

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 116
5525003

BETWEEN JUST PLANTS LIMITED
Applicant

AND DANIEL SMITH
First Respondent

AND RENTOKIL INITIAL LIMITED
Second Respondent

Member of Authority: P R Stapp

Representatives: Jamie Steele, Counsel for Applicant
Daniel Smith in person
Michael O'Brien, Counsel for Second Respondent

Investigation Meeting
(including submissions): 12 November 2014 at Wellington

Determination: 14 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is a claim from Just Plants Limited that Mr Smith has breached a restraint of trade clause in his employment agreement, when he commenced work for a new employer, Rentokil Initial Limited. Just Plants Limited has also claimed that Rentokil Initial Limited has aided and abetted the breach.

[2] Just Plants Limited has also claimed unspecified damages to compensate losses suffered as a result of the breach.

[3] Just Plants Limited is seeking an injunction to prevent Mr Smith from working with Rentokil Initial Limited in terms of the restraint of trade. It also seeks to limit Rentokil Initial Limited employing Mr Smith.

[4] The respondents have denied the claims. Rentokil Initial Limited also claims that the employment agreement referred to by Just Plants Limited does not apply to Mr Smith because it is with another entity called Just Water International Limited. Alternatively, Rentokil Initial Limited claims that the restraint clause in the employment agreement is unenforceable and in any case is ambiguous.

Issues

[5] The first issue is to determine who Mr Smith's employer was at the time he entered into an employment agreement. The second is what terms and conditions apply to Mr Smith and whether or not the employment agreement applies to him and Just Plants Limited.

[6] The third issue is whether or not the restraint if it applies as a term of Mr Smith's employment is enforceable given the public policy that the restraint is prima facie unenforceable/unlawful.

[7] If the restraint is enforceable, has there been a breach of the term, and has Rentokil Initial Limited aided and abetted in any such breach?

[8] The matter of the claim for damages has been reserved.

[9] For completeness, the employment relationship problem was lodged in the Authority as an interim application with an undertaking for damages. However, the parties took up the opportunity provided by the Authority to have a full investigation meeting on the substantive claims quickly. As a result, the applicant withdrew the interim application.

The Law

[10] I have had regard to all the parties' submissions. I am not required to repeat them, but I can assure each of the parties that I have taken the submissions into account. Moreover I have paid particular attention to the law that applies. Also, importantly I have focussed on the following:

[11] In *Brown v Brown* [1980]1 NZLR 484 Richardson J said;

It is well settled law that to be enforceable a covenant in restraint of trade should be no wider than the circumstances of the case reasonably require.

Reasonableness in the relevant sense relates to the legitimate interests to the parties in the covenant and to the wider public interest.

[12] This was relied upon in a decision of Justice Andrews in *Ryan v Mason* [2012] NZHC 3105, (2012) 10 NZELR 174. Justice Andrews referred to the relevant subsidiary principles to an employment contract:

- (a) *That restraints by employers on employees are scrutinised with particular care and enforced only to the extent that they are required to protect the proprietary interest of the employer;*
- (b) *That such a restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer;*
- (c) *That reasonableness is to be measured at the time the covenant was given, although developments necessary within the contemplation of the parties at the time may be taken into account;*
- (d) *That the question whether or not the agreement was a fair agreement in all the circumstances or was a one-sided arrangement only entered into because of the superior bargaining power of the employer is relevant to reasonableness;*
- (e) *That while the principle parameters used to determine reasonableness are the area, nature and duration of the restraint, those are not to be considered as separate factors, since reasonableness depends upon the assessment of all relevant surrounding circumstances; and*
- (f) *That the nature of the employer's business and of the relationship between the employee and the customer or clients of that business are important in considering whether restraint is reasonably necessary.*

[13] Justice Andrews also referred to *Fuel Expresso Ltd v. Hsieh* [2007] 2 NZLR 651 in which the Court of Appeal accepted that the adequacy of consideration may also be relevant in determining the reasonableness of a restraint. This case is also significant in that the Court referred to parties needing to be mindful that agreements are made to be kept.

[14] Where there is a redundancy involved this is a factor in the mix for consideration (applying *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42 at page 59).

