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Marshment v Sheppard Industries Limited [2010] NZEmpC 98 (30 July 2010)

Last Updated: 4 August 2010

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 98](#)

ARC 77/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ADAM LESLIE MARSHMENT Plaintiff

AND SHEPPARD INDUSTRIES LIMITED Defendant

Hearing: 27 July 2010

(Heard at Auckland)

Appearances: Kathryn Beck and Richard Upton, Counsel for Plaintiff

Timothy Allan, Counsel for Defendant

Judgment: 30 July 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This judgment decides Adam Marshment's challenge to the determination of the Employment Relations Authority. It granted Sheppard Industries Limited (SIL) an interlocutory injunction enforcing a contractual restraint against competitive economic activity until the Authority can investigate and determine SIL's claim of breach of that restraint by Mr Marshment.

[2] The Authority issued its determination granting the injunction on 2 July

2010,^[1] following an investigation meeting held on 28 June 2010. Mr Marshment was then within a week of a planned overseas trip with his new employer to an

important sales exhibition in the USA and regarded the terms of the Authority's

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injunctive order as precluding him from doing so. Mr Marshment applied for a very urgent hearing of his challenge and although the Court was in a position to grant this, the company's concessions about the effect of the Authority's injunctive order (as recorded in a minute issued on 7 July 2010) permitted the plaintiff to travel to the sales exhibition and return to New Zealand before the hearing of this challenge.

[3] The Employment Relations Authority has scheduled its investigation meeting to begin on 5 and 6 August 2010 although, realistically, its determination may not be delivered for at least several weeks after that. The restraint in Mr Marshment's employment agreement with the defendant was for six months which will, in any event, expire in late September 2010.

[4] Although this is a challenge to the Authority's determination, that was given almost one month ago and the subject matter of the proceeding is dynamic. If nothing else, the restraint has run in force for another month and its expiry according to the contract is that much closer. It would be artificial, therefore, to freeze frame completely the relevant facts as at the date of the Authority's investigation meeting,

28 June 2010.

[5] This challenge has been determined on the basis of the affidavits that were before the Authority together with some brief updating evidence about relevant circumstances since the Authority's investigation meeting in late June. That direction was made because, although a hearing by challenge de novo, this is also akin to an appeal against the Authority's decision to grant interim relief.

[6] This being a challenge by hearing de novo, I address the same three questions as did the Authority:

1. Whether the (now) defendant had an arguable case of breach of the parties' employment agreement and, if so, whether the company had an arguable case for a "permanent" injunction for the unexpired portion of the restraint;
2. where the balance of convenience (including adequacy of damages as a remedy) might lie until the Authority's substantive determination of the proceedings;
3. where the overall justice of the case lies for that period.

Additional evidence

[7] At the outset of the hearing Mr Allan announced that he wished the Court to view a number of e-mails and/or other communications, said to have been authored by Mr Marshment during his employment. Counsel said these would refute the plaintiff's contention that he was not aware of confidential information or other secret intellectual property of the defendant. After having heard argument in support of and in opposition to this application I declined to consider this material and said I would give my reasons in this judgment. These are as follows.

[8] Although in early July 2010 when the challenge was first filed I directed that it should be determined on the basis of the evidence that was before the Authority, this did not preclude either party from applying to introduce fresh evidence if there were good grounds for doing so. No application was made over the period of about three and a half weeks before the hearing.

[9] Although the Employment Relations Authority's timetable for the filing and serving of the parties' intended evidence in that forum has now closed, SIL has not tendered this material as part of its substantive case. Mr Allan indicated that he proposed introducing it for the first time in the course of cross-examination of Mr Marshment in the Authority's investigation meeting.

[10] Although it is correct, as Mr Allan pointed out, that the defendant did not have an opportunity to file evidence in reply in the Authority because of the urgency of its investigation meeting, it nevertheless had ample opportunity to seek to do so on this challenge by hearing de novo, but did not.

[11] The e-mails or other written communications are not complete records because material that formed part of them is considered by the defendant to be so secret that it cannot be disclosed to Mr Marshment's counsel in this case.

[12] Finally, the submissions to be made by the plaintiff were said by Mr Allan to contain numerous and repeated untruths on behalf of Mr Marshment about his level of knowledge and involvement in the strategic operations of the defendant. It was to refute these submissions that counsel intended to hand the documents up to me in the courtroom.

[13] As I indicated in the course of argument, submissions on their own are not evidence and the Court expects that submissions will have evidential backing. In the absence of this, submissions may be neutral at best and counter-productive at worst. I considered the most just course in the circumstances was to require counsel for the parties to support or refute submissions by reference to affidavit evidence before the Court.

