

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jackel (NZ) Limited (Initiating party)
AND Craig Ireland (Responding party)
REPRESENTATIVES Jane Latimer, Counsel for the Initiating Party
Peter Davey, Counsel for the Responding Party
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS RECEIVED 17 February 2004, 27 February 2004 and 4 March 2004
DATE OF DETERMINATION 4 March 2004

DETERMINATION OF THE AUTHORITY IN RELATION TO DISCLOSURE

Employment Relationship Problem

The substantive matter before the Authority relates to a claim by the applicant company against the respondent – its former managing director - for a penalty, damages and costs arising from the respondent's alleged breaches of duty towards the applicant.

While the parties have agreed to disclose certain documentation between them there is no agreement in regard to other documentation which, if submitted, is necessary and relevant to matters in question in the proceeding.

This is the issue that is addressed and determined in this interim determination. The parties have agreed the issues of disclosure will be dealt with by way of submissions.

Jurisdiction to order disclosure

There is no formal process for the mutual disclosure and inspection of documents in the Employment Relations Act 2002. However, certain provisions of the Act support the Authority in its role of resolving employment relationship problems including a provision which gives the Authority the power to call for evidence and information.

Role of the Authority

Section 157(1) of the Employment Relations Act provides-

The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

Powers of the Authority

Section 160 1 (a) of the Act provides:

The Authority may, in investigating any matter,-

(a) call for evidence and information from the parties or from any other person.

I am satisfied having studied the Statement of Problem, the Amended Statement of Problem, the Statement in Reply and the submissions before me that the investigation and determination of the substantive matter requires the disclosure by the parties of certain documentation that is both necessary and relevant to the proceedings.

Criteria for Ordering Disclosure

I intend to utilise the well known criteria for ordering disclosure:

- Documents will be ordered to be disclosed if they are necessary to the proceedings.
- Documents which are relevant to matters in question in the proceedings will be ordered to be disclosed.

Determination/Orders

In arriving at the determination and subsequent orders in this matter I have had regard to the above principles and have carefully considered the submissions of the parties. Those submissions are not recorded in full in this decision in the interests of brevity and timeliness but summaries only of the positions of the parties are included. My determination/orders are set out below together with brief reasons for the orders made.

Applicant's request for disclosure

The applicant seeks disclosure of the following documentation.

- (i) All financial statements and sales records (detailing the item, quantity sold, unit sale and price and customer) of IHL for the year ended 31 March 2003 and also to 31 January 2004.

The applicant submits this information is relevant if it has a bearing on the measure of the lost profits that the applicant seeks to quantify, prove and recover. This documentation will also show (or allow to be derived) IHL's gross profit margin – a measure of how well a company generates income.

The respondent advises he is prepared to disclose to the applicant copies of all sales invoices and purchase orders with the unit price deleted up to the date of the applicant's dismissal. As I understand the respondent's position, it is that the respondent was not

subject to a restraint of trade and his duty of fidelity to the applicant did not survive the termination of his employment. That being the case there is no basis for the applicant requiring IHL sales information which goes beyond that date.

The respondent also agrees (despite questioning its relevance to matters in the proceedings) to disclose the trading account for the year ended 31 March 2003 which will show actual gross profit on sales made by IHL for the entire period before he was dismissed. It is submitted that the applicant should be directed to disclose its trading account for the same period.

As I understand the submissions the parties dispute the disclosure of the respondent's documentation that would allow the applicant to determine IHL's gross profit rate. Having reviewed the submissions and relevant case law, in particular *Doherty Trading Ltd v Ferris* [1999] 3 ERNZ I am satisfied that it is the applicant's expected gross profit that will be relevant to determining loss of profit if and when I am required to do so. I find arguments mounted by counsel for the applicant for information that would allow its accounting expert to determine the gross profit rate of IHL to be insufficiently convincing to persuade me to order disclosure of documentation going to IHL's gross profit rate.