[15] Restraint of trade covenants are different to that of other contractual obligations. Covenants of restraint are generally considered unenforceable if the purpose of the restraint is to prevent an employee from his or her entitlement to work in their area of expertise and skill and compete in the free-market. However a

restraint of trade may be enforceable if it can be shown that the restraint of trade is reasonably necessary to protect some proprietary interest(s) and is reasonable between the parties and in the public interest. A restraint cannot be imposed simply to limit competition.¹

[16] The starting point in assessing the enforceability of a restraint of trade provision is to ascertain whether there is a proprietary interest which should be protected.

[17] The Employment Court in *Airgas Compressor Specialists v Bryant*² commented on what information may be accepted as attracting a proprietary interest as follows:

An employer may possess a proprietary interest in trade secrets, confidential information, and its business or trade connections. The employer is permitted to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

[18] In *Transpacific Industries v Harris & Anor* [2013] NZEmpC 97 the Employment Court referred to the requirements for proprietary interest and that general knowledge and skills in broad terms was too wide to enforce a restraint of trade.

[19] The Court noted in the decision of *Warmington, O'Neill v Affco New Zealand Limited* [2012] NZEmpC 19, [2012] ERNZ 1 at p1:

[44] A number of factors are to be considered in determining the reasonableness or otherwise of a restraint of trade provision. Restraints by employers are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

¹ *Gallagher Groups Ltd v Walley* [1999] 1 ERNZ 490

² [1998] 2 ERNZ 42

The facts

[20] Just Plants Limited (Just Plants and/or the applicant) is an incorporated company operating from Seaview Lower Hutt. It is in the business of supplying and servicing plants to commercial and business premises predominantly in the greater Wellington region that means the Wellington CBD and up to Otaki and Levin.

[21] Daniel Smith was employed by “Just Plants” purportedly under an individual employment agreement (the IEA) as a sales person. There is a dispute that the Individual Employment Agreement applies to Just Plants Limited because of what appears to be a mistake. Mr Smith was required to sell indoor plant hire short and long term rentals to corporate and business clients of Just Plants Limited. The agreement was signed only by Mr Smith on 26 March 2013. It was not signed off for the employer. It is between Mr Smith and Just Water International Limited with reference to “Just Plants”. Just Plants Limited has existed throughout Mr Smith’s employment, but with different owners where there was a change from 1 July 2014.

[22] At Just Plants, Mr Smith’s job involved being paid commission and his total remuneration package prior to the termination of his employment was around \$93,400 per annum. This was made up with a retainer and commissions and incentive. Under the terms of the IEA, there are restraint and confidentiality provisions. The clauses in the IEA read as follows:

(18) RESTRAINTS

In consideration of the remuneration payable to the Employee by the Employer, the Employee agrees with the Employer:

- (a) That the Employee shall during the term of this Agreement or at any time after the termination thereof observe strict secrecy as to the confidential affairs, dealing and concerns of the Employer and clients of the Employer and will not disclose to any third party any information concerning the Employer business or the business of the Employer clients, particularly product sources and prices, or concerning inventions, formulae, programmes, software, technical data, processes or methods of the company or any clients of the Employer.*
- (b) That the Employee shall not at any time either during the continuance of this Agreement or thereafter the termination thereof, use for the Employee’s benefit or the benefit of anyone else, any of the trade secrets or confidential information of the Employer, or any client of*

the Employer and shall not use or attempt to use any such knowledge or information in any manner which may injure or cause loss directly or indirectly to the Employer or any clients of the Employer.

- (c) *That the Employee shall not at any time, during the term of employment, compete against the Employer, in any area of trade or business conducted by the Employer, on a private basis or for any third party. The position with the Employer shall be the Employee's sole employment.*
- (d) ***That the Employee shall not be engaged, invest in (save as a shareholder or debenture holder for the purposes of investment only in a public company quoted on any stock exchange) or interested in any business or occupation which competes with any of the businesses of the Employer, for a period of six months after the termination of this Agreement. (Emphasis added)***

19. CONFIDENTIALITY

- (a) *The employee must keep confidential matters concerning the company and associated companies, which are not public knowledge. This includes, but is not limited to such matters as, price construction, discount schedules, client lists, product sources, confidential information supplied by clients, marketing initiatives or plans, financial information about the company or associated companies and other information which can reasonably be viewed as commercially sensitive. This obligation continues both during the employment of the employee and after the employee terminates from employment.*
- (b) *On termination from employment, the employee must immediately return any documentation of a confidential nature, whether in written form (sic) or not. This includes information stored electronically.*

[23] Just Plants claims that the consideration for the restraint of trade and non-solicitation related to the benefits that were all agreed contemporaneously with the parties' agreement for including clause 18, namely the offer of employment and the remuneration and the various benefits set out in the IEA, in addition to Mr Smith obtaining skills in the specialised business of the company. This applied to Mr Smith gaining knowledge and experience on the job with plants in a sales role.

[24] On 16 September 2014 Mr Smith called on Rentokil Initial Limited looking for a job. Rentokil Initial Limited (Rentokil) through its Ambius Division is in the same business as Just Plants. As it happened Rentokil had two vacancies at the time and Mr Smith was given an application form to fill out, which he completed. He says

that he anticipated there was a problem with his employment with the new owners and this related to how he was being treated.

[25] On Thursday 18 September 2014, Mr Caird met with Mr Smith to advise him that a restructure was proposed and likely to result in the sales representative's position being disestablished. Mr Caird says that Mr Smith was requested to consider the proposal and provide his feedback by the following Monday. Mr Smith provided his feedback at that meeting and that he could see no alternative position with the company, that he would prefer not to work the Thursday or Friday and it was agreed that subject to any further feedback and confirming any monetary entitlements, he would finish his employment effective on the Friday. Mr Smith's employment ceased with Just Plants on Friday, 19 September 2014. That was never challenged by Mr Smith.

[26] Mr Caird claims that at the final meeting Mr Smith was reminded of his restriction on employment with competitors for six months. On Monday, 22 September 2013, Mr Smith returned his car, phone and keys and his final pay was made to him via direct credit.

[27] On Monday, 22 September 2014 a text message appeared on Mr Smith's phone from a previous employee of Just Plants, who had been contacted by Rentokil. The text indicated that Mr Smith might have some work relationship with Rentokil. On 23 September 2014, a Mr Andrew Martin (the Just Water Wellington Branch Manager and Mr Smith's previous manager), advised Mr Caird that he had been requested to, and had, provided a verbal reference for Mr Smith to Rentokil on 22 September 2014. Apparently Mr Martin advised Mr Caird that in answer to a question "*is there anything else Rentokil should be aware of*", Mr Martin advised Rentokil that Mr Smith had a six month restraint of trade in respect of competitors of Just Plants under the terms of his IEA with Just Plants.

[28] Mr Caird emailed Mr Smith on 23 September 2014 with his reference of employment and a note that he was subject to a six month restraint and confidentiality clause.

[29] In the meantime Rentokil offered Mr Smith employment with an offer dated 23 September 2014.

[30] Mr Caird says that he received a telephone call from a person enquiring and asking for Mr Smith's contact details to arrange a medical check for him. Mr Caird says that he asked the person who she was. He says that she advised she was from Rentokil and he says that he advised her that Mr Smith had a restriction for six months on working for competitors which she confirmed she was aware of. Mr Caird says that he was aware that Rentokil was at the time seeking an account manager and a sales representative for its Ambius Division in Wellington. Mr Caird says that on Wednesday, 24 September 2014 he rang a director/CFO of Rentokil and spoke to a Katy Stark about the matter. He says that she indicated that she would follow up the matter internally and get back to him. He says she was not aware of the situation, but understood the issues.