[14] For these reasons I declined to look at the documents that Mr Allan proposed to be handed up in Court and wished me to see.

Relevant facts

[15] SIL manufactures and assembles bicycles and accessories. Its own brand is Avanti and it holds or has held agency or distributorship arrangements with other international bicycle and bicycle equipment manufacturers. One of these was an exclusive distributorship agreement with a US company known as Specialized Bicycle Corporation Inc (Specialized) which is now trading in New Zealand but not, apparently, by a local corporate entity. It manufactures and sells what are known as "high end" bicycles, those ridden generally by cyclists who are or seek to emulate elite cyclists competing in international cycling events. The market for such machines and their accessories is brand-conscious, sensitive and competitive and more especially so at times like the present and recent past when international events such as the Tour de France and others prompt people to consider purchasing bicycles and accessories.

[16] Although until recently SIL had represented Specialized in New Zealand, this changed last year with Specialized resolving to engage directly with the Australian and New Zealand markets. A distributorship dispute between SIL and Specialized was resolved between those companies by what is described as a "Deed Of Settlement Amending Exclusive

Distributorship Agreement” in August 2009. This provided that in February 2010 both parties would announce the dissolution of their relationship; that from May 2010 Specialized would begin selling its bicycles and accessories in New Zealand; and that SIL would be entitled to sell those products made by other manufacturers. The exclusive distributorship relationship between SIL and Specialized would end completely on 31 August 2010.

[17] Another employee of SIL, a sales executive Tony Smith, wished to work for Specialized in New Zealand. That employee’s employment agreement with SIL contained a covenant in restraint of competitive economic activity. Part of the commercial settlement between the two companies arising out of their dispute permitted that other employee to be employed by Specialized. It appears that there has been further litigation between the two commercial entities even after the settlement of their first dispute.

[18] Mr Marshment had been employed since 1998, more latterly as an account manager with SIL. At that time, he reported directly to Mr Smith who subsequently began work with Specialized by agreement with his former employer. Mr Marshment’s duties covered selling cycles and accessories to retail cycle stores in the central North Island region (excluding Hamilton).

[19] Before 2005 Mr Marshment’s employment contract contained a limited covenant in restraint of trade. On the evidence before the Court at the moment I find it is probable that this included the following provisions in common with restraints in the contracts of other employees including Mr Smith:

18.1 The Employee that he/she will not at any time within the period of six months of the date of the termination of his/her employment with the company for any reason:

a) Be interested in or engaged in any way as principal, employee, agent, director or shareholder or otherwise how-so-ever in any

enterprise carrying on business in direct competition with that of the

Company (except with the written consent of the Company); or

b) Solicit any business from or in any way approach any person, persons or company who shall have been a customer of the Company, within the period [of] six months immediately preceding such termination.

[20] In 2005 SIL revised its employees’ employment agreements. Mr Marshment’s contained an expanded restraint and other related provisions as follows:

25.0 RESTRAINT OF TRADE:

25.1 The Employee is entrusted with responsibility and has the ability to build up substantial knowledge and expertise in the course of his/her employment in the Employer’s business.

The Employee recognises the Employer’s unique processes used in its business and the fact that it operates throughout New Zealand and Australia.

25.2 The Employee agrees that he/she shall not during the term of this agreement and for a period of **six months** after its cessation for any reason

be directly or indirectly interested or engaged or concerned in (including the use of confidential information) or assist financially in any way, whether *on his/her own account or as principal, employee, agent, partner, member or director, trustee, shareholder, representative, consultant or any other capacity*, in any enterprise carrying on business in direct or indirect competition with that of the Employer or in any business or activity associated with the Bicycle Industry, and more specifically, the import or design or marketing or assembly or distribution or retail sale of bicycles (except with the written consent of the Employer).

solicit any business of or endeavour to entice away from the Employer or in any way approach any *director or employee or consultant of the Employer or Company or other person (whether or not such person would commit any breach of contract or terms of employment by leaving)*, nor the custom of any person who is an existing client or customer of the Employer, or who has been contacted by the Employer during the Employee’s employment, and nor shall the Employee knowingly comply, aid or assist in the procurement of such *employees or clients or customers by any person, firm or company* with which the Employee is associated.

The term ‘*existing client or customer of the Employer*’ includes not only present clients or customers, but also those who have been clients or customers within the **six months** period prior to the cessation of this Agreement.