On the matter of the period over which financial information should be disclosed and relying on findings in *BFS Marketing v Field (No.1)* [1993] 2 ERNZ 101 I find that pre termination breaches of an employee's duty to his or her employer may, if the employer suffers subsequent loss as a result, leave the employer open to recover damages. The applicant requires such information as is reasonably necessary for it to formulate/prove that loss. Given lead times in placing orders internationally and the subsequent receipt and distribution of products I am setting six months after Mr Ireland's dismissal as a reasonable period in respect of which he must disclose relevant financial information.

The respondent is directed to disclose for the purpose of these proceedings:

All sales records detailing item and brand, customer, quantity sold, selling prices (disclosing discounts and incentives) from 11 June 2002 to 30 September 2003.

In accordance with the respondent's offer he is directed to disclose the trading account for IHL to 31 March 2003. The applicant has also agreed to disclose its trading accounts limited to the applicant's baby brands and subject to a confidentiality agreement in the respondent's possession. (See Final Direction p. 8) The applicant's trading account limited to its baby brands is to be disclosed for the year ended 31 March 2003.

- (ii) All business plans, forecasts and budgets, which were presented to the respondent's/IHL's current bank.

The applicant seeks disclosure of this documentation as going to its claim that the respondent acted in breach of his duty of fidelity whilst employed by the applicant in that he set up IHL.

As I understand the respondent's position he questions the relevance of this documentation but has agreed to approach his bank to obtain copies of this documentation.

I consider this documentation to be relevant to the applicant's claims that the respondent breached his duty of fidelity.

Therefore, the respondent is directed to disclose for the purpose of these proceedings business plans, forecasts and budgets presented to his bank which relate to the establishment of IHL.

(iii) All presentations and submissions to the Warehouse

The applicant notes that the respondent is prepared to provide this information up to the date of his dismissal. The applicant contends that the respondent was in breach of his duty to the applicant for many months prior to his termination and that the 'spring board' doctrine applies here *Aquaculture Corporation v The New Zealand Mussel Company Ltd.* (1985) 4 1PR 353 (HC:NZ). This justifies disclosure of presentations after the date of dismissal.

The respondent agrees to provide the documentation sought for the period to the respondent's dismissal. It is submitted that presentations after the date of the dismissal are irrelevant as he was under no duty to the applicant after that date.

There are competing principles at issue here between the respondent's right to compete with the applicant after his employment terminated and the duty which extended post termination not to misuse confidential information which is properly the property of his former employer. I find that provision of the relevant documentation for a period of 3 months after the applicant's termination is a reasonable period in respect of which the requested information is necessary and relevant to questions raised in the proceedings.

The respondent is directed to provide documentation on all presentations to the Warehouse made on behalf of IHL up to 30 June 2003.

(iv) All presentations to overseas suppliers including purchase orders

The applicant submits this information is relevant to:

- The applicant's claim that the respondent breached his duty of fidelity which he owed to the applicant.
- The applicant's claim that the respondent used the applicant's confidential information in order for him to obtain a head start in setting up IHL – the competing business.
- Purchase orders are necessary to determine IHL's gross profit.

The respondent submits he does not have any presentations to overseas suppliers other than the emails the applicant already has in its possession. The respondent submits that purchase orders are not relevant to the proceedings as it is the applicant's gross profit that must be considered should a question of damages arise.

Adopting the same principles to those applied in (i) & (iii) above the respondent is directed to disclose all documentation relating to presentations to overseas suppliers and purchase orders showing quantities ordered (but excluding purchase prices) to 30 June 2003. If the respondent has no documentation relating to such presentations to

overseas suppliers other than that information already in the possession of the applicant that can be confirmed on oath in the list served subsequent to this determination.