[31] The next thing that happened was that on Friday, 26 September 2014, Mr Caird says that he had a call from Zoe Whittaker of Rentokil Wellington and that she informed him:

- (a) That she was seeking to confirm whether Just Plants would enforce the restraint in regard to Mr Smith. Mr Caird said that he replied that Just Plants would be enforcing the restraint;
- (b) That she noted that redundancy meant that he had no living. He says that he explained the reason for the restraint;
- (c) That she did offer an alternative position in Rentokil (with Initial) for Mr Smith to sell women's hygiene products (Initial Division) and that this was a separate division from Ambius with separate salespeople, and that she said Rentokil takes its confidentiality and anti-corruption obligations seriously and would ensure Mr Smith did not provide information to the Ambius Division. Mr Caird says that he asked for this to be outlined in an email in regard to the nature of the role, the restrictions and any undertakings that Rentokil and Mr Smith would provide so that Just Plants could consider it;
- (d) That she was meeting the managing director next Tuesday and would respond on Tuesday and/or Wednesday that week. She agreed in response to a request from Mr Caird that they would not employ Mr Smith until that time in light of any injunctive action in the Courts.

She indicated that the offer for Mr Smith to work with Rentokil came from HR in Australia and that she would need to check where it was.

[32] Mr Caird says that he telephoned Zoe Whittaker on Thursday, 2 or Friday, 3 October to get an update but was advised that she was away until Monday, 13 October 2014. During the time Ms Whittaker and Mr Smith signed off an employment agreement after he had been made redundant, and he started work at Rentokil on 6 October 2014.

[33] Mr Caird says that on 17 October 2014, he learned that Mr Smith was working for Ambius. There was a message from an unknown person on Mr Smith's old phone, asking how his new job was. Mr Caird concluded that he was indeed working at Ambius.

[34] The parties have been to mediation and there are open letters with settlement proposals. However, the matters have not settled and it falls to the Authority to make a determination.

Determination

[35] The first matter is that Just Plants Limited was Mr Smith's employer. This is supported by the following:

- i. That Mr Smith was paid by Just Plants Limited throughout his employment. His pay slips made this clear.
- ii. That Mr Smith had knowledge of the existence of Just Plants Limited.
- iii. That Mr Smith worked solely in the plants side of the business when it was owned by Just Water International Limited.
- iv. That Mr Caird met with the employees of Just Plants Limited during due diligence and confirmed that nothing would change. This included the employment arrangements being continuous.

[36] The employment agreement referred to only a trading name of "Just Plants" and it being a division of Just Water International Limited. There was a registered company called Just Plants Limited that was 100% owned by Just Water International Limited before 1 July 2014. The shareholding is now owned by Veronica Garrett and

Turakirae Investments Limited when the ownership changed on 1 July 2014. Mr Caird is a director of both companies, and Veronica Garrett is also a director of Just Plants Limited. Mr Smith's employment has been treated as continuous.

[37] The employment agreement provides for terms that Mr Smith had previously accepted in his employment with Just Plants Limited, and Mr Caird, following due diligence, decided not to change the arrangements. The employment agreement has been challenged by the second respondent on the grounds that it purports to apply to Just Water International Limited and does not include the name of the correct entity for the employer, if it happens to be Just Plants Limited. That is so, but it is clear that the terms applied, albeit that the employment agreement contained mistakes as to the correct name and the address where the business operated from. The arrangements in the agreement always applied to Mr Smith's role, except that during the agreement there was a change of arrangements as to the ownership of the business from 1 July 2014.

[38] Indeed Mr Smith appears to accept that his employer was Just Plants Limited, despite the change of ownership. He accepts that he worked for Just Plants in the role as prescribed. He agrees he signed off the IEA and that there was no other changes made during his employment as to the terms.

[39] The second respondent claims that the terms of the restraint cannot possibly apply in the agreement to Just Plants Limited given the name on the agreement is Just Water International Limited. There is a mistake and that is because the agreement apparently was a template and was not properly checked as to the accuracy of the situation at the time. Read in context the employer is Just Plants Limited and reading the restraint clause it applies to Just Plants Limited. I note that the agreement was not signed off by anyone for the employer.

[40] On the enforcement of the restraint the test applied is of reasonableness and must be judged as to the context of the whole agreement at the time the clause was agreed. The restraint was entered into at the commencement of the employment. I am satisfied that there was consideration for the restraint provision that seems to be related to the remuneration and Mr Smith having the opportunity to "obtain(ing) skills in the specialised business of Just Plants". It is common ground that the role was Mr Smith's first time in the business of plants and he says his knowledge increased with names of plants and the methods of Just Plants. I accept it is a niche business, but a

business where there is competition and that Mr Smith was employed as a salesperson.