25.3 Both the Employer and Employee consider these restrictions to be reasonable in all the circumstances. However, if a Court of competent jurisdiction finds any of them to be unenforceable, both the Employer and Employee agree to accept any modification of the area, extent or duration of the restriction concerned which the Court sees fit to impose, or if it does not

see fit, which may be required, to make the restriction enforceable.

25.4 The Employee shall keep confidential and shall not use any information relating to the Employer's business, technical processes, designs or intellectual information relating to patents or pending patents or registered trademarks after the Employee's termination of employment.

25.5 The Employee acknowledges that the remuneration and other terms of this Agreement shall form the consideration of this provision.

...

28.0 CONFIDENTIALITY

28.1 Except in the proper performance of the employee's duties, he/she shall not at any time use or divulge to any person any knowledge or information which he/she may acquire during the course of his/her employment by the Company concerning the business, operations, affairs, property, customers, clients, suppliers, employees and principals of the Company.

28.2 This restriction shall continue to apply after the termination of employment without limit in point of time, but shall cease to apply to knowledge or information which may become public knowledge or a matter of public record without breach by the employee of this restriction.

28.3 On termination, the employee shall return any confidential information belonging to the Company, including but not limited to, all records, documents, plans, letters, papers and other information of any description, whether in hard copy or electronic form, including copies of the same, which are within the employee's possession or control, and which relate to the Company's business.

28.4 On termination, the employee shall delete all electronically held information, which relates to the Company's business, from any private computer networks which are within the employee's possession or control.

28.5 Any breach of this clause or disclosure will be considered as serious misconduct and will lead to the employee's dismissal.

...

31.0 COMPLETENESS:

The employee acknowledges that prior to entering into this Agreement, he/she has been provided with a copy of this intended employment Agreement, has been advised that he/she is entitled to seek independent advice upon it and has been given a reasonable opportunity to do so.

The terms and conditions set out in this Agreement replace any previous agreements and understandings. This Agreement represents a full record of the agreement entered into between the Employee and the Company.

The Employee declares that the Rules of Employment and its application, and penalties for misconduct and serious misconduct have been explained prior to acceptance of this Agreement.

The Employee agrees to comply with and abide by these provisions, and accepts the terms and conditions contained in this Agreement and attached appendices.

The employee understands that the rights and obligations contained in this agreement shall continue to apply after termination of employment without limit in point of time, but shall cease to apply to knowledge or information which may become public knowledge or a matter of public record.

[21] On 23 February 2010 Mr Marshment gave notice of his resignation from SIL to take effect from 26 March 2010. He told his employer that he was doing so to take up a sales position with Specialized. Mr Marshment was placed on gardening leave by SIL for the balance of his notice period, that is he was paid and not only not required to perform his usual work but directed not to do so.

[22] In a letter dated 2 March 2010 SIL reminded Mr Marshment of the provisions in his employment agreement set out above. Significantly, also, SIL notified Mr Marshment that it considered that his stated employment plans breached the parties' restraint.

[23] Although Mr Marshment offered his former employer undertakings about not using confidential information, these were not sufficient for the defendant's purposes. Mr Marshment began work with Specialized on 6 April 2010 but, at least until the time of the Authority's investigation and by his own account, was confined to working from home carrying out

administrative tasks.

[24] The defendant issued its proceedings in the Authority on about 14 May 2010 approximately two and a half months following Mr Marshment's advice to it of his intention to work for Specialized and almost as long after he indicated his intention specifically not to comply with his restraint because he considered it invalid. Other relevant events which have occurred since that time are dealt with subsequently in this judgment.

Arguable case?

[25] There is really no question that SIL has an arguable case of breach of his contractual restraint by Mr Marshment. He is working for a competitor which conducts business in the same field and in the same areas as SIL. He has done so within the period of six months from the end of his employment with SIL, contrary to the express words of that restraint which he agreed in 2005 was reasonable. There is also evidence of arguable potential loss to the defendant attributable to the breach.

[26] Although the plaintiff submits that the restraint at issue was so unreasonable at the time it was entered into that it was both unmodifiable and should be declared unlawful and null, that cannot be the correct position at this stage. The defendant had proprietary confidential information to which Mr Marshment was privy. There may well be arguments that the geography of the restraint ought to have been more limited, that customers with whom Mr Marshment did not deal ought not to have been included reasonably within the scope of the restraint, and even that its term was too long. But this is not an instance where the defendant has no seriously arguable case for protection. Modification of a restraint such as this under s 8 of the [Illegal Contracts Act 1970](#) is a question for trial. Finally, the existence of an arguable case for the defendant is reinforced by Mr Marshment's acknowledgement in the 2005 contract of the reasonableness of the restraint and the opportunity that he was offered and confirmed to have taken independent legal advice about the additional restraint obligations to which he was then agreeing.

