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R K Trading (2003) Limited v Pillay (Auckland) [2011] NZERA 459; [2011] NZERA Auckland 301 (11 July 2011)

Last Updated: 19 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 301
5295306

BETWEEN R K TRADING (2003) LIMITED

Applicant

AND RAKESH PILLAY Respondent

Member of Authority: K J Anderson

Representatives: R Singh, Advocate for the Applicant

R Pillay, In Person Investigation Meeting: 21 June 2011 at Hamilton Determination: 11 July 2011

DETERMINATION OF THE AUTHORITY

Background

[1] Mr Ranjeet Singh is the Managing Director of the applicant company, R K Trading (2003) Limited. Mr Singh owns and operates the Civic Food Store in Putaruru. From on or about 20th December 2008 until on or about 9th July 2009, Mr Rakesh Pillay was employed as the Store Manager at the Civic Food Store (the Store). Mr Pillay is a Fijian citizen. The reason that he ceased his employment at the store is that his work permit, which allowed him to work in New Zealand, expired on 10th July 2009.

[2] Apparently, in anticipation of the expiry of Mr Pillay's work permit, and in support of his application for its renewal, Mr Singh provided Mr Pillay with a letter dated 2nd June 2009, making an offer of employment. The particularly relevant content of the letter is:

Subject to obtaining the extension of the necessary work permit and legal requirements from the NZ Immigration Service (NZIS) and as per the terms and conditions of the attached employment agreement this offer becomes effective from July 10 2009. On extension of your work permit by NZIS you are required to continue working in this capacity. Contrary to this, it will be unfortunate that your services cannot be continued with this organization, hence your appointment will be terminated on July 09 2009.

The letter was accompanied by a new employment agreement that was signed by the parties on 4th June 2009. The agreement contains two clauses that are the subject matter of the application before the Authority.

[3] The first of these clauses is:

The Position

The Employee is employed in the position of Store Manager at the Employer's business at 33-35 Arapuni Street, Putaruru 3411, New Zealand. This Agreement supersedes any previous agreements signed between the employer and employee. This is a legally binding agreement valid from the date of signing till [sic] 20th December 2010. In the event that the employee

terminates this agreement before this date he is obliged and willing to pay back the equivalent of the salary remaining till

20th December 2010.

[4] The second clause is:

Restraint of Trade

In the event of the employee terminating this agreement it is agreed that the employee will not engage, work or be part of a business similar to that of the employer for a period of three years and not within 25 kilometres of the radius of the workplace from the date of the termination.

[5] It transpired that Mr Pillay did not make an application for a new work permit immediately. Rather, it appears, he remained in New Zealand on a visitor permit for a short period and then subsequently obtained a new work permit. Relevant to the matter before the Authority is that due to the expiry of the work permit, Mr Pillay could no longer legally continue to work for Mr Singh and hence, by common acceptance, Mr Pillay ceased his employment at Civic Food Store on or about 9th July

2009.

[6] In early September 2009, or possibly a little sooner, Mr Pillay obtained employment at another store in Putaruru; K-Beez Model Foodmarket, and currently is employed there in a management role.

[7] Mr Singh now claims that Mr Pillay is in breach of the two clauses (above)

and seeks to have them enforced against Mr Pillay along with monetary remedies.

Determination

[8] Unfortunately for Mr Singh, the claims before the Authority have no chance of success for several reasons. The most obvious reason is that the proposed employment agreement was conditional on Mr Pillay obtaining a new work permit, which would be effective from 10th July 2009. That simply did not happen and the parties, by mutual agreement, went their own ways with no further obligations owed to each other, following the termination of Mr Pillay's employment on or about 9th July 2009. Therefore, the glaring reality is that this is where matters effectively should have ended.

[9] However, Mr Singh should also be aware, for future reference, in case he is of a mind to include the above clauses in another employment agreement, that neither of the clauses is legally enforceable. In regard to the first clause, apart from the fact that it is in conflict with the termination clause, that (reasonably) requires either party to give two weeks' notice of termination of employment, it appears to represent a form of bondage in regard to the employee remaining in the employment for a set period. It goes without saying that such a provision is legally unenforceable.

[10] In regard to the restraint of trade clause, given that the parties are not legally represented, it is not really appropriate for the Authority to go into too much detail in regard to the legal principles that apply to restraint of trade provisions. It is enough to say that such provisions are essentially contrary to the public interest in that they have the effect of preventing an employee from engaging in alternative employment and hence they are *prima facie* void, unless such a provision is found to be reasonable between the parties, with reference to the public interest.¹

[11] Any examination in respect of the reasonableness of a restraint of trade covenant essentially begins by asking whether an employer has a proprietary interest that is entitled to protection, or whether the employer is simply attempting to limit or reduce competition. A business may have a proprietary interest in trade secrets, confidential information and its business and trade connections. Mr Singh was unable to point to any particular factor within his business that would meet the usual criteria applying to a proprietary interest. With respect, that is not surprising given that his

¹ *Airgas Compressor Specialists v Bryant* [1998] NZEmpC 45; [1998] 2 ERNZ 42.

store is simply one of very many such enterprises that exist in small communities throughout New Zealand.

[12] And of course there is another major problem with the clause in question in this case. This is that the term of the restraint is for three years and hence even if Mr Singh had a proprietary interest that he is entitled to protect, a term of three years is unreasonable and most restraints are usually only reasonably enforceable for a period of 6 to 12 months unless certain special circumstances exist.

[13] In summary, upon the evidence available to the Authority, given the current overall nature of his business, it is difficult to see how Mr Singh could ever enforce a restraint of trade provision against an employee and hence one has to question why such a provision would be included in the employment agreements for the business. I would respectfully suggest to Mr Singh that he obtains specialist legal advice in regard to the content of future employment agreements for his business.

Costs: Given that both parties were unrepresented, a consideration of costs is not required.

K J Anderson

Member of the Employment Relations Authority

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