[41] What was the proprietary interest at the time? It is alleged by Mr Caird that Mr Smith built up a skill and expertise in tropical plants while he worked for Just Plants. The terms of the employment agreement on the restraint included:

- Information (product sources and prices, inventions, formulae, programmes, software, technical data, processes or methods of the company).
- Trade secrets.
- Confidential information.

[42] It seems that the only matters relating to Mr Smith is his knowledge of client lists and pricing which did not identify the legitimate interest, particularly as Mr Caird could not identify anything more than Mr Smith having worked for Just Plants and his knowledge and skills as a salesperson. Mr Caird confirmed that the purpose of the claim for enforcing the restraint only applied to some of the factors involved in the proprietary interest. There was no other evidence of any detail provided that indicates the proprietary interest was anything more than Mr Smith gaining knowledge and skills. Knowledge and skills is too wide to encompass the enforcement of the restraint. Moreover there is no evidence that Mr Smith has any possession of Just Plants information to pass on, and there is no evidence that he has actually passed on any information other than he has a new employer and had previously worked for Just Plants.

[43] There is no geographical scope for the restraint. This has to be presumed to be “worldwide” and at the very least to apply to all New Zealand and Australia, however unrealistic that may be. It is consequently not reasonable that it apply to a sales representative where there has been a change of ownership of the business since the restraint was signed and Mr Smith was made redundant by Just Plants Limited. In addition it is common ground that the new owners of Just Plants Limited were putting in place new and different arrangements from the ones that applied when Just Plants Limited was owned by Just Water International Limited. The parties have referred to the Wellington region, the Wellington CBD and the Greater Wellington region. There

is no evidence of what would apply at the time the restraint was entered into. This is influenced by the change of ownership in July 2014. Also, the employment agreement at the time it was entered into applied to arrangements with Just Water International Limited and Just Plants Limited with arrangements in Auckland and Australia, and possibly including a client with premises in Christchurch. In the absence of any agreed term on the geographical scope and the differences now between the witnesses on scope I hold that the restraint is unreasonable. Realistically it could only cover the limited area of operation, which is the Wellington region wherever Just Plants has clients. This is not prescribed and without any agreement on a term the restraint cannot be regarded as reasonable. Given that there was never been anything agreed as to the geographical scope it is not a matter for modification to apply terms not negotiated by the parties and where there may be difficulties with enforcement. I have decided not to exercise discretion accordingly. This includes any of the proprietary interests given there was a change of ownership and Mr Caird followed due diligence without changing anything.

[44] I hold that the six months' time duration of the restraint would be at the far end of a reasonable time given that Mr Caird referred to the duration, between one month and less than one year, and that the role involves a salesperson. Indeed Rentokil has prescribed 3 months in its restraint provision applying to Mr Smith, and this apparently is a much bigger business.

[45] I have considered that Mr Smith started to look for other work for his own reasons and before he was informed that he was being made redundant and that Rentokil had offered Mr Smith work and had agreement for him to start on 6 October. It is understandable why Mr Caird sees their behaviour with some disquiet. Rentokil and Mrs Smith decided to take the risk over the restraint being enforced, I hold. However, Rentokil has moved to ensure that it does not become a party to any breach relating to the terms surviving Mr Smith's employment with Just Plants. This has involved reprimanding Mr Smith when he very unwisely left his new business card with one of Just Plant's clients. However suspicious this is, there is no direct evidence of any improper motive and result given that Mr Smith says his contact was a personal relationship and involves a person he has coffee with.

[46] Overall I hold that the restraint (the six months not to be engaged with a competitor) is unenforceable as it is not reasonable. For completeness, however Mr

Smith must still comply with the confidentiality provisions of the employment agreement, including the other provisions of clause 18 that survive the end of his employment with Just Plants Limited. This should provide adequate protection to Just Plants so that it is not without remedy.

[47] As the restraint is unenforceable the claim that Mr Smith has breached the restraint of trade by working for Rentokil Initial Limited and Rentokil aiding and abetting the breach by employing him must be dismissed.

Costs

[48] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority