



# New Zealand Employment Relations Authority Decisions

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## Hally Labels Limited v Powell [2011] NZERA 243; [2011] NZERA Auckland 181 (5 May 2011)

Last Updated: 16 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 181 5339566

BETWEEN HALLY LABELS LIMITED

Applicant

AND KEVIN POWELL

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Alastair Dumbleton

Chris Patterson, counsel for Applicant Andrew Gallie, counsel for Respondent

2 May 2011 5 May 2011

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] Under an express term of an employment agreement between the applicant, Hally Labels Ltd, and the respondent, Mr Kevin Powell, upon the termination of their employment relationship Hally had the ability to invoke a provision that would restrain Mr Powell from becoming involved in any business competing with the company. The restraint provision was expressed to apply for 12 months within New Zealand or Australia.

[2] Mr Powell resigned his position as Business Development Manager with Hally on 7 December 2010, giving two months' notice in writing as required by the employment agreement. At the same time he told Hally's management that he intended taking up employment with Geon Group Ltd, a competitor of Hally. The day before he resigned Mr Powell had received an offer of employment from Geon. The offer was expressly subject to the condition that Mr Powell had no restraint of trade obligations towards Hally, and it provided for a commencement date with Geon "between 1 February and 30 June 2011." [3] Hally acknowledged on 13 December 2010 receiving Mr Powell's resignation and requested that he go on leave until the two month notice period expired and the employment terminated. At the same time Hally expressly invoked the employment agreement's restraint provision, relevant parts of which are as follows:

*9.4 The Company may within 7 days of giving or receiving notice of termination of the employment invoke the following sub-clause the consideration for which will be the making of a payment to Business Development Manager in the sum of six months base salary:*

*9.4.1 The Business Development Manager shall not, for a period of 12 months after the termination of this agreement (for whatever reason); carry on, be connected, engaged, or interested, either directly or indirectly or alone with any other person or persons, (whether as Principal, Partner, Agent, Director, Shareholder, Employee, or otherwise), in any business in the adhesive label manufacturing industry, within New Zealand or Australia, that is in competition, either directly or indirectly, with the company.*

[4] On 17 December, shortly after he had given notice, Mr Powell through his solicitors wrote to Hally seeking agreement to vary the restraint by reducing it from 12 months to 6 months. A corresponding reduction by half in the monetary consideration expressed to be payable for the restraint was also proposed. The request was not responded to by Hally's solicitors until 18 February 2011, two months later and 11 days after 7 February when the employment had terminated. There was some further correspondence about varying the terms of the restraint but no agreement was reached.

[5] On 10 March 2011 Mr Powell's solicitors wrote to Hally advising that he had cancelled the restraint provision pursuant to s 7 of the [Contractual Remedies Act 1979](#) and that he consequently considered himself no longer bound by the restraint. Hally was advised that the provision had been cancelled because Hally had breached the express requirement in it to provide consideration in return for the restraint. That consideration was expressed to be a payment in the sum of six months base salary, equal to about \$62,000 at the rate of Mr Powell's gross annual salary at the time.

[6] Mr Powell advised Geon that he had cancelled the restraint agreement with Hally and commenced employment with Geon on 28 March 2011.

[7] Two days later, on 30 March 2011, Hally applied to the Authority pursuant to [s 162](#) of the [Employment Relations Act 2000](#) for an interim injunction to restrain

Mr Powell, under the provisions he had purportedly cancelled, from working for Geon. The terms of the injunction sought were that it would remain in force until full investigation and final determination by the Authority of the employment relationship problem.

[8] In accordance with the procedure for hearing interlocutory applications for interim injunctions, the Authority was provided with affidavit evidence given on behalf of Hally and by Mr Powell. Submissions were made in support and opposition, by counsel Mr Patterson for Hally and counsel Mr Gallie for Mr Powell.

### **The law**

[9] Counsel were agreed on the law to be applied by the Authority in considering this application. I adopt the submissions of Mr Patterson in this regard, that:

*... in order for the Authority to grant the interim injunction sought, the Authority must be satisfied that there is a serious question to be tried; that there is no other remedy available to the applicant, that the balance of convenience favours the granting of the injunction; and the overall justice favours the granting of the injunction. In respect to injunctions to enforce a restraint of trade (prima facie illegal), the applicant must also show that it is arguable that the restraint in question is reasonable*

[10] I have addressed the tests or questions under the same four headings Mr Patterson and Mr Gallie used in their written submissions.