(v) Bank Statements/GST returns

The applicant seeks the respondent's personal and company bank accounts and GST returns. The relevance of this documentation to the matters in question in the proceedings is a little hard to understand except that it is clear the applicant wishes to establish when the IHL account was opened (going to the allegation of breach of fidelity). The applicant seeks the GST returns for IHL to assist in verifying sales and purchases.

The respondent agrees to provide the first bank statement for IHL to show when the account was set up. The respondent does not see the relevance of GST returns but is prepared to supply the GST returns for IHL up to the date of the applicant's dismissal.

The respondent is directed to disclose the first bank statement for IHL. For the purposes of verifying sales information directed to be disclosed in (i) above, the respondent is directed to provide IHL's GST returns relevant to the verification of sales up to 30 September 2003.

(vi) Patents and Correspondence relating to the First Steps, Little Ones and Infanti Brands

The applicant seeks documentation relating the First Steps brand. It is submitted this documentation relates directly to the respondent setting up a business, which sold products that directly competed with those of the applicant i.e. First Steps brand vs. Tommee Tippee brand.

The applicant also seeks corresponding information with respect to the Little Ones and Infanti Brands. It is submitted in respect of the Little Ones brand that this brand was developed and registered by the respondent whilst he was still employed by Jackel.

The respondent is prepared to disclose documents relating to the First Steps brand but submits the applicant has all documents with the exception of a catalogue.

It is submitted the applicant appears to have abandoned its claim regarding the Infanti Brand as a result of information supplied by the respondent that this brand only came to the respondent's attention in July 2003.

In respect of the Little Ones brand it is submitted that work on developing this brand did not commence until at least May 2003 well after the respondent's employment was terminated.

The respondent is directed to disclose all correspondence and patents relating to the First Steps brand that is not already in the possession of the applicant. Further, in accordance with the principle set out in (iii) above the respondent is directed to disclose correspondence and patents relating to other brands developed or in development up to 30 June 2003 i.e. Little Ones brand. I make no order in respect of Infanti brand.

(vii) Correspondence with logo and packaging companies.

The applicant submits this documentation is relevant to the applicant's claim that the respondent was in breach of his duty of fidelity. It will show when logos and packaging for IHL was first contemplated.

The respondent agrees to provide any information in his possession.

The respondent is directed to provide any documentation in his possession in the nature of correspondence with logo and packaging companies.

(viii) IHL customer brochures, price lists, point of sale promotional literature.

The applicant submits this information sets out what products the respondent, through IHL, is selling in the marketplace. This will enable the applicant to identify which products directly compete with its own allowing it to accurately quantify the losses suffered by the applicant.

The respondent submits that he does not have any brochures or promotional material up to the date of his dismissal. After that such information is irrelevant because the respondent's duty of fidelity towards the applicant was at an end. As previously argued price lists are not relevant and are commercially sensitive.

The applicant submits it does not have the brochure referred to in Mr Ireland's letter to Leon Roff dated 2 March 2003.

The respondent is directed to disclose all IHL customer brochures and promotional material in existence or in development up to 30 June 2003 including the colour brochure referred to in Mr Ireland's letter to Leon Roff dated 2 March 2003.

Otherwise it is my view that the sales information I have directed to be disclosed should enable the applicant to identify accurately which of the respondent's products directly compete with its own. Therefore, I make no further order under this head but leave it open to the applicant to return for further directions if the sales information (once provided) does not assist it in the identification process described.

(ix) Correspondence between the respondent and APC Logistics

The applicant submits this information is relevant to its claim the respondent breached his duty of fidelity to the respondent and he may have used contacts made through his employment to his advantage in setting up IHL.

The respondent submits the respondent's knowledge of a freight forwarder is not confidential information and that this information is not relevant to the investigation.

I agree such contacts made by the respondent whilst in his employment are not confidential information.

Nevertheless the respondent is directed to disclose correspondence relating to his initial contact/contract with APC logistics as this goes to activities undertaken by him pursuant to setting up IHL that may have occurred whilst he had a duty of fidelity to Jackel.

