it would not be reasonable to uphold the claim for damages against Ms Wooding on this front. Firstly, I do find that that the losses claimed by Green can "convincingly be said " to be the result of Ms Wooding's conduct. It may well be, that had she immediately informed Mr Burling of the departure of Vector, as required, he may have been able to have taken steps to recover that business, but that is by no means certain.

Secondly, the evidence of Ms Tollenaar from Vector, was that they had agreed to give Velva a trial for one month. This was as a result of a representative from Velva marketing their services. Price was a consideration but even when Mr Burling offered to match Velva on price, she said that Vector were happy with the very good standard of drycleaning and the service from Velva and would be staying with them. Ms Tollenaar also said that in 2001, there was a period that they sent their drycleaning to another drycleaner but subsequently transferred back to Green.

Finally, following ***Medic Corporation***, it seems to me that Ms Wooding would have had to have knowingly, if not wilfully, decided not to inform Mr Burling of the loss of the Vector business and also she would have had to have been aware of the consequences. While Ms Wooding was clearly remiss in not informing Mr Burling, there is no evidence to suggest that that her conduct was deliberate or premeditated.

Therefore, taking all of the circumstances into account, I do not believe that it is appropriate to award Green damages against Ms Wooding as claimed and I decline to do so.

2. **The Restraint Provisions**

Clause 14 of the employment agreement contains several restraints and it seems appropriate to consider the nature and extent of those restraints and their overall reasonableness. It has to said that the restraints in question are somewhat different to the restraint of trade provisions that arise for examination from time to time, in that there is no restriction upon the ability of Ms Wooding to obtain employment with the industry. Indeed, nor should there be any such restriction given the overall nature of the position that she held at Green.

That then takes us to examine what is actually being restrained and for how long. The provisions as set out on page 2 of this determination, on the whole do not appear to impose any unreasonable impositions upon Ms Wooding. Given that she had some exposure to the respective customers of Green, it seems reasonable that they would want to ensure that Ms Wooding should not influence those customers to transfer their custom to her current employer, if an appropriate inducement was offered to her, albeit there is no evidence that such has occurred.

Having said that, one would have to question how it might be decided that there has been a direct or indirect referral of a "potential" client and who might be a potential client, as contained in sub-clause 14.2.1. Several of the other provisions are very broad in nature and one would have to question whether they are enforceable, particularly sub-clause 14.2.4, at least within the jurisdiction of the Authority, but that seems to be better left to be tested, if or when particular circumstances may arise. I also gave some thought to the length of time that the restraints are in place, and had they had the effect of restricting Ms Wooding's ability to work within the industry, or imposed some other detriment upon her, I would have held that the time frame should be reduced to make it more reasonable. However, given the overall circumstances, I do not believe that such modification is required.

I now examine the assertion from Green that Ms Wooding passed on information pertaining to Vector as a client, to Mr Lyford. There is no evidence of any such conduct on the part of Ms Wooding, apart from that of Mr Cox and I did not find that compelling. In any event, it seems to me that Mr Lyford would have already been aware of the substantive customer base of Green as he was the previous manager, and it seems unlikely that he would be able to obtain any information of any value from Ms Wooding, assuming he had the inclination to do so.

In summary, there is no evidence of Ms Wooding being in breach of the restraint provisions of her employment agreement and therefore a compliance order is not appropriate. Nonetheless, Ms Wooding is reminded that the restraint provisions remain in force, and she is bound to observe them until 4 June 2003.

3. **Confidential Information**

There is no evidence of Ms Wooding having breached any of the provisions pertaining to the "Confidential Information" provisions of the employment contract, apart once again from that of Mr Cox, and I have already made comment upon that evidence. Therefore a compliance order is not appropriate. I would make the comment that this clause is particularly broad in its coverage and may be difficult to enforce, paticularly what appears to be a perpetual time frame, but once again the question of enforceability is better left for other circumstances, if or when they may arise. It also seems to me that it would be unlikely that Ms Wooding would have had access to anything other than what is generally known within the industry about the conduct of a drycleaning business, including it would seem, pricing structures, and one would have to question whether the content of this clause is appropriate to the level of the position that was held by her. However, Ms Wooding should remain aware that the provisions remain in place and could be invoked by Green, although one would anticipate that such would be unlikely given my overall findings.

Summary of the Determinations of the Authority

1. I find that Ms Wooding failed to observe the provisions of Schedule 1 of her employment agreement in that she failed to immediately inform Mr Burling that Vector had ceased to use the services of Green. However, as set out in the body of this document, I have found that it is not appropriate to award damages to Green and I decline to do so.

2. There is no compelling evidence that Ms Wooding has breached either the "Restraints" provisions or the "Confidential Information" provisions of the employment agreement and therefore orders for damages and compliance are declined.

Costs

As Ms Wooding has been largely successful in her defence of the claims pursued by Green, it is appropriate that she should recover a contribution to her costs. However, costs are reserved at this point and I would ask that the parties attempt to reach an agreement upon that issue if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, Ms Neville is invited to file submissions with the Authority, and copy to Ms Paterson, within 14 days of the date of this determination. Ms Paterson will have a further 14 days to respond to the Authority and copy to the Ms Neville.

Ken Anderson
Member
Employment Relations Authority