### **Is there a serious question to be tried?**

[11] Under this first heading counsel agreed that the issues for consideration were;

- a. Whether Mr Powell was entitled to cancel the restraint; and
- b. The reasonableness of the restraint.

[12] In relation to the second issue, there is a concise statement of legal principle from the High Court in the judgment of Hardie Boys J in *The Broadcasting Corporation of New Zealand v Nielsen* [\[1988\] NZHC 959](#); [\(1988\) 2 NZELC 96.040](#). He said in relation to the enforceability of covenants in restraint of trade;

*Such a covenant is prima facie unlawful, but will be upheld to the extent that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises that he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.*

[13] The reasonableness of restraint provisions is to be assessed at the time they became part of the employment agreement. Mr Powell was employed for 22 years by Hally and businesses it acquired. There were restraint provisions in his employment agreements from at least 2005 when his position was Market Manager. In May 2010 he signed a new agreement with Hally for the position of Business Development Manager. It contains the restraint provisions at clause 9.4.1, which Hally invoked in December 2010 after Mr Powell had given notice of his intention to leave and begin working for Geon, a competitor of Hally.

[14] To the stage or level of there being a serious question I am satisfied that Hally, in May 2010, had trade secrets and trade connections and that the protection of Hally's interest in those by having a restraint provision in Mr Powell's employment agreement was reasonably necessary. It is relevant that in consenting to that provision Mr Powell, at clause 9.0, had expressly recognised that Hally had "a legitimate proprietary interest in the customers, procedures and practices of the company."

Further, in agreeing to the restraint he had expressly recognised his "national status and seniority" as Business Development Manager and he had recognised the significance Hally attached to its proprietary interests.

[15] These acknowledgements in the employment agreement may be taken as having been made genuinely by Mr Powell and on an informed basis, given his many years experience working for Hally and also his declaration at clause 17.0 that he had read and understood the terms of the agreement and had been given the opportunity to obtain separate independent advice about those terms of his employment

[16] The affidavit evidence of Hally's National Sales Manager, Mr David Welch, also supports Hally's claim of having proprietary interests in the areas of sales and technical information which Mr Powell has considerable knowledge and experience of. These are the trade secrets and trade connections Hally had a reasonable interest in protecting, for some finite period of time, with restraint provisions. I am satisfied there is also evidence that a breach of the restraint provisions is likely to cause Hally loss of competitive edge and loss of business.

[17] There is no dispute that Geon is a competitor of Hally or that Mr Powell started working for Geon on 28 March 2011, near the beginning of the 12 month restraint period which had commenced on 7 February. Mr Powell's position with Geon is Key Account Manager and his remuneration is at a similar level to that he received from Hally as Business Development Manager.

[18] I am satisfied that some degree of restraint was reasonable. If 12 months is too long or Australasia is too wide, clause 9 can be modified by the Authority under [s 8](#) of the [Illegal Contracts Act 1970](#). It may be assumed that Mr Powell considered at least 6 months to be reasonable (until August 2011), as he tried to get Hally to agree to that much modification. These are matters for consideration in the substantive investigation and not at this interim stage.

### **Cancellation**

[19] In relation to the question of whether the restraint provision was cancelled pursuant to s 7 of the [Contractual Remedies Act 1979](#) the issue is the payment to Mr Powell of the consideration required by the provision. In particular the issue is when that was required to be paid and whether Mr Powell had to give notice stipulating a time for payment to be made before he could cancel for default under s 7.

[20] The restraint under clause 9.4.1 which was invoked by Hally on 13 December 2010, took effect upon termination of Mr Powell's employment, which occurred on 7 February 2011. The consideration for the restraint was said to be the making of a payment to Mr Powell in the sum of six months' base salary. As at 10 March 2011 when Mr Powell advised Hally that he was cancelling the restraint agreement, he had not been paid that sum (about \$62,000) and he had not been offered payment. A few days after cancellation, on 14 March, he received one half of one month's base salary (\$5,168) credited to his account. His evidence is that upon speaking to Hally's pay administrator he was advised that she had been instructed to make 12 consecutive monthly payments, each in the sum of the amount credited to him. This advice was confirmed by Mr Patterson in an email to Mr Gallie who said with reference to the consideration, "my client decided to continue paying your client as it has previously done via monthly payments".