[27] I am satisfied that the defendant meets the first test for an interlocutory injunction, that there is an arguable case of breach by Mr Marshment of a lawful restraint and in respect of the unexpired portion of which, if any by then, it might be entitled to protection by permanent injunction.

Balance of convenience?

[28] This is one of the areas of real controversy between the parties.

[29] The position must be considered for the probable shorter of two periods. They are until the Employment Relations Authority can determine the substantive proceeding or, alternatively, the expiry of the restraint on its terms on or about 26 September 2010.

[30] Much of the defendant's focus is on what it says is the breach or breaches already committed by Mr Marshment which, it claims, have resulted and will continue to result in financial loss to it. Irrespective of the merits of that assertion, the remedy of interlocutory injunction is future looking. Put another way, if there has been a breach, especially a discrete breach which is now concluded as is the defendant's case about soliciting the Cyclezone business, then that will be a matter for damages and not for interlocutory injunction.

[31] Past breaches are, however, not irrelevant. As the defendant submits, establishing a past breach may make more likely the commission of a further breach or breaches by the plaintiff during the balance of the restraint. If that is so, then interlocutory injunction may be an appropriate interim remedy to prevent such breaches.

Financial losses claimed to date

[32] The defendant says that Mr Marshment's breach of his restraint, by soliciting for Specialized the business of a Rotorua cycle retailer known as Cyclezone, resulted and will result in a loss to SIL of gross profits of approximately \$93,000 per year which, over the period of three years to mid 2013, will amount to a little less than

\$300,000. There is a dispute on the facts, which cannot be resolved at this stage, whether Mr Marshment solicited Cyclezone's business in any dealings with its owner, Bryce Shapley. There is hearsay evidence relied on by the defendant which alleges that Mr Marshment pressured Mr Shapley to purchase Specialized cycles from that company in New Zealand and to end Cyclezone's commercial relationship with SIL. Mr Marshment denies any such communications and this is confirmed by Mr Shapley. Specialized's Mr Smith says that he has been the person at that company who had dealings with Mr Shapley rather than Mr Marshment. Resolution

of those fundamental factual disputes will be for trial. For the purposes of this judgment it cannot be said that SIL has a strong case of breach.

[33] More easily determined at this stage are, however, some other questions about the extent of Mr Marshment's liability (if any) to SIL if he solicited Cyclezone's business in breach of his covenant. First, a significant proportion of historical sales to

Cyclezone on which SIL's claimed losses are based, consisted of Specialized machines and parts. That business would not, in any event, have been SIL's for the period of the loss claimed as a result of its agreement with Specialized to foreshorten its New Zealand distributorship arrangements. It is probable, therefore, that some, although not all, of the ongoing business losses claimed by SIL in respect of Cyclezone would not have been the defendant's in any event.

[34] Next, SIL's commercial conduct towards Cyclezone when the defendant learnt that the Rotorua business would not remain with it, is unlikely to have engendered an ongoing commercial relationship, at least as existed previously. The evidence is that SIL itself ended the commercial relationship with Cyclezone for all purposes and not only in respect of Specialized cycles. It called in all debts owed by Cyclezone to SIL for payment in full within a matter of days and threatened liquidation proceedings against Cyclezone if its demands were not complied with. There was, eventually, a settlement of these questions between SIL and Cyclezone and, Mr Allan tells me, SIL continues to supply Cyclezone with bicycle parts. However, I consider Mr Marshment has a strong argument that the past commercial relationship between supplier and vendor on which the claims of loss against him are based, would not have continued in the same way. Mr Allan asserted that it is probable that even if Cyclezone had elected for good and proper reasons not to continue to purchase its high end machines from SIL but, rather, to continue to trade in Specialized machines, SIL could have supplied the Rotorua outlet with other manufacturers' high end products. That is, however, an assertion from the bar unsupported by evidence and is, at this stage, speculative.

[35] For these reasons I conclude that SIL's claims for special damages against Mr Marshment for breaches which it says have occurred, must be discounted significantly. It is simply not possible to determine, even approximately, the level of

such discount but it is not insignificant. It follows that it is unlikely that SIL will succeed in a damages claim against Mr Marshment in respect of the Cyclezone business at the level of almost \$300,000 as quantified by the defendant.

Adequacy of damages

[36] The Authority appears to have accepted SIL's assessment of its monetary loss would be about \$279,400 over a three year period. The Authority's determination records that SIL submitted to the Authority that but for what it contended was Mr Marshment's probably inability to pay such a sum, damages would be an adequate remedy for it. Although Specialized had then agreed publicly to indemnify Mr Marshment, it had not by that stage offered to lodge a monetary bond with or through its solicitors as it now has. SIL submitted to the Authority that any award of damages that Specialized might have agreed to indemnify would not be a practicable remedy given the overseas domicile of Mr Marshment's new employer. In these circumstances the Authority concluded: "Overall, I cannot say that Mr Marshment is likely to be able to meet an award of damages of the levels indicated, and it is arguable that he could not."

[37] This is an important consideration in assessing the balance of convenience. Mr Marshment says that he is good for an award of damages. That is because of a combination of his own financial circumstances, financial backing in the form of indemnity by Specialized, and now its proposal to pay a substantial sum by way of bond on strict conditions to its solicitor's trust account. In these circumstances it is necessary to attempt to ascertain, to the extent that this can be done at this stage, the defendant's likely financial losses if no injunction is granted.

[38] First I deal with Mr Marshment's financial circumstances. His annual salary with Specialized is \$65,000. He has some rental income which is not specified but may be as much as \$10,000 per year from the evidence supplied. Mr Marshment and his wife own two homes, one a family home and the other a rental property. From the certificates of title produced, it appears they are tenants in common in equal shares of both properties.

[39] Although Mr Allan submitted that the Court should deduct 30 per cent from the official 2008 current valuations of both properties to represent values consistent with the current market and with a forced sale of them, I consider that such a substantial discount is unwarranted. There is no information at all about the accuracy of the 2008 current valuations in the current market. Although counsel may be correct that an element of necessity to sell, if required to meet an award of damages, may be reflected in a lower sale price than ordinarily, a reduction of 30 per cent appears both arbitrary and excessive. Nevertheless, I propose to ascribe conservative values to the figures.

[40] Mr and Mrs Marshment's equity in their home is about \$220,000 and the equity in the rental property about \$50,000. The plaintiff's separate equity in the family home and the rental property must be calculated without reference to his wife's separate equity that cannot be used to satisfy an award of damages against Mr Marshment alone. Estimated conservatively, that ability is probably restricted to a little over \$130,000.

A bond?

[41] As part of my conclusion about Mr Marshment's ability to meet a requirement to pay damages, there is now an additional factor that was not before the Authority but is nevertheless influential in the decision of this challenge. Although Specialized has always stood behind Mr Marshment with an indemnity that it will meet any costs or damages for which he may be liable, that is an arrangement between Mr Marshment personally and his overseas based employer. That is not an arrangement under which SIL is a beneficiary or one that would entitle it to ensure recovery of any damages or costs to

which it may be entitled.

[42] Perhaps realising that, Specialized is now agreeable to lodging a cash bond in New Zealand on conditions that would mean the disbursement of this security would be in the hands of the Court. The sum proposed is \$100,000 in New Zealand currency. Mr Allan accepted that if this sum were to be increased to \$300,000, his client could not then strongly press for interim injunctive relief.

[43] Because, however, of my conclusion about Mr Marshment's ability to meet an award of damages, I consider that the proposed sum of \$100,000 will provide an adequate independently controlled fund for this purpose.

[44] I was advised that if it is a condition of any order made by this Court that this bond be lodged, then that can occur within 48 hours.

[45] As will be seen from the outcome of this judgment, as part of my decision that damages will be an adequate remedy for the defendant and no interlocutory injunctive relief is required, the lodgement of such a bond is relied on. In these circumstances the judgment will lie in Court, that is it will not become operative or enforceable for the period of 72 hours following its delivery, to allow for the lodgement of such a bond by Specialized with the Registrar of the Employment Court at Auckland. Once received, that sum of \$100,000 in New Zealand currency is to be held by the Registrar in an interest bearing account and is to be disbursed only with the written consent of counsel for the parties in this case, together with the written consent of a partner in Specialized's New Zealand firm of solicitors, Simpson Grierson, or otherwise by a direction of a Judge of this Court.

[46] Added to the security of \$100,000 that Mr Marshment's employer Specialized is prepared to provide as a secured bond, it follows that damages may only be an inadequate remedy if they are likely to exceed this sum.

[47] The defendant's assessment of its monetary losses is not only for a three year period but is calculated on a scenario in which Mr Marshment will have worked for Specialized for a more substantial period of his restraint than is now in issue. Put another way, it is unlikely that SIL will suffer its full estimated loss of a little less than \$300,000 if Mr Marshment's restraint is not now enforced by interim injunction.

[48] It follows that I am satisfied that damages would be an adequate remedy for the defendant and that the plaintiff is in a position to meet those damages, because their amount will be less than has been predicted by the defendant. This conclusion strengthens my assessment that the Authority's determination on the balance of

convenience was wrong, or at least if it was more finely balanced then, as compared to now, the balance of convenience favours the plaintiff at this stage.

[49] In these circumstances, and contrary to the Authority's conclusion, I find the balance of convenience favours Mr Marshment's position. That is principally because damages will be an ascertainable, adequate, and realisable remedy. There is no suggestion in the defendant's case that its losses will be intangible or otherwise difficult to quantify such as losses of goodwill and/or an opportunity of future custom.

Overall justice?

[50] Although the Authority did not identify any discretionary issue that may have affected its decision to grant interim injunctive relief in favour of SIL, there were clearly several such issues put before it or, if not, that it ought to have identified and addressed.

[51] First, SIL delayed inexplicably seeking interlocutory injunctive relief against Mr Marshment. It had warned him, within a short and reasonable period of his advice that he intended to work for Specialized, against breaching his restraint. Mr Marshment responded clearly within an equally short time that he regarded the restraint as ineffectual and would not be bound by it. A period of about two months elapsed before the proceeding was issued. There is no explanation about why Specialized could or did not move promptly as would have been expected in these circumstances.

[52] When taxed with this matter Mr Allan submitted that it would have been unreasonable for SIL to have issued proceedings before Mr Marshment began work for Specialized on 6 April 2010. I do not agree. Not only had Specialized been told promptly and clearly by Mr Marshment that he was intending to work for SIL's competitor but he also refused, as expressly and as promptly, to agree to abide by his restraint from early March 2010. It is also significant that there was no further correspondence of any sort with Mr Marshment between early March and the proceedings being served on him. I am left with the inference that SIL either ignored

Mr Marshment's situation or sat on its rights for such a lengthy period when compared to the term of the restraint that this ought to have been explained but was not.

[53] Given that the total period of restraint was six months, one-third of that period is a significant delay for which there should either have been an explanation or, in its absence as here, the Authority should have weighed, as a discretionary

consideration, against granting interlocutory relief.

[54] The second discretionary consideration not addressed by the Authority is the effective extension by one month of the six month restraint because of Mr Marshment's placement on gardening leave immediately he gave one month's notice of his intention to resign. Although the restraint is stated to apply for a period of six months from the end of employment, that period commenced on the expiry of Mr Marshment's notice. The purpose of the restraint was, among other things, to allow SIL a reasonable opportunity to replace and train a replacement for Mr Marshment, and to ensure the expiry of confidential information to which he may have been privy during his employment. However, these important commercial consequences were also achieved by SIL ensuring that for his last month of employment Mr Marshment, although paid his salary, was impotent commercially. By this means it may be said that if the company did not literally obtain a further month's restraint, it retained all of the significant benefits of the restraint for that additional period. This is a relevant consideration going to overall justice.

[55] Third, the Authority noted in its narration of the relevant facts that there were and still are several concurrent proceedings between SIL and associated parties in the High Court. However, it did not apparently consider it relevant in the exercise of its discretion that Mr Marshment's circumstances can be seen unmistakably as part of a broader commercial battle between SIL and Specialized but which has drawn in others including Mr Marshment.

[56] Finally, the Authority appears not to have considered the relevant question of SIL's arguably inconsistent treatment of another former and more senior employee (Mr Smith) who, although subject to the same restraint as Mr Marshment, SIL has agreed should not be restrained from working for Specialized as he does in a senior position.

[57] When asked for an explanation of this apparent inconsistent treatment of a more senior employee with more knowledge of commercially sensitive information but whose restraint was not enforced at least as rigorously as Mr Marshment's, Mr Allan advanced only one explanation. That was that Mr Smith's release from some of his restraint was part of a commercial settlement of a broader dispute between SIL and Specialized into which this Court is not entitled to inquire. That may be so but it does not explain adequately, apparently inconsistent treatment of an employee subject to the same restraint and with at least the same, if not more, knowledge of and access to commercial sensitive information. That unexplained inconsistency is a relevant discretionary consideration going to the overall justice of the defendant's claims.

[58] These are all factors which are not only unique to the case but are relevant matters in the exercise of the Authority's and the Court's discretion whether to restrain Mr Marshment by injunction.

[59] I conclude that these discretionary factors favour refusal of interim interlocutory relief.

