Determination Number: CA 37/07
File Number: 5079790

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN	Maccaferri N Z Ltd
AND	Peter Langham
REPRESENTATIVES	Naomi Cervin, Counsel for applicant Tim McGinn, Counsel for respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	30 March 2007
DATE OF DETERMINATION	10 April 2007, Christchurch

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maccaferri NZ Limited is a company that operates a business supplying geosynthetic materials to the civil and related construction industry in New Zealand. It has offices in Auckland and Christchurch and also employees based in Napier and Hamilton. It is a specialised business with only a few competitors in New Zealand, one of which is a company called Geotech Systems Limited.

[2] Maccaferri employed Peter Langham as a sales engineer from 7 November 2005 until he resigned by giving one month's notice on 8 January 2007 in order to take up employment with Geotech. There are restraint of trade provisions in a written but unsigned employment agreement said by Maccaferri to apply to Mr Langham. Maccaferri seeks a compliance order requiring Mr Langham to comply with the provision that prevents him from working for a competitor in New Zealand for 6 months after the termination of his employment. It is not disputed that the restraint as worded prevents Mr Langham from working for Geotech. Rather, Mr Langham first says that he is not bound by the written employment agreement that includes the restraint clause; or if he is held to be bound by the written agreement, that the restraint is illegal and unenforceable in its present form; or if it is not illegal and unenforceable (as modified if necessary), that the restraint period runs from 9 January when he finished work rather than the end of his notice period.

[3] Despite mediation, the parties were not able to reach agreement.

[4] To resolve the problem, it is necessary to review the arrangements made concerning the employment of Mr Langham. If the unsigned written agreement applies it will then be necessary to determine whether it is reasonable and should be enforced in its current or a modified form then whether Mr Langham's employment ceased on 9 January 2007 or at the end of the notice period.

[5] In its statement of problem Maccaferri also seeks an inquiry into damages caused by alleged breaches of contract and the imposition of a penalty. However, it was agreed that the current investigation and determination would be restricted to the issues arising from the compliance order application which is the urgent aspect of the whole problem.

Mr Langham's employment

[6] Chris Brockliss is Maccaferri's New Zealand managing director. On Friday 23 September 2005 he interviewed Mr Langham to fill a vacancy for a South Island sales engineer position based in Christchurch. Next day, there was some discussion over the phone between the two men about whether Mr Langham might be interested in a lower North Island position. Mr Brockliss then sent Mr Langham an email that afternoon giving some details about the North Island position but confirming that *we would like to proceed with an offer for the Sales Engineer [position] based in Christchurch* in any event. Mr Langham had sought details of the North Island position so he could discuss the possibility with his family. However, over the weekend, a decision was made that the family preferred not to shift so Mr Langham phoned Mr Brockliss on Monday 26 September 2005 to tell him that and to discuss further the Christchurch position.

[7] There is some dispute about exactly what was said during the Monday phone discussion but that mostly reflects the passage of time. Mr Langham told me that he expected to receive something in writing covering off what had been agreed during the phone call. In response to a question from counsel he initially agreed that Mr Brockliss intimated that he would forward an employment agreement but then said he expected something in writing which could have been a job description. Mr Brockliss on the other hand says that he told Mr Langham that he would send him an employment agreement for him to review. To the extent there is a difference in the evidence of the two men on this point, I prefer the account of Mr Brockliss. It is common practice in such employment for agreements to be conveyed in writing which is what Mr Brockliss did. It is more likely than not that he told Mr Langham that he would put the agreement in writing. I should also note that I found Mr Brockliss to be a reliable witness.

[8] Mr Brockliss sent the draft agreement by email at 6.47 pm on Tuesday 27 September 2005. In the email, Mr Brockliss asks Mr Langham to review the document and to call him if there are any questions. The email goes on to say *When you confirm your agreement to the standard draft, I will post you two originals, one for your records and one for return to myself for your personnel file*. The draft agreement is in letter format dated 27 September 2005 addressed to Mr Langham saying Maccaferri is *pleased to offer you the position of Sales Engineer …commencing Monday 31 October, 2005 …. Our offer of employment is based on your acceptance of the terms and conditions set out below*. Mr Langham was asked to sign and return a copy of the letter by Monday 3 October 2005. It is common ground that the inclusion of a restraint provision in this draft agreement was the first reference to that being one of the terms of the employment.

[9] Mr Brockliss believes that he would not have subsequently sent a signed copy of the proposed agreement unless Mr Langham had contacted him to confirm the acceptability of the draft but he does not profess to any recollection of such contact after sending the email. Mr Langham's evidence is that he did not see the draft until Wednesday evening after work by which time he had already told his manager at his current employment that he was resigning to take up a new position. Mr Langham says that the proposed restraint placed him between a rock and a hard place, that he did not know what were his options with further negotiations with Mr Brockliss and he had already told his current employer of his resignation. Mr Langham decided to do nothing in response to the email.

[10] On 29 September and (apparently) without having heard from Mr Langham, Mr Brockliss signed and posted a hard copy of the employment agreement to Mr Langham. This version includes an amendment to the commencement date (7 November 2005) and the date for returning the signed agreement (10 October 2005). The evidence of both Mr Brockliss and Mr Langham is that the dates (as amended) had been discussed during their 26 September phone call so it is unclear why the wrong dates were included in the 27 September 2005 draft agreement. Mr Langham received the 29 September 2005 agreement in the post but did nothing further with it, consistent with his decision not to respond to the email. Neither Mr Brockliss nor anyone else at Maccaferri noticed that Mr Langham did not sign and return the written agreement.

[11] Mr Langham commenced work on 7 November 2005. Some time shortly after starting Mr Langham was provided with and signed company policy records covering a variety of matters. The policy record includes a statement that where the policy conflicts with any clause in the employee's current *Terms and Conditions of Employment* it is the policy document that prevails but other clauses in *Terms and Conditions of Employment* remain effective.

Does the unsigned written agreement apply?

[12] There is a statutory requirement for the individual employment agreement of an employee whose work is not covered by a collective agreement (as here) to be in writing: see s.65(1) of the Employment Relations Act 2000. An employer is also obliged in the same circumstances to provide the intending employee with a copy of the proposed agreement, advise them of their right to seek independent advice and allow a reasonable opportunity for the employee to do so: see s.63A of the Employment Relations Act 2000. In the present case, Mr Brockliss was not specifically aware of all of these obligations so Maccaferri did not advise Mr Langham of his entitlement to seek independent advice. Counsel for Mr Langham drew attention to the inevitable conclusion that Maccaferri must be guilty of unfair bargaining pursuant to s.68(2)(d) of the Employment Relations Act 2000. However, a failure to comply with these statutory obligations does not render an individual employment agreement unenforceable: see *Warwick Henderson Gallery v Weston (No 2)* [2005] ERNZ 921 and s.63A(4) of the Employment Relations Act 2000.

[13] Counsel both referred to *Royal v Axon Computer Systems Ltd* [1994] 1 ERNZ 312. In that case there was some reference to a restraint provision during the interview process. When the proposed written contract (including the restraint) arrived with a request for it to be signed and returned, the intending employee instead wrote to the employer saying *I have read and understood the conditions provided*. He deliberately did not sign and return the written agreement because, although he believed the restraint would be unenforceable, he wanted to secure the job which he thought might be jeopardised by any discussion about the restraint. The Court did not hesitate to find that the employee communicated his acceptance of the proffered written employment agreement. The Court went on to comment *Even had Mr Royal not sent any letter of acceptance I would have still been inclined to find that he was party to and bound by that contract …with particular regard to the fact that he took up the employment and remained in it on the terms of that document*. In the present case Mr Langham took up his employment and remained in it on the terms of the proffered written agreement. The only significant fact to distinguish the present case from *Royal* is that there was no reference to any proposed restraint during the interview process.

[14] Counsel also referred to *Quantum Global Limited v Day* (2003) 7 NZELC 97070 and *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490. In the former case, the Authority found that an employee was not bound by a written employment agreement that included a restraint. There had been negotiations about the proposed new agreement and the employer commenced paying a higher salary. However, the Authority held that the parties through their exchanges had elevated the importance of signing the proposed terms beyond a mere formality. Other evidence also indicated at the time that the employer did not consider that the restraint had been agreed. In the present case, I do not accept that the parties elevated the importance of signing the agreement beyond what is usually the case. I do note however the comment by the Authority in *Quantum Global* that the passage of a few more months without more could have resulted in a finding of implied consent to the written terms including the restraint. The *Space Industries* case is not particularly helpful in the present circumstances because it essentially turned on the Court disbelieving a respondent's evidence and preferring documentary indications that a restraint had been agreed although the actual document could not be located.

[15] Another case referred to is *Marine Helicopters Ltd v Stevenson* [1996] 1 ERNZ 472. In that case the employee was sent a letter of appointment and a draft employment contract which included a restraint provision. The employee read it and put it away in a drawer without signing it. In the subsequent proceedings to enforce the restraint, the Court found that there was an oral employment contract but that the unsigned written document evidenced the terms of that contract. The Court was satisfied that the restraint provision was one of the terms of

employment because the letter and draft contract had been sent and received and they embarked on the employment relationship without further discussion regarding the terms of employment. The *Royal* case is not referred to in this judgment but the Court's approach reflects the comment in *Royal* referred to above.

[16] Counsel argued that *Royal* and *Marine Helicopters* are distinguishable, a submission which I do not accept. As with the employee in *Royal*, Mr Langham crafted his response to the written offer (silence and commencing the employment) to avoid making an issue about the proposed restraint. It is clear from *Marine Helicopters* that commencing employment can amount to evidence of acceptance of a written but unsigned offer of employment. Both cases are examples of where the Courts have been prepared to accept the existence of restraint provisions in the absence of signed written agreements.

[17] Another point made by counsel is that the employment agreement in the present case was formed orally over the phone on Monday 26 September 2005 when there was consensus reached about all terms essential to the formation of a contract of service. In reliance on that arrangement, Mr Langham said in sworn evidence that he resigned (verbally) from his prior employment before the dispatch of the email and attached draft agreement on the Tuesday evening. Mr Langham also gave sworn evidence that he followed up his verbal resignation with a written resignation. I asked Mr Langham (and he agreed) to obtain a copy of the written resignation from his previous employer and forward that to the Authority. On 5 April 2007 the senior support officer approached counsel to inquire about this document. That resulted in a letter the same day from counsel. Counsel reports that he is advised by Mr Langham that the evidence to the Authority about the resignation is not true. Apparently Mr Langham was not in employment at the time of the interview with and offer from Maccaferri so no resignation was required. More will be said below about the untruthful evidence, but for present purposes, it is sufficient to point out the earlier finding that Mr Brockliss told Mr Langham that a written offer would follow. Accordingly, I do not accept that an oral agreement independent of the written offer to follow had been reached during the phone discussion.

[18] Counsel argued that the written offer was no longer available for acceptance because it lapsed when Mr Langham did not respond by the stipulated date. The answer to the point is that an employment relationship did come into existence because Mr Langham worked for Maccaferri for more than a year assuming the responsibilities position and accepting the benefits of the offered position. The task for the Authority is simply to determine the terms of the relationship, not whether it was formed.

[19] From the above, I conclude that Mr Langham accepted the terms of the unsigned written employment agreement dated 29 September 2005 including the restraint provision by commencing employment in early November 2005. It was not so much his silence as his actions that bind him to the written agreement.

An enforceable restraint?

[20] It is accepted that Maccaferri has a proprietary interest capable of being protected by a restraint of trade provision in the employment agreement of an employee such as Mr Langham.

[21] It is submitted that the restraint fails for lack of consideration. Part of that argument is that it should be seen as a variation to the contract entered into as a result of the phone call on Monday 26 September 2005 but I reject that for the same reasons explained above. The second aspect arises from the way in which the restraint is introduced in the written agreement. That says that the restraint is *[i]n consideration of the remuneration to be paid under this agreement ….* It is common ground that the level of remuneration was agreed during the phone discussion so it is argued that the express consideration is past and ineffective to support the restraint in the written agreement. However, the submission overlooks the point that Mr Langham accepted the offer of employment entitling him to perform work and receive remuneration following the communication of the offer contained in the 29 September 2005 correspondence. At the time the offer was accepted, the consideration for the restraint was not past.

[22] There is a submission that Maccaferri breached its employment agreement with Mr Langham so that it cannot now rely on the restraint: see *Grey Advedrtising (New Zealand) Limited v Marinkovich* [1999] 2 ERNZ 844 and *The University of Auckland Primary Health Care Trust v Sewell* [2000] 1 ERNZ 781. The former case held that there was a serious issue to be tried about whether a restraint could survive if the employee established a repudiatory breach by the employer. The latter case went on to express some comments on the point despite finding that the restraint was otherwise unreasonable and unenforceable. The Court noted the acceptance by counsel that a repudiatory breach by an employer may render a restraint unenforceable against an employee and that where successful, the argument has been founded on a wrongful dismissal. There was no wrongful dismissal in the present case. Mr Langham resigned and was sent home shortly afterwards. Payment has been made for the period of notice. Accordingly I find that there was no repudiatory breach such as to render the restraint unenforceable.

[23] Counsel submitted that the restraint is unreasonable and therefore unenforceable. There is a complaint about the duration of the restraint which is six months. It is said that no more than 3 months is required to allow Maccaferri to engage or deploy a new sales engineer and for that person to establish their relationship with the clients formerly serviced by Mr Langham. It is also said that the geographical coverage of the whole of New Zealand is too wide when Mr Langham operated in the top half of the South Island only.

[24] It is for the applicant to establish the reasonableness of the restraint. It is expressed to restrain the employee from performing any work in a similar capacity to which the employee was employed by Maccaferri directly or indirectly in competition with Maccaferri anywhere in New Zealand within the period of six months after the conclusion of the agreement. The geosynthetic industry is specialised. Mr Langham developed his knowledge and experience in the industry solely from his employment with Maccaferri. It is reasonable to prevent him using that knowledge and experience for Maccaferri's competitor for a period of time. Mr Langham remains free to work in any other sales industry including general civil construction in the meantime. I also accept that six months is a reasonable duration for the restraint. Mr Langham built up relationships with clients and was provided with access to a significant amount of commercially sensitive information relevant to Maccaferri's business and those clients. As it has transpired, the duration of Mr Langham's employment has been relatively short but judged as at the formation of the employment agreement, six months is a reasonable period of restraint. I further accept that Maccaferri has established that it is reasonable for the restraint to cover the whole of New Zealand. Mr Langham had access to information about clients and sales throughout New Zealand.

[25] It follows that Mr Langham is subject to a restraint limiting his field of employment for six months following the conclusion of his agreement with Maccaferri.

When did the agreement conclude?

[26] There is an evidential dispute about what was said to Mr Langham when he was sent home and its effect. Phillip Ball is Maccaferri's New Zealand sales and marketing manager. He received a call from Mr Brockliss on 8 January and was asked to travel to Christchurch to effect Mr Langham's exit from Maccaferri. Mr Brockliss wanted Mr Ball to tell Mr Langham to stay at home during the notice period which would be paid. Mr Ball's note of this conversation includes the line *To ChCh [symbol] Dismissal of Peter Langham after his resignation … [symbol] Months pay in lieu of working*. Mr Ball could not explain why he wrote the word *Dismissal* but says he told Mr Langham to stay home during the notice period which would be paid. Mr Ball also made a note of his conversation with Mr Langham. It records him saying that Maccaferri would be paying him out the one month's notice period and that his final salary would be paid within a few days. The note also opens by saying *I travelled to the Christchurch office to remove PL from the office following his resignation …*.

[27] From this I conclude that the effect of the message delivered to Mr Langham was the immediate ending of the employment relationship nothwithstanding Mr Brockliss's intentions to place him on garden leave.

Remedies

[28] Section 137 permits the Authority by order to require a person to cease doing any specified thing to prevent further non-compliance with any provision of an employment agreement. More commonly, restraint of trade provisions are enforced by injunction often preceded by interim injunction. However, there is no reason why a party should not be entitled to enforce a post employment restraint by way of compliance order. Having determined that Mr Langham is subject to a valid and enforceable restraint provision and that his current employment with Geotech Systems Limited places him in breach of the restraint, the only question now is whether a compliance order should issue. That raises questions about the substantial merits and equities of the case, matters referred to in s.157(1), (2) & (3) of the Employment Relations Act 2000.

[29] When Mr Ball attended to the exit of Mr Langham he said that Maccaferri would be enforcing the restraint provision. That was on 9 January 2007. Proceedings were lodged in the Authority on 26 February 2007 following an attempt to get Mr Langham to sign an undertaking. I accept the explanation that Maccaferri's legal advisors were dealing concurrently with Mr Langham and another former Maccaferri employee both of whom commenced work for Geotech Systems Limited. Some delay in communicating with the other ex-employee resulted in the delay in lodging the present proceedings. However, the delay has not disadvantaged or prejudiced Mr Langham so it does not count against granting a compliance order.

[30] I have also considered whether Maccaferri's failure to advise Mr Langham of his right to get independent advice should allow Mr Langham to avoid a compliance order. The answer lies in the obligation of the Authority to make its determination in accordance with the substantial merits of a case without regard to technicalities. Maccaferri's failure was one of form rather than substance. The proposed employment agreement was given to Mr Langham and he had ample opportunity to get advice if he wanted to do so. He noticed that the proposed agreement included the restraint of trade provision but he chose not to get advice. That cannot be attributed to Mr Brockliss not referring to the right to seek independent advice.

Orders

[31] I therefore make an order requiring Mr Langham to comply with his employment agreement and cease the performance of work for Geotech Systems Limited in a similar capacity to that performed by him when employed by Maccaferri. This order is effective immediately and applies until 9 July 2007.

[32] Costs are reserved.

Good faith

[33] I should note that I accept the assurance given by counsel that he only became aware when following up on my request for the written resignation that Mr Langham's evidence about that resignation from the former employment was untruthful.

[34] By giving evidence which is now acknowledged to be untruthful Mr Langham obstructed rather than facilitated the Authority's investigation. He also failed to act in good faith towards Maccaferri.

Further action

[35] The issue about Mr Langham's untruthful evidence will be referred to the Solicitor General for whatever action is thought appropriate.

[36] The Authority will approach the parties in due course to make arrangements to investigate the unresolved aspects raised in the statement of problem. It would be helpful it the parties let the Authority know about relevant developments in the High Court proceedings.

Philip Cheyne
Member of Employment Relations Authority