[21] In this regard it seems clear that Hally had not intended to observe clause 9.4 which provided for a single payment to be made, quantified by reference to

Mr Powell's base salary. Hally intended to drip-feed the \$62,000 owed to Mr Powell out over 12 months, the period of the restraint. To do so would have been an ongoing breach of clause 9.4 unless Mr Powell consented to the change. What is clear is that Mr Powell by the time he cancelled the restraint on 10 March had not received full payment of the consideration and had not even received part payment of it. After cancellation all he received, on 14 March 2011, was 1/12th of the consideration. He rejected that payment and offered to repay Hally, having purported to cancel the restraint a few days before receiving the payment.

### **When consideration was to be paid**

[22] It is an important issue between the parties as to whether clause 9.4 made provision for a time by which the single payment of consideration was to be made to Mr Powell. For Hally it is argued that clause 9.4 was silent in this respect and that therefore, according to established legal principle, before Mr Powell could exercise the right to cancel under the [Contractual Remedies Act](#) he first had to put Hally on notice that time was of the essence and give the company an opportunity to rectify any default or threatened default.

[23] A recent statement of principle to this effect can be found in the decision of the Supreme Court in *Steele v. Serepisos* [2006] NZSC 67. The judgment of McGrath J at [120] refers to earlier authority holding that there is a requirement under which a party will not be allowed to treat a contract as having come to an end, after elapse of a reasonable time, without giving notice. At [141] McGrath J said:

*When a contract does not state a time for its completion, equity will not permit a party to rescind for non-completion by the*

other party without having previously given the defaulting party a notice stipulating a certain time for completion and making performance by that time essential. That gives the defaulter a chance to remedy the default. Equity's requirement is motivated by fairness, not by notions of etiquette.

[24] Mr Gallie submitted that this principle had no application in the present case as the restraint provision at clause 9.4 expressly or impliedly stated a time for completion by payment of the specified consideration to Mr Powell. I agree with that submission and find that although not expressed there is a strong and clear implication from clause 9.4 that the payment of consideration was to be made at the same time as one or other of two events occurring at times that would become known with certainty. The first such event was whenever Hally invoked the restraint provision (in this case 13 December 2010) and the second such event was the start of the period of restraint upon termination of the employment (in this case 7 February 2011).

[25] I agree with the submission that the application of the law relating to the implication of terms into a contract is relevant in this case to make it clear when the consideration was to be paid by. Mr Gallie referred to cases in which 'logically implied terms' had been found under a contract and also cases where the 'business efficacy' test had been applied.

[26] In relation to employment agreements, the principles for implying terms were discussed by the Court of Appeal in *Attorney-General v. NZ Post Primary Teachers' Assn* [1991] NZCA 206; [1992] 1 ERNZ 1163. With reference to the 'business efficacy' test, Gault J said the following at p.1168:

*The more rigid test of practical or business efficacy involves the five criteria which may be briefly stated as that the term to be implied must:*

1. *Be reasonable and equitable,*
2. *Be necessary to give business efficacy to the contract,*
3. *Be so obvious that it goes without saying,*
4. *Be capable of clear expression,*
5. *Not contradict the express terms of the contract.*

[27] I find that if it was not already a matter of sufficiently clear and strong inference from the construction of clause 9.4, a term can be implied into that provision in accordance with the business efficacy test. That term I consider is that when the restraint provision has been invoked the payment of consideration to Mr Powell will be made no later than the date on which his employment terminates and the restraint takes effect. As previously discussed, it is already plain and clear from the wording of the clause that the payment must be made in full at the one time and not drip-fed or paid by instalments over a period of time at Hally's option.

[28] I find that the term to be implied is reasonable and equitable. The consideration should move or pass no later than the time at which Mr Powell begins to give up or limit his rights to be employed in his profession, or ply his trade. The term is necessary to give business efficacy to the employment contract. In particular, it will avoid disputes between the parties and not lead them to spend time and money on interpretation and compliance proceedings in the Authority or the Court. The term is so obvious that it goes without saying, and it is capable of clear expression by being linked to a particular event in time.

[29] I also find that the term does not contradict any express terms of the contract. Mr Patterson argued that there was some contradiction because payment of the consideration by the end of the period of notice coincided with payment to Mr Powell of salary during the period of notice. I do not agree there is anything contradictory in this, as the payments are for two entirely different purposes and there is no double payment involved.

[30] The payment by Hally of the sum of six months' salary was intended to be the price of Mr Powell's promise not to become employed by a competitor for 12 months after the termination of his employment with Hally. It is reasonable, logical, and in accordance with commercial practice and basic economics, to expect that the price is to be paid when the promise is either made or at the very latest when performance of the promise begins. There is no reasonable basis for concluding that the payment could be withheld until the promise has been fully performed, or even until some unspecified date after that.

[31] I therefore find that in the circumstances of this case the rule of equity discussed by the Supreme Court in *Steele v. Serepisos* has no application. The restraint provisions in the employment agreement can be constructed as reasonably clearly having provided a time when consideration was to be paid, if not expressly then by a term able to be implied.

[32] I also find, for the purposes of determining this interim application, that the circumstances were within s 7 of the [Contractual Remedies Act 1979](#) and therefore Mr Powell was entitled to cancel the restraint provision on the grounds of breach of it by Hally. I find that Hally had made it clear it did not intend to perform its obligations to pay Mr Powell consideration in one payment, which was to be made by the date of termination of his employment agreement if not earlier. Accordingly, Hally was in breach of a term of the agreement. Mr Powell was entitled to exercise his right to cancel because the parties had expressly agreed that the performance of that term was essential to Mr Powell, or the effect of the breach was

to substantially reduce the benefit of the restraint provision to Mr Powell. The breach meant that he had received no part of the consideration for the restraint by the time it became operative. Even after that point, in the payments Hally began making, it remained in breach by spreading them out over a long period rather than making one single payment.

[33] I reject the submission that Mr Powell, with knowledge of the breach, had affirmed the restraint provisions. There is no conduct I can find on his part that could amount to any acquiescence in the breach. Mr Powell had accepted the existence of the restraint provision but had reasonably tried to negotiate a variation of it. This was not helped by the considerable delay before Hally responded to his initial proposal. When a variation was not concluded and when Mr Powell had not been paid consideration, he exercised his right to cancel the restraint provision. There is nothing I find about his behaviour that could amount to a waiver of his rights or an affirmation of the contract with its breached terms.

[34] I find that in accordance with s 8 of the [Contractual Remedies Act](#) the cancellation by Mr Powell took effect when it was communicated to Hally in writing on 10 March 2011. As of that date, Mr Powell was free to commence employment with Geon under the terms of offer made to him by that company. He started on

28 March 2011.

[35] On this basis I find it is strongly arguable that the restraint provision had ceased to bind Mr Powell and therefore he was not in breach of it by commencing work for Geon. To the extent it is part factual the issue is not one that should or could be finally determined on the untested affidavit evidence available at this interim stage.

[36] For the purposes of determining this application for interim injunction I conclude that overall there is a serious issue to be tried. While on the one hand provisions restraining Mr Powell appear to have been quite reasonable, on the other there is also a clear case made by him that pursuant to the [Contractual Remedies Act](#) he obtained an effective release from the restraint before he began working for Geon. The two issues have to be weighed together.

#### **Is there an alternative remedy available?**

[37] I agree with the submissions for Hally that damages will not provide an adequate remedy. It will be very difficult to quantify the damage that may be caused to Hally if Mr Powell continues for any length of time working for Geon in breach of the restraint provisions. It is likely he had developed a personal following of clients and customers who will gravitate towards him now he is at Geon. The cost and time required to prove loss will be a real barrier to Hally being able to obtain justice in that event, assuming proof is available.

[38] There is also some uncertainty about Mr Powell's ability to meet awards of damages at higher levels. While he has provided an undertaking as to damages as required, the estimate he has given as to the worth of his personal assets is merely an opinion and is not supported by any evidence such as property valuations, current market prices in the particular location(s) where he owns houses and properties jointly with his wife, or the extent of his borrowings.