Respondent's request for disclosure.

The respondent seeks disclosure of the following documentation:

- (i) Monthly flash reports containing monthly sales information, monthly management accounts, and quarterly sales reports prepared for the board of directors, for the period 1 April 2001 to 1 April 2003.
- (ii) Statements of financial performance for Jackel (NZ) Ltd. for the years ended 31 March 2002 and 31 March 2003.

The respondent submits that the applicant has agreed to supply the documents described in (i) & (ii) above subject to a confidentiality agreement which has not been finalised. To avoid further delays, the respondent seeks directions from the Authority that the applicant disclose the above documents on the basis that they will only be used for the purposes of this investigation.

I can find no submissions on the above requests by the applicant and their silence on this point is taken as acceptance of the respondent's request.

The applicant is, therefore, directed to provide monthly flash reports containing monthly sales information, monthly management accounts and quarterly sales reports prepared for the board of directors for the period 1 April 2001 to 1 April 2003. The applicant is also directed to disclose statements of financial performance for Jackel (NZ) Ltd for the years ended 31 March 2002 and 31 March 2003. Disclosure of this documentation may be subject to agreement or further directions regarding a proposed confidentiality agreement. (See Final Direction p.8).

- (iii) All correspondence relating to the applicant's purchase and sale of the gift sets and the fork and spoon set that were allegedly deleted by the respondent as part of its claim for lost profits on those items.

It is submitted this information should include copies of invoices and sales information which shows the units sold and profit on those items from 1 April 2002 up to the present time.

The applicant agrees to provide all purchase and sales invoices (prior to the products being delisted) from April 2002 to the present date. Further, the applicant agrees to disclose all correspondence with suppliers of these products between 1 April 2002 and the present date.

In respect of the above products the applicant is directed to disclose copies of all purchase and sales invoices (prior to the products being delisted) from April 2002 to the present date. The applicant is also directed to disclose all correspondence with suppliers of these products between 1 April and the present date.

- (iv) Copies of invoices and proof of their payment plus non-privileged documentation relating to attendances that form part of the applicant's claim for expenses (Para 3 of Mr Appleby's report dated 13 October 2003).

The applicant agrees to provide copies of all invoices and proof of their payment. It is submitted that details of other consulting tasks undertaken by Turner Business Consultants for Jackel are irrelevant to the proceedings and they should be permitted to be deleted from the invoices disclosed.

The applicant is directed to disclose the invoices sought and proof of their payment (deleting details of other work undertaken for Jackel by Turner Business Consultants).

Final direction

All documentation directed in this determination to be disclosed is to be used only for the purposes of this investigation.

There has been some discussion between the parties with respect to a confidentiality agreement. I have little information as to the proposed application of that agreement or its current status. If my direction 'that the documentation disclosed pursuant to this determination is to be used only for the purposes of the investigation' is in the view of the parties insufficient to protect the use of the documents directed to be disclosed then the parties are free to come back to me for further directions on this.

Timetable

I have given some thought to the proposal that I should order the preparation and service by the parties of a list of documents confirmed by oath. The reason it has occupied my thoughts goes to the provisions of s. 157 of the Act which suggests the Authority should go about its business without regard to technicalities.

However, given the importance of this case to the parties and the fact there is no fundamental disagreement between them as to the provision of lists as proposed I have come down on the side of ordering lists be provided with a timetable for inspection as follows:

- Preparation and service by the parties of their respective lists of documents confirmed on oath by Wednesday 24 March 2004.
- Inspection allowed after 24 March 2004.

Mediation

If, after inspection and analysis of the material disclosed, the parties consider that they may be in a better position to resolve between themselves some or all of the issues between them they are encouraged to considered meeting again in mediation. The Authority would be happy to facilitate an early date if this would be helpful to the parties.

Janet Scott
Member of Employment Relations Authority