New Zealand Employment Relations Authority Decisions

The Consultancy Group Christchurch Ltd v Cullen CA 90/07 (Christchurch) [2007] NZERA 632 (3 August 2007)

Last Updated: 18 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 90/07 5039132

BETWEEN THE CONSULTANCY GROUP CHRISTCHURCH LIMITED

Applicant

AND STEVIE CULLEN

Respondent

Member of Authority: Paul Montgomery Representatives: Sam Guest, Counsel for Applicant

Stevie Cullen in person Investigation Meeting: 24 October 2006 at Christchurch Determination: 3 August 2007

DETERMINATION OF THE AUTHORITY

Introduction

[1] Both Mr Cullen and another former employee of the applicant were cited as respondents in this matter. The applicant's solicitor undertook to serve documents on a Mr Akurangi, but has been unable to do so. At the beginning of the investigation meeting the company, by its counsel Mr Guest, formally withdrew the proceeding in respect of Mr Akurangi, leaving Mr Cullen as the sole respondent.

The employment relationship problem

[2] Mr Cullen was employed by the applicant working at The Boulevard Bar in Christchurch. The applicant alleges that the respondent is in breach of clause 9 of the individual employment agreement and also in breach of the implied duties of fidelity and good faith to the applicant. The applicant's claim is for the loss of the profit reasonably expected from The Boulevard contract for the balance of the restraint of trade period set out in the agreement.

[3] Mr Cullen denies that he was in breach of his agreement and duties towards the applicant. He says he was aware of the restraint but after taking legal advice decided to undertake the security work at The Boulevard. Mr Cullen was formerly the Security Manager at the Bar. Mr Cullen denies he is managing the security operation on the premises but is a "Hospitality Security Expert" employed at the Bar by its owners.

How the problem arose

[4] The respondent was bound by the terms of an individual employment agreement with his then employer, Allied Security Christchurch Limited. The document in question is headed "Allied Security, Employer". Mr Damian Black, formerly the Managing Director of Allied Security Christchurch Limited, explained the situation. In evidence he said he is the Operations Manager for The Consultancy Group Christchurch Limited (previously Allied Security Christchurch Limited). His evidence is that The Consultancy Group Christchurch Limited continues to trade under the name Allied Security.

[5] Mr Cullen executed his employment agreement with the applicant in February 2005 and the applicant says the relevant clauses in these proceedings are:

3.2(iv) The employee shall: deal with the employer in good faith in all aspects of the employment relationship.

9.3 Non-competition

The employee agrees that whilst actively employed, the employee will not enter into employment with any outside employer or contractor where such employment will put them in competition either directly or indirectly with the employer.

9.4 Non-solicitation of clients

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, seek to solicit or carry out any work of the same nature for any client or customer of the employer with which the employee had any contact or dealings whilst employed by the employer.

9.5 Restraint

The employee may not be employed by any current or former client of the company within one year of termination of this contract unless expressly agreed to by the company.

9.6 Non-solicitation of employees

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, solicit or engage or employ any employee of the employer with whom the employee had any dealings whilst employed with the employer.

[6] The applicant alleges that Mr Cullen is in breach of all these terms of the agreement.

[7] Mr Black says that after being based at other venues, Mr Cullen was offered the role of Security Manager at The Boulevard when Allied Security had been awarded that contract. In August 2005 he says some Allied staff advised him that other Allied staff had approached the Bar's Manager and offered to take over the security arrangements at the Bar. The staff who advised Mr Black of this also told him that the respondent was attempting to recruit other existing Allied staff.

[8] For the applicant, Mr Black says his Area Manager contacted a Mr Kordic, The Boulevard Manager, who told him that while he was happy with the service Allied was supplying, he was concerned that he would lose an efficient operational team if he did not run with the new arrangements. Mr Kordic told the Area Manager that if security staff stayed with Allied, he would stay with Allied. Clearly, it was evident that if they did not, he would go with the best interests of The Boulevard's security.

[9] The applicant says it was clear that Stevie Cullen was the organiser of the group planning to take over the Bar security work. Mr Cullen says that is wrong. His position is that he was approached by two Allied employees whom, he says, had no employment agreements with Allied and saw better security in having a third party undertake The Boulevard contract.

[10] The respondent says he was aware of all the clauses in his agreement, but says *I do not believe they apply*. His basic position is that *I do not consider Allied Security to be a good employer*.

The issues

[11] To determine this matter the Authority must decide the following issues:

- Did Mr Cullen in fact breach the terms of his individual agreement in respect of the clauses above; and
- Are the clauses in respect to restraint reasonable in the context of the security industry; and
- Have the actions of the respondent breached the good faith and fidelity obligations due to his employer; and
- If the respondent has breached his obligations under the individual employment agreement, what remedies are due to the applicant?

The investigation meeting

[12] The investigation meeting was relatively brief and the Authority heard evidence from Mr Black on behalf of the applicant and evidence on his own behalf from Mr Cullen. Mr Cullen was unrepresented at the investigation meeting.

Discussion and analysis

[13] Any discussion needs to begin by referring to clause 5 of the agreement between the parties. It reads:

5. *Hours of work*

5.1 Casual employment with no minimum number of hours of work.

The parties agree that because the employee is being employed on an as required basis, the employee has no fixed hours of work, nor any minimum number of hours of work. The hours of work and the days to be worked will be as agreed between the employer and the employee from time to time. The employee shall take all reasonable steps to be available if required. This firm will undertake to roster staff so as to achieve a minimum 4 hour working shift and offers a minimum of 2 hours for turning up for a rostered shift unless prior arrangement made.

[14] It is clear from this that the respondent regarded Mr Cullen as a casual employee.

[15] Restraints in general, need to be commensurate with that casual status and the need for restraint is to be seen in the context of the protection of trade secrets, pricing strategies, etc which are the property of the employer and to which the obligation of confidentiality attaches.

[16] On the matter of the non-competition clause (9.3), the prohibition imposed by the agreement is restricted to a period *whilst actively employed* by the applicant company. Essentially the respondent was not free while employed by the applicant to *enter into employment with any outside employer or contractor if that employment will put the employee in competition either directly or indirectly with the employer*.

[17] Mr Cullen would be in breach if, while still employed by the applicant, he undertook further employment with an employer who was in competition with the applicant company. On the evidence before the Authority, there is little on which to find against the respondent under this clause.

[18] Moving to the non-solicitation of clients clause (9.4), this imposes a period of one year post employment with the applicant during which a former employee is prevented from soliciting or carrying out work of the same nature for any customer of the company with whom the employee has been dealing in the course of that employee's employment.

[19] Clearly, the clause is designed to prevent former employees seeking employment with, or competing for, the security business of the applicant's client.

[20] The protecting of one's own proprietary interest is legitimate. However, the length of time set out in this clause is excessive in respect of the restriction of competition and in respect to the employment issue, is an unwarranted curb on a person's right to choose from whom he or she may accept an offer of employment. While the applicant is unlikely to be able to point to trade secrets or formulae as part of its business, its client list and its pricing strategies are entitled to some measure of protection. It is difficult to see, in the present case, any justification for a restraint lasting for one year, particularly in the light of the respondent's casual employment.

[21] Addressing the clause setting out the restraint provision (9.5), the prohibition of a former employee accepting employment with a "former client" for one year following resignation is also oppressive. By definition a former client is one with

whom the applicant company has ceased to do business, and so can have no further interest of any type to protect.

[22] Turning to the issue of a "current client", the one year term is unnecessarily harsh. In the event of an employee leaving his employment with the applicant to take up employment with a current client, there is little to be protected apart from the applicant's wishing to protect confidential information and this could be achieved by the insertion of an explicit clause into the agreement.

[23] I now turn to Mr Cullen's defence that he did not breach any of the provisions of his agreement with the applicant and that his actions were prompted by the ongoing dissatisfaction of the applicant staff's at The Boulevard Bar. On the evidence it is clear that there was dissatisfaction among staff at the Bar and that Mr Cullen was approached by two members of staff who proposed that he lead the team that was in place at the time, but removed from the control of the applicant company. Mr Cullen's evidence is clear that he did not personally approach Mr Kordic, but two other employees, Tina Barnes and Burt Rigby, spoke to Mr Kordic to determine whether he would be interested in taking on all of the existing staff employed by the applicant at the time, but under the direction of another company. Mr Kordic agreed to this in order to keep together what he regarded as a professional and cohesive security team.

[24] While I accept the initiatives taken to wrest the contract from the applicant came from staff other than Mr Cullen, he was aware of the proposal and was central to the practical implementation of the plan. Further, he was reminded of his obligations to his employer in the letter dated 23 August 2005 from the company's solicitor. Mr Cullen did not respond to that letter and continued to be involved in the plan. I also accept Mr Cullen's evidence that he did not personally solicit the applicant's staff. However, he was clearly aware that others had made approaches to other employees of the applicant.

[25] As Mr Black said in his evidence, *I stress that this is not a case of this employee simply leaving my employment and setting up a security business on his own. The respondent actually left and immediately took over an existing contract of Allied Security.* Elsewhere in his evidence Mr Black says *this action was done in a covert and secretive manner*.

[26] A useful summary of the current legal position in respect of restraints of trade is to be found in *Peninsula Real Estate Ltd v. Harris* [1991] NZHC 2630; [1992] 2 NZLR 216. In that decision Tipping J set out seven summary points which provide a useful guideline. Only paras.1 and 7 of that summary are relevant to this case. In point 1 the learned Judge says:

In the absence of a valid restraint of trade clause a former employer cannot prevent a former employee simply from competing.

[27] On the evidence in front of the Authority, it is clear that Mr Black accepts this position.

[28] In point 7 of the summary, Tipping J says:

Whether the departing employee takes customer lists or not, generally he may not solicit or approach a client of his former employer in respect of a transaction current at the time of his departure.

[29] This, it appears to me, is what was involved in this particular case. The question is not whether Mr Cullen was the ringleader but whether he was a participant in a process which was in breach of his obligations to his then employer.

The Determination

[30] I find that the respondent has breached clause 9.5 of his employment agreement with the applicant. I find this in spite of the excessive restraint period, as Mr Cullen, while still employed by the applicant was engaged in planning the takeover of the contract. Even a reasonable restraint period, such as a month, would not have deterred him given the defence he has raised. Further, I find that Mr Cullen has not adhered to his obligations of

fidelity and good faith in his dealing with the applicant.

Remedies

[31] In its statement of problem, the applicant seeks the remedy of damages in the event that the Authority finds in its favour. At the investigation meeting Mr Black provided a document on which he based a claim for loss of gross profit in the sum of

$18,031.95 which would have been expected from the continued commercial relationship of the applicant with The Boulevard Bar over a period of 12 months.

[32] A difficulty arises in fairly assessing the remedies. No written contract governs the arrangements between the applicant and the Boulevard Bar so it is difficult to assess how long the applicant would have retained the security work at those premises. Having found the one year restraint unenforceable, the Authority is unable to utilise it as a benchmark when assessing remedies. The matter is further complicated by the withdrawal of proceedings against the second respondent which, in effect, leaves Mr Cullen alone facing the full burden of remedies.

[33] Having resolved the issue of liability, I reserve the matter of quantum. Each party is to lodge and serve its submissions as to quantum by no later than 4 pm Friday 31 August 2007. The Authority will provide the opportunity for the parties to be heard on this issue and requires each party to signal whether it wishes to speak to its submissions when lodging the documents with the Authority.

Costs

[34] Costs are reserved.

Paul Montgomery

Member of the Employment Relations Authority