Undertaking as to damages

[60] It was only during the hearing of the challenge that it first became clear both to the Court and, Ms Beck for the plaintiff told me, to her client, that SIL had not given an undertaking as to damages in support of its claim for interim injunctive orders in the Authority. Because this was a challenge based on the material before the Authority, there would have been no need ordinarily for a separate undertaking to have been given to the Court. It was only when Mr Allan proffered an undertaking on behalf of his client to strengthen his claim that it became clear that the failure to do so as expected and required in the Authority, had passed under the Authority's radar and Mr Marshment's. Mr Allan told me that he had proffered an undertaking

as to damages to the Authority during its investigation meeting but it had not required one.

[61] The defendant's failure to provide an undertaking as to damages in support of its application for interim injunctive orders in the Authority should have been fatal to its claim to those orders. Not only is the case law very clear that such an undertaking is required, the undertaking must be referred to in the orders made by the Authority. That is because the requirements of the High Court Rules dealing with interlocutory injunctions must be adhered to in the Authority (and in this Court). Rule 7.54 of the High Court Rules provides:

7.54 Undertaking as to damages

(1) An applicant for an interlocutory injunction under rule 7.53 must file a signed undertaking that the applicant will comply with any order for the payment of damages to compensate the other party for any damage sustained through the injunction.

(2) The undertaking must be referred to in the order granting the interlocutory injunction and is part of it.

[62] The necessity to adhere to this requirement has been made clear in a succession of cases decided by this Court which are binding on the Authority. These include, to take one early example: *Ham v Hawera Aero Club Inc.*^[2] As Chief Judge

Goddard noted in *Ham*, the earlier case of *McGivern v Water Care Services Ltd*^[3]

affirmed the following passage from Spry, *Principles of Equitable Remedies* (2nd ed

The purpose of requiring an undertaking is simply to enable the Court, should it think that the justice of the case requires it, to recompense a person who has been temporarily enjoined and, as it subsequently proves, enjoined contrary to his rights as finally ascertained, for the damage which he has meanwhile suffered; and in the end the view has prevailed that every plaintiff who is granted an interlocutory injunction ought, in the absence of the most exceptional circumstances, to be required to give an appropriate undertaking, especially since by so giving he does not undertake a definite liability or obligation but merely renders more simple the task of the Court, at the final hearing, of making the order which is most just in all the circumstances.

[63] Chief Judge Goddard then noted:

I want to confirm that, in my view as well, this passage correctly describes the position in this Court. The formal requirement for such an undertaking in this country stems from the combined effect of rules 236A, 624, 629(1), and

630 of the High Court Rules 1985 which apply because of the reference to the practice of the High Court in s104(1)(h) of the Employment Contracts

Act 1991. ...

It can therefore be said that in all cases in which an injunction is sought in this Court by way of interim order, an undertaking of the kind described in rule 630(1) must be given.

... the deeming provision shows that an undertaking must be given without exception and that the Court has no power to exempt any applicant from the requirement to give an undertaking. Any discretion that the Court has is to be exercised at the time that the applicant is called to account for any damage that the injunction has caused and not at the time of granting the injunction.

[64] The necessity for undertakings has been re-emphasised subsequently in numerous cases determined by this Court when exercising precisely the jurisdiction that the Authority exercised in this case which was inherited by it under the [Employment Relations Act 2000](#) (the Act).

[65] The Act is silent about the law that the Authority must apply when considering applications for interlocutory injunctions. That is possibly because, as may have been originally intended, the Authority was not to undertake such cases. However, as this Court has found,^[4] the legislation as eventually enacted does permit those powers to be exercised by the Authority.

[66] Interestingly, s 127(4) requires expressly, when determining whether a dismissed employee should have interim reinstatement, that in making its decision the Authority must apply the law relating to interim injunctions. In such cases it would follow that the Authority must require an undertaking as to damages and to record the fact of this undertaking in its order. It would be remarkable that in its exercise of essentially the same powers, albeit in proceedings in common law for breach of contract as opposed to statutory personal grievances, the Authority could act otherwise. The absence of a similar express reference to that contained in s 127(4) cannot be taken to be the acknowledgement of a lower standard in cases such as this. An undertaking as to damages is required in all applications for

interlocutory injunctive orders. Failure to give one deprives the Authority of its powers to grant them.

[67] Non-compliance with this requirement for both the giving of an undertaking as to damages and the incorporation of the undertaking into the Authority's order may render inchoate, and therefore unenforceable, what the Authority has purported to do.

[68] This requirement is also related to the importance of making an injunctive order that is within jurisdiction, comprehensible by those affected by it, and enforceable. In this case, the Authority's determination said of the outcome of the application for interlocutory injunction, the following:

[40] With reference to clause 26 of the agreement with SIL Mr Marshment is ordered to refrain from carrying out his obligations under the employment agreement with Specialised, and otherwise to observe the terms of the clause, pending the resolution of the substantive matter or the expiry of the period of restraint whichever is earlier. Mr Marshment and Specialised will need to address how this should be accommodated in terms of their employment relationship.

[69] In my view the Authority's order, if it had been warranted, should have adhered closely to the words of the contractual restraint that was engaged. It may justifiably also have particularised that to the circumstances of any conduct or misconduct that the Authority had found established which would likely be repeated unless restrained by injunction. The reference in the Authority's order to a requirement to refrain from carrying out obligations under a new employment agreement with Specialized is enigmatic. The restraint prohibited any such employment. Even if the Authority's determination reflected a concession on the part of SIL that Mr Marshment could continue to be employed by Specialized, it is unclear what were the "obligations under the employment agreement" with Specialized that were enjoined.

[70] The Authority's order should have required significant modification at best to have been enforceable as a sealed order to be complied with on pain of significant sanctions if breached. In any event, however, in my view the outcome was of doubtful lawfulness because of the failure to give or record the undertaking as to damages.

[71] Whatever may have been the effect in law of the absence, until now, of an undertaking as to damages, the defendant has now provided an appropriate undertaking to this Court. Because s 183(2) of the Act deems that this judgment has the effect of setting aside the Authority's determination, if I had concluded that an interlocutory injunction was now warranted, that would have been supported by the undertaking now given.

The Authority's substantive investigation

[72] The Authority has scheduled its investigation meeting, at which it will deal with questions of liability and remedies including permanent injunction and damages, for 5 and 6 August 2010. Having discussed this matter with counsel at the hearing, I have significant doubts that the Authority will be in a position to determine SIL's claim for damages at that stage.

[73] The requirement to file and serve statements of the evidence of intended witnesses has now closed but there is no expert accounting evidence intended to be called by either party to support the company's claim for damages for future profit loss. Mr Allan tells me that it is intended that a manager or managers of the company itself will attempt to establish these losses in evidence. Although entitled to do so, of course, the establishment of loss of future profits is an exercise in which courts and tribunals are usually assisted by expert evidence.

Alternate dispute resolution

[74] As I was obliged to by the statute, I raised with counsel for the parties, whether their dispute might be assisted by further mediation or other alternate dispute resolution means. That appeared not to have been considered by them although, at a very early stage, the matter was subject to an unsuccessful mediation with a Department of Labour mediator.

[75] Without wishing to be critical of the department's mediation service, this employment case is part of a bigger and very intense commercial dispute, the employment aspects of which will probably need to be associated with a settlement of that. It is unlikely to be able to be settled independently by the mediation service. On the other hand, there has already been a commercial mediation settlement of part of the dispute between SIL and Specialized which included within it a resolution of the employment status of another senior employee of SIL who now works at Specialized. Although I am not prepared to direct the parties to further mediation with the Department of Labour's mediation service and no judicial settlement conference in this Court is possible without agreement between parties, I nevertheless urge them to consider seriously further mediation of this and associated larger disputes which clearly form the background to this employment issue.

Summary of judgment

[76] For the foregoing reasons I allow Mr Marshment's challenge to the Authority's determination of 2 July 2010 granting an interlocutory injunction. The Authority's determination is set aside and, pursuant to s 183(2) of the Act, this judgment stands in its place.

[77] I decline to make an order for interlocutory injunction as sought by the defendant.

[78] This judgment will lie in Court, that is it will not become operative or enforceable for the period of 72 hours following its delivery so that Specialized Bicycle Corporation Inc can transfer to the Registrar of the Employment Court at Auckland the sum of \$100,000 in New Zealand currency. That sum is to be held by the Registrar in an interest bearing account. That sum and the interest earned on it are to be disbursed only with the written consent of counsel for the parties in this case, together with the written consent of a partner of Specialized Bicycle Corporation Inc's New Zealand solicitor, Simpson Grierson, or otherwise by a direction of a Judge of this Court.

[79] The plaintiff is entitled to costs on this challenge. The amount of those costs is reserved to allow the parties to have an opportunity to settle that issue in the first instance. If no such settlement can be achieved, Mr Marshment may have the period of two calendar months within which to apply by memorandum for an order, with the defendant having the period of one calendar month thereafter to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Friday 30 July 2010

[2] [\[1993\] NZEmpC 156](#); [\[1993\] 2 ERNZ 756](#).

[3] [\[1993\] NZEmpC 144](#); [\[1993\] 2 ERNZ 724](#).

[4] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [\[2007\] ERNZ 205](#).

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