#### **Where does the balance of convenience lie?**

[39] I consider that the balance of convenience favours Mr Powell and allowing him to keep earning an income for the relatively short period until the substantive hearing begins, in about three weeks. Hally has denied him full payment of the agreed consideration which may have provided him with some financial means in the event he was prevented from working for Geon. The balance of the full amount has now been paid by Hally into trust, although the terms on which that deposit has been made have not been disclosed. That arrangement is unsatisfactory in a case such as this where one party wants to enforce its part of a bargain but without allowing the other party access to the benefit it was agreed he would be entitled to under the restraint provisions. There is an element of Hally wanting to have it both ways, by enforcing the restraint it claims remains binding on Mr Powell and at the same time keeping its hands on the consideration Hally agreed to provide him.

[40] I also take it into account that there are other surviving terms of his employment that Mr Powell remains bound by, such as those of clause 9 in relation to confidentiality and non-solicitation. He does not dispute they are still in force.

[41] Mr Powell has been working for just over one month of a 12 month restraint period, but in about three weeks there will be a full investigation of the problem raised by Hally and a final determination will be given after that. I find that the balance of convenience would favour Hally if the restraint had not been cancelled, as there would be harm and loss accruing to Hally the longer Mr Powell remained working for Geon, although the period before the substantive hearing takes place is a relatively short one of about three weeks, until 26 and 27 May 2011.

#### **What is the overall justice?**

[42] In considering the overall justice I take it into account there is a strong possibility in this case that Mr Powell was freed from the restraint provisions when he purported to cancel them pursuant to the [Contractual Remedies Act](#). There is a real possibility that that will be the final determination after the full investigation and the cancellation will be found to have been effective.

[43] One fact stands out in this case; Mr Powell has never been paid in full the consideration Hally agreed to pay if it invoked the restraint provisions. He has not even been offered that amount. At best he was paid 1/12 of the amount and then after he had become bound by the restraint but before he purported to cancel it and before he began working for Geon. In those circumstances it would be unjust to enforce the restraint against Mr Powell even if only on an interim basis.

[44] I also take into account material delays on Hally's part. First, its failure for two months to reply to Mr Powell's request to vary the scope of the restraint. Hally was not required to negotiate with him over that but it was still in an employment relationship and was therefore bound by s 4 of the [Employment Relations Act](#) to deal with Mr Powell in good faith. That duty under s 4(1A)(b) required Hally to be "responsive and communicative." A more timely response to the variation request while Mr Powell remained on leave under notice might have avoided the situation that no doubt through frustration led him to act in a way that left him feeling entitled to start employment with Geon.

[45] The second delay by Hally was between 10 March when Mr Powell notified his cancellation of the restraint and 30 March when Hally applied to the Authority for an interim injunction. Cancellation should have been a strong warning to Hally that Mr Powell was likely to be taking up employment with Geon or another competitor. A timely application might have made Mr Powell hesitate before starting with Geon on 28 March. He might have decided it was prudent to await the determination of such an application before commencing the new employment. Hally's delays have in my view contributed to the situation which has arisen and which it now asks to have rectified with a remedy that will stop Mr Powell from working, at least temporarily. In justice to Mr Powell those delays should be taken into account against Hally.

[46] While it is true that Mr Powell could have proactively sought a legal declaration of his rights and obligations, from the Authority or the Court, he should not have had to do that when Hally had not behaved as a party ought to when it has a clear obligation under the provisions it now wishes to enforce against him. Cancellation of the provisions for breach, or threat of breach, seems a reasonable alternative that became open to Mr Powell in circumstances which Hally arguably contributed heavily to by not paying him the consideration due. I find that the overall justice favours declining the application.

#### **Determination**

[47] For the reasons given above the application by Hally for interim injunctive relief against Mr Powell is not granted. The parties are recommended to resume mediation before the meeting due to start on 26 May.

#### **Costs**

[48] Costs are reserved for determination following the substantive investigation meeting and its outcome.

A Dumbleton

#### **Member of the Employment Relations Authority**