

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 206
5529856

BETWEEN K T VENTURES LIMITED
Applicant

A N D IAN JOHNSON
Respondent

Member of Authority: M B Loftus

Representatives: Kathryn Dalziel, Counsel for Applicant
Peter Moore and Anna Oberndorfer, Advocates for
Respondent

Investigation Meeting: 4 December 2014 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 8 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, K T Ventures Limited (KT), seeks an interim injunction preventing Mr Johnson from being employed in circumstances that it says breach a restraint of trade provision contained in an employment agreement between them.

[2] Mr Johnson argues he is not in breach of the covenant but adds, in the alternate and should I not agree, the provision is now void as a result of KT repudiating the employment agreement by unjustifiably dismissing him.

Background

[3] KT holds the New Zealand master franchise of Cleantastic, a franchised commercial cleaning business. Cleantastic sells franchises and then trains the

franchisee in all aspects of running the business, from recordkeeping to undertaking commercial cleaning. Cleantastic finds the clients for the franchisees to service and allocates the clients to each franchisee. Cleantastic then manages the franchisee's service and quality levels.

[4] KT employed Mr Johnson as its Area Manager, South Island, commencing on 16 April 2013.

[5] The two entered into a written employment agreement. Contained there-in is the clause KT wishes to have enforced. It reads:

11.6 Non-Competition.

*The Employee agrees that for a period of **one year** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, carry on business in competition with the Employer within a radius of **100 kilometres** from the Employers' premises.*

[6] The employer's premises were, for the purposes of the agreement, identified as being at an address in Buchanans Road, Christchurch.

[7] The agreement also contains a clause prohibiting the disclosure or use of confidential information messages, data or trade secrets obtained in the course of the employment either during or after its cessation. There is then a prohibition on the solicitation of, or performance of work for, any of KT's clients with whom Mr Johnson had contact while in KT's employ for a period of one year following cessation. To round off the suit of restrains a similar prohibition applies in respect of engaging ex-colleagues.

[8] The employment continued though not without tension. Soon after Mr Johnson's engagement his only colleague in the Christchurch office resigned and a replacement was not obtained for some 15 months. Mr Johnson claims to have become stressed by virtue of having to do the work of two though there is little evidence he formally raised these concerns at the time.

[9] On 4 August 2014, a competitor, CleanPlanet, advertised for a regional manager in the Canterbury area.

[10] On 22 August 2014, Mr Johnson resigned. While couched in conciliatory terms his letter of resignation cites the fact Mr Johnson was forced to work alone before stating his resignation was finally triggered by remarks made by Kevin Richardson, a director of KT, during a then recent visit to Christchurch.

[11] Mr Johnson gave a month's notice and his letter suggests he intended working that period. That, however, did not occur as on 26 August Mr Richardson rang to tell Mr Johnson he should leave forthwith, though he would be paid for the remainder of the notice period (to 19 September 2014).

[12] Mr Johnson commenced employment with CleanPlanet the following working day (22 September 2014) although KT was not aware of this until advised by an industry supplier on 29 October 2014. KT responded by writing to Mr Johnson on 5 November 2014 demanding he comply with clause 11.6 of the employment agreement by tendering his resignation to CleanPlanet no later than 5pm on 10 November 2014.

[13] Mr Johnson did not do so and that led to the current application.

Determination

[14] KT seeks, on an interim basis, an order precluding Mr Johnson from working in competition within a radius of 100km of Buchanans Road. The period is debatable given the clause states one year though KT says the order would only remain valid until its claim is the subject of a substantive determination.

[15] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but through addressing some broad questions (see *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) and *Hally Labels Ltd v Powell* [2011] NZEmpC 43). In exercising its discretion the Authority needs to consider:

- (a) Is there a serious issue to be tried?
- (b) If so, are adequate alternate remedies available?
- (c) Does the balance of convenience favours the granting of the orders sought? and

(d) What outcome does the overall justice of the case require?

[16] First I address the question of whether or not there is a serious issue to be tried. KT says it has various proprietary interests it needs to protect and through Mr Richardson's affidavit lists a number which, it claims, gives it a competitive advantage.

[17] In submission reliance is placed on the fact Mr Johnson does not challenge the various assertions in respect of proprietary interest. That is, on the face of it, correct. Mr Johnson's primary response is the items listed are irrelevant as his new employer has its own versions and need not rely on any knowledge he may have gained while in KT's employ. His secondary argument is KT's proprietary interests are worthless as his new employer operates in a different market and its target clientele differs.

[18] While the lack of rebuttal must lead to a conclusion KT has an arguable case I am unable to estimate its strength (and therefore its seriousness) on the evidence before me. Mr Richardson chose not to detail KT's competitive advantages for reasons of commercial sensitivity and while KT disputes the divergent markets claim there is no supporting detail.

[19] Further questions arise from the fact that while Mr Richardson spoke of only one main competitor to KT a quick perusal of the Christchurch yellow pages showed other firms operating similar, if not identical, businesses in the region. I also note that Mr Johnson was appointed to a South Island role yet the restraint only applies to a portion of his territory. That raises the question of why, if there were important proprietary interests, they only warranted partial protection. Perhaps the answer lies in the fact some 85% of the business is performed around Christchurch but that could indicate the restraint is primarily anti-competitive and not aimed at protecting valuable proprietary interests. The above is, however, speculative and resolution would require test of a substantive investigation.

[20] For the above reasons I conclude KT has an arguable case whose merits are completely unknown and can not be estimated. There must therefore be a question as to whether or not it is *serious* and that can only be resolved by a substantive investigation.

[21] Turning to the question of adequate alternate remedies. As was said at paragraph [10] of *Pottinger & Ors v Kelly Services (NZ) Limited* [2012] NZEmpC 101 (a case that KT emphasises):

The purpose of interim relief is to protect a plaintiff (in this case the defendant) against injury for which it cannot be adequately compensated in damages in the event that it succeeds at trial.

[22] Most of the argument focused on Mr Johnson's means and whether or not he was capable of recompensing KT should he cause damage to its business. KT argues there is no evidence he could, thus rendering damages an ineffective alternate to enforcement of the restraint.

[23] While that is correct, there is also no contrary evidence to show Mr Johnson could not recompense KT should he cause harm.

[24] Here I also note this may not be an issue. There is not only no evidence Mr Johnson has caused harm through inappropriate action, it has not even been alleged. In other words there may be no issue as to damages and remedies may be limited to penalties.

[25] Having weighed the evidence (albeit untested and somewhat superficial in this regard) and the submissions I conclude there are viable alternates to enforcing the restraint. They lie in enforcement of one of more of the various covenants contained in clause 11 of Mr Johnson's employment agreement with KT, penalties and possibly damages.

[26] There is then the balance of convenience. This must strongly favour Mr Johnson.

[27] As already said, and while KT has an arguable case, there is little evidence it has substantial merit. That said, there is also no evidence it lacks substantial merit. There is then no evidence any of KT's proprietary interests are at risk of actual misuse by Mr Johnson and this has not been alleged.

[28] Against that I must balance the fact Mr Johnson would face considerable hardship should he be required to resign just prior to Christmas and the probability such timing may well impede his ability to find a replacement source of income for what could possible be a considerable period.

[29] There is then the period of the restraint. While I hear the argument an interim order would only remain enforceable until determination of the substantive application I also note substantive hearings often never occur and as far as the Authority is concerned its interim determination forms the final judgment. The provision I am being asked to enforce remains valid for twelve months. That would, in the normal course of events, be considered inordinately long and therefore unenforceable. As Ms Dalziel conceded it is for KT to establish its proprietary interests need such lengthy protection and in this instance the necessary evidence is yet to be furnished.

[30] Finally I must comment on KT's argument and the emphasis placed on the *Pottinger* case. While many of the principles cited are relevant I both note and agree with Mr Moore's argument *Pottinger* is distinguishable. The present application is a complete restraint while *Pottinger* dealt with non-solicitation and confidentiality clauses. Note must therefore be taken of Judge Inglis' comments at paragraph [48] of *Pottinger* and her view there is a distinction between a restraint of trade that prevents an employee from working in competition with the former employer at all and a provision which prevents an employee from soliciting or working with customers of the ex-employer. Judge Inglis concluded the former is more onerous and requires a more acute examination to why public policy considerations should override the underlying principle a restraint is, prima facie, unenforceable. Here there is little evidence to support such a conclusion.

Conclusion

[31] When I consider that KT may have an arguable case but its merits are, on the evidence before me, incalculable; the existence of alternate remedies and a balance of convenience that strongly favours Mr Johnson I conclude there is little to persuade me to depart from the established principle restraints of trade are, prima facie, unenforceable.

[32] For the above reasons KT's application fails.

[33] Given the above conclusion the question of whether or not the restraint is void as a result of the circumstances under which Mr Johnson departed need not be answered. That said I note for the parties' benefit and given this claim may yet be the subject of a substantive hearing that the argument was unlikely to succeed. This is for

two reasons. First, and as Ms Dalziel submitted, repudiation in circumstances which give rise to a personal grievance is unlikely to invalidate a restraint (see *Pottinger*). Second the grievance itself would have to be determined to ascertain whether or not there was an unjustifiable repudiation and that is unlikely in the context of this application.

Costs

[